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His most recent publications include a contribution to *Attacks on the Rule of Law From Within* (the first anthology published by the Runnymede Society) and two scholarly monographs, *Seven Absolute Rights* and *Permanent State of Emergency* (McGill-Queens' University Press, 2020 and 2017).

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Dwight Newman, QC holds a BA in Economics (Regina), JD (Saskatchewan), BCL, MPhil, DPhil (Oxford). He has also studied in the summer course in private international law (French-language directed-studies) at the Hague Academy of International Law. Following his JD, he clerked for Chief Justice Antonio Lamer and Justice Louis LeBel at the Supreme Court of Canada, worked for NGOs in South Africa and Hong Kong, worked for the Department of Justice in Ottawa, and completed his graduate studies at Oxford as a Rhodes Scholar. He joined the faculty at the University of Saskatchewan College of Law in 2005, where he is currently Professor of Law and Canada Research Chair in Indigenous Rights in Constitutional and International Law. He has been a recent visiting fellow at Cambridge, Princeton, Oxford and the Université de Montréal. He has published widely on constitutional law, Indigenous rights law, and other topics and has been cited in dozens of judicial decisions. He is a member of the Ontario and Saskatchewan bars, engages in selective practice on constitutional law issues, and was designated a Queen's Counsel in 2018.

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Chapter 1

INTRODUCTION

The Rule of Law, at its most basic, "vouchsafes to the citizens and residents of the country a stable, predictable and ordered society in which to conduct their affairs" and "provides a shield for individuals from arbitrary state action."[1] Yet this definition elides the many nuances associated with the Rule of Law. It is a "highly textured expression"[2] and one whose definition is "essentially contested".[3] Debates over the content of the Rule of Law, and its implications for doctrine, pervade recent Supreme Court of Canada cases.[4]

Some justices, beyond debating the nuances of the Rule of Law, have even questioned its contemporary relevance. For example, Justice Abella has levelled a two-fold attack on the Rule of Law. Firstly, she has indicated that the phrase "the Rule of Law" "annoys" her[5] because "[t]he Holocaust, apartheid and U.S. segregation unfolded according to law."[6] On this account, the Rule of Law could countenance the greatest evils that government perpetrates against citizens, or, at the very least, fail to prevent them. Secondly, Justice Abella has questioned the influence the Rule of Law ought to have on formal legal doctrine. Her joint concurrence with Justice Karakatsanis in *Vavilov*, for example, questions the propriety of the Rule of Law as an organizing principle employed by the majority; Justice Abella reasons that pluralistic conceptions of law like deference and administrative discretion can be stultified by a "court-centric" conception of the

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[1] *Reference re Secession of Quebec*, [1998] S.C.J. No. 61, [1998] 2 S.C.R. 217 at para. 70 (S.C.C.).

[2] *Reference re Secession of Quebec*, [1998] S.C.J. No. 61, [1998] 2 S.C.R. 217 at para. 70 (S.C.C.).

[3] Jeremy Waldron, "Is the Rule of Law an Essentially Contested Concept (in Florida)?" (2002) 21 Law and Philosophy 137.

[4] See, for example, *Fraser v. Canada (Attorney General)*, [2020] S.C.J. No. 28, 2020 SCC 28 at para. 135; see also the dissent of Brown and Rowe JJ. at para. 220.

[5] Sean Fine, "Doing justice to her father's dream," Globe & Mail, online, https://www.theglobeandmail.com/news/national/doing-justice-to-her-fathersdream/article31207151.

[6] Sean Fine, "Doing justice to her father's dream," Globe & Mail, online, https://www.theglobeandmail.com/news/national/doing-justice-to-her-fathersdream/article31207151.

Rule of Law.[7] Taken together, then, according to this view, the Rule of Law is potentially inconsistent with, one, a just society and, two, a more pluralistic conception of law.

With respect, however, these criticisms offer an impoverished view of the Rule of Law, for a number of reasons. First, there are good reasons to conclude that the Rule of Law requires more than mere legal authorization for government action. Put another way, even the most formalist Rule of Law theorists tend to support the existence of structures, both legal and conventional, to constrain arbitrary government action, which go beyond the basic idea that all government action must find its source in a legal rule. Dicey, the namesake of this volume and the apparent "dark lord" of Canadian administrative law,[8] understood that formal legality must be supported by a "spirit of legality".[9] For Dicey, this spirit of legality was about the cultural conditions necessary for a Rule of Law state to flourish. Dicey "did not associate the ideas behind [this expression] with the ideas associated with the analytical method, formalism, or codification".[10] Justice Abella's criticism also ignores the "thicker" conceptions of the Rule of Law that some scholars support, which incorporates procedural guarantees and, in some cases, substantive rights.[11] No matter which conception one adopts, it will be fundamentally incompatible with regimes such as Nazi Germany.

A legitimate system of government must be one in which governments are accountable for their actions. The Rule of Law ensures that all state actors derive their legitimacy from the law, which often takes the form of a Constitution. The Rule of Law does not, by itself guarantee justice, but it provides the structures necessary for any meaningful conception of justice to emerge. The problem is that "justice" is a largely subjective concept for which there is often little agreement. However, history has shown us that states that pursue justice at the expense of the Rule of Law are often left with neither. Those societies that cultivate and preserve the Rule of Law, on the other hand, lay the foundation from which evolutive conceptions of justice can emerge.

Courts are not exempt from the dictates of the Rule of Law. Put bluntly, judges are state actors that exert power. Through the interpretation of laws and development of doctrine, judges can either act within their prescribed authority or exceed it. They can foster either Dicey's "spirit of legality" or the enlightened despotism of

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[7] *Canada (Minister of Immigration and Citizenship) v. Vavilov*, [2019] S.C.J. No. 65, 2019 SCC 65 at paras. 240-241 (S.C.C.).

[8] See A.V. Dicey, *Introduction to the Study of the Law of the Constitution* (London: Macmillan, 1815) [Dicey].

[9] See Dicey, at 413-14; see Mark D Walters, "Dicey, Rand, and the Rule of Law" (2010) 55:3 McGill L.J. 563 at 583.

[10] "Dicey, Rand, and the Rule of Law" (2010) 55:3 McGill L.J. 563 at 583.

[11] See, for example, Tom Bingham, The Rule of Law (London: Allen Lane, 2010).

philosopher kings. Scholars, lawyers and engaged citizens should, to the greatest extent possible, scrutinize the judiciary (and other state actors) to ensure that its decisions are in accordance with the Rule of Law. And as they do so, they should continue to debate the content and dictates of the Rule of Law in free and democratic society.

Hence the inspiration for this volume. The Runnymede Society and Advocates for the Rule of Law are dedicated to recognizing and promoting the Rule of Law as a fundamental organizing principle of Canadian law. Both organizations are committed to a true exchange of ideas about the meaning of the Rule of Law, its historical roots, and its relevance in 21st century Canada. We are also interested in determining the extent to which doctrine promulgated by the Supreme Court of Canada and appellate courts is consistent with the Rule of Law. To that end, we have gathered some of the brightest Canadian scholars to discuss specific doctrinal developments — and, in some cases, entire areas of law — that are currently controversial from a Rule of Law perspective. Through this volume, our aim is to start a conversation about the importance of the Rule of Law in various doctrinal contexts. Also, we aim to make this an annual volume, so that the conversation can continue with each passing year.

Ultimately, the Rule of Law is an inheritance that must be assiduously maintained. A government of laws is not inevitable, and its upkeep is never easy. Like a lush garden, it must be continually cultivated and cared for. We believe that each of the excellent contributions to this journal assists in doing just that.

Asher Honickman

Mark Mancini

Chapter 2

À LA RECHERCHE DES LIMITES PROCÉDURALES À LA SOUVERAINETÉ PARLEMENTAIRE EN DROIT CANADIEN

David D'Astous*

I. INTRODUCTION

Au Royaume-Uni, l'étude de la souveraineté parlementaire, notamment des limites et des conséquences de son déploiement dans les institutions politiques britanniques, a longuement suscité l'engouement des constitutionnalistes. L'une des questions les plus importantes et les plus anciennes concernant les limites de la souveraineté du Parlement britannique est celle de savoir si celui-ci peut se lier pour l'avenir en s'obligeant à légiférer par une procédure plus onéreuse que celle employée ordinairement. Reconnaître que le législateur a un tel pouvoir laisse entendre que la validité d'une loi peut être assujettie à des exigences de « manière et à la forme » (*manner and form*) et que le respect de règles procédurales est susceptible d'être examiné par les tribunaux.

Ce débat est important pour comprendre le rôle constitutionnel des tribunaux et les modalités du contrôle judiciaire des lois et a par conséquent fait l'objet de nombreuses spéculations dans plusieurs pays du Commonwealth, dont l'Australie, la Nouvelle-Zélande ainsi que l'Afrique du Sud. Néanmoins, au Canada, la question a rarement été débattue, et peu d'arrêts en ont fait l'étude: pas plus d'une dizaine d'affaires dans les trois dernières décennies. Qui plus est, le caractère obligatoire des conditions de manière et de forme a été largement accepté par la majorité des auteurs doctrinaux, sans grand débat[1]. Pourtant, la théorie de l'autolimitation procédurale,

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* B.C.L./J.D. (McGill). L'auteur tient à remercier Johanne Poirier pour son appui, ses conseils et ses commentaires durant le processus de rédaction. Il souhaite également remercier Marc-Antoine Gervais, Maxime St-Hilaire et Patrick F. Baud, à qui cet article doit beaucoup, ainsi que Catherine Laperrière et Etienne W. Gratton, pour leurs précieux commentaires.

[1] Voir par ex. Herbert Marx & François Chevrette, *Droit constitutionnel, principes fondamentaux: notes & jurisprudence*, 2e éd. par Han-Ru Zhou, Montréal, Éditions Thémis, 2016, p. 294 et suiv.; Peter W. Hogg, *Constitutional Law of Canada*, Toronto, Thomson

développée par certains constitutionnalistes britanniques, soulève des questions particulières en droit canadien, vu l'enchâssement de la Constitution du Canada, de la hiérarchie des normes qui en résulte ainsi que des conséquences particulières de la sanction d'inconstitutionnalité.

Cela dit, la Cour suprême du Canada ne s'est jamais prononcée de façon claire et déterminante sur la question. Dans le *Renvoi relatif au Régime d'assistance publique du Canada*, le juge Sopinka, s'exprimant pour une Cour unanime, était resté équivoque à cet égard[2]. Le raisonnement de la Cour suprême dans deux affaires récentes, l'arrêt *Mikisew*[3] et le *Renvoi relatif à la réglementation pancanadienne des valeurs mobilières*[4], semble cependant indiquer que le Parlement et les législatures pourraient conditionner l'adoption, la modification ou l'abrogation future des lois au respect des exigences procédurales qu'ils s'imposent par la loi. Dans ces deux affaires, les juges de la Cour suprême ont accueilli, en *obiter dictum*, l'applicabilité de la théorie britannique en droit canadien, ne faisant vraisemblablement aucune distinction entre les normes imposées au législateur par la loi ordinaire de celles imposées par la Constitution. Ces *dicta* restent très limités en ce qu'ils ne permettent pas de résoudre les diverses difficultés que soulève la théorie de l'autolimitation procédurale en droit canadien.

Cet article adopte une approche théorique et comparative pour mettre en lumière ces difficultés. La première partie (**I**) clarifie les multiples facettes de ce principe constitutionnel en distinguant la conception orthodoxe de la conception nouvelle de la souveraineté parlementaire développée par certains constitutionnalistes britanniques. En examinant la jurisprudence du Commonwealth, nous montrons comment certaines constitutions enchâssées limitent expressément le pouvoir de légiférer de leur parlement par des exigences procédurales. La seconde partie (**II**) traite d'abord de la réception en droit canadien de la souveraineté parlementaire et des limites inhérentes que lui impose la Constitution. En s'appuyant sur une telle compréhension, nous remettons ensuite en question l'applicabilité de la théorie de l'autolimitation procédurale en droit canadien, telle que mise de l'avant par la doctrine et la jurisprudence récente de la Cour suprême du Canada.

Reuters, 2018, p. 12-11 et suiv.; Henri Brun, Guy Tremblay & Eugénie Brouillet, *Droit constitutionnel*, 6e éd., Montréal, Yvon Blais, 2014, par. VIII.35 et suiv.; Nicole Duplé, *Droit constitutionnel: principes fondamentaux*, 7e éd., Montréal, Wilson et Lafleur, 2018, p. 101 et suiv.

[2] Le juge Sopinka affirmait dans ce jugement qu'il est « fort peu probable » qu'une loi ordinaire traduise l'intention dulégislateur de se lier pour l'adoption future de lois. Voir *Renvoi relatif au Régime d'assistance publique du Canada (C.-B.)*, [1991] S.C.J. No. 60, [1991] 2 R.C.S. 525, 563 [ci-après *Renvoi sur le RAP*].

[3] *Mikisew Cree First Nation* c. *Canada (Gouverneur général en conseil)*, [2018] S.C.J. No. 40, 2018 CSC 40 [ci-après *Mikisew*].

[4] *Renvoi relatif à la réglementation pancanadienne des valeurs mobilières*, [2018] S.C.J. No. 48, 2018 CSC 48 [ci-après *Renvoi sur les valeurs mobilières*].

II. LES MULTIPLES FACETTES DE LA SOUVERAINETÉ PARLEMENTAIRE: LEÇONS DU ROYAUME-UNI ET DU COMMONWEALTH

Notre compréhension de la souveraineté parlementaire repose sur certaines leçons qui peuvent être tirées du droit britannique et de la jurisprudence du Commonwealth. Elle s'appuie sur une réévaluation de la théorie de l'autolimitation procédurale telle que développée par certains constitutionnalistes britanniques. Nous posons d'abord les propositions fondamentales de la souveraineté parlementaire telles que traditionnellement acceptées en droit britannique. Nous montrons ensuite les principales objections qui y ont été opposées, tout en posant un regard critique sur la conception nouvelle de la souveraineté parlementaire, notamment à la lumière de la jurisprudence du Commonwealth.

1. Une doctrine au cœur de la tradition constitutionnelle britannique

En droit britannique, aucune loi fondamentale ne dispose du pouvoir de légiférer du Parlement de Westminster. C'est la souveraineté parlementaire, une doctrine fondamentale de la constitution non écrite britannique, « [t]he bedrock of the British constitution », qui en régit la compétence législative[5]. L'existence de cette doctrine remonte à l'édiction du *Bill of Rights*, qui consacre en droit britannique le principe selon lequel le monarque n'a pas le pouvoir de changer seul la common law, le droit statutaire ou le droit coutumier du Royaume-Uni[6]. Seule l'action concertée des trois organes du pouvoir législatif – la Chambre des communes, la Chambre des lords et la Reine – donne naissance à la norme juridique. Le célèbre axiome de A.V. Dicey définit la souveraineté parlementaire comme étant « the right to make or unmake any law whatever », s'y ajoutant la règle selon laquelle « no person or body is recognised by the law of England as having a right to override or set aside the legislation of Parliament »[7].

Autrement dit, l'axiome de Dicey exprime le pouvoir juridique du Parlement de Westminster d'édicter ou d'abroger toute loi (*i*); toute loi qu'il édicte donne naissance à une norme juridique qui gouverne les autres branches de l'État, à savoir l'exécutif et le judiciaire (*ii*). Ces deux dimensions de la souveraineté parlementaire forment respectivement un « pouvoir » (dimension positive) et une « immunité » (dimension négative)[8]. Cette compréhension de la souveraineté parlementaire est

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[5] *R. (Jackson)* v. *Attorney General*, [2005] U.K.H.L. 56, 1 A.C. 262, par. 9 (Lord Bingham) (U.K.H.L.) [ci-après *Jackson*].

[6] R. (Miller) v. Secretary of State for Exiting the European Union, [2017] UKSC 5, par. 43. Voir aussi Case of Proclamations, (1611) 12 Co. Rep. 74 (U.K.K.B.); Jeffrey Goldsworthy, The Sovereignty of Parliament: History and Philosophy, Oxford, University Press, 1999, p. 159 et suiv.

[7] Albert Venn Dicey, Introduction to the Study of the Law of the Constitution (1915), 8e éd., Indianapolis, Liberty Fund, 2012, p. 3.

[8] Voir Pavlos Eleftheriadis, Parliamentary Sovereignty and the Constitution, (2009) 22 Can. J.L. & Jur. 267, 268.

largement acceptée au Royaume-Uni, tant par le politique que par le judiciaire, de sorte qu'elle est décrite comme la conception « orthodoxe ».

(a) Le pouvoir du Parlement de Westminster d'édicter toute loi

La souveraineté parlementaire comporte une dimension positive importante, à savoir que le Parlement de Westminster a un pouvoir de légiférer illimité: toute loi relève de sa compétence, et corollairement, il ne peut être lié par ses prédécesseurs ni lier ses successeurs[9]. Partant, le Parlement a le pouvoir d'abroger toute loi explicitement ou implicitement (*implied repeal*), suivant la règle de la préséance de la loi postérieure. Ce principe d'interprétation des lois signifie que, puisque le Parlement ne peut être empêché de légiférer sur un sujet particulier, le conflit entre deux dispositions législatives est résorbé par la préséance de la plus récente sur la plus ancienne[10]. Un tel principe se défend conceptuellement par un argument démocratique: une Chambre des communes élue par la volonté populaire d'aujourd'hui ne peut limiter le pouvoir de légiférer de celle élue par la volonté populaire de demain[11]. Lord Maughan, dans l'affaire *Ellen Street Estates*, avait notamment statué que: « The legislature cannot, according to our constitution, bind itself as to the form of subsequent legislation and, it is impossible for Parliament to enact that in a subsequent statute dealing with the same subject-matter there can be no implied repeal. »[12]

Selon H.W.R. Wade, il en découle que la seule limite au pouvoir législatif du Parlement est celle qui lui impose de maintenir cette souveraineté[13]. Le législateur ne peut, au moyen d'une disposition législative, rendre plus onéreuse l'abrogation ou la modification d'une loi ou encore prétendre assujettir l'adoption future des lois à une procédure spéciale. La portée juridique d'une telle disposition serait nulle, car toute loi peut être adoptée, modifiée ou abrogée par une loi formellement ordinaire. La conception orthodoxe de la souveraineté parlementaire ne reconnaît pas le pouvoir du législateur d'enchâsser (*entrench*) une loi par le truchement d'exigences

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[9] Peter W. Hogg, Constitutional Law of Canada, Toronto, Thomson Reuters, 2018, p. 12-1.

[10] Voir Alec Samuels, Implied Repeal, (2019) 40:2 Stat. L. Rev. 206; Alison Young, Parliamentary Sovereignty and the Human Rights Act, Oxford, Hart Publishing, 2009, p. 31 et suiv. Voir aussi Vauxhall Estates, Ltd. v. Liverpool Corp, [1932] 1 K.B. 733 (U.K.K.B.); Ellen Street Estates, Ltd. v. Minister of Health, [1934] 1 K.B. 590 (U.K.C.A.) [ci-après Ellen Street].

[11] Herbert Marx & François Chevrette, Droit constitutionnel, principes fondamentaux: notes & jurisprudence, 2e éd. par Han-Ru Zhou, Montréal, Éditions Thémis, 2016, p. 281. Voir aussi AW Bradley, « The Sovereignty of Parliament–Form or Substance? », dans Jeffrey Jowell & Dawn Oliver, (dir.), The Changing Constitution, 7e éd., Oxford, Oxford University Press, 2011, p. 22, à la p. 31.

[12] Ellen Street Estates, Ltd v. Minister of Health, [1934] 1 K.B. 590 at 567 (U.K.C.A.).

[13] C'est le principe du maintien de la souveraineté parlementaire (« continuing sovereignty »). H.W.R., The Basis of Legal Sovereignty, (1955) 13:2 Cambridge L.J. 172, 174.

procédurales particulières[14]. De plus, les tribunaux ne pourraient, en principe, contrôler le respect de telles exigences procédurales, vu la dimension négative de la souveraineté parlementaire, suivant laquelle les tribunaux ne peuvent vérifier que rudimentairement la validité des lois.

(b) La préséance de la loi au regard du pouvoir judiciaire

La souveraineté parlementaire telle que comprise par Dicey décrit le statut juridique de l'organe législatif et, par le fait même, la relation qui doit exister entre le législateur et les tribunaux[15]. Wade l'expliquait en quelques mots: « aucune loi de l'assemblée législative souveraine [...] ne peut être invalide aux yeux des tribunaux »[16]. Cette dimension de la souveraineté parlementaire en est la plus importante, car elle s'intéresse au pouvoir et à la légitimité des tribunaux d'exercer un contrôle judiciaire des lois édictées par le Parlement de Westminster[17].

Il découle de la souveraineté parlementaire que les tribunaux britanniques doivent donner effet aux lois dûment édictées par le Parlement, vu l'absence de norme juridique permettant d'en faire le contrôle[18]. C'est ce qu'exprime Lord Simon dans l'arrêt *Pickin*: « [T]he courts in this country have no power to declare enacted law to be invalid. »[19] La notion de « loi dûment édictée par le Parlement », en droit

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[14] H.W.R. Wade, Constitutional Fundamentals, London, Stevens & Sons, 1980, p. 24 et suiv.

[15] Albert Venn Dicey, Introduction to the Study of the Law of the Constitution (1915), 8e éd., Indianapolis, Liberty Fund, 2012, p. 24. Voir aussi Richard Ekins, Acts of Review and the Parliament Acts, (2007) 123 Law Q. Rev. 91, 101-105.

[16] H.W.R. Wade, The Basis of Legal Sovereignty, (1955) 13:2 Cambridge L.J. 172, 174 [Notre traduction].

[17] Pavlos Eleftheriadis, Parliamentary Sovereignty and the Constitution, (2009) 22 Can. J.L. & Jur. 267, 283.

[18] Voir Anthony Clarke & John Sorabji, The Rule of Law and Our Changing Constitution, in Mads Andenas & Duncan Fairgrieve, (dir.), Tom Bingham and the Transformation of the Law: A Liber Amicorum, Oxford, Oxford University Press, 2009, p. 39, à la p. 54. À noter que cette notion déroge à la théorie du constitutionnalisme de common law mise de l'avant par plusieurs constitutionnalistes britanniques. Sur ce sujet, voir notamment T.R.S Allan, Constitutional Justice: A Liberal Theory of the Rule of Law, Oxford, Oxford University Press, 2001; Thomas Poole, Back to the Future? Unearthing the Theory of Common Law Constitutionalism, (2003) 23 Oxford J. Leg. Stud. 435; Stuart Lakin, Debunking the Idea of Parliamentary Sovereignty: The Controlling Factor of Legality in the British Constitution, (2008) 28:4 Oxford J. Leg. Stud. 709; T.R.S. Allan, The Sovereignty of Law, Oxford, Oxford University Press, 2013, p. 142; Han-Ru Zhou, « The Continuing Significance of Dr Bonham's Case », dans Paul Daly (dir.), Apex Courts and the Common Law, Toronto, University of Toronto Press, 2019, p. 279. Pour une critique de cette théorie, voir Jeffrey Goldsworthy, Parliamentary Sovereignty: Contemporary Debates, Cambridge, Cambridge University Press, 2010, p. 14.

[19] Pickin v. British Railways Board, [1974] U.K.H.L. 1, 15 [ci-après Pickin] (U.K.H.L.).

britannique, est traditionnellement régie par la règle du *enrolled bill*. Cette règle consacre le principe selon lequel une loi est réputée valide dès lors qu'elle est passée dans les deux Chambres et qu'elle a reçu la sanction royale. Les tribunaux se limitent donc, d'un point de vue purement procédural, à un exercice de vérification de l'« authenticité » de la loi[20]. Cet exercice s'oppose à l'examen de la régularité procédurale de la loi (« validité »), car une loi est « authentique » dès lors qu'elle apparaît au *parliamentary roll*, ou son équivalent moderne, imprimée sur papier vélin, certifiée par le greffier puis archivée[21].

De plus, la procédure d'adoption des lois et les règles de procédure interne (*standing order*) sont immunisées contre le contrôle judiciaire par le privilège parlementaire, lequel existe afin de protéger le processus législatif de l'ingérence des pouvoirs exécutif et judiciaire et, par le fait même, garantir l'exercice de la souveraineté parlementaire[22]. C'est ce qu'avait expliqué la Chambre des lords dans l'affaire *Pickin*: « The function of the Court is to construe and apply the enactments of Parliament. The Court has no concern with the manner in which Parliament or its officers carrying out its Standing Orders perform these functions. »[23] Par conséquent, il est reconnu en droit britannique qu'une loi ne peut pas être invalidée par les tribunaux au motif que la procédure par laquelle elle a été édictée était entachée d'un vice.

Enfin, une compréhension dite « diceyenne » de la constitution britannique établit comme fondamentale la distinction entre le pouvoir *juridique* et le pouvoir *politique* de légiférer[24]. Suivant une telle distinction, le pouvoir de légiférer du Parlement de Westminster, bien que désormais limité par plusieurs contraintes politiques, reste juridiquement illimité[25]. Par conséquent, la conception orthodoxe de la souveraineté

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[20] Voir Edinburgh & Dalkeith Railway Co v. Wauchope, [1842] U.K.H.L. 710, 725 (U.K.H.L.). Voir aussi Luc. B. Tremblay, Legitimacy of Judicial Review: Special or General?, (2002) 21 Windsor YB. Access Just. 505, 514.

[21] Voir Katherine Swinton, Challenging the Validity of an Act of Parliament: The Effect of Enrolment and Parliamentary Privilege, (1976) 14:2 Osgoode Hall L.J. 345, 347.

[22] Voir Bradlaugh v. Gossett, (1884) 12 Q.B.D 271, [1884] EWHC 1, 278 (U.K.Q.B.). La Cour y avait affirmé: « [W]hat is said or done within the walls of Parliament cannot be inquired into in a court of law [. . .]. [The] House of Commons is not subject to the control of Her Majesty's courts in its administration of that part. of the statute law which has relation to its own internal proceedings. » Voir aussi Bill of Rights 1689, 1 Wil & Mar, c. 2, art. 9, qui prévoit que « les procédures du Parlement ne devront pas être attaquées ou mises en question par un tribunal ou par ailleurs hors du Parlement ».

[23] Pickin v. British Railways Board, [1974] U.K.H.L. 1, 9.

[24] Albert Venn Dicey, Introduction to the Study of the Law of the Constitution (1915), 8e éd., Indianapolis, Liberty Fund, 2012, p. 24.

[25] Sur la question, voir notamment Alison Young, Parliamentary Sovereignty and the Human Rights Act, Oxford, Hart Publishing, 2009; Michael Gordon, Parliamentary Sovereignty in the UK Constitution: Process, Politics and Democracy, Oxford, Hart Publishing,

parlementaire persiste, dans une large mesure, en droit britannique, malgré les changements politiques et constitutionnels qui se succèdent au Royaume-Uni[26]. Toutefois, certains constitutionnalistes, dont Michael Gordon, ont interprété ces changements politiques comme signalant l'avènement d'une nouvelle orthodoxie constitutionnelle, mieux interprétée sous le prisme de la théorie de l'autolimitation procédurale[27].

2. Le Parlement de Westminster peut-il se lier pour l'avenir par la forme?

(a) Une conception nouvelle de la souveraineté parlementaire

La dimension positive de la souveraineté parlementaire, qui considère sans effet les tentatives d'un Parlement souverain de se lier pour l'avenir par des limites procédurales, s'avère particulièrement contentieuse, et à plus forte raison compte tenu des développements politiques au Royaume-Uni. Il faut également admettre que la conception orthodoxe de la souveraineté parlementaire n'est pas sans paradoxe, suivant la célèbre formule du professeur Hamish R. Gray:

> *If Parliament is sovereign, there is nothing it cannot do by legislation; if there is nothing Parliament cannot do by legislation, it may bind itself hand and foot by legislation; if Parliament so binds itself by legislation there are things which it cannot do by legislation; and if there are such things Parliament is not sovereign.*[28]

Pour Ivor Jennings, la proposition selon laquelle un parlement souverain ne peut se lier pour l'avenir et, par conséquent, qu'on ne puisse accorder à une loi une autorité supralégislative en limitant sa modification ou son abrogation à une procédure plus

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2015; Nicholas W Barber, The Afterlife of Parliamentary Sovereignty, (2011) 9 Intl. J. Constitutional L. 144; Mark Elliott, Constitutional Legislation, European Union Law and the Nature of the United Kingdom's Contemporary Constitution, (2014) 10 European Constitutional L. Rev. 379; Paul Silk, « Devolution and the UK Parliament », dans Alexander Horne & Gavin Drewry (dir.), Parliament and the Law, Oxford, Hart Publishing, 2018, p. 181; Mark Elliott, « Parliamentary Sovereignty in a Changing Constitutional Landscape », dans Jeffrey Jowell & Colm O'Cinneide (dir.), The Changing Constitution, 9e éd., Oxford, Oxford University Press, 2019, p. 30; Mark Elliott & Stephen Tierney, Political Pragmatism and Constitutional Principle: The European Union (Withdrawal) Act 2018, (2019) Public Law 37.

[26] Voir R. (Miller) v. Secretary of State for Exiting the European Union, [2017] UKSC 5, par. 43. Contra Mark Elliott, United Kingdom: Parliamentary Sovereignty under Pressure, (2004) 2 Intl. J. Constitutional L. 545, 553; Mark Elliott, « The Principle of Parliamentary Sovereignty in Legal, Constitutional and Political Perspective », dans Jeffrey Jowell & Dawn Oliver (dir.), The Changing Constitution, 8e éd., Oxford, Oxford University Press, 2015, p. 39; Martin Loughlin & Stephen Tierney, The Shibboleth of Sovereignty, (2018) 81:6 Mod. L. Rev. 989.

[27] Michael Gordon, Parliamentary Sovereignty in the UK Constitution: Process, Politics and Democracy, Oxford, Hart Publishing, 2015, p. 3. Voir aussi R. (Jackson) v. Attorney General, [2005] U.K.H.L. 56, 1 A.C. 262, par. 102 (Lord Steyn), par. 104 (Lord Hope), par. 159 (Lady Hale).

[28] Voir Hamish R. Gray, The Sovereignty of Parliament Today, (1953) 10 U.T.L.J. 54, 54.

onéreuse – c'est-à-dire l'enchâsser (*entrench*) – s'accorde mal avec la notion de souveraineté du Parlement. Il soutient plutôt que, si le législateur détient réellement une compétence législative illimitée, cette dernière doit comprendre le pouvoir de modifier les conditions d'exercice du pouvoir législatif elles-mêmes: « its power to change the law includes the power to change the law affecting itself »[29]. Autrement dit, puisque la souveraineté parlementaire confère au législateur un pouvoir juridiquement illimité, ce pouvoir doit inclure le pouvoir d'édicter des règles régissant la validité des lois subséquentes[30].

Les fondements théoriques de cette conception nouvelle de la souveraineté parlementaire reposent sur les travaux de R.T.E. Latham[31]. Pour Latham, la simple affirmation de la souveraineté du Parlement est lacunaire dans la mesure où elle n'indique pas ce que constitue « le Parlement » ni ne pose les règles qui permettent d'authentifier l'expression de sa volonté souveraine. De son avis, toute constitution doit comporter certaines règles prescrivant les conditions formelles d'expression de la volonté du souverain: « Where the purported sovereign is any one but a single actual person, the designation of him must include the statement of rules for the ascertainment of his will. »[32] Par conséquent, la souveraineté parlementaire doit comporter tout à la fois les règles qui régissent la conséquence juridique de la validité d'une loi ainsi que les règles qui régissent la détermination de cette validité[33]. Mais il ne s'ensuit pas nécessairement que ces dernières puissent être librement modifiées par le législateur en sa compétence législative[34]. Or, la conception nouvelle de la souveraineté parlementaire, notamment mise de l'avant par Jennings et Latham, diffère seulement de la conception orthodoxe en ce qu'elle

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[29] Ivor Jennings, The Law and the Constitution, 5e éd., London, University of London Press, 1959, p. 153. C'est le principe de la souveraineté parlementaire « auto-limitative » (« self-embracing »). Voir H.L.A. Hart, The Concept of Law, Oxford, Clarendon Press, 1961, p. 146.

[30] Voir Han-Ru Zhou, « Revisiting the "Manner and Form" Theory of Parliamentary Sovereignty », (2013) 129:3 Law Q. Rev. 610, 613; Michael Gordon, Parliamentary Sovereignty in the UK Constitution: Process, Politics and Democracy, Oxford, Hart Publishing, 2015, p. 69.

[31] Voir Peter Oliver, Law, Politics, the Commonwealth and the Constitution: Remembering R.T.E. Latham, 1909–43, (2000) 11 King's College L.J. 153, 154. Heuston qualifiait l'œuvre de Lantham de « most brilliant contribution to the literature of English constitutional law since Dicey ». Voir R.F.V. Heuston, Essays in Constitutional Law, 2e éd., London, Stevens & Sons, 1964, p. 7.

[32] R.T.E. Latham, What is an Act of Parliament?, (1939) King's Counsel 152, 154. Voir aussi R.T.E. Latham, « The Law and the Commonwealth », dans W.K. Hancock, Survey of British Commonwealth Affairs, London, Oxford University Press, 1937, p. 510, à la p. 523.

[33] Voir Luc B. Tremblay, The Rule of Law, Justice and Interpretation, Montréal, McGill-Queen's University Press, 1997, p. 62.

[34] Voir H.W.R. Wade, The Basis of Legal Sovereignty, (1955) 13:2 Cambridge L.J. 172.

suggère que le Parlement de Westminster (et tout parlement souverain) possède un tel pouvoir.

Il existerait donc des règles régissant la validité des lois, lesquelles peuvent être modifiées au moyen de la loi ordinaire et dont l'inobservance peut être sanctionnée par les tribunaux: « [C]e n'est que lorsque les règles formelles d'adoption des lois sont respectées que la volonté dûment exprimée du Parlement devient loi. »[35] Or, si, traditionnellement, les tribunaux ne peuvent s'enquérir que de l'authenticité de la loi en raison du privilège parlementaire, la théorie de l'autolimitation procédurale nécessite que les tribunaux puissent surveiller le respect par le législateur de règles formelles qu'il a lui-même édictées. Le professeur Han-Ru Zhou reconnaît d'emblée cette difficulté. Il suggère plutôt que le privilège parlementaire puisse, à l'occasion, ne pas immuniser les procédures législatives du contrôle judiciaire, notamment lorsque le législateur a clairement indiqué son l'intention d'être lié par une exigence procédurale[36].

La théorie de l'autolimitation procédurale repose sur le postulat qu'il existe une différence fondamentale entre une restriction du pouvoir de légiférer sur le fond, lequel ne peut être entravé sans que soit sapée la souveraineté du Parlement, et une limite procédurale qui conditionnerait l'adoption future des lois sur la forme. Selon cette conception nouvelle de la souveraineté parlementaire, une condition de manière et de forme ne saurait être comprise comme une limite au pouvoir législatif du Parlement, car elle ne restreint en rien son autorité de légiférer sur une matière donnée. C'est ce que soutiennent plusieurs constitutionnalistes, dont Geoffrey Marshall: « rules that simply define the procedures through which legal changes are effected are not fetters or limits on power and do not constitute restrictions on sovereignty »[37].

Cela a pour conséquence de suggérer qu'un législateur a le pouvoir d'enchâsser certaines lois fondamentales en stipulant, par le truchement d'une condition de manière et de forme, qu'elle ne peut être modifiée ou abrogée que suivant une procédure plus onéreuse que celle employée ordinairement[38]. Suivant un tel

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[35] Han-Ru Zhou, Revisiting the "Manner and Form" Theory of Parliamentary Sovereignty, (2013) 129:3 Law Q. Rev. 610, 613 [notre traduction].

[36] Voir Han-Ru Zhou, Revisiting the "Manner and Form" Theory of Parliamentary Sovereignty, (2013) 129:3 Law Q. Rev. 610, 614. Voir aussi R.F.V. Heuston, Essays in Constitutional Law, 2e éd., London, Stevens & Sons, 1964, p. 17.

[37] Geoffrey Marshall, « The Constitution: Its Theory and Interpretation », dans Vernon Bogdanor (dir.), The British Constitution in the Twentieth Century, Oxford, Oxford University Press, 2005, p. 35, à la p. 46. Voir aussi Michael Gordon, Parliamentary Sovereignty in the UK Constitution: Process, Politics and Democracy, Oxford, Hart Publishing, 2015, p. 74; Han-Ru Zhou, Revisiting the "Manner and Form" Theory of Parliamentary Sovereignty, (2013) 129:3 Law Q. Rev. 610, 613.

[38] Han-Ru Zhou, Revisiting the "Manner and Form" Theory of Parliamentary Sovereignty, (2013) 129:3 Law Q. Rev. 610, 614.

raisonnement, une condition de manière et de forme ne peut pas être abrogée implicitement par une loi postérieure qui ne la respecterait pas – au motif de l'incompatibilité – lorsque cette dernière n'a pas été adoptée suivant la procédure spéciale prescrite par la loi antérieure[39]. Le manquement à une exigence procédurale entraîne plutôt l'invalidité de la loi entachée du vice: elle est nulle *ab initio*, car elle ne correspond pas à l'expression authentique de la volonté du législateur[40].

Dans l'arrêt *Jackson*, les juges Hale et Steyn ont envisagé, en *obiter dictum*, l'applicabilité de la théorie de l'autolimitation procédurale en droit britannique. En l'espèce, la Chambre des lords était appelée à se pencher sur la portée juridique du *Parliament Act 1911*[41], telle que modifiée par le *Parliament Act 1949*[42], pour déterminer la validité des lois adoptées en vertu de la procédure exceptionnelle établie par cette loi. Cette procédure prévoit qu'une loi d'intérêt public (*public bill*) peut être adoptée sans l'accord de la Chambre des lords lorsque celle-ci retarde un vote pour l'adoption d'une loi pendant une période de deux ans. Ce délai a été réduit de moitié, passant de deux à un an, par le *Parliament Act 1949*, lui-même adopté en vertu de la procédure spéciale prévue par le *Parliament Act 1911* et donc sans le consentement de la Chambre des lords.

La validité du *Hunting Act 2004*, adopté en vertu des *Parliament Acts*, était indirectement contestée par les demandeurs dans *Jackson*[43]. De fait, ceux-ci plaidaient que la Chambre des communes ne pouvait se prévaloir de la procédure prévue par le *Parliament Act 1911* pour la modifier et donc que les lois adoptées en vertu du *Parliament Act 1949*, dont fait partie le *Hunting Act 2004*, sont invalides[44]. En cela, le principe dégagé de *Pickin* selon lequel il n'appartient pas aux tribunaux de juger de la validité des lois est sauvegardé dans la mesure où les juges ne statuent pas sur la validité de la procédure par laquelle le *Hunting Act* a été adoptée, mais qu'elle effectue plutôt un exercice d'interprétation des lois[45]. Les neuf juges de la

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[39] Gerard Carney, An Overview of Manner and Form in Australia, (1989) 5 Queensland U. Technology L.J. 69, 93; Hamish R. Gray, The Sovereignty of Parliament and the Entrenchment of Legislative Process, (1964) 27:6 Mod. L. Rev. 705, 708. Voir aussi R. c. Mercure, [1988] S.C.J. No. 11, [1988] 1 R.C.S. 234, 277.

[40] Jeffrey Goldsworthy, Parliamentary Sovereignty: Contemporary Debates, Cambridge, Cambridge University Press, 2010, p. 183.

[41] Parliament Act 1911 (UK), 1 & 2 Geo. V, c. 13.

[42] Parliament Act 1949 (UK), 13 & 14 Geo. VI, c. 10.

[43] Hunting Act 2004 (UK), 52 Eli., c. 37.

[44] Seulement six autres lois ont été édictées en vertu de cette procédure: Government of Ireland Act 1914; Welsh Church Act 1914; Parliament Act 1949; War Crimes Act 1991; European Parliament Elections Act 1999; Sexual Offences (Amendment) Act 2000.

[45] R. (Jackson) v. Attorney General, [2005] U.K.H.L. 56, 1 A.C. 262, par. 51 (Lord Nicholls), par. 169 (Lord Carswell) (U.K.H.L.). Contra Michael Gordon, Parliamentary Sovereignty in the UK Constitution: Process, Politics and Democracy, Oxford, Hart Publishing, 2015, p. 196 et suiv.

Chambre des lords ont confirmé unanimement, dans neuf motifs différents, la validité du *Parliament Act 1949*. Les juges Hale et Steyn ont explicitement fondé leurs motifs sur la théorie de l'autolimitation procédurale: « If Parliament can do anything, there is no reason why Parliament should not decide to redesign itself. »[46] En d'autres termes, la *Parliament Act 1949* aurait eu pour effet de redéfinir le processus législatif en permettant, dans certaines circonstances, de légiférer validement sans obtenir le consentement de la Chambre des lords, donnant raison aux constitutionnalistes défendant la conception nouvelle de la souveraineté parlementaire.

Cela étant dit, plusieurs nuances s'imposent. D'abord, il faut souligner que la juge Hale distingue la réduction des exigences procédurales (« downwards ») de l'imposition de limites procédurales au pouvoir de légiférer (« upwards »), en refusant de statuer sur cette dernière[47]. Suivant un tel raisonnement, il ne pourrait être possible de rendre plus onéreuse la procédure d'adoption des lois que celle employée ordinairement, mais il serait permis de l'alléger. Ensuite, plusieurs autres juges, dont Lord Bingham, Lord Carswell et Lord Hope, ont expressément rejeté cette proposition, suivant plutôt la conception orthodoxe de la souveraineté parlementaire[48]. De plus, il faut admettre que la procédure prévue par le *Parliament Act 1949* est une procédure alternative et non impérative et, en cela, ne cadre pas avec la nature obligatoire des conditions de manière et de forme[49]. Enfin, il n'est pas non plus évident qu'une redistribution du pouvoir législatif entre la Chambre des lords et la Chambre des communes puisse constituer une limite procédurale ou même une limite de fond au pouvoir de légiférer du Parlement[50].

Par ailleurs, la Cour suprême du Royaume-Uni, dans l'arrêt *Miller (No. 1)*, a réaffirmé la centralité de la conception orthodoxe de la souveraineté parlementaire dans la constitution britannique[51]. La disposition de quelques juges du plus haut tribunal du Royaume-Uni à envisager une conception nouvelle de la souveraineté

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[46] R. (Jackson) v. Attorney General, [2005] U.K.H.L. 56, 1 A.C. 262, par. 160 (motifs de Lady Hale). Voir aussi par. 94 (motifs de Lord Steyn) (U.K.H.L.).

[47] R. (Jackson) v. Attorney General, [2005] U.K.H.L. 56, 1 A.C. 262, par. 163. Voir aussi par. 81 (motifs de Lord Steyn). Contra par. 113 (motifs de Lord Hope) (U.K.H.L.).

[48] Voir R. (Jackson) v. Attorney General, [2005] U.K.H.L. 56, 1 A.C. 262, par. 9 (motifs de Lord Bingham), par. 174 (motifs de Lord Carswell) et par. 113 (motifs de Lord Hope) (U.K.H.L.).

[49] Voir Jeffrey Goldsworthy, Parliamentary Sovereignty: Contemporary Debates, Cambridge, Cambridge University Press, 2010, p. 177.

[50] George Winterton, The British Grundnorm: Parliamentary Sovereignty Re-Examined, (1976) 92:4 Law Q. Rev. 519, 598.

[51] R. (Miller) v. Secretary of State for Exiting the European Union, [2017] UKSC 5, par. 43. Cependant, cet arrêt peut également être interprété comme illustrant le virage interventionniste qu'ont récemment adopté les tribunaux à l'égard du pouvoir législatif. Voir Roger Masterman et Shauna Wheatle, Unpacking Separation of Powers: Judicial Independence,

parlementaire n'est donc pas déterminante. Il n'empêche que l'arrêt *Jackson* continue de susciter l'engouement de certains constitutionnalistes qui y voient une consécration de la théorie de l'autolimitation procédurale en droit britannique[52].

(b) Le Colonial Laws Validity Act et la jurisprudence du Commonwealth

La question de savoir si un parlement peut se lier pour l'avenir au moyen d'exigences procédurales ne s'est jamais présentée de la même manière dans les colonies britanniques, malgré leur réception du constitutionnalisme britannique et de la souveraineté parlementaire[53]. Au Royaume-Uni, la conception orthodoxe de la souveraineté parlementaire exclut la possibilité qu'une loi soit formellement enchâssée et qu'elle ait ainsi préséance sur les autres lois dans la hiérarchie des normes. Par opposition, les lois impériales édictées pour les colonies britanniques primaient les dispositions incompatibles des lois coloniales en vertu de l'article 2 du *Colonial Laws Validity Act 1865*[54]. Cette même loi énonçait expressément, en son article 5, le pouvoir des législatures coloniales de modifier les modalités du processus législatif par la loi, pour autant que soient respectées les conditions de manière et de forme prévues notamment par toute loi impériale ou toute loi coloniale antérieure:

> *Every colonial legislature shall have [...] full power to make laws respecting the constitution, powers, and procedure of such legislature; provided that such laws shall have been passed in such manner and form as may from time to time be required by any Act of Parliament, letters patent, Order in Council, or colonial law for the time being in force in the said colony.*[55]

Quelques législatures coloniales ont usé de ce pouvoir dévolu par le CLVA pour enchâsser formellement certaines normes, les protégeant ainsi du processus législatif ordinaire par diverses exigences procédurales, de sorte à ériger une constitution rigide (« controlled »). Par opposition, la constitution britannique est souple («

Sovereignty and Conceptual Flexibility in the UK Constitution, (2017) 3 Public Law 469, p. 24-25.

[52] Voir Michael Gordon, Parliamentary Sovereignty in the UK Constitution: Process, Politics and Democracy, Oxford, Hart Publishing, 2015, p. 194; Han-Ru Zhou, Revisiting the "Manner and Form" Theory of Parliamentary Sovereignty, (2013) 129:3 Law Q. Rev. 610, 623; Rika Weill, Centennial to the Parliament Act 1911: The Manner and Form Fallacy, (2012) 27:1 Public Law 105. Contra Richard Ekins, Acts of Parliament and the Parliament Acts, (2007) 123 Law Q. Rev. 91; Christopher Forsyth, The definition of Parliament after Jackson: Can the life of Parliament be extended under the Parliament Acts 1911 and 1949?, (2011) 9:1 Intl. J. Constitutional L. 132.

[53] Voir Peter Oliver, The Constitution of Independence, New York, Oxford University Press, 2005.

[54] (R.-U.), 28 & 29 Vict., c. 63. Voir aussi Jean E. Côté, The Reception of English Law, (1977) 15 A.L.R. 29, 31.

[55] Colonial Laws Validity Act, art. 5.

uncontrolled »), c'est-à-dire qu'elle peut être modifiée sans formalité particulière[56].

Dans l'affaire *Trethowan*, la législature australienne de la Nouvelle-Galles du Sud s'était imposé une procédure spéciale pour l'abolition de son conseil législatif, à savoir la tenue d'un référendum, en édictant le *Constitution (Legislative Council) Amendment Act*[57]. Cette disposition législative ne pouvait être modifiée ou abrogée par la législature de la Nouvelle-Galles du Sud en sa compétence législative ordinaire, car elle était elle-même protégée par la procédure spéciale: elle était doublement enchâssée. Partant, elle conditionnait tout à la fois la validité des lois prétendant abolir le Conseil législatif et la validité des lois prétendant abroger cette condition de manière et de forme sans passer par voie référendaire. En l'espèce, le Conseil privé a jugé *ultra vires*, et donc invalide, la tentative de la législature d'abolir successivement la disposition législative et le Conseil législatif sans tenir de référendum sur la base du CLVA[58].

Ainsi, l'article 5 CLVA conférait aux tribunaux le pouvoir d'invalider les lois dérogeant à la procédure requise par les conditions de manière et de forme applicables en vertu de la loi. Les tribunaux ont pu exercer un contrôle judiciaire du processus législatif et du respect de règles formelles sur la base de cette disposition législative. Une loi entachée d'un vice procédural est frappée d'invalidité, car le législateur excède alors du pouvoir législatif que lui attribue le CLVA[59]. Cela dit, le Conseil privé s'est inspiré de l'affaire *Trethowan*, à notre avis à tort, pour trancher deux affaires subséquentes où le CLVA n'était pourtant plus applicable. Comme nous le verrons, l'amalgame entre les arrêts *Trethowan*, *Harris* et *Ranasinghe* est douteuse, car les fondements juridiques du contrôle judiciaire dans ces affaires diffèrent les uns des autres.

Dans l'affaire *Harris*[60], l'article 152 du *South Africa Act 1909*[61], loi constituant le Parlement de l'Afrique du Sud, prévoyait une procédure de modification plus onéreuse pour certaines dispositions de la Constitution de l'Afrique du Sud[62]. Cette procédure spéciale exigeait que toute modification soit adoptée aux deux tiers de la majorité d'une session conjointe des deux Chambres du Parlement. Le droit de vote des « Coloured », protégé par cette procédure spéciale, ne pouvait donc être modifié

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[56] Voir McCawley v. The King (Australia), [1920] A.C. 691, 701 (P.C.).

[57] (AUS) 1929/28.

[58] Attorney-General for New South Wales v. Trethowan, [1932] A.C. 526 at 433 (P.C.).

[59] Attorney-General for New South Wales v. Trethowan, [1932] A.C. 526 at 433 (P.C.). Voir aussi Norman Siebrasse, The Doctrinal Origin of Judicial Review and the Colonial Laws Validity Act, (1993) 1:1 Rev. Const. Stud. 75; B.M. O'Brien, The Indivisibility of State Legislative Power, (1981) 7:4 Monash U.L. Rev. 225.

[60] Harris v. Minister of the Interior, [1952] 4 S.A. 769 (S.C.S.A.).

[61] (U.K.), 9 Ed. VII, c. 9, art. 152.

[62] Voir Denis V. Cowen, The Entrenched Sections of the South Africa Act, (1953) 70 South African L.J. 238.

ou abrogé par voie législative ordinaire. En l'espèce, la Cour suprême de l'Afrique du Sud a invalidé le *Separate Representation of Voters Act*[63], loi formellement ordinaire adoptée sans respecter la procédure de modification et visant à ségréger la liste électorale[64]. Pourtant, dans une affaire antérieure, la plus haute cour de l'Afrique du Sud avait statué que, suivant la ratification du *Statut de Westminster*[65] et l'abrogation subséquente du CLVA en droit sud-africain, les tribunaux n'avaient plus le pouvoir d'invalider les lois[66].

Ensuite, dans l'affaire *Ranasinghe*, l'article 29(4) de la Constitution ceylanaise, prévue par décret impérial, disposait d'une procédure spéciale requérant une majorité aux deux tiers dans les deux chambres pour toute modification constitutionnelle[67]. Le Conseil privé a invalidé une loi édictée par le Parlement ceylanais visant à modifier la Constitution au motif qu'elle n'avait pas obtenu le certificat du Président de la Chambre assurant l'obtention du vote spécial prescrit par la Constitution. Le juge Pearce avait alors statué qu'une législature « has no power to ignore the conditions of law-making that are imposed by the instrument which itself regulates its power to make law »[68]. Il en découle le principe bien établi selon lequel un parlement ne peut mettre de côté les conditions d'exercice du pouvoir législatif contenues dans l'instrument – la constitution – qui lui confère ce pouvoir de légiférer. Toute tentative par le législateur d'y déroger a pour conséquence l'excès de la compétence législative qui lui est dévolue et la loi entachée d'un vice procédural doit être sanctionnée d'invalidité par les tribunaux. Autrement dit, une constitution ne peut être modifiée que par la procédure de révision y étant expressément prévue, le cas échéant.

Dans ces trois cas où des conditions de manière et de forme ont servi à invalider une loi, l'erreur procédurale était évidente. En effet, il appert que les tribunaux ont pu déroger à la règle du *enrolled bill* dans des situations où il était apparent, à première vue, qu'il y avait irrégularité ou vice procédural[69]. À tout le moins, ces arrêts semblent suggérer que la présomption de régularité procédurale en faveur de l'action législative, garantie par le privilège parlementaire, est réfragable, contrairement à ce qu'avancent les partisans de la conception orthodoxe de la souveraineté

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63 (AFS), 1951/46.

64 Harris v. Minister of the Interior, [1952] 4 S.A. 769, at 437 (S.C.S.A.).

65 (R.-U.), 22 Geo. V, c. 4.

66 Voir Ndlwana v. Hofmeyr, [1937] A.D. 229, at 1265 (S.C.S.A.).

67 Bribery Commissioner v. Ranasinghe, [1965] A.C. 172 (P.C.). Pour une recension des circonstances et conséquences constitutionnelles entourant cette décision, Voir Rehan Abeyratne, Uncertain Sovereignty: Ceylon as a Dominion 1948–1972, (2019) 17:4 Intl. J. Constitutional L. 1258.

68 Bribery Commissioner v. Ranasinghe, [1965] A.C. 172, 198, 200 (P.C.).

69 Herbert Marx & François Chevrette, Droit constitutionnel, principes fondamentaux: notes & jurisprudence, 2e éd. par Han-Ru Zhou, Montréal, Éditions Thémis, 2016, p. 410.

parlementaire[70]. Toutefois, comme le note Katherine Swinton, cette conclusion risque d'être plus admissible en droit canadien ou australien, où le contrôle judiciaire des lois est exercé en vertu d'une constitution écrite, qu'en droit britannique ou en droit néo-zélandais, où la souveraineté parlementaire et le privilège parlementaire y font traditionnellement obstacle[71].

Pourtant, certains constitutionnalistes, dont Jennings, se sont inspirés de la jurisprudence du Commonwealth pour élaborer la théorie de l'autolimitation procédurale[72]. De même, dans l'arrêt *Jackson*, Lord Steyn et Lady Hale ont formulé leur jugement en s'appuyant sur ces arrêts comme source persuasive de droit[73]. L'*obiter* du juge Pierce dans *Ranasinghe* fut interprété comme signifiant que les conditions de manière et de forme ne limitent en rien le pouvoir de légiférer d'un d'un parlement: « A Parliament does not cease to be sovereign whenever its component members fail to produce among themselves a requisite majority [for the adoption of] ordinary legislation [...] or when in the case of legislation to amend the Constitution there is only a bare majority if the Constitution requires something more. »[74] Partant, une certaine lecture de l'arrêt *Ranasinghe* permettrait de réconcilier la souveraineté parlementaire avec l'obligation du législateur de respecter certaines exigences procédurales: un parlement ne peut pas s'interdire de légiférer sur une question, mais il peut s'obliger à ne légiférer sur cette question que d'une manière plus onéreuse que ne l'est la procédure ordinaire[75]. Selon cette compréhension, tout parlement souverain aurait le pouvoir de se lier pour l'avenir au moyen d'une loi ordinaire[76].

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[70] Katherine Swinton, Challenging the Validity of an Act of Parliament: The Effect of Enrolment and Parliamentary Privilege, (1976) 14:2 Osgoode Hall L.J. 345, 353-56.

[71] Katherine Swinton, Challenging the Validity of an Act of Parliament: The Effect of Enrolment and Parliamentary Privilege, (1976) 14:2 Osgoode Hall L.J. 345, 358.

[72] Katherine Swinton, Challenging the Validity of an Act of Parliament: The Effect of Enrolment and Parliamentary Privilege, (1976) 14:2 Osgoode Hall L.J. 345, 153-54. Voir aussi R.F.V. Heuston, Essays in Constitutional Law, 2e éd., London, Stevens & Sons, 1964, p. 218-219, Hamish R. Gray, The Sovereignty of Parliament and the Entrenchment of Legislative Process, (1964) 27:6 Mod. L. Rev. 705, 708.

[73] R. (Jackson) v. Attorney General, [2005] U.K.H.L. 56, 1 A.C. 262, par. 81-85 (motifs de Lord Steyn); par. 163-64 (motifs de Lady Hale).

[74] Bribery Commissioner v. Ranasinghe, [1965] A.C. 172, 200 (P.C.).

[75] Herbert Marx & François Chevrette, Droit constitutionnel, principes fondamentaux: notes & jurisprudence, 2e éd. par Han-Ru Zhou, Montréal, Éditions Thémis, 2016, p. 294.

[76] R.F.V. Heuston, Essays in Constitutional Law, 2e éd., London, Stevens & Sons, 1964, p. 218-219; Hamish R. Gray, The Sovereignty of Parliament and the Entrenchment of Legislative Process, (1964) 27:6 Mod. L. Rev. 705, 708; Han-Ru Zhou, Revisiting the "Manner and Form" Theory of Parliamentary Sovereignty, (2013) 129:3 Law Q. Rev. 610, 612-614; Michael Gordon, Parliamentary Sovereignty in the UK Constitution: Process, Politics and Democracy, Oxford, Hart Publishing, 2015, p. 90. Voir aussi Geoffrey Marshall,

(c) La thèse de l'ancrage supralégislatif

À notre avis, il serait erroné de faire une lecture aussi généreuse de l'arrêt *Ranasinghe* et des principes qui en découlent. De l'aveu même du juge Pearce, son *obiter* ne pourrait permettre aux tribunaux britanniques d'invalider les lois édictées par le Parlement de Westminster, car aucune loi supralégislative ne régit son pouvoir de légiférer[77]. La jurisprudence du Commonwealth n'offre pas l'autorité que suggèrent certains constitutionnalistes quant au pouvoir du législateur britannique de se lier pour l'avenir sur des questions procédurales. Il est vrai que dans *Trethowan*, le juge Dixon a suggéré, en *obiter*, que son raisonnement pouvait trouver application en droit britannique[78]. À notre avis, c'est omettre le fondement juridique de l'invalidation de la disposition contestée, à savoir l'article 5 CLVA, et la compétence législative limitée dévolue aux législatures coloniales par le CLVA. En effet, les législatures coloniales avaient expressément le pouvoir de se lier pour l'avenir par des conditions de manière et de forme, pour autant qu'elles aient respecté toute condition antérieure[79]. Jennings lui-même reconnaissait cette difficulté[80].

Dans les cas où l'exercice du pouvoir de légiférer sur une question avait été assujetti au respect d'une procédure plus onéreuse que celle employée ordinairement, c'était par l'application d'une norme supralégislative dont l'autorité permettait indéniablement de conditionner la validité des lois subséquentes. D'abord, dans *Trethowan*, le caractère obligatoire des conditions de manière et de forme était assuré par le truchement du CLVA, qui régissait expressément la souveraineté parlementaire des législatures coloniales. Ensuite, dans *Harris* et *Ranasinghe*, les dispositions litigieuses étaient des normes constitutionnellement enchâssées, contenues dans un instrument conférant aux législatures leur compétence législative et dictant expressément les modalités de ce pouvoir législatif.

Suivant la thèse des professeurs Gerard Carney[81] et Jeffrey Goldsworthy[82], le

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Constitutional Theory, New York, Oxford University Press, 1980, p. 55.

[77] Bribery Commissioner v. Ranasinghe, [1965] A.C. 172, 197 (P.C.).

[78] Attorney-General for New South Wales v. Trethowan, [1932] A.C. 526, at 426 (P.C.). En ce sens, voir par exemple Stephen A. Scott, Constituent Authority and the Canadian Provinces, (1967) 12 McGill L.J. 528, 545; Hamish R. Gray, The Sovereignty of Parliament Today, (1953) 10 U.T.L.J. 54, 64; W. Friedmann, Trethowan's Case, Parliamentary. Sovereignty, and the Limits of Legal Change, (1950) 24 Aust. L.J. 103, 104.

[79] H.W.R. Wade, Constitutional Fundamentals, London, Stevens & Sons, 1980, p. 29; H.W.R. Wade, The Basis of Legal Sovereignty, (1955) 13:2 Cambridge L.J. 172, 183.

[80] Ivor Jennings, The Law and the Constitution, 5e éd., London, University of London Press, 1959, p. 156.

[81] Gerard Carney, An Overview of Manner and Form in Australia, (1989) 5 Queensland U. Technology L.J. 69, 69.

[82] Jeffrey Goldsworthy, Structural Judicial Review and the Objection from Democracy,

législateur ne peut se lier pour l'avenir qu'en présence d'une norme supralégislative recréant les effets de l'article 5 CLVA en droit. Cependant, le *Statut de Westminster*[83] exclut l'application du CLVA comme limite à la compétence législative du Parlement du Canada et des législatures provinciales, leur permettant d'abroger toute loi du Royaume-Uni s'y appliquant, sous réserve des restrictions applicables: « Aux termes du par. 7(1), le Parlement impérial est demeuré l'instrument juridique d'adoption de modifications des A.A.N.B., 1867-1930. »[84] Le Statut fut par ailleurs entièrement applicable en Afrique du Sud dès 1931, et le Parlement de l'Afrique du Sud l'a expressément ratifié en 1934[85]. Par opposition, l'article 10 du *Statut* prévoyait qu'il ne s'appliquerait à l'Australie et à la Nouvelle-Zélande qu'à la suite d'une ratification formelle par leur Parlement respectif[86].

Il fut ratifié par le Parlement du Commonwealth en 1942, puis par le Parlement de Wellington en 1947[87]. Néanmoins, le CLVA est demeuré applicable aux lois édictées par les États fédérés de l'Australie jusqu'en 1986, au moment de l'édiction de l'*Australia Act 1986*[88] par le Parlement du Commonwealth[89]. L'article 6 de cette loi reproduit les effets juridiques de l'article 5 CLVA en permettant aux États fédérés de l'Australie d'édicter des conditions de manière et de forme au moyen de la loi, pour autant que soit observée toute condition antérieure[90]. Par conséquent, la validité des lois édictées par les États australiens, contrairement à celle du Parlement de Westminster, est assujettie aux conditions de manière et de forme prévues par la loi[91].

En principe, toutefois, une condition de manière et de forme ne peut être

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(2010) 60 U.T.L.J. 137, 143. Voir aussi Jeffrey Goldsworthy, Parliamentary Sovereignty: Contemporary Debates, Cambridge, Cambridge University Press, 2010, p. 174 et suiv.

83 Renvoi: Résolution pour modifier la Constitution, [1981] S.C.J. No. 58, [1981] 1 R.C.S. 753, 794.

84 (UK), 22 Geo. V, c. 4, reproduit dans L.R.C. (1985), annexe II, no 5, Partie VI, art. 2.

85 Status of the Union Act (AFS), 1934/69.

86 Status of the Union Act, art. 10.

87 Statute of Westminster Adoption Act 1942 (AUS), 1942/47; Statute of Westminster Adoption Act 1947 (NZ), 1947/38.

88 (AUS), 1985/142.

89 Gerard Carney, An Overview of Manner and Form in Australia, (1989) 5 Queensland U. Technology L.J. 69, 69.

90 Jeffrey Goldsworthy, Manner and Form in Australian States, (1987) 16 Melbourne L. Rev. 403, 411. Voir aussi Gerard Carney, « State Constitutions », dans Cheryl Saunders & Adrienne Stone (dir.), The Oxford Handbook of the Australian Constitution, Oxford, Oxford University Press, 2018, p. 277, à la p. 296; Gerard Carney, An Overview of Manner and Form in Australia, (1989) 5 Queensland U. Technology L.J. 69, 70.

91 Voir South Australia v. Commonwealth ('First Uniform Tax case'), (1942) 65 C.L.R. 373, 422 (juge Latham) (H.C.A.).

contraignante en droit que si elle est elle-même enchâssée par une procédure de modification ou d'abrogation plus onéreuse que celle employée ordinairement. Logiquement, une règle procédurale ne peut être comprise comme limitant le pouvoir législatif du parlement ou comme conditionnant la validité des lois subséquentes si elle peut elle-même être modifiée ou abrogée par l'exercice ordinaire de sa compétence législative[92]. Dans la même veine, il n'est pas impossible qu'une règle procédurale non enchâssée puisse être abrogée implicitement par la simple incompatibilité d'une loi postérieure avec la procédure qu'elle prescrit[93]. En effet, dans l'arrêt *McCawley*, le Conseil privé avait jugé que le *Constitutional Act of Queensland*, 1867, loi coloniale dont les dispositions pouvaient expressément être modifiées par la législature du Queensland en sa compétence législative ordinaire, ne pouvait pas conditionner l'adoption future des lois, même par le truchement du CLVA, car elle n'était pas elle-même enchâssée[94]. Par opposition, dans *Trethowan*, la disposition litigieuse était doublement enchâssée et limitait donc la souveraineté parlementaire de la législature[95].

Il ne fait ainsi aucun doute que l'article 128 du *Commonwealth of Australia Constitution Act 1900*[96], qui dispose de la procédure de révision de la Constitution australienne, conditionne la validité des lois édictées par le Parlement fédéral. De fait, cette disposition interdit au Parlement fédéral de modifier ou d'abroger les dispositions constitutionnelles – incluant l'article 128 – sans qu'un référendum rassemblant une majorité des électeurs dans une majorité des États fédérés sanctionne une telle modification ou abrogation[97]. À notre avis, le caractère obligatoire des conditions de manière et de forme prescrites par une loi fondamen-

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92 Peter Congdon, A Constitutional Antinomy: The Principle in McCawley v. The King and Territorial Limits on State Legislative Power, (2017) 39:4 Sydney L. Rev. 439, 445. Voir aussi Gerard Carney, An Overview of Manner and Form in Australia, (1989) 5 Queensland U. Technology L.J. 69, 93; Jeffrey Goldsworthy, Manner and Form in Australian States, (1987) 16 Melbourne L. Rev. 403, 406; Bora Laskin, An Inquiry Into the Diefenbaker Bill of Rights, (1959) 37 R. du B. Can. 78, 132.

93 Voir West Lakes v. South Australia, (1980) 25 S.A.S.R. 389, 414 (juge Zelling) (A.S.C.). Voir aussi Jeffrey Goldsworthy, Manner and Form in Australian States, (1987) 16 Melbourne L. Rev. 403, 406; Robert French, Manner and Form in Western Australia: An Historical Note, (1993) 23:2 U.W.A. L. Rev. 335, 344; Thomas Roszkowski & Jeffrey Goldsworthy, Symmetric entrenchment of manner and form requirement, (2012) 23 Public Law 216, 217.

94 McCawley v. The King (Australia), [1920] A.C. 691, 712-14 (P.C.).

95 Attorney-General for New South Wales v. Trethowan, [1932] A.C. 526 (P.C.). Voir aussi Jeffrey Goldsworthy, Parliamentary Sovereignty: Contemporary Debates, Cambridge, Cambridge University Press, 2010, p. 144; A.B. Keith, Imperial Unity and the Dominions, Oxford, Clarendon Press, 1916, p. 389-90.

96 (UK), 63 & 64 Vict., c. 12.

97 Voir Kartinyeri v. Commonwealth, (1998) 195 C.L.R. 337, par. 100 (juges Brennan & McHugh) (H.C.A.).

tale enchâssée est incontestable et existe indépendamment de la question de savoir si un législateur peut se lier par des conditions de manière et de forme au moyen d'une loi ordinaire. C'est bien ce que suggèrent les principes qui se dégagent des arrêts *Harris et Ranasinghe*.

Par opposition, il demeure improbable que le Parlement du Commonwealth puisse s'imposer par la loi des exigences procédurales en les ajoutant aux conditions de manière et de forme prescrites par la Constitution australienne, en l'absence d'une norme supralégislative reproduisant les effets juridiques du CLVA[98]. Le droit néo-zélandais, sur cette question, présente un exemple similaire à celui du droit britannique, au vu du caractère souple de la Constitution de la Nouvelle-Zélande. Il nous semble peu probable que les règles procédurales édictées par le Parlement de Wellington puissent le lier pour l'avenir et la Cour suprême a d'ailleurs récemment refusé de trancher la question[99].

Dans cette partie, nous avons montré les propositions et les difficultés que soulève la théorie de l'autolimitation procédurale. Selon cette conception nouvelle de la souveraineté parlementaire, si le pouvoir d'un parlement est illimité, celui-ci doit logiquement inclure celui de réduire le champ d'action des législatures subséquentes par l'édiction d'exigences procédurales. Autrement dit, il doit être possible, par l'opération d'une loi autrement ordinaire, de rendre plus onéreuse la procédure subséquente d'adoption, d'abrogation ou de modification de certaines lois. Cette théorie demeure spéculative en droit britannique et ne semble pas correspondre aux principes découlant de la jurisprudence provenant d'autres du pays Commonwealth. Le Parlement de Westminster, dont les pouvoirs sont régis par la doctrine constitutionnelle de la souveraineté parlementaire, ne peut être comparé aux parlements dont les pouvoirs sont régis par une constitution formellement enchâssée, ou encore aux législatures ayant expressément le pouvoir de se lier pour l'avenir par des conditions de manière et de forme.

III. Les limites de la souveraineté parlementaire en droit canadien

Dans cette partie, nous montrons les failles conceptuelles qui assaillent l'applicabilité de la théorie de l'autolimitation procédurale en droit canadien. Notre raisonnement repose d'abord sur le pouvoir limité du législateur de modifier les contraintes de

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[98] Voir Attorney-General (WA) v Marquet, [2003] HCA 67, par. 251 (majorité) et par. 279 (juge Kirby) (H.C.A.). Voir aussi George Winterton, Can the Commonwealth Parliament Enact "Manner And Form" Legislation?, (1980) 11 Fed. L. Rev. 167.

[99] Voir Hinemanu Ngaronoa & Ors v Attorney-General & Ors, [2018] NZSC 123, par. 70. Voir aussi Timothy Shiels & Andrew Geddis, Tracking the Pendulum Swing on Legislative Entrenchment in New Zealand, (2020) 41:2 Stat. L. Rev. 207; Jerome B. Elkind, A New Look at Entrenchment, (1987) 50 Mod. L. Rev. 158. Contra B.V. Harris, The Law-Making Powers of the New Zealand General Assembly: Time to Think about Change, (1984) 5 Otago L. Rev. 565; F.M. Brookfield, Parliamentary Supremacy and Constitutional Entrenchment: A Jurisprudential Approach, (1984) 5 Otago L. Rev. 603; Philip A. Joseph, Constitutional and Administrative Law in New Zealand, 4e éd., Wellington, Brookers Ltd., 2014, p. 607.

fond et les conditions de forme que lui impose la Constitution. Nous mettons ensuite à l'épreuve l'argument jurisprudentiel sur lequel se fonde la Cour suprême dans l'arrêt *Mikisew* et le *Renvoi sur les valeurs mobilières* pour faire allusion au caractère obligatoire des règles procédurales édictées par la loi formellement ordinaire. Finalement, nous montrons les obstacles supplémentaires qui s'opposent à l'application de telles règles procédurales par les tribunaux.

1. Une réception partielle de la souveraineté parlementaire

Le préambule de la *Loi constitutionnelle de 1867* prévoit que la Constitution canadienne repose « sur les mêmes principes que celle du Royaume-Uni »[100]. Cette assise consacre au Canada la formation d'institutions parlementaires similaires à ceux du Parlement de Westminster et l'incorporation de principes juridiques fondamentaux modelés sur ceux de la Constitution britannique[101]. Aussi fut-il rapidement établi que le préambule avait pour effet d'introduire en droit canadien le principe de la souveraineté parlementaire[102]. Toutefois, nous verrons que la souveraineté du Parlement et des législatures n'existe qu'à l'intérieur des limites prescrites par la Constitution. Comme l'explique S.A. de Smith, « [t]he Constitution defines and establishes the principal organs of government; it is the source of their authority; it prescribes the manner in which and the limits within which their functions are to be exercised »[103].

Le pouvoir de légiférer est encadré par la Constitution et toute loi, sans égard à son objet, est susceptible de contrôle judiciaire sur le fond (*i*). La compétence législative dévolue au Parlement et aux législatures est définie et limitée par certaines exigences procédurales qui déterminent la validité des lois qu'ils édictent (*ii*).

(a) Des contraintes au pouvoir de légiférer sur le fond

Contrairement au Royaume-Uni, le Canada est un état fédéral où la constitution écrite répartit formellement les compétences législatives entre les ordres de gouvernements fédéral et provincial. La Constitution du Canada, dont notamment la

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[100] Préambule de la Loi constitutionnelle de 1867 (UK), 30 & 31 Vict., c. 3, art. 91, reproduit dans L.R.C. (1985), annexe II, no 5.

[101] Peter W. Hogg, Constitutional Law of Canada, Toronto, Thomson Reuters, 2018, p. 12-3.

[102] Luc B. Tremblay, The Rule of Law, Justice and Interpretation, Montréal, McGill-Queen's University Press, 1997, p. 58. Voir aussi Mark Walters, « The British Legal Tradition in Canadian Constitutional Law », dans Peter Oliver, Patrick Macklem, & Nathalie Des Rosiers (dir.), The Oxford Handbook of the Canadian Constitution Handbook, Oxford, Oxford University Press, 2017, p. 106; Louis Sormany, « Le préambule de l'A.A.N.B. », (1977) 18 C. de D. 91, 123 et suiv.

[103] Stanley A. de Smith, The New Commonwealth and its Constitutions, London, Stevens and Sons, 1964, p. 109. Voir aussi J. Noel Lyon, The Central Fallacy of Canadian Constitutional Law, (1976) 22 McGill L.J. 42, 45.

partie VI de la *Loi constitutionnelle de 1867*, consacre le partage des compétences entre le Parlement du Canada et les législatures provinciales, chacun des deux ordres du gouvernement étant également souverain dans le champ de compétence qui lui est exclusif[104]. De cet ordre des choses découle la nécessité pour les tribunaux d'être investis du pouvoir d'interpréter les dispositions constitutionnelles et de trancher les litiges qui en découleraient, comme l'a par ailleurs défendu A.V. Dicey[105].

Dès les origines du fédéralisme canadien, les tribunaux ont pu contrôler les sphères de compétence législative de chaque ordre de gouvernement. Ce contrôle de constitutionnalité s'effectuait d'abord par le truchement de l'article 2 CLVA et, plus tard, de l'article 7(1) du *Statut de Westminster*, qui permettaient aux tribunaux d'invalider les dispositions législatives contrevenant au partage des compétences[106]. Ces dispositions ont été ensuite abrogées et remplacées par le régime établi par l'article 52 de la *Loi constitutionnelle de 1982*[107]. En effet, l'alinéa 52(1) consacre le principe de la suprématie de la Constitution, suivant lequel « [l]a Constitution du Canada est la loi suprême du Canada » et, de plus, elle « rend inopérantes les dispositions incompatibles de toute autre règle de droit »[108].

Les deux dimensions que consacre la souveraineté parlementaire, à savoir la compétence législative illimitée du Parlement de Westminster et l'immunité des activités législative contre le contrôle judiciaire, n'ont donc jamais pu pleinement exister en droit canadien[109]. Au contraire, la notion de souveraineté parlementaire telle que traditionnellement comprise en droit britannique est en tension avec la structure du fédéralisme canadien[110]. Néanmoins, il peut être défendu que la doctrine britannique de la souveraineté parlementaire a été « rapidement adaptée » au contexte du fédéralisme canadien, le pouvoir du Parlement et des législatures de légiférer dans leur sphère respective ayant été interprété comme illimité[111].

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104 Loi constitutionnelle de 1867, Partie VI, art. 91–95. Voir aussi Hodge v. The Queen (Canada), (1883) 9 A.C. 117 (P.C.).

105 Albert Venn Dicey, Introduction to the Study of the Law of the Constitution (1915), 8e éd., Indianapolis, Liberty Fund, 2012, p. 78 et suiv.

106 Voir B.L. Strayer, The Canadian Constitution and the Courts, 3e éd., Toronto, Butterworths, 1988, p. 7.

107 R. c. Big M Drug Mart. Ltd, [1985] S.C.J. No. 17, [1985] 1 R.C.S. 295, par. 35.

108 Loi constitutionnelle de 1982, art. 52(1), constituant l'annexe B de la Loi de 1982 sur le Canada (UK), 1982, c. 11.

109 B.L. Strayer, The Canadian Constitution and the Courts, 3e éd., Toronto, Butterworths, 1988, p. 39.

110 Renvoi: Résolution pour modifier la Constitution, [1981] S.C.J. No. 58, [1981] 1 R.C.S. 753, 806. Voir aussi J. Noel Lyon, The Central Fallacy of Canadian Constitutional Law, (1976) 22 McGill L.J. 42, 45; Walter R. Tarnopolsky, The Canadian Bill of Rights, 2e éd., Toronto, McClelland and Stewart, 1975, p. 104.

111 Warren Newman, The Principles of the Rule of Law and Parliamentary Sovereignty

Quoi qu'il en soit, la *Loi constitutionnelle de 1982* ajoute de nouvelles limites au pouvoir de légiférer du Parlement des législatures, en plus des contraintes imposées par le partage des compétences législatives. Elle enchâsse la *Charte canadienne des droits et libertés*, qui permet aux tribunaux de déclarer inconstitutionnelles les lois en violation des droits fondamentaux qu'elle garantit, sous réserve des limites raisonnables établies à l'article premier[112]. Cependant, la disposition de dérogation (art. 33) préserve la souveraineté parlementaire dans la mesure où elle permet de soustraire temporairement certaines lois au contrôle judiciaire exercé sur la base des droits de la Charte expressément suspendus (art. 2 et 7 à 15)[113]. De plus, l'article 35 constitutionnalise les droits existants, ancestraux ou issus de traités des peuples autochtones, lesquels ne peuvent être atteints que dans les limites prescrites par une norme de justification établie dans la jurisprudence[114].

Ces changements importants ont amené la Cour suprême à postuler la transformation du système canadien d'un ordre juridique régi par la souveraineté parlementaire en un ordre juridique régi par la suprématie constitutionnelle[115]. Toutefois, comme le soutient Brian Bird, « Canada was, before 1982, governed by constitutional supremacy — the difference was the breadth of state action subject to constitutional oversight »[116]. À notre avis, il n'y a rien d'étonnant dans l'affirmation selon laquelle la souveraineté parlementaire n'a pas été reçue intégralement en droit canadien[117]. Au contraire, le pouvoir de légiférer est d'abord et avant tout défini par

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in Constitutional Theory and Litigation, (2005) 16 N.J.C.L. 175, 206. Voir aussi Hodge v. The Queen (Canada), (1883) 9 A.C. 117 (P.C.).

[112] Charte canadienne des droits & libertés, partie I de la Loi constitutionnelle de 1982. Voir aussi R. c. Oakes, [1986] S.C.J. No. 7, [1986] 1 R.C.S. 103.

[113] Henri Brun, Guy Tremblay & Eugénie Brouillet, Droit constitutionnel, 6e éd., Montréal, Yvon Blais, 2014, par. VIII.95; Nicole Duplé, Droit constitutionnel: principes fondamentaux, 7e éd., Montréal, Wilson & Lafleur, 2018, p. 487; Geoffrey Sigalet, Grégoire Webber & Rosalind Dixon (dir.), Constitutional Dialogue: Rights, Democracy, Institutions, Cambridge, Cambridge University Press, 2019, p. 209; Maxime St-Hilaire & Xavier Foccroulle Ménard, Nothing to Declare: A Response to Grégoire Webber, Eric Mendelsohn, Robert Leckey and Léonid Sirota on the Effects of the Notwithstanding Clause, (2020) 29:1 Const. Forum Const. 38. Contra Vanessa MacDonnell, The New Parliamentary Sovereignty, (2016) 21 Rev. Const. Stud. 13, 25 et suiv.; Peter W. Hogg, Allison A.B. Thornton and Wade K. Wright, A Reply on "Charter Dialogue Revisited", (2007) 45 Osgoode Hall L.J. 45 193, 201.

[114] Voir R. c. Sparrow, [1990] S.C.J. No. 49, [1990] 1 R.C.S. 10; Tsilhqot'in Nation British Columbia, [2014] S.C.J. No. 44, 2014 CSC 44.

[115] Renvoi relatif à la sécession du Québec, [1998] S.C.J. No. 61, [1998] 2 R.C.S. 217, par. 72.

[116] Brian Bird, The Unbroken Supremacy of the Canadian Constitution, (2018) 55:3 Alberta L.R. 755, 771. Voir aussi B.L. Strayer, The Canadian Constitution and the Courts, 3e éd., Toronto, Butterworths, 1988, p. 49.

[117] Vanessa MacDonnell, The New Parliamentary Sovereignty, (2016) 21 Rev. Const.

les contraintes de fond et les conditions de forme que lui impose la Constitution. Ce n'est qu'à l'intérieur de ces limites que la souveraineté parlementaire peut exister[118].

De fait, l'ordre juridique canadien ne rompt pas entièrement avec la tradition constitutionnelle britannique. La Cour suprême, unanime dans le *Renvoi sur les valeurs mobilières*, a d'ailleurs affirmé sans équivoque que si « la Constitution apporte des limites aux pouvoirs de légiférer du Parlement et des législatures provinciales », la souveraineté parlementaire demeure un « élément fondamental de la structure de l'État canadien »[119]. En dehors des contraintes de fond et des limites procédurales que les normes constitutionnelles imposent, la souveraineté parlementaire régit, comme en droit britannique, la relation juridique qui existe entre les trois organes de l'État, à savoir le législatif, l'exécutif et le judiciaire[120].

De même, il est bien établi en droit canadien, comme en droit britannique, qu'il est « interdit au Parlement et aux législatures d'entraver, par une loi ordinaire, l'exercice futur de leur pouvoir de légiférer »[121]. Le législateur ne peut s'interdire de légiférer sur une question sur laquelle il a par ailleurs compétence. Corollairement, en cas de conflit véritable entre deux normes législatives, les tribunaux donnent préséance à la loi postérieure sur la loi antérieure, suivant le principe de la préséance de la loi postérieure[122]. Toute tentative de limiter la compétence du Parlement et des législatures sur le fond par la loi ordinaire se trouve donc sans effet.

(b) Des conditions de manière et de forme prescrites par la Constitution

La Constitution conditionne l'exercice du pouvoir législatif dévolu au Parlement et aux législatures au respect de certaines exigences procédurales. Si une loi dûment édictée peut devenir inopérante par son incompatibilité sur le fond avec la

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Stud. 13, 20. Voir aussi Herbert Marx & François Chevrette, Droit constitutionnel, principes fondamentaux: notes & jurisprudence, 2e éd. par Han-Ru Zhou, Montréal, Éditions Thémis, 2016, p. 242; Henri Brun, Guy Tremblay & Eugénie Brouillet, Droit constitutionnel, 6e éd., Montréal, Yvon Blais, 2014, par. VIII.30.

[118] Renvoi relatif à la réglementation pancanadienne des valeurs mobilières, [2018] S.C.J. No. 48, 2018 CSC 48, par. 58.

[119] Renvoi relatif à la réglementation pancanadienne des valeurs mobilières, [2018] S.C.J. No. 48, 2018 CSC 48, par. 58. Voir aussi Renvoi relatif à la sécession du Québec, [1998] S.C.J. No. 61, [1998] 2 R.C.S. 217, par. 72.

[120] Henri Brun, Guy Tremblay & Eugénie Brouillet, Droit constitutionnel, 6e éd., Montréal, Yvon Blais, 2014, par. VIII.32.

[121] Renvoi relatif à la Loi sur les valeurs mobilières, [2011] S.C.J. No. 66, 2011 CSC 66, par. 119.; Renvoi relatif au Régime d'assistance publique du Canada (C.-B.), [1991] S.C.J. No. 60, [1991] 2 R.C.S. 525, 563.

[122] Voir Pierre-André Côté, Stéphane Beaulac & Mathieu Devinat, Interprétation des lois, 4e éd., Montréal, Éditions Thémis, 2009, p. 1334, et suiv. Voir aussi Peter W. Hogg, Constitutional Law of Canada, Toronto, Thomson Reuters, 2018, p. 12-8; Henri Brun, Guy Tremblay & Eugénie Brouillet, Droit constitutionnel, 6e éd., Montréal, Yvon Blais, 2014, par. VIII.123.

Constitution, une loi entachée d'un vice procédural ne correspond pas à l'expression authentique de la volonté du législateur: elle est invalide *ab initio*, le législateur ayant excédé la compétence législative que la Constitution lui confère[123]. Cette conséquence juridique de l'irrégularité procédurale ne fait aucun doute sous le régime de l'article 52 de la *Loi constitutionnelle de 1982*: « [D]ans un cas où on n'a pas respecté les modalités et la forme requises en matière constitutionnelle, l'invalidité continue d'être la conséquence de ce non-respect. »[124]

Cet effet juridique est le résultat de l'enchâssement de certaines normes constitutionnelles, qui ne peuvent être modifiées que d'une manière plus onéreuse que ne l'est la procédure ordinaire. Le fondement procédural du contrôle judiciaire fut d'abord établi à l'article 5 du *Colonial Laws Validity Act*, comme nous l'avons vu plus haut, et préservé jusqu'en 1982 par le *Statut de Westminster*. À notre avis, un mécanisme juridique similaire fut repris à l'alinéa 52(3) de la *Loi constitutionnelle de 1982*, qui énonce que « [l]a Constitution du Canada ne peut être modifiée que conformément aux pouvoirs conférés par elle »[125]. Certaines dispositions constitutionnelles sont expressément enchâssées par l'application de l'alinéa 52(3). D'autres sont librement modifiables ou abrogeables par le Parlement et les législatures en vertu de l'alinéa 52(3) et ne conditionnent donc pas le pouvoir législatif du Parlement et des législatures.

La partie V et l'article 35.1 de la *Loi constitutionnelle de 1982*, qui établissent les modalités de la révision constitutionnelle, prévoient deux types de procédures: de l'une, des procédures attributives de compétence, et, de l'autre, des procédures limitatives de compétence[126]. Les articles 38 à 42 de la *Loi constitutionnelle de 1982* assujettissent la modification ou l'abrogation de certaines dispositions constitutionnelles – incluant la partie V – au respect d'exigences procédurales limitatives de compétence[127]. Ces conditions de manière et de forme ont pour effet d'enchâsser constitutionnellement les dispositions qu'elles protègent: le Parlement et les législatures n'ont pas compétence pour modifier les normes enchâssées constitu-

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[123] Fabien Gélinas, La primauté du droit & les effets d'une loi inconstitutionnelle, (1988) 67 R. du B. Can. 455, 463.

[124] Renvoi: Droits linguistiques au Manitoba, [1985] S.C.J. No. 36, [1985] 1 R.C.S. 721, 746.

[125] Loi constitutionnelle de 1982, art. 52(3).

[126] Voir Maxime St-Hilaire, Patrick S. Baud et Éléna S. Drouin, The Constitution of Canada as Supreme Law: A New Definition, (2019) 28:1 Const. Forum Const. 7; Warren J. Newman, « Constitutional Amendment by Legislation », dans Emmett Macfarlane (dir.), Constitutional Amendment in Canada, Toronto, University of Toronto Press, 2016, p. 100.

[127] Certaines dispositions législatives formellement ordinaires sont également enchâssées par l'effet de ces dispositions. C'est le cas des articles 5 et 6 de la Loi sur la Cour suprême, enchâssées par l'application de l'article 41(d) et l'article 42(1)(d) de la Loi constitutionnelle de 1982. Voir Loi sur la Cour suprême, L.R.C. (1985), c. S-26; Renvoi relatif à la Loi sur la Cour suprême, art. 5 et 6, [2014] S.C.J. No. 21, 2014 CSC 21, par. 91-95.

tionnellement par l'exercice d'une procédure législative ordinaire[128]. Par opposition, les articles 44 et 45 sont des dispositions attributives de compétence en ce qu'elles permettent au Parlement et aux législatures de modifier la constitution en leur compétence législative ordinaire.

Avant 1982, les dispositions enchâssées de la Constitution canadienne ne pouvaient être modifiées que par l'édiction d'une loi impériale, vu l'absence de disposition modificatrice à la *Loi constitutionnelle de 1867* (contrairement, par exemple, au *Commonwealth of Australia Constitution Act 1900*)[129]. La modification des autres éléments de la Constitution, propres à chaque ordre de gouvernement, relevait expressément de la compétence du Parlement ou des législatures en vertu des paragraphes 91(1) et 92(1)[130], remplacés par les articles 44 et 45 de la *Loi constitutionnelle de 1982*[131]. Cette compétence du Parlement et des législatures sur leur constitution s'exerce au même titre que tous les autres pouvoirs législatifs établis à la *Loi constitutionnelle de 1867*, de sorte que cette compétence constituante et leur compétence législative se retrouvent indissociables[132].

La Constitution formelle prescrit deux ensembles de limites procédurales au pouvoir législatif du Parlement et des législatures: des exigences portant sur la composition des organes législatifs et des exigences régissant les qualités d'une loi dûment édictée[133]. Par exemple, le Parlement du Canada est formé de deux chambres législatives, l'une composée d'élus et l'autre, de membres qui sont nommés, ainsi que de la Reine, suivant l'article 17 de la *Loi constitutionnelle de 1867*[134]. L'action concertée de ces deux chambres, lorsqu'elle est sanctionnée au nom de la Reine par le Gouverneur général, donne naissance à la loi fédérale[135]. De même, les articles 55 et 90 de la *Loi constitutionnelle de 1867* exigent qu'une loi

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[128] Voir Benoît Pelletier, Les modalités de la modification de la Constitution du Canada, (1999) 33 R.J.T. 1. Voir aussi Benoît Pelletier, La modification constitutionnelle au Canada, Scarborough, Carswell, 1996.

[129] Renvoi: Résolution pour modifier la Constitution, [1981] S.C.J. No. 58, [1981] 1 R.C.S. 753, 825-26. Voir aussi Ontario (Procureur général) c. SEFPO, [1987] S.C.J. No. 48, [1987] 2 R.C.S. 2, par. 88.

[130] Tels qu'ajoutés à la Loi constitutionnelle de 1867 par l'Acte de l'Amérique du Nord britannique (n° 2) (R.-U.), 1949, 13 Geo. VI, c. 81.

[131] Renvoi relatif à la réforme du Sénat, [2014] S.C.J. No. 32, 2014 CSC 32, par. 46-48.

[132] François Chevrette, Le Conseil législatif de Québec: son fondement constitutionnelles caractères, (1963) 13 R.J.T. 85, 98.

[133] William E. Conklin, Pickin and its Applicability to Canada, (1975) 25 U.T.L.J. 193, 201.

[134] Loi constitutionnelle de 1867, art. 17. Voir aussi Renvoi relatif à la réforme du Sénat, [2014] S.C.J. No. 32, 2014 CSC 32, par. 55.

[135] Loi constitutionnelle de 1867, art. 55. Voir aussi Authorson c. Canada (Procureur général), [2003] S.C.J. No. 40, 2003 CSC 39, par. 37.

provinciale soit sanctionnée au nom de la Reine par le lieutenant-gouverneur d'une province[136]. Dans le cas des législatures du Manitoba, du Québec et du Nouveau-Brunswick, ainsi que dans celui du Parlement fédéral, la législation est également assujettie à une exigence de bilinguisme[137]. En outre, l'article 4 de la *Loi constitutionnelle de 1982* prévoit une procédure spéciale pour prolonger le mandat de la Chambre des communes ou d'une assemblée législative, autrement limité à cinq ans[138]. Ces règles ont en commun qu'elles sont enchâssées par une procédure de modification ou d'abrogation rigide. Elles conditionnent donc la validité des lois édictées par le Parlement et les législatures.

Par opposition, les normes constitutionnelles non enchâssées – c'est-à-dire modifiables par l'application des articles 44 et 45 de la *Loi constitutionnelle de 1982* – ne peuvent permettre d'invalider les lois adoptées irrégulièrement. Comme nous l'avons soutenu plus haut, une règle procédurale non enchâssée ne peut être comprise comme conditionnant le pouvoir législatif du Parlement et des législatures si elle peut être modifiée ou abrogée en leur compétence législative ordinaire. Les normes constitutionnelles non enchâssées emportent plutôt l'inopérabilité des dispositions législatives incompatibles. Si, d'une part, la loi inopérante pour incompatibilité avec une règle procédurale doit être entièrement paralysée par l'effet d'une norme constitutionnelle non enchâssée – l'incompatibilité sur la forme doit s'étendre à l'entièreté de la loi –, l'abrogation subséquente de la disposition constitutionnelle en conflit mène à la réhabilitation de la loi jusqu'alors inopérante, d'autre part[139]. En cela, une loi incompatible sur la forme avec une norme constitutionnelle non enchâssée ne peut être considérée comme l'abrogeant implicitement[140]. Néanmoins, l'effet de l'invalidité *ab initio* se distingue de l'inopérabilité,

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[136] Gallant v. The King [1949] 2 D.L.R. 425, 23 M.P.R. 48, at 450 (P.E.I.S.C.), cité avec approbation dans Renvoi: Résolution pour modifier la Constitution, [1981] S.C.J. No. 58, [1981] 1 R.C.S 753, 881. Voir aussi Re Initiative and Referendum Act, [1919] A.C. 935, 943 (P.C.).

[137] Loi constitutionnelle de 1867, art. 133; Loi constitutionnelle de 1982, art. 18; Loi de 1870 sur le Manitoba, 33 Vict., c. 3 (Canada), reproduit dans L.R.C. (1985), annexe II, art. 23. Voir aussi Québec (Procureur général) c. Blaikie, [1979] 2 R.C.S. 1016, 30 N.R. 225, at 1022; Renvoi: Droits linguistiques au Manitoba, [1985] S.C.J. No. 36, [1985] 1 R.C.S. 721, 774.

[138] Loi constitutionnelle de 1982, art. 4.

[139] Pierre-André Côté, La préséance de la Charte canadienne des droits & libertés, (1984) 18 R.J.T. 107, 119.

[140] Succession Eurig (Re), [1998] S.C.J. No. 72, [1998] 2 R.C.S. 565, par. 35; R. c. Mercure, [1988] S.C.J. No. 11, [1988] 1 R.C.S. 234, 277. Contra Avis sur la Loi sur l'organisation du marché des produits agricoles, [1978] 2 R.C.S. 1198, 84 D.L.R. (3d) 257, at 1291.

car cette dernière n'engage que la préséance d'une norme sur une autre[141].

2. Le Parlement et les législatures peuvent-ils se lier pour l'avenir par la forme?

(a) Une ouverture à la théorie de l'autolimitation procédurale

Il ne fait aucun doute que le manquement aux conditions de manière et de forme enchâssées constitutionnellement est sanctionné d'invalidité. Cette affirmation ne doit pas mener à la conclusion que le Parlement et les législatures ont le pouvoir de s'imposer des conditions de manière et de forme par l'exercice de leur compétence législative ordinaire: « to do so would rob the phrase "bind itself" of its significance »[142]. En effet, il n'existe pas dans la Constitution canadienne de disposition reproduisant expressément les effets du CLVA, c'est-à-dire permettant au Parlement et aux législatures d'édicter librement des conditions de manière et de forme, comme c'est par ailleurs le cas en Australie.

Néanmoins, une doctrine prédominante défend l'applicabilité de la théorie de l'autolimitation procédurale en droit canadien sur la base d'un argument essentiellement jurisprudentiel, s'inspirant – à notre avis à tort – de la jurisprudence du Commonwealth[143]. Selon cette thèse, le Parlement et les législatures auraient le pouvoir d'édicter et de modifier les conditions de validité des lois par l'exercice de leur compétence législative ou, autrement dit, au moyen d'une loi ordinaire. Cependant, l'opinion du juge Sopinka dans le *Renvoi sur le RAP* était restée équivoque à cet égard: « [L]orsqu'une loi ne présente aucun caractère constitutionnel, il est fort peu probable qu'elle traduise une intention de la part du corps législatif de se lier pour l'avenir. »[144] Or, les opinions récemment émises par la Cour suprême dans l'arrêt *Mikisew* et le *Renvoi sur les valeurs mobilières* semblent plutôt envisager l'applicabilité de cette théorie en droit canadien[145].

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[141] Pierre-André Côté, La préséance de la Charte canadienne des droits & libertés, (1984) 18 R.J.T. 107, 130.

[142] Luc B. Tremblay, The Rule of Law, Justice and Interpretation, Montréal, McGill-Queen's University Press, 1997, p. 83.

[143] Voir par ex. Herbert Marx & François Chevrette, Droit constitutionnel, principes fondamentaux: notes & jurisprudence, 2e éd. par Han-Ru Zhou, Montréal, Éditions Thémis, 2016, p. 294 et suiv.; Peter W. Hogg, Constitutional Law of Canada, Toronto, Thomson Reuters, 2018, p. 12-11 et suiv.; Henri Brun, Guy Tremblay & Eugénie Brouillet, Droit constitutionnel, 6e éd., Montréal, Yvon Blais, 2014, par. VII.152 et suiv.; Katherine Swinton, Challenging the Validity of an Act of Parliament: The Effect of Enrolment and Parliamentary Privilege, (1976) 14:2 Osgoode Hall L.J. 345, 381, Pour une opinion plus nuancée, voir John Lovell, Legislating Against the Grain: Parliamentary Sovereignty and Extra-Parliamentary Vetoes, (2008) 24:1 N.J.C.L. 1.

[144] Renvoi relatif au Régime d'assistance publique du Canada (C.-B.), [1991] S.C.J. No. 60, [1991] 2 R.C.S. 525, 563.

[145] Voir Noura Karazivan, « Cooperative Federalism v Parliamentary Sovereignty:

Dans l'affaire *Mikisew*, les appelants, membres de la Mikisew Cree First Nation, contestent la validité de deux lois susceptibles d'avoir un effet préjudiciable sur leurs droits garantis par traité et déposés devant le Parlement sans qu'ils aient été consultés. À l'appui de leur position, les membres de la Mikisew Crew First Nation plaident notamment que l'article 35 de la *Loi constitutionnelle de 1982* fait naître une obligation de consulter que le législateur doit respecter avant d'édicter une loi susceptible d'avoir une incidence sur des intérêts autochtones protégés[146]. Cette obligation de consulter agirait comme une condition de manière et de forme imposée au législateur par l'article 35 de la *Loi constitutionnelle de 1982*. Celle-ci formerait donc un fondement procédural autonome du contrôle judiciaire des lois et non seulement une partie de la norme de justification de la loi portant atteinte aux droits garantis par la Constitution[147].

Traditionnellement, l'obligation de consulter, qui découle du principe constitutionnel de l'honneur de la Couronne, est notamment imposée au gouvernement lorsqu'il envisage de prendre des mesures susceptibles d'avoir un effet préjudiciable sur les droits autochtones protégés par l'article 35 de la *Loi constitutionnelle de 1982* dans l'exercice de son pouvoir exécutif[148]. En l'espèce se pose la question de savoir si cette obligation est également imposée au gouvernement dans l'élaboration des projets de loi et plus largement dans le processus législatif. La Cour a unanimement rejeté le pourvoi pour des motifs juridictionnels, mais quatre opinions divisées ont été émises en *obiter dictum* sur la question de l'obligation de consulter.

Pour une majorité des juges (7-2), la fonction législative qu'exercent les ministres et le Gouverneur général relève des pouvoirs législatifs qui leur sont dévolus dans la partie IV de la *Loi constitutionnelle de 1867*, et non pas de leur pouvoir

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Revisiting the Role of Courts, Parliaments and Governments », dans Alain-G. Gagnon & Johanne Poirier (dir.), Canadian Federalism and its Future: Actors and Institutions, Kingston & Montreal, McGill-Queen's University Press, à paraître; Craig Scott, Consultation, Cooperation and Consent in the Commons' Court: 'Manner and Form' After Mikisew Cree II, (2020) 94 S.C.L.R. (2d) 155.

[146] Mikisew Cree First Nation c. Canada (Gouverneur général en conseil), [2018] S.C.J. No. 40, 2018 CSC 40, par. 30. Pour un argument similaire, voir Zachary Davis, The Duty to Consult and Legislative Action, (2016) 79 Sask. L. Rev. 17.

[147] Mikisew Cree First Nation c. Canada (Gouverneur général en conseil), [2018] S.C.J. No. 40, 2018 CSC 40, par. 30, 90, 124 (mémoire des appelants par. 38, 39). La consultation fait partie du cadre d'analyse relatif à la justification d'une atteinte des droits autochtones. Voir R. c. Sparrow, [1990] S.C.J. No. 49, [1990] 1 R.C.S. 10, at 1119; Tsilhqot'in Nation British Columbia, [2014] S.C.J. No. 44, 2014 CSC, par. 77.

[148] Voir Nation Haïda c. Colombie-Britannique (Ministre des Forêts), [2004] S.C.J. No. 70, 2004 CSC 73; Première nation Tlingit de Taku River c. Colombie-Britannique (Directeur d'évaluation de projet), [2004] S.C.J. No. 69, 2004 CSC 74; Première nation crie Mikisew c. Canada (Ministre du Patrimoine canadien), [2005] S.C.J. No. 71, 2005 CSC 69.

exécutif[149]. Il découle de cette conclusion que l'obligation de consulter n'est pas imposée par la Constitution aux gouvernements fédéral et provinciaux dans leur fonction législative. Par opposition, le constat suivant lequel l'article 35 impose une exigence procédurale au législateur aurait eu pour conséquence que les lois adoptées par le Parlement du Canada en l'espèce étaient invalides, ce que même les juges Abella et Martin n'étaient pas prêtes à considérer[150].

Or, l'absence de fondement constitutionnel signifie que la Cour outrepasserait son rôle si elle imposait une obligation de consulter au processus législatif[151]. La souveraineté parlementaire, le privilège parlementaire et la séparation des pouvoirs immunisent l'élaboration, l'adoption et la promulgation des lois contre une telle ingérence par les tribunaux[152]. Cela dit, huit des neuf juges de la Cour, dans trois des quatre motifs du jugement, ont suggéré que le législateur pourrait s'imposer lui-même une telle obligation de consulter à l'étape de l'élaboration des projets de loi[153]. Une telle règle procédurale serait prévue par une loi ordinaire et pourrait, selon eux, faire l'objet d'un contrôle judiciaire par les tribunaux et invalider les lois ne l'observant pas.

Le *Renvoi sur les valeurs mobilières* semble réaffirmer la volonté de la Cour suprême d'accueillir la théorie de l'autolimitation procédurale en droit canadien. Dans cet arrêt s'est posée la question de savoir si un régime coopératif permettant aux provinces et au Parlement de réguler conjointement le marché des capitaux au moyen d'une loi provinciale type, la « Loi uniforme », avait pour effet de limiter la souveraineté parlementaire des législatures[154]. Le Protocole d'accord, l'entente

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[149] Mikisew Cree First Nation c. Canada (Gouverneur général en conseil), [2018] S.C.J. No. 40, 2018 CSC 40, par. 33.

[150] Mikisew Cree First Nation c. Canada (Gouverneur général en conseil), [2018] S.C.J. No. 40, 2018 CSC 40, par. 96.

[151] Mikisew Cree First Nation c. Canada (Gouverneur général en conseil), [2018] S.C.J. No. 40, 2018 CSC 40, par. 35. Cependant, la majorité des juges de la Cour suprême ont laissé supposer que l'article 35 pourrait, dans le futur, être reconnu comme imposant certaines contraintes au processus législatif. Voir Craig Scott, Consultation, Cooperation and Consent in the Commons' Court: 'Manner and Form' After Mikisew Cree II, (2020) 94 S.C.L.R. (2d) 155, 159.

[152] Mikisew Cree First Nation c. Canada (Gouverneur général en conseil), [2018] S.C.J. No. 40, 2018 CSC 40, par. 32 (motifs des juges Karatkasanis, Wagner & Gascon), par. 101 (motifs du juge Brown), par. 148 (motifs des juges Rowe, Côté & Moldaver); contra, par. 63 (motifs des juges Abella & Martin, dissidentes notamment sur ce point).

[153] Mikisew Cree First Nation c. Canada (Gouverneur général en conseil), [2018] S.C.J. No. 40, 2018 CSC 40, par. 51 (motifs des juges Karatkasanis, Wagner & Gascon), par. 96 (motifs des juges Abella & Martin), par. 167 (motifs des juges Rowe, Côté & Moldaver).

[154] La régulation du marché des capitaux est de compétence provinciale, mais le fédéral a compétence pour légiférer sur certains aspects des valeurs mobilières pour prévenir les risques systémiques & pour assurer la stabilité du marché. Voir Renvoi relatif à la Loi sur les

intergouvernementale, prévoit la création d'un « Conseil des ministres », composé des ministres responsables de la réglementation des marchés des capitaux de chacune des provinces participantes, et du ministre fédéral des Finances, dont l'un des rôles est de voter les propositions de modifications à la loi par un mécanisme de révision particulier[155].

Devant la Cour d'appel du Québec, la procureure générale du Canada avait plaidé que la structure de modification de la Loi uniforme prévue par le Protocole n'était pas justiciable[156]. La procureure générale de la Colombie-Britannique, appuyant la position de la procureure générale du Canada, arguait que si cette structure décisionnelle était justiciable, elle jouait le rôle d'une exigence procédurale permettant de conditionner la validité des lois[157]. Or, quatre des cinq juges de la Cour d'appel étaient d'avis que le mécanisme d'amendement à la Loi uniforme prévu par le régime coopératif avait pour effet d'entraver la compétence législative des législatures au Conseil des ministres (au sens du Protocole) et l'avaient jugé inconstitutionnel[158].

La Cour suprême, unanime, a exprimé l'opinion inverse. Selon la Cour, le mécanisme de révision prévu au Protocole d'accord n'a pas pour effet d'entraver la compétence législative des législatures, puisqu'il n'est pas incorporé dans la Loi uniforme. Le Conseil des ministres n'aurait donc, de l'avis de la Cour, aucun rôle à jouer dans le processus législatif et ne peut limiter l'exercice par les législatures de leur pouvoir de légiférer[159]. Si la Loi uniforme visait à lier les législatures par une exigence procédurale, elle aurait eu à le faire de manière claire et explicite: « [L]a législature qui a l'intention de s'engager à respecter des règles quant à la manière et à la forme selon lesquelles la loi est censée être modifiée *doit* le faire en termes clairs. »[160] Autrement dit, la Cour suprême aurait été prête à considérer le caractère obligatoire du mécanisme de révision de la Loi uniforme s'il y avait été incorporé.

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valeurs mobilières, [2011] S.C.J. No. 66, 2011 CSC 66. La Loi régulerait tous les aspects du marché des capitaux par une coopération des deux ordres de gouvernement.

[155] Renvoi relatif à la réglementation pancanadienne des valeurs mobilières, [2018] S.C.J. No. 48, 2018 CSC 48, par. 45.

[156] Renvoi relatif à la réglementation pancanadienne des valeurs mobilières, [2017] J.Q. no 5583, 2017 QCCA 756, par. 50.

[157] Renvoi relatif à la réglementation pancanadienne des valeurs mobilières, [2017] J.Q. no 5583, 2017 QCCA 756, par. 52.

[158] Renvoi relatif à la réglementation pancanadienne des valeurs mobilières, [2017] J.Q. no 5583, 2017 QCCA 756, par. 103.

[159] Renvoi relatif à la réglementation pancanadienne des valeurs mobilières, [2018] S.C.J. No. 48, 2018 CSC 48, par. 51-67.

[160] Renvoi relatif à la réglementation pancanadienne des valeurs mobilières, [2018] S.C.J. No. 48, 2018 CSC 48, par. 51. Suivant le raisonnement du juge Schrager, dissident dans le renvoi devant la Cour d'appel, il est fort probable que le mécanisme de modification aurait été jugé inconstitutionnel eût-il été incorporé à la Loi uniforme. Voir Renvoi relatif à la

(b) Suprématie constitutionnelle et souveraineté parlementaire

Si dans le *Renvoi sur les valeurs mobilières*, le juge Brown a joint son opinion à celle des autres juges de la Cour suprême, il n'a pas pour autant souscrit, dans l'arrêt *Mikisew*, à la thèse voulant que la théorie de l'autolimitation procédurale soit applicable en droit canadien[161]. Il a plutôt exposé tacitement la distinction fondamentale qui doit être faite entre les conditions de manière et de forme imposées par une norme enchâssée constitutionnellement et les règles procédurales que le législateur s'impose à lui-même au moyen d'une loi ordinaire. Selon lui, la souveraineté parlementaire ne peut être contrainte que par la Constitution, qui impose certaines exigences procédurales au processus législatif[162]. À son avis, soutenir le contraire mène à une « enflure du pouvoir judiciaire [. . .] au détriment du pouvoir des assemblées législatives sur leurs procédures »[163]. Suivant cette logique, il ne peut être possible pour une législature de lier les législatures subséquentes en édictant une loi prétendant leur imposer une procédure plus onéreuse pour l'adoption, la modification ou l'abrogation des lois.

À notre avis, c'est cette position qui cadre le mieux avec le principe de la souveraineté parlementaire tel que compris à la lumière de la suprématie de la Constitution. Si la constitution non écrite britannique est la source de l'autorité législative du Parlement, sa compétence législative et sa compétence constituante demeurent indissociables: une modification constitutionnelle est édictée par la loi ordinaire[164]. Même en acceptant que la souveraineté parlementaire confère au Parlement de Westminster le pouvoir de modifier les conditions d'exercice de son pouvoir de légiférer, ce qui est loin d'être acquis, il ne s'ensuit pas pour autant que ces conclusions soient applicables en droit canadien. De plus, qu'une condition de manière et de forme soit une limite acceptable au pouvoir de légiférer du Parlement ou des législatures ne signifie pas pour autant que le législateur dispose du pouvoir de se l'imposer par l'exercice de sa compétence législative, ni même que les

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réglementation pancanadienne des valeurs mobilières, [2017] J.Q. no 5583, 2017 QCCA 756, par. 185.

[161] Voir Mikisew Cree First Nation c. Canada (Gouverneur général en conseil), [2018] S.C.J. No. 40, 2018 CSC 40, par. 122-23 (juge Brown).

[162] Mikisew Cree First Nation c. Canada (Gouverneur général en conseil), [2018] S.C.J. No. 40, 2018 CSC 40, par. 122 (motifs du juge Brown).

[163] Mikisew Cree First Nation c. Canada (Gouverneur général en conseil), [2018] S.C.J. No. 40, 2018 CSC 40, par. 139 (motifs du juge Brown).

[164] Voir Albert Venn Dicey, Introduction to the Study of the Law of the Constitution (1915), 8e éd., Indianapolis, Liberty Fund, 2012, p. 36-38; McCawley v. The King (Australia), [1920] A.C. 691, 703-04 (P.C.); Renvoi: Résolution pour modifier la Constitution, [1981] S.C.J. No. 58, [1981] 1 R.C.S. 753, 837. Il ne nous semble pas ici nécessaire de trancher le débat sur la nature de la constitution britannique. Voir Jeffrey Goldsworthy, Parliamentary Sovereignty: Contemporary Debates, Cambridge, Cambridge University Press, 2010, p. 14 et suiv.

tribunaux soient habilités à en examiner l'observance.

De fait, la Constitution du Canada est non seulement la source de l'autorité législative du Parlement et des législatures, mais elle est également la source des conditions d'exercice de ce pouvoir législatif[165]. C'est dire que les règles régissant la validité des lois ou, autrement dit, les limites à la souveraineté parlementaire sont expressément prévues par la Constitution et ne peuvent être modifiées que par une procédure rigide. C'est ce qu'avait brillamment expliqué le juge La Forest, alors dissident dans le *Renvoi relatif à la rémunération des juges*:

> Le pouvoir d'annuler les lois adoptées par des représentants démocratiquement élus tire sa légitimité d'une source supra-législative: le texte de la Constitution. Ce document fondamental [. . .] exprime le désir du peuple de limiter, de certaines façons précises, le pouvoir des législatures. Comme notre Constitution est écrite, ces limites ne peuvent pas être modifiées par le recours au processus démocratique habituel. Toutefois, elles ne sont pas immuables et peuvent être modifiées au moyen d'une autre forme d'expression de la volonté du peuple: la modification constitutionnelle.[166]

Il est vrai que l'application des articles 44 et 45 de la *Loi constitutionnelle de 1982*

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[165] Voir Maxime St-Hilaire & Patrick S. Baud, « Legal Roadblocks to Proposals for A Quebec Constitution », dans Richard Albert & Léonid Sirota (dir.), Does Quebec Need a Written Constitution?, Montréal, McGill-Queen's University Press, à paraître. Voir aussi MH Tse, The Canadian Bill of Rights as an Effective Manner and Form Device: An Analysis of the Supreme Court of Canada Decision in Authorson v Canada (Attorney General), (2005) 18:1 N.J.C.L. 71.

[166] Renvoi relatif à la rémunération des juges de la Cour provinciale de I.P.E., [1997] S.C.J. No. 75, [1997] 3 R.C.S. 3, par. 314. Voir cependant l'opinion des juges majoritaires dans cette même affaire, pour qui les principes non écrits de la Constitution auraient une portée normative limitant la compétence législative du Parlement et des législatures. Voir aussi Renvoi relatif à la sécession du Québec, [1998] S.C.J. No. 61, [1998] 2 R.C.S. 217, par. 49 et suiv.; Babcock c. Canada (Procureur général), [2002] S.C.J. No. 58, 2002 CSC 57, par. 54-55; Mark D. Walters, The Common Law Constitution in Canada: Return of Lex Non Scripta as Fundamental Law, (2001) 51 U.T.L.J. 91; David J. Mullan, Underlying Constitutional Principles: The Legacy of Justice Rand, (2010) 34:1 Man. L.J. 73; Vincent Kazmierski, Draconian but not Despotic: The 'Unwritten' Limits of Parliamentary Sovereignty in Canada, (2010) 41:2 Ottawa L. Rev. 245; Alyn James Johnson, The Judges Reference and the Secession Reference at Twenty: Reassessing the Supreme Court of Canada's Unfinished Unwritten Constitutional Principles Project, (2019) 56:4 Alta. L. Rev. 1077; Alyn James Johnson, Imperial Tobacco and Trial Lawyers: An Unstable and Unsuccessful Retreat, (2019) 57:1 Alta. L. Rev. 29. Contra Jeffrey Goldsworthy, The Preamble, Judicial Independence and Judicial Integrity, (2000) 11:2 Const. Forum Const. 60; Jean Leclair, Canada's Unfathomable Unwritten Constitutional Principles, (2002) 27:2 Queen's L.J. 389. Depuis le Renvoi relatif à la rémunération des juges, il n'est jamais arrivé que la Cour suprême invalide une loi sur la seule base d'un principe constitutionnel non écrit et plusieurs juges ont même émis des doutes quant à cette éventualité. Voir Colombie-Britannique c. Imperial Tobacco Canada Ltée, [2005] S.C.J. No. 50, 2005 CSC 49, par. 66 (juge Major, pour la Cour, unanime); Trial Lawyers Association of British Columbia c. Colombie-Britannique (Procureur général),

permet au Parlement et aux législatures de modifier la constitution qui leur est propre, à l'inclusion de certaines règles procédurales, par l'exercice de leur compétence législative[167]. Néanmoins, comme nous l'avons suggéré, ces dispositions constitutionnelles n'ont pas pour effet de conférer au Parlement et aux législatures le pouvoir de conditionner la validité des lois futures au respect de règles procédurales. De fait, le pouvoir d'autodéfinition du Parlement et des législatures est limité en ce qu'il ne leur permet pas de modifier les exigences procédurales qui excèdent leur compétence sur leur constitution respective[168]. Si les articles 44 et 45 de la *Loi constitutionnelle de 1982* ne permettent pas de modifier ou d'abroger certaines normes constitutionnelles enchâssées, de même n'est-il pas possible pour le législateur d'enchâsser une règle procédurale au-delà de la compétence qu'elles attribuent. Le législateur reste libre d'abroger – pourvu qu'il le fasse expressément – toutes les règles procédurales adoptées en vertu des articles 44 et 45 de la *Loi constitutionnelle de 1982* et son pouvoir n'est en rien limité par celles-ci.

Admettre que la Constitution confère au Parlement et aux législatures le pouvoir de conditionner la validité des lois au moyen d'une loi ordinaire mènerait à la conclusion invraisemblable qu'une loi édictée ordinairement puisse entraîner les mêmes effets juridiques qu'une norme constitutionnellement enchâssée. Une telle conclusion contreviendrait au régime établi par l'article 52 de la *Loi constitutionnelle de 1982*, qui dispose d'une hiérarchie entre les normes constitutionnelles et les normes législatives ordinaires ainsi que d'une procédure relative à l'enchâssement de nouvelles dispositions constitutionnelles.

Il faut dire que les juges de la Cour suprême dans l'arrêt *Mikisew* et le *Renvoi sur les valeurs mobilières* ont d'abord et avant tout été convaincus par un argument de nature jurisprudentielle, mis de l'avant par certains auteurs, dont Peter W. Hogg, Herbert Marx et François Chevrette. Ceux-ci ont prétendu que la théorie de l'autolimitation procédurale était applicable en droit canadien par suite des arrêts

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[2014] S.C.J. No. 59, 2014 CSC 59, par. 26 (juge McLachlin, pour la majorité); par. 80 et suiv. (juge Rothstein, dissident).

[167] Robin Elliot, Rethinking Manner and Rethinking Manner and Form: From Parliamentary Sovereignty to Constitutional Values, (1991) 29:2 Osgoode Hall L.J. 215, 246-47.

[168] Sur la compétence du Parlement et des législatures à l'égard de leur constitution respective, telle que prévue aux termes des articles 44 et 45 de la Loi constitutionnelle de 1982, voir Renvoi: Compétence du Parlement relativement à la Chambre Haute, [1979] S.C.J. No. 94, [1980] 1 R.C.S. 54 et Québec (Procureur général) c. Blaikie, [1979] 2 R.C.S. 1016, 30 N.R. 225; Ontario (Procureur général) c. SEFPO, [1987] S.C.J. No. 48, [1987] 2 R.C.S. 2, par. 81 et suiv. Ces décisions sont encore pertinentes bien que décidées dans le contexte des articles 91(1) et 92(2) de la Loi constitutionnelle de 1982, puisque leur champ d'application est inchangé. Voir Renvoi relatif à la réforme du Sénat, [2014] S.C.J. No. 32, 2014 CSC 32, par. 46-47. Voir aussi Warren J. Newman, « Constitutional Amendment by Legislation », dans Emmett Macfarlane (dir.), Constitutional Amendment in Canada, Toronto, University of Toronto Press, 2016, p. 100.

Drybones et *Mercure*, qui illustreraient la reconnaissance par la Cour suprême du caractère obligatoire des règles procédurales contenues dans les lois ordinaires[169]. Le juge Sopinka dans le *Renvoi sur le RAP* avait lui aussi interprété les arrêts *Drybones* et *Mercure* comme indiquant qu'une règle procédurale contenue dans une loi de « nature constitutionnelle », mais par ailleurs formellement ordinaire, était susceptible de conditionner la validité des lois subséquentes[170]. À notre avis, cet argument jurisprudentiel ne tient pas la route, tel que nous l'expliquons plus bas.

(c) La question épineuse des lois quasi constitutionnelles

Les lois quasi constitutionnelles sont des lois formellement ordinaires, mais qui revêtiraient un statut particulier dans la hiérarchie des normes en raison de l'importance des protections qu'elles garantissent[171]. Cette position soulève certaines difficultés au regard de notre opinion sur le caractère obligatoire des règles procédurales contenues dans les lois ordinaires. De fait, il y a une inadéquation entre l'édiction des lois quasi constitutionnelles et leur effet: elles sont adoptées, modifiées et abrogées par une compétence législative ordinaire, mais ont préséance sur les autres lois ordinaires par l'interprétation qu'en font les tribunaux[172].

Selon Luc B. Tremblay, appuyé par la majorité des auteurs doctrinaux, les dispositions de dérogation contenues dans plusieurs lois quasi constitutionnelles illustreraient le pouvoir du Parlement et des législatures de se lier pour l'avenir en s'obligeant à respecter une procédure plus onéreuse que celle prévue ordinairement[173]. De même, pour Hogg, l'inadéquation entre la procédure d'adoption et l'effet des lois quasi constitutionnelles ne peut être expliquée qu'en recourant à la

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[169] Voir Herbert Marx & François Chevrette, Droit constitutionnel, principes fondamentaux: notes & jurisprudence, 2e éd. par Han-Ru Zhou, Montréal, Éditions Thémis, 2016, p. 294 et suiv.; Peter W. Hogg, Constitutional Law of Canada, Toronto, Thomson Reuters, 2018, p. 12-11 et suiv. Brun, Tremblay et Brouillet offrent une perspective plus nuancée sur la question. Voir Henri Brun, Guy Tremblay & Eugénie Brouillet, Droit constitutionnel, 6e éd., Montréal, Yvon Blais, 2014, par. VIII.151 et suiv.

[170] Renvoi relatif au Régime d'assistance publique du Canada (C.-B.), [1991] S.C.J. No. 60, [1991] 2 R.C.S. 525, 563.

[171] Vanessa MacDonnell, A Theory of Quasi-Constitutional Legislation, (2017) 53:2 Osgoode Hall L.J. 508, 510.

[172] Richard Albert, « Quasi-Constitutional Amendements », dans Richard Albert & Joel I Colón-Ríos (dir.), Quasi-Constitutionality and Constitutional Statutes, Oxon, Routledge, 2019, p. 135, à la p. 137.

[173] Luc B. Tremblay, The Rule of Law, Justice and Interpretation, Montréal, McGill-Queen's University Press, 1997, p. 90, 132; Herbert Marx & François Chevrette, Droit constitutionnel, principes fondamentaux: notes & jurisprudence, 2e éd. par Han-Ru Zhou, Montréal, Éditions Thémis, 2016, p. 295; Walter R. Tarnopolsky, The Canadian Bill of Rights, 2e éd., Toronto, McClelland and Stewart, 1975, p. 141.

théorie de l'autolimitation procédurale[174].

Leur opinion sur la question prend racine dans le raisonnement de la Cour suprême dans l'arrêt *Drybones*[175]. Dans cette décision, la Cour suprême avait déterminé que l'article 2 de la *Déclaration canadienne des droits*[176], une disposition de dérogation expresse, avait pour effet de rendre inopérantes les lois incompatibles avec les droits qu'elle garantit, en l'occurrence une loi édictée antérieurement[177]. Néanmoins, la décision aurait été la même si la loi avait été adoptée postérieurement: la *Déclaration canadienne des droits* rend inopérantes les lois incompatibles avec elles sur le fond, qu'elles soient édictées antérieurement ou postérieurement[178]. Autrement dit, la primauté que confère le statut de quasi-constitutionnalité à la *Déclaration canadienne des droits* la protégerait contre une abrogation implicite, soumettant par le fait même l'entièreté des lois édictées par le Parlement à l'exigence d'une déclaration expresse de dérogation[179]. De même, la *Charte des droits et libertés de la personne*[180] rendrait inopérantes les lois portant atteinte aux droits qu'elle garantit lorsque la mention expresse de dérogation imposée par l'article 52 n'est pas invoquée[181]. Plusieurs autres lois touchant au domaine des droits et libertés disposent d'une clause de dérogation et possèdent donc une

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[174] Peter W. Hogg, Constitutional Law of Canada, Toronto, Thomson Reuters, 2018, p. 12-18.

[175] R. c. Drybones, [1970] R.C.S. 282, 9 D.L.R. (3d) 473 [Drybones].

[176] L.R.C. (1985), app. III.

[177] R. c. Drybones, [1970] R.C.S. 282, 9 D.L.R. (3d) 473, at 293-59. Voir aussi R. c. Miller, [1977] 2 R.C.S. 680, 11 NR 386; Law Society of Upper Canada c. Skapinker, [1984] S.C.J. No. 18, [1984] 1 R.C.S. 357, par. 10; Authorson c. Canada (Procureur général), [2003] S.C.J. No. 40, 2003 CSC 39, par. 10. La Déclaration est une loi quasi constitutionnelle, comme la Cour suprême l'a reconnu pour la première fois dans l'arrêt Hogan. Voir R. c. Hogan, [1975] 2 R.C.S. 574, 597, 2 NR 343 (juge Laskin).

[178] Singh c. Ministre de l'Emploi & de l'Immigration, [1985] S.C.J. No. 11, [1985] 1 R.C.S. 177, par. 121 (juge Beetz).

[179] Voir John Helis, « Quasi-Constitutionality in Canada and the Weak-Form Model of Constitutionalism and Judicial Review », dans Richard Albert & Joel I Colón-Ríos (dir.), Quasi-Constitutionality and Constitutional Statutes, Oxon, Routledge, 2019, p. 118, à la p. 122.

[180] RLRQ, c. C-12.

[181] Voir Ford c. Québec (Procureur général), [1988] S.C.J. No. 88, [1988] 2 R.C.S. 712, 745. Béliveau St-Jacques c. Fédération des employées & employés, [1996] S.C.J. No. 70, [1996] 2 R.C.S. 365, par. 116; De Montigny c. Brossard (Succession), [2010] S.C.J. No. 51, 2010 CSC 51, par. 45. La Charte des droits & libertés de la personne est une loi quasi constitutionnelle, comme l'a reconnu explicitement la Cour suprême pour la première fois dans l'arrêt Frenette. Voir Frenette c. Métropolitaine (La), cie d'assurance-vie, [1992] S.C.J. No. 24, [1992] 1 S.C.R. 647, 673 (juge Laskin).

primauté sur les autres lois dans la hiérarchie des normes[182].

Nous souscrivons cependant à la thèse de Maxime St-Hilaire selon laquelle les lois quasi constitutionnelles ne peuvent être comprises comme imposant des conditions de manière et de forme au législateur[183]. D'abord, elles ne conditionnent pas la validité des lois et ne limitent en rien le pouvoir de légiférer du législateur. Ensuite, la préséance qui leur est accordée n'est pas rattachée à une règle procédurale, c'est-à-dire à l'efficacité juridique de leurs dispositions, mais plutôt à l'inapplication de principes d'interprétation des lois. En cela, les auteurs doctrinaux majoritaires font erreur en qualifiant de particulier le statut de lois quasi constitutionnelles dans la hiérarchie des normes. L'interprétation de dispositions législatives incompatibles suivant certains principes de common law et leur caractère fondamental d'un point de vue matériel n'équivalent pas à leur hiérarchisation d'un point de vue formel.

Drybones reste l'arrêt de principe sur l'effet qu'entraînent les lois quasi constitutionnelles sur les autres lois en cas de conflit. Dans cet arrêt, le juge Ritchie, pour la majorité, avait expliqué de façon très claire de quelle façon se résorbe le conflit entre normes législatives quasi constitutionnelles et ordinaires, en traçant un parallèle avec l'inopérabilité qu'entraîne la loi fédérale sur la loi provinciale en cas d'incompatibilité[184]. Similairement, dans *Authorson*, la Cour suprême a affirmé que la *Déclaration canadienne des droits* n'a pas pour effet de permettre aux tribunaux de « contraindre le législateur à modifier son processus législatif »[185]. En cas de conflit entre une loi quasi constitutionnelle et une loi ordinaire, les tribunaux ne font que prioriser l'application d'une norme par rapport à une autre en lui donnant préséance.

C'est ce qu'explique le juge Bastarache dans l'arrêt *Tranchemontagne* lorsqu'il affirme que la validité d'une disposition déclarée inopérante par l'effet d'une loi quasi constitutionnelle n'est pas remise en question: « Le législateur avait le pouvoir d'adopter la disposition incompatible; il se trouve seulement qu'il a également

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182 Voir Anne F Bayefsky, Parliamentary Sovereignty and Human Rights in Canada, (1983) 31 Political Studies 239, 250-52.

183 Voir Maxime St-Hilaire, « 'Quasi Constitutional' Status as *Not* Implying a Form Requirement » (8 août 2017), online (blog): Blog of the International Journal of Constitutional Law, <http://www.iconnectblog.com/2017/08/quasi-constitutional-status-as-not-implying-a-form-requirement/>.

184 R. c. Drybones, [1970] R.C.S. 282, 9 D.L.R. (3d) 473, 295. Sur la doctrine de la prépondérance fédérale, voir par ex. Rothmans, Benson & Hedges Inc c. Saskatchewan, 2005 CSC 13, [2005] S.C.J. No. 1.

185 Authorson c. Canada (Procureur général), [2003] S.C.J. No. 40, 2003 CSC 39, par. 40. Voir aussi MH Tse, The Canadian Bill of Rights as an Effective Manner and Form Device: An Analysis of the Supreme Court of Canada Decision in Authorson v. Canada (Attorney General), (2005) 18:1 N.J.C.L. 7, 11.

édicté une autre règle de droit qui prévaut. »[186] En cela, la primauté des lois quasi constitutionnelles se distingue des conditions de manière et de forme qui régissent l'exercice du pouvoir législatif: une disposition invalide n'a jamais existé, le législateur n'ayant pas le pouvoir de l'adopter[187]. Aussi est-il possible d'assimiler les normes constitutionnelles non enchâssées avec les lois quasi constitutionnelles en ce qu'elles ont préséance sur la loi ordinaire en cas de conflit.

Quoi qu'il en soit, les dispositions de dérogation ne peuvent être comprises comme la source de la primauté des lois quasi constitutionnelles. Cet effet juridique prend plutôt racine dans l'intention du législateur de déroger aux principes d'interprétation des lois. Ces principes, dont font partie la règle de la préséance de la loi postérieure et la règle de la préséance de la spéciale, permettent ordinairement aux tribunaux de résoudre les conflits de lois[188]. Or, dans le cas des lois quasi constitutionnelles, la volonté du législateur de déroger à ces principes est clairement exprimée par le caractère fondamental des protections qu'elles garantissent, ce qui leur permet de primer la loi ordinaire en cas de conflit. La Cour suprême a statué à maintes reprises que la préséance des lois quasi constitutionnelles privées de disposition de dérogation au regard des lois ordinaires était assurée par leur caractère fondamental[189]. Il arrive par ailleurs que des lois soient reconnues quasi constitutionnelles sans qu'elles soient dotées d'une clause de dérogation, ou même d'une clause de primauté[190]. Le statut particulier des lois quasi constitutionnelles –

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[186] Tranchemontagne c. Ontario (Directeur du Programme ontarien de soutien aux personnes handicapées), [2006] S.C.J. No. 14, 2006 CSC 14, par. 35.

[187] Tranchemontagne c. Ontario (Directeur du Programme ontarien de soutien aux personnes handicapées), [2006] S.C.J. No. 14, 2006 CSC 14, par. 35. Voir aussi John Helis, Quasi-Constitutional Laws of Canada, Toronto, Irwin Law, 2018, p. 153 et suiv.; Maxime St-Hilaire & Patrick S. Baud, « Legal Roadblocks to Proposals for A Quebec Constitution », dans Richard Albert & Léonid Sirota (dir.), Does Quebec Need a Written Constitution?, Montréal, McGill-Queen's University Press, à paraître, p. 7; John Lovell, Legislating Against the Grain: Parliamentary Sovereignty and Extra-Parliamentary Vetoes, (2008) 24:1 N.J.C.L. 1, 15; John Lovell, « Parliamentary Sovereignty in Canada », dans Peter Oliver, Patrick Macklem, & Nathalie Des Rosiers (dir.), The Oxford Handbook of the Canadian Constitution Handbook, Oxford, Oxford University Press, 2017, p. 189, à la p. 201; Jeffrey Goldsworthy, Parliamentary Sovereignty: Contemporary Debates, Cambridge, Cambridge University Press, 2010, p. 183.

[188] Voir Pierre-André Côté, Stéphane Beaulac & Mathieu Devinat, Interprétation des lois, 4e éd., Montréal, Éditions Thémis, 2009, par. 1334 et suiv.; Ruth Sullivan, Sullivan on the Construction of Statutes, 6e éd., Toronto, LexisNexis, 2014, p. 363-67.

[189] Voir Québec (Commission des droits de la personne & des droits de la jeunesse) c. Montréal (Ville), [2000] S.C.J. No. 24, 2000 CSC 27, par. 27. Voir aussi Insurance Corporation of British Columbia c. Heerspink, [1982] S.C.J. No. 65, [1982] 2 R.C.S. 145, 158; Winnipeg School Division No 1 v. Craton, [1985] 2 R.C.S. 150, 156.

[190] C'est le cas des lois protégeant l'accès à l'information. Voir Canada (Commissaire à l'information) c. Canada (Commissaire de la Gendarmerie royale du Canada), [2003] S.C.J.

et l'effet juridique qui en découle – n'est donc pas le résultat des règles procédurales dont elles sont disposées, mais plutôt de principes d'interprétation des lois, ou, en l'occurrence, de leur inapplicabilité[191]. La thèse prédominante sur la question doit dès lors échouer.

(d) Le cas particulier de l'arrêt Mercure: retour sur la jurisprudence du Commonwealth

Aux termes de l'article 2 de la *Loi constitutionnelle de 1871*, le Parlement fédéral a le pouvoir de constituer de nouvelles provinces[192]. La province de la Saskatchewan a été constituée à partir des Territoires du Nord-Ouest par la *Loi sur la Saskatchewan*[193], édictée par l'exercice de cette compétence. Lors de sa création, certaines dispositions de l'*Acte des Territoires du Nord-Ouest*[194], adoptées par le Parlement fédéral pour l'Assemblée territoriale, ont été préservées pour éviter la création d'un vide juridique.

Dans l'arrêt *Mercure*[195], la validité d'une loi de la Saskatchewan était contestée au motif qu'elle n'avait pas été adoptée suivant la procédure prescrite par l'article 110 de l'*Acte des Territoires du Nord-Ouest*, à savoir une exigence de bilinguisme. De l'avis de la Cour suprême, cette règle procédurale avait été préservée aux termes de l'article 14 de la loi constitutive de la province, qui prévoit le maintien des conditions d'exercice du pouvoir législatif telles qu'établies par l'*Acte des Territoires du Nord-Ouest* jusqu'à leur abrogation par la législature nouvellement constituée[196]. Autrement dit, l'exigence de bilinguisme avait continué de s'appliquer

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No. 7, 2003 CSC 8; Canada (Commissaire à l'information) c. Canada (Ministre de la Défense nationale), [2011] S.C.J. No. 25 2011 CSC 25. C'est également le cas des lois protégeant les droits linguistiques. Voir R. c. Beaulac, [1999] S.C.J. No. 25, [1999] 1 R.C.S. 768; Lavigne c. Canada (Commissariat aux langues officielles), [2002] S.C.J. No. 55, 2002 CSC 5; Thibodeau c. Air Canada, [2014] S.C.J. No. 67, 2014 CSC 67.

[191] John Helis, « Quasi-Constitutionality in Canada and the Weak-Form Model of Constitutionalism and Judicial Review », dans Richard Albert & Joel I Colón-Ríos (dir.), Quasi-Constitutionality and Constitutional Statutes, Oxon, Routledge, 2019, p. 118, à la p. 122-23; Voir aussi Maxime St-Hilaire & Patrick S. Baud, « Legal Roadblocks to Proposals for A Quebec Constitution », dans Richard Albert & Léonid Sirota (dir.), Does Quebec Need a Written Constitution?, Montréal, McGill-Queen's University Press, à paraître, p. 7.

[192] Loi constitutionnelle de 1871 (R.-U.), 34 & 35 Vict., c. 28.

[193] Loi sur la Saskatchewan, 1905 (UK), 4 & 5 Éd. VII, c. 42, art. 14.

[194] S.R.C. 1886, c. 50.

[195] R. c. Mercure, [1988] S.C.J. No. 11, [1988] 1 R.C.S. 234, appliqué dans R. c. Paquette, [1990] 2 R.C.S. 1103, [1990] S.C.J. No. 99, qui traitait de la même question à l'égard des lois élaborées par l'Alberta suivant la création de la province par une opération identique.

[196] R. c. Mercure, [1988] S.C.J. No. 11, [1988] 1 R.C.S. 234, 270. L'article 14 disposait: « Jusqu'à ce que ladite législature en statue autrement, toutes les dispositions de la loi relatives à la constitution [. . .] s'appliquent mutatis mutandis, à l'[A]ssemblée législative de

au processus législatif de l'Assemblée législative de la Saskatchewan.

En revanche, si l'article 110 de l'*Acte des Territoires du Nord-Ouest* était enchâssé avant 1905, puisque l'Assemblée territoriale n'avait pas compétence pour l'abroger, il ne l'était plus, au moment où l'Assemblée législative de la Saskatchewan a été constituée par la *Loi sur la Saskatchewan*. De fait, cette dernière disposait alors du pouvoir de modifier sa constitution par le truchement de l'article 92(1) de la *Loi constitutionnelle de 1867*, remplacé par l'article 45 de la *Loi constitutionnelle de 1982*[197]. Néanmoins, selon le juge La Forest, l'exigence de bilinguisme prévue à l'article 110 de l'*Acte des Territoires du Nord-Ouest* ne pouvait être abrogée implicitement par l'édiction de lois ne l'observant pas.

Au contraire, cette disposition devait être considérée comme une condition de manière et de forme permettant d'invalider les lois entachées d'un vice procédural[198]. Pour arriver à cette conclusion, le juge s'appuyait sur les écrits de Jennings et sur les arrêts *Trethowan*, *Harris*, et plus particulièrement sur le célèbre *dicta* du juge dans l'affaire *Ranasinghe*: « [U]ne législature n'a pas le pouvoir de laisser de côté les conditions d'exercice du pouvoir législatif qui lui sont imposées par l'‘instrument même qui règle son pouvoir de faire des lois. »[199] À son avis, qu'une règle procédurale prévue par la constitution soit enchâssée ou non n'a aucune incidence sur l'effet qu'elle entraîne au regard des lois édictées par le législateur. Il suffit qu'elle soit une norme constitutionnelle contenue dans l'instrument régissant son pouvoir de légiférer[200]. Partant, l'Assemblée législative de la Saskatchewan était obligée de respecter l'exigence de bilinguisme lui étant imposée. Suivant ce raisonnement, l'arrêt *Mercure* fut interprété comme signalant l'applicabilité de la théorie de l'autolimitation procédurale en droit canadien[201].

À notre avis, il n'en est pas ainsi. D'une part, nous avons des doutes quant au bien-fondé du raisonnement de la Cour suprême dans l'arrêt *Mercure*. Comme l'expliquent avec justesse Maxime St-Hilaire et Patrick Baud, le juge La Forest semble fonder sa conclusion sur la prémisse erronée selon laquelle, puisque l'article 110 de la l'*Acte des Territoires du Nord-Ouest* conditionnait la validité des lois édictées par l'Assemblée territoriale, il doit s'ensuivre que l'article 14 de la *Loi sur la Saskatchewan* préserve cet effet[202]. Pourtant, nous avons montré qu'une règle

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[la Saskatchewan]. » Voir Loi sur la Saskatchewan, 1905 (UK), 4 & 5 Éd. VII, c. 42, art. 14.

[197] R. c. Mercure, [1988] S.C.J. No. 11, [1988] 1 R.C.S. 234, 272.

[198] R. c. Mercure, [1988] S.C.J. No. 11, [1988] 1 R.C.S. 234, 277.

[199] R. c. Mercure, [1988] S.C.J. No. 11, [1988] 1 R.C.S. 234, 277-79.

[200] R. c. Mercure, [1988] S.C.J. No. 11, [1988] 1 R.C.S. 234, 277-79.

[201] Herbert Marx & François Chevrette, Droit constitutionnel, principes fondamentaux: notes & jurisprudence, 2e éd. par Han-Ru Zhou, Montréal, Éditions Thémis, 2016, p. 295.

[202] Voir Maxime St-Hilaire & Patrick S. Baud, « Legal Roadblocks to Proposals for A Quebec Constitution », dans Richard Albert & Léonid Sirota (dir.), Does Quebec Need a Written Constitution?, Montréal, McGill-Queen's University Press, à paraître, p. 9-10.

procédurale ne peut être comprise comme limitant le pouvoir de légiférer d'un Parlement si elle peut être modifiée ou abrogée par la loi ordinaire.

De fait, dans *Harris* et *Ranasinghe*, les instruments en litige conditionnaient l'exercice du pouvoir législatif dévolu aux législatures qu'ils constituaient dans la mesure où les conditions de manière et de forme étaient elles-mêmes enchâssées. Le Parlement fédéral avait, en l'espèce, sciemment décidé de ne pas enchâsser l'exigence de bilinguisme prévue à l'article 110 de *l'Acte des Territoires du Nord-Ouest*, et ce, précisément dans le but de permettre à la législature nouvellement constituée de l'abroger[203]. C'est par ailleurs ce que l'Assemblée législative de la Saskatchewan avait fait en édictant *The Language Act* deux ans après l'arrêt *Mercure*[204]. Nous sommes d'avis qu'elle aurait pu le faire sans suivre la manière et la forme prescrite par l'exigence de bilinguisme. L*'Acte des Territoires du Nord-Ouest* n'était plus qu'une loi quasi constitutionnelle au moment où elle fut reconduite à titre de loi provinciale, comme l'a lui-même reconnu le juge La Forest[205]. Son raisonnement aurait d'ailleurs pu se limiter au seul constat de la nature quasi constitutionnelle de l'article 110 de l'*Acte des Territoires du Nord-Ouest*. Il aurait par le fait même évité de confondre la sanction d'invalidité avec l'interprétation d'une loi comme n'ayant pas l'effet souhaité, c'est-à-dire l'inopérabilité.

D'autre part, même si le juge La Forest s'appuie sur la conception de la souveraineté parlementaire développée par Jennings et sur les affaires *Trethowan*, *Harris* et *Ranasinghe* pour élaborer son jugement, nous avons montré que ces arrêts ne sont pas des autorités permettant de conclure sans équivoque qu'un Parlement a le pouvoir de conditionner l'exercice de son pouvoir de légiférer dans le cadre de sa compétence législative[206]. L'arrêt *Mercure* n'a donc pas la portée que certains auteurs doctrinaux lui accordent[207].

3. LOIS ORDINAIRES ET CONDITIONS DE VALIDITÉ DES LOIS: MARIAGE CONCEPTUEL INCERTAIN

Si la Cour suprême semble disposée à reconnaître le pouvoir du Parlement et des législatures de s'imposer des conditions de manière et de forme en leur compétence législative, nous avons montré les difficultés conceptuelles de cette approche au vu du régime établi par l'article 52 de la *Loi constitutionnelle de 1982*. En tout état de cause, s'ajoutent à cette difficulté plusieurs obstacles qui limiteraient le pouvoir des tribunaux d'invalider les lois sur la base d'une règle procédurale contenue dans une

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[203] R. c. Mercure, [1988] S.C.J. No. 11, [1988] 1 R.C.S. 234, 248.

[204] S.S. 1988, c. L-7.5.

[205] R. c. Mercure, [1988] S.C.J. No. 11, [1988] 1 R.C.S. 234, 268.

[206] Voir Jacques-Yvan Morin, Pour une nouvelle Constitution du Québec, (1985) 30:2 McGill L.J., p. 209-10.

[207] C'est aussi l'opinion de la Cour d'appel du Québec: « On ne doit pas donner à l'arrêt Mercure une portée qu'il n'a pas. » Voir Ordre des comptables généraux licenciés du Québec c. Québec (Procureur général), [2004] J.Q. no 4881, [2004] R.J.Q. 1164, par. 43 (Que. C.A).

loi ordinaire. De même, le critère de l'intention claire, qui gouverne l'identification des exigences procédurales que s'impose le législateur par la loi n'est pas en mesure de résoudre ces difficultés.

La souveraineté parlementaire préserve à tout le moins la plénitude des pouvoirs du Parlement et des législatures de légiférer sur les questions qui sont *intra vires* de leur compétence législative respective, entendu que soient respectées les limites prescrites par la Constitution[208]. Une loi prétendant interdire au Parlement ou à une législature de légiférer sur une question en particulier n'a aucun effet juridique[209]. Il n'est pas évident que le législateur ait le pouvoir de s'obliger à légiférer sur une question seulement d'une manière plus onéreuse que ne l'est la procédure législative ordinaire dans le cadre du pouvoir qui lui est dévolu par la Constitution. Il n'est pas davantage évident que les tribunaux auraient le pouvoir d'invalider une loi entachée d'un vice procédural.

En effet, la Cour suprême a régulièrement suggéré qu'en dehors des limites prescrites par la Constitution, le Parlement et les législatures étaient libres d'édicter toute loi par l'exercice de leur compétence législative ordinaire: « [L]es législatures sont assujetties à des exigences constitutionnelles pour que l'exercice de leur pouvoir de légiférer soit valide, mais à l'intérieur des limites que leur impose la constitution, elles peuvent faire ce que bon leur semble. »[210] Dans l'arrêt *Melford Developments*, le juge Etsey avait même affirmé qu'il est « incontestable que le Parlement est souverain et qu'il ne peut se lier pour l'avenir lorsqu'il exerce la compétence souveraine que lui accorde la constitution »[211]. C'est dire que, dans le « domaine résiduel » où s'applique la souveraineté parlementaire, « il n'appartient pas aux tribunaux de juger de la validité des lois »[212]. Par conséquent, la compétence des tribunaux à déclarer invalides des lois n'ayant pas observé une règle procédurale contenue dans une loi ordinaire reste incertaine.

Il est vrai que la théorie de l'autolimitation procédurale postule une distinction

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[208] Renvoi relatif à la réglementation pancanadienne des valeurs mobilières, [2018] S.C.J. No. 48, 2018 CSC 48, par. 58.

[209] Renvoi relatif à la Loi sur les valeurs mobilières, [2011] S.C.J. No. 66, 2011 CSC 66, par. 119; Renvoi relatif au Régime d'assistance publique du Canada (C.-B.), [1991] S.C.J. No. 60, [1991] 2 R.C.S. 525, 563.

[210] Wells c. Terre-Neuve, [1999] S.C.J. No. 50, [1999] 3 R.C.S. 199, par. 59. D'autres décisions soutiennent explicitement ou tacitement cette thèse: Renvoi relatif au Régime d'assistance publique du Canada (C.-B.), [1991] S.C.J. No. 60, [1991] 2 R.C.S. 525, 548; Authorson c. Canada (Procureur général), [2003] S.C.J. No. 40, 2003 CSC 39, par. 39; Mikisew Cree First Nation c. Canada (Gouverneur général en conseil), [2018] S.C.J. No. 40, 2018 CSC 40, par. 36; Renvoi relatif à la réglementation pancanadienne des valeurs mobilières, [2018] S.C.J. No. 48, 2018 CSC 48, par. 58.

[211] R. c. Melford Developments Inc, [1982] S.C.J. No. 76, [1982] 2 R.C.S. 504, 513.

[212] Canada (Vérificateur général) c. Canada (Ministre de l'Énergie, des Mines & des Ressources), [1989] S.C.J. No. 80, [1989] 2 R.C.S. 49, 91.

entre une contrainte de fond et une contrainte de forme, cette dernière n'étant pas à proprement parler une « limite » à la souveraineté parlementaire, ce que nous avons pour le reste remis en question. Cependant, même en acceptant une telle affirmation, il n'est pas évident, comme l'explique le juge Sopinka dans le *Renvoi sur le RAP*, de tracer la ligne de démarcation entre une abdication du pouvoir de légiférer sur le fond et une règle procédurale qui rendrait plus onéreuse la procédure d'adoption des lois[213]. Par exemple, les tribunaux ont refusé d'interpréter certaines dispositions législatives comme de simples règles procédurales, les jugeant plutôt comme des limites sur le fond. C'est le cas notamment des référendums contraignants en droit, dits législatifs, dont le succès se traduirait par l'obligation du législateur d'adopter la loi soumise au vote populaire[214]. C'est également le cas des dispositions déléguant un véto à l'adoption, la modification ou l'abrogation des lois à des entités ne faisant pas partie de l'organe législatif[215].

De plus, les tribunaux canadiens ont traditionnellement été réticents à examiner la manière par laquelle une loi a été adoptée, présumant plutôt la régularité procédurale de la loi à défaut de preuve du contraire[216]. À cet égard, le pouvoir des tribunaux d'examiner l'application des dispositions législatives portant sur la procédure interne des assemblées législatives est considérablement réduit par l'immunité que leur confère le privilège parlementaire[217]. Aussi est-il frappant de

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213 Renvoi relatif au Régime d'assistance publique du Canada (C.-B.), [1991] S.C.J. No. 60, [1991] 2 R.C.S. 525, 564.

214 Voir Re Initiative and Referendum Act, [1919] A.C. 935 (P.C.); Manitoba v. Government of Manitoba, [2014] M.J. No. 206, 2014 MBQB 155. Dans Trethowan, le Conseil privé avait jugé valide une exigence procédurale similaire, mais en l'espèce, une norme supralégislative, à savoir le Colonial Laws Validity Act, habilitait expressément la législature à l'adopter. Voir Attorney-General for New South Wales v. Trethowan, [1932] A.C. 526, at 433 (P.C.).

215 Voir Renvoi relatif au Régime d'assistance publique du Canada (C.-B.), [1991] S.C.J. No. 60, [1991] 2 R.C.S. 525, 564. Voir aussi Canada (Attorney General) v. Friends of the Canadian Wheat Board, [2012] F.C.J. No. 706, 2012 FCA 183, par. 82; Oberg v. Canada (Attorney General), [2012] M.J. No. 53, 2012 MBQB 64, par. 25. Voir aussi West Lakes v. South Australia, (1980) 25 S.A.S.R. 389 at 390 (juge King) (A.S.C.), cité avec approbation dans Renvoi relatif au Régime d'assistance publique du Canada (C.-B.), [1991] S.C.J. No. 60, [1991] 2 R.C.S. 525, 564.

216 Voir Henri Brun, Guy Tremblay & Eugénie Brouillet, Droit constitutionnel, 6e éd., Montréal, Yvon Blais, 2014, par. VIII.166; William E. Conklin, Pickin and its Applicability to Canada, (1975) 25 U.T.L.J. 193, 203; Katherine Swinton, Challenging the Validity of an Act of Parliament: The Effect of Enrolment and Parliamentary Privilege, (1976) 14:2 Osgoode Hall L.J. 345, 353-56. Voir aussi The King c. Irwin [1926] Ex CR 127 at 129 (E.C.); Akar c. A.-G. Sierra Leone, [1970] A.C. 853 at 867-68 (P.C.).

217 Voir Temple c. Bulmer, [1943] R.C.S. 265, [1943] 3 D.L.R. 649; Canada (Chambre des communes) c. Vaid, [2005] S.C.J. No. 28, 2005 CSC 30, par. 34; Chagnon c. Syndicat de la fonction publique & parapublique du Québec, [2018] S.C.J. No. 39, 2018 CSC 39, par.

lire, dans l'arrêt *Mikisew*, la majorité des juges de la Cour suprême s'appuyer sur le fait que le privilège parlementaire limite l'intervention des tribunaux dans le processus législatif pour se prononcer sur l'obligation de consulter, d'une part, mais de l'omettre complètement eu égard à la question du caractère obligatoire des règles procédurales imposées par la loi ordinaire, d'autre part[218]. Cette difficulté, sans être insurmontable[219], nécessite la plus grande prudence des tribunaux pour que soit préservée la séparation des pouvoirs entre les différents organes de l'État[220].

Au demeurant, l'interprétation des lois ordinaires doit se faire suivant les dispositions pertinentes des différentes lois d'interprétation[221], lesquelles reflètent le pouvoir illimité de légiférer du Parlement et des législatures à l'intérieur des limites prescrites par la Constitution[222]. Dans le *Renvoi sur le RAP*, le juge Sopinka avait à juste titre soulevé la difficulté pour les tribunaux de déterminer l'intention du législateur de faire primer une loi ordinaire sur les autres lois[223]. Pour y remédier,

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24. Voir aussi Maxime St-Hilaire, Affaire Boulerice: le privilège parlementaire comme modification constitutionnelle judiciaire et (donc) inconstitutionnelle, (2020) 13:3 R.D.P.P. 521.

218 À notre avis, seul le juge Brown est entièrement cohérent sur la question du privilège parlementaire. Voir Mikisew Cree First Nation c. Canada (Gouverneur général en conseil), [2018] S.C.J. No. 40, 2018 CSC 40, par. 122 et suiv. Voir cependant l'opinion du juge Rowe dans Chagnon, suivant laquelle le législateur ne peut invoquer le privilège parlementaire pour éviter de se conformer au texte d'une loi qu'il a édictée. Voir Chagnon c. Syndicat de la fonction publique & parapublique du Québec, [2018] S.C.J. No. 39, 2018 CSC 39, par. 66. Il semble également qu'un argument fondé sur la primauté du droit puisse être soulevé à cet égard. Voir Colombie-Britannique c. Imperial Tobacco Canada Ltée, [2005] S.C.J. No. 50, 2005 CSC 49, par. 60.

219 Voir Herbert Marx & François Chevrette, Droit constitutionnel, principes fondamentaux: notes & jurisprudence, 2e éd. par Han-Ru Zhou, Montréal, Éditions Thémis, 2016, p. 410; Hamish R. Gray, The Sovereignty of Parliament and the Entrenchment of Legislative Process, (1964) 27:6 Mod. L. Rev. 705, 708; Han-Ru Zhou, Revisiting the "Manner and Form" Theory of Parliamentary Sovereignty, (2013) 129:3 Law Q. Rev. 610, 614; Katherine Swinton, Challenging the Validity of an Act of Parliament: The Effect of Enrolment and Parliamentary Privilege, (1976) 14:2 Osgoode Hall L.J. 345, 153-54.

220 Voir Chagnon c. Syndicat de la fonction publique & parapublique du Québec, [2018] S.C.J. No. 39, 2018 CSC 39, par. 26; Canada (Chambre des communes) c. Vaid, [2005] S.C.J. No. 28, 2005 CSC 30, par. 21.

221 Voir par ex. Loi d'interprétation, L.R.C. (1985), c. I-21, art. 42(1); Loi d'interprétation, LRQ 1985, c. I-16, art. 11. Le par. 42(1) de la loi d'interprétation fédérale prévoit qu'il « est entendu que le Parlement peut toujours abroger ou modifier toute loi et annuler ou modifier tous pouvoirs, droits ou avantages attribués par cette loi ».

222 Renvoi relatif au Régime d'assistance publique du Canada (C.-B.), [1991] S.C.J. No. 60, [1991] 2 R.C.S. 525, 548.

223 Renvoi relatif au Régime d'assistance publique du Canada (C.-B.), [1991] S.C.J. No. 60, [1991] 2 R.C.S. 525, 562.

il avait suggéré que les tribunaux puissent conclure à l'intention du Parlement ou d'une législature de se lier sur la forme lorsque cette intention est clairement exprimée: « [T]oute exigence de mode et de forme doit surmonter le texte clair du par. 42(1) de la *Loi d'interprétation.* »[224] Le seul critère de l'intention claire, tel qu'il a été réaffirmé dans le *Renvoi sur les valeurs mobilières*, ne permet cependant pas de résoudre les difficultés posées par les obstacles décrits précédemment[225].

Dans les faits, la résolution des conflits découlant de règles procédurales édictées par la loi ordinaire est toujours une question d'interprétation des lois. La question qui doit préoccuper les tribunaux est celle de s'avoir s'il faut donner effet à la lettre d'une loi édictée antérieurement par le législateur qui prétend l'obliger à légiférer par une procédure plus onéreuse qu'employée ordinairement ou s'il faut plutôt donner effet à la décision postérieure du législateur d'exercer son pouvoir législatif libre de toute contrainte formelle[226]. Il nous semble que le raisonnement du juge Sopinka dans le *Renvoi sur le RAP* découle d'une confusion entre la sanction d'invalidité découlant du régime établit par l'article 52 de la *Loi constitutionnelle de 1982* et l'interprétation d'une loi comme n'ayant pas l'effet souhaité, à savoir l'inopérabilité. Selon nous, le critère de l'intention claire ne fait que traduire la nécessité pour le législateur d'exprimer clairement sa volonté de déroger aux principes d'interprétation des lois lorsqu'il souhaite donner préséance à une loi édictée antérieurement en cas de conflit. Aussi est-il plus délicat pour les tribunaux d'arriver à une telle conclusion dans le cas des lois ordinaires, par opposition aux lois de « nature constitutionnelle »[227].

Il en découle à notre avis que les règles procédurales contenues dans les lois ordinaires sont assimilables à des règles d'interprétation des lois ou encore à des règles de procédure interne – lorsque la volonté claire du législateur n'est pas établie – et non à des conditions de manière et de forme. Par exemple, les lois édictées par l'Assemblée nationale du Québec ne sont pas susceptibles d'être invalidées sur la base qu'elles ont été adoptées sans respecter les dispositions de la *Loi sur l'Assemblée nationale*[228], bien que celle-ci fasse partie de la constitution de la province[229]. Comme nous l'avons soutenu plus haut, une règle procédurale non

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[224] Renvoi relatif au Régime d'assistance publique du Canada (C.-B.), [1991] S.C.J. No. 60, [1991] 2 R.C.S. 525, 563.

[225] Renvoi relatif à la réglementation pancanadienne des valeurs mobilières, [2018] S.C.J. No. 48, 2018 CSC 48, par. 51.

[226] Voir Berend Hovius, The Legacy of the Supreme Court of Canada's Approach to the Canadian Bill of Rights: Prospects for the Charte, (1982) 28 McGill L.J. 32, 54; Robin Elliot, Rethinking Manner and Rethinking Manner and Form: From Parliamentary Sovereignty to Constitutional Values, (1991) 29:2 Osgoode Hall L.J. 215, 237.

[227] Renvoi relatif au Régime d'assistance publique du Canada (C.-B.), [1991] S.C.J. No. 60, [1991] 2 R.C.S. 525, 563.

[228] RLRQ, c. A-23.1.

[229] Voir par ex. Michel Bonsaint (dir.), Procédure parlementaire du Québec, 3e éd.,

enchâssée ne peut conditionner la validité des lois, car le législateur reste libre de l'abroger par l'exercice de sa compétence législative. C'est notamment ce qui était en jeu dans l'affaire *Canadian Taxpayers Federation*, où la Cour supérieure de l'Ontario a jugé valide l'abrogation d'une règle procédurale et l'adoption subséquente d'une loi sans la respecter[230].

Par ailleurs, même en acceptant que le critère de l'intention claire permette aux tribunaux de conclure à l'existence d'une condition de manière et de forme que le législateur se serait imposé par la loi ordinaire, il demeure que son application par les tribunaux inférieurs mène à des résultats souvent contradictoires, certains juges allant jusqu'à refuser d'examiner la question[231]. À ce jour, un seul jugement a convenu, dans des motifs incidents, du caractère obligatoire d'une règle procédurale prévue par la loi, suivant le critère de l'intention claire[232]. Il semble désormais nécessaire pour la Cour suprême de clarifier l'état du droit sur la question.

Dans cette partie, nous avons montré que le caractère obligatoire des règles procédurales que s'imposerait le législateur par une loi ordinaire est loin d'être acquis, contrairement à ce qu'a suggéré la Cour suprême dans l'arrêt *Mikisew* et le *Renvoi sur les valeurs mobilières*. Bien au contraire, il semble que les conditions d'exercice du pouvoir législatif dévolu au Parlement et aux législatures sont prévues par la Constitution et ne peuvent être modifiées que par une procédure rigide. Contrairement à la thèse de la majorité des auteurs doctrinaux sur laquelle s'appuie la Cour suprême, les arrêts *Drybones* et *Mercure* ne prouvent pas l'applicabilité de la théorie de l'autolimitation procédurale en droit canadien. Les lois quasi constitutionnelles, tout comme les normes constitutionnelles non enchâssées, n'emportent pas l'invalidité des lois, mais bien leur inopérabilité, ce qui les distingue fondamentalement des conditions de manière et de forme. Même si, en théorie, le Parlement et les législatures pouvaient s'imposer des conditions de manière et de forme au moyen d'une loi ordinaire – ce qui est loin d'être acquis –, il faudrait qu'un tribunal soit à même d'en contrôler l'observance.

IV. CONCLUSION

La thèse que nous avons mise de l'avant remet en question l'opinion défendue par la majorité des auteurs doctrinaux et appuyée par la jurisprudence récente de la Cour

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Québec, Éditeur officiel du Québec, 2012, p. 51.

230 Voir Canadian Taxpayers Federation v. Ontario (Minister of Finance), [2004] O.J. No. 5239, 73 O.R. (3d) 621 (Ont. S.C.).

231 Voir Ordre des comptables généraux licenciés du Québec c. Québec (Procureur général), [2004] J.Q. no 4881, [2004] R.J.Q. 1164 (Que. C.A); Greater Vancouver Regional District v. British Columbia (Attorney General), [2011] B.C.J. No. 1549, 2011 BCCA 345; Canada (Attorney General) v. Friends of the Canadian Wheat Board, [2012] F.C.J. No. 706, 2012 FCA 183; Oberg v. Canada (Attorney General), [2012] M.J. No. 53, 2012 MBQB 64.

232 Amalgamated Transit Union Local 1374 v. Saskatchewan (Finance), [2017] S.J. No. 218, 2017 SKQB 152.

suprême du Canada selon laquelle le législateur peut se lier pour l'avenir en s'obligeant à légiférer sur une question d'une manière plus onéreuse que la procédure employée ordinairement.

Selon notre lecture de la jurisprudence du Commonwealth, le Parlement de Westminster, dont les pouvoirs sont régis, en droit britannique, par la doctrine constitutionnelle de la souveraineté parlementaire, ne peut être comparé avec les parlements dont les pouvoirs sont régis par une constitutionnelle formellement enchâssée, ou encore aux législatures ayant expressément le pouvoir de se lier pour l'avenir par des conditions de manière et de forme. Dans ces deux cas, il ne fait aucun doute que l'exercice de la compétence législative est assujetti au respect des exigences procédurales. Cependant, il n'est pas aussi clair qu'une loi ordinaire puisse conditionner l'adoption future des lois, comme le veut la théorie de l'autolimitation procédurale. Même en acceptant que la souveraineté parlementaire confère au Parlement de Westminster le pouvoir de modifier les conditions d'exercice de son pouvoir de légiférer, il ne s'ensuit pas pour autant que cette conclusion soit applicable en droit canadien.

La souveraineté parlementaire n'existe en droit canadien que dans un domaine résiduel considérablement réduit par l'opération des normes constitutionnellement enchâssées. De fait, les conditions d'exercice du pouvoir législatif du Parlement du Canada et des législatures provinciales sont expressément prévues par la Constitution du Canada et ne peuvent être modifiées que par une procédure rigide de révision constitutionnelle. Il ne fait aucun doute que le manquement aux conditions de manière et de forme enchâssées constitutionnellement est sanctionné d'invalidité, vu l'enchâssement de la Constitution prévu à l'alinéa 52(3) de la *Loi constitutionnelle de 1982*. Par opposition, la modification par le Parlement et les législatures de leur constitution respective s'exerce au même titre que leur compétence législative ordinaire. La Constitution du Canada, et notamment l'application des articles 44 et 45 de la *Loi constitutionnelle de 1982*, ne permet donc pas au législateur de s'imposer des conditions de manière et de forme au moyen d'une loi ordinaire.

Il existe également une confusion entre la sanction d'invalidité dont est frappée la loi outrepassant les exigences procédurales enchâssées par la Constitution et l'inopérabilité qui résulte d'un conflit entre une loi ordinaire et la loi quasi constitutionnelle ou la norme constitutionnelle non enchâssée. Cette première découle du régime de l'article 52 de la *Loi constitutionnelle de 1982*, tandis que cette dernière découle des principes encadrant l'interprétation des lois par les tribunaux. En cela, nous avons pu réfuter l'argument jurisprudentiel fondé sur les arrêts *Mercure* et *Drybones*. Enfin, nous avons émis des doutes quant au pouvoir des tribunaux d'invalider les lois sur la base des règles procédurales édictées par une loi ordinaire. D'une part, la présomption de validité des lois et le privilège parlementaire limitent le champ d'action des tribunaux au regard de la procédure législative. D'autre part, le critère de l'intention claire, mis de l'avant dans le *Renvoi sur le RAP* et le *Renvoi sur les valeurs mobilières*, ne permet pas de conclure à l'existence d'une condition de manière et de forme édictée par la loi ordinaire, mais plutôt de traduire

l'intention du législateur de soustraire une disposition législative des règles d'interprétation des lois.

Pour ces raisons, nous sommes d'avis que la Cour suprême a fait erreur dans l'arrêt *Mikisew* et le *Renvoi sur les valeurs mobilières* sur la question l'applicabilité de la théorie de l'autodéfinition procédurale en droit canadien.

Chapter 3

PLAYING ALONG TO GET ALONG: SECTION 6 RIGHTS, LIMITATION AND EXTRADITION

Kevin W. Gray*

> "If I think it's good for what will be certainly the largest trade deal ever made, which is a very important thing, what's good for national security, I would certainly intervene [in the case against Meng Wanzhou] if I thought it was necessary."[1]
>
> President Donald J. Trump

> "I found the French expert report convoluted, very confusing, with conclusions that are suspect. Despite this view, I cannot say that it is evidence that should be completely rejected as 'manifestly unreliable'".[2]
>
> **Justice Robert L. Maranger**

I. INTRODUCTION

It is undisputed that on October 3, 1980, a bomb exploded outside a synagogue on Copernic Street in Paris, France.[3] The explosion killed four people and injured over 40. No prosecution was undertaken for almost 30 years. In 2008, allegedly acting on intelligence from German agencies, the French government attempted to extradite a Canadian citizen, Hassan Naim Diab, a Lebanese-Canadian professor of sociology.

Few other facts about the case are clear. France claimed that Diab was the fictitious person known as Alexander Panadriyu, an alibi for one of the individuals

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[1] Katie Simpson & Philip Ling, "Justice Canada studied Trump's comments on Huawei extradition, documents show" (March 27, 2019), online: CBC News https://www.cbc.ca/news/politics/trump-huawei-comments-justice-canada-1.5072345.

[2] *France v. Diab*, [2011] O.J. No. 2551 at para. 121, 2011 ONSC 337, 236 C.R.R. (2d) 248 (Ont. S.C.J.), affd [2014] O.J. No. 2305, 2014 ONCA 374 (Ont. C.A.), leave to appeal refused [2014] S.C.C.A. No. 317 (S.C.C.).

[3] This summary of events is taken from *France v. Diab*, [2011] O.J. No. 2551 at para. 121, 2011 ONSC 337, 236 C.R.R. (2d) 248 (Ont. S.C.J.), affd [2014] O.J. No. 2305, 2014 ONCA 374 (Ont. C.A.), leave to appeal refused [2014] S.C.C.A. No. 317 (S.C.C.).

allegedly responsible for the bombing. In 2009, Canada issued an Authority to Proceed, arresting Diab, and beginning an odyssey which ultimately ended in Diab's extradition to, four-year detention in, and subsequent release by France.

Diab's extradition proceeded under the *Extradition Act*.[4] The French government provided Canada with a Record of the Case ("ROC") containing what the Superior Court judge would describe as exclusively circumstantial evidence.[5] It included a passport allegedly belonging to Diab, evidence of his membership in the Popular Front for the Liberation of Palestine ("PFLP"), eyewitness descriptions of Alexander Panadriyu, composite sketches of two suspects and photos of Mr. Diab, and the report of French handwriting experts. Cumulatively, the evidence was underwhelming.

The ROC included a passport, issued in the name of Hassan Naim Diab, that had been seized on October 8, 1981, by Italian authorities at Rome airport from an Ahmed Ben Mohammed. It contained an entry stamp into Spain, dated September 18, 1980, and an exit stamp from Spain dated, October 7, 1980. France's theory was that in between the two dates Diab had traveled between France and Spain to carry out the attack.

Friends of Diab stated that he was a member of the PFLP. France provided eyewitness descriptions of the fictitious Alexander Panadriyu, but there was considerable discrepancy in how he was described. In the words of the extradition judge, "[s]ome of the witnesses[' descriptions] indicated a mustache while others did not, some indicated glasses while others did not, and the receptionist at the hotel seems to be describing somebody completely different from the person described by the prostitute [who had allegedly had relations with a man staying at the same hotel as Panadriyu]. The witnesses from the motorcycle shop describe [a man with] blonde hair, while the other witnesses described [him with] chestnut brown or black hair."[6] The French government submitted composite drawings derived from the eye witness description alongside a picture of Diab which showed "arguably a resemblance to some of the photos".[7]

However, the most controversial evidence was an expert report by Anne Bisotti, which was included in a supplemental ROC. It purported to contain handwriting

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[4] S.C. 1999, c. 18.

[5] *France v. Diab*, [2011] O.J. No. 2551 at paras. 2, 151, 2011 ONSC 337, 236 C.R.R. (2d) 248 (Ont. S.C.J.), affd [2014] O.J. No. 2305, 2014 ONCA 374 (Ont. C.A.), leave to appeal refused [2014] S.C.C.A. No. 317 (S.C.C.).

[6] *France v. Diab*, [2011] O.J. No. 2551 at para. 169, 2011 ONSC 337, 236 C.R.R. (2d) 248 (Ont. S.C.J.), affd [2014] O.J. No. 2305, 2014 ONCA 374 (Ont. C.A.), leave to appeal refused [2014] S.C.C.A. No. 317 (S.C.C.).

[7] *France v. Diab*, [2011] O.J. No. 2551 at para. 179, 2011 ONSC 337, 236 C.R.R. (2d) 248 (Ont. S.C.J.), affd [2014] O.J. No. 2305, 2014 ONCA 374 (Ont. C.A.), leave to appeal refused [2014] S.C.C.A. No. 317 (S.C.C.).

analysis comparing known sample of Diab's handwriting with writing samples connected to the case. Bisotti's report concluded that there existed "a very strong presumption with regards to Hassan Diab as the author" of the writing samples.[8]

Justice Robert Maranger, who heard the case at the Ontario Superior Court ("ONSC"), dismissed all the evidence as insufficient for extradition other than the Bisotti Report. Turning his mind, however, to the Bisotti Report, he found that, although Diab's lawyers and competing experts subjected the evidence to strong criticism, their rebuttal was insufficient to "render another expert's opinion manifestly unreliable in the context of an extradition".[9] In so far as the Bisotti Report was prepared by someone who appears to be a qualified expert from the Republic of France, it was "presumptively reliable".[10]

Thus, although Justice Maranger had found that the other evidence in the ROC would be insufficient to justify committing Diab to trial, the evidence in the ROC of the handwritten evidence "tip[ped] the scale in favor of committal".[11] He found this in spite of concluding that: the Bisotti Report was "highly susceptible to criticism and impeachment"; that the case against "Diab [was] a weak case"; and, importantly, that "the prospects of conviction in the context of a fair trial, seem unlikely".[12] In a decision that was upheld on appeal, he committed Diab for extradition. Then Minister of Justice, Rob Nicholson, ordered Diab surrendered in 2012. After his final appeal was rejected, Diab was extradited to France in November 2014, where he was denied bail and spent over three years in prison before he was ultimately released and allowed to return to Canada.[13]

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[8] *France v. Diab*, [2011] O.J. No. 2551 at para. 184, 2011 ONSC 337, 236 C.R.R. (2d) 248 (Ont. S.C.J.), affd [2014] O.J. No. 2305, 2014 ONCA 374 (Ont. C.A.), leave to appeal refused [2014] S.C.C.A. No. 317 (S.C.C.).

[9] *France v. Diab*, [2011] O.J. No. 2551 at para. 122, 2011 ONSC 337, 236 C.R.R. (2d) 248 (Ont. S.C.J.), affd [2014] O.J. No. 2305, 2014 ONCA 374 (Ont. C.A.), leave to appeal refused [2014] S.C.C.A. No. 317 (S.C.C.).

[10] *France v. Diab*, [2011] O.J. No. 2551 at para. 123, 2011 ONSC 337, 236 C.R.R. (2d) 248 (Ont. S.C.J.), affd [2014] O.J. No. 2305, 2014 ONCA 374 (Ont. C.A.), leave to appeal refused [2014] S.C.C.A. No. 317 (S.C.C.).

[11] *France v. Diab*, [2011] O.J. No. 2551 at para. 190, 2011 ONSC 337, 236 C.R.R. (2d) 248 (Ont. S.C.J.), affd [2014] O.J. No. 2305, 2014 ONCA 374 (Ont. C.A.), leave to appeal refused [2014] S.C.C.A. No. 317 (S.C.C.).

[12] *France v. Diab*, [2011] O.J. No. 2551 at paras. 190, 191, 2011 ONSC 337, 236 C.R.R. (2d) 248 (Ont. S.C.J.), affd [2014] O.J. No. 2305, 2014 ONCA 374 (Ont. C.A.), leave to appeal refused [2014] S.C.C.A. No. 317 (S.C.C.).

[13] Department of Justice, "Independent Review of the Extradition of Dr. Hassan Diab" (July 26, 2019), online: https://www.justice.gc.ca/eng/rp-pr/cj-jp/ext/01/p4.html#a17.

II. A PROMISE TO TELL THE TRUTH

The *France v. Diab*[14] case is a symptom of a broader problem in Canadian law. Our courts have, it argues, placed such great emphasis on pleasing our allies, that they have undermined the rights of Canadian citizens.[15] It has done so under the guise of Canada's international obligations and the role our courts have placed on a peculiar Canadian invention: comity in public law.[16]

In the Canadian legal system, "'comity' is no joke. Canada has adopted an extradition policy which focuses obsessively on its perceived international obligations rather than upon the individual rights of Canadians."[17] The Canadian approach, with its reliance on comity, stands in sharp contrast to the commentary of international lawyers, the very group of people who would otherwise be expected to endorse the important role to be played by comity. In truth, international lawyers do not think highly of comity.[18]

In an earlier paper, I developed a broad critique of the use of comity in section 7 jurisprudence.[19] I argued that the SCC has generally been so deferential to foreign sovereigns under the doctrine of comity as to have created a situation in which any evaluation by Canadian courts of the actions of those foreign states, their courts or their rules of evidences will likely be found to run afoul of comity. Chaining itself to a rigid prohibition on the exercise of extraterritorial jurisdiction, the SCC has been willing to give effect to the rules of virtually any foreign legal system that is even remotely compliant with human rights norms. It has invoked comity as a trump card when *Canadian Charter of Rights and Freedoms*[20] and international legal obligations are in tension. I concluded that the SCC's comity jurisprudence is overly

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[14] [2011] O.J. No. 2551 at para. 169, 2011 ONSC 337, 236 C.R.R. (2d) 248 (Ont. S.C.J.) [hereinafter "*Diab*"], affd [2014] O.J. No. 2305, 2014 ONCA 374 (Ont. C.A.), leave to appeal refused [2014] S.C.C.A. No. 317 (S.C.C.).

[15] For a scathing summary, see Neil Macdonald, "Canada betrays its own citizens. Hassan Diab's case is among its most egregious" (September 15, 2018), online: CBC News https://www.cbc.ca/news/opinion/hassan-diab-1.4823570.

[16] Kevin W. Gray, "That Most Canadian of Virtues: Comity in Section 7 Jurisprudence" (2020) 10 W. J. Legal Stud. 1.

[17] Gary Botting, *Canadian Extradition Law Practice*, 5th ed. (Markham, ON: LexisNexis Canada, 2015) at 2.

[18] Lawrence Antony Collins, Albert Venn Dicey & John Humphrey Carlile Morris, *Dicey and Morris on the Conflict of Laws*, 13 ed. (London, Sweet and Maxwell, 2000) at 534 ("[C]omity is used to cover a view which . . . affords a singular specimen of confusion of thought produced by laxity of language").

[19] Kevin W. Gray, "That Most Canadian of Virtues: Comity in Section 7 Jurisprudence" (2020) 10 W. J. Legal Stud. 1.

[20] Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 (hereinafter "the Charter").

broad, capacious and rests on a misunderstanding of what extraterritoriality really is.

There are numerous problems with this approach. First, our reliance on comity is wholly unnecessary. Comity does not prevent a judicial determination of what effect to give the actions of foreign sovereigns. While there may be a limited place for comity in diplomatic relations and the law of immunity, there is no principled reason, other than solicitude to foreign sovereigns, for its expansive use in Charter jurisprudence.

Second, the reliance on comity undermines Charter protections. Courts have been reluctant to extend rights protections extraterritoriality. However, abandoning the concept of comity would not necessarily require extending full Charter protections.[21] As Justice Bastarache suggested in *R. v. Hape*,[22] Canadian courts could always ask, after finding that the alleged rights infringing actions were imputable to a Canadian government actor, whether there existed equivalent human rights protections and fundamental human rights norms available in the foreign jurisdiction. Differences in criminal procedure, as was the case in *Hape* and *R. v. Cook*,[23] might be *prima facie* evidence of a breach of the Charter, but in most circumstances, they would be permitted by section 1.

The problem is particularly acute in the context of extradition. This is not a new observation. As Professor La Forest argued, writing shortly after the release of the revised 1999 version of the *Extradition Act*, the updated Act unduly "limit[ed] the liberty interest in favour of comity"[24] and undermined due process.[25] Since then, however, no article has followed up to examine the ways in which comity has permeated all aspects of the extradition prospect. This article addresses that short-coming, arguing that La Forest's predictions have proven true, and if anything, reforms to the extradition act did little to overcome flaws in the earlier jurispru-

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[21] Courts have grappled with the question in different ways. While some courts, such as the USSC, have taken even a narrower approach than Canadian courts, holding that protections under the Bill of Rights do not generally apply extraterritorially (*United States v. Alvarez-Machain*, 504 U.S. 655), other courts have broadened the territorial scope of human rights protections. For instance, the European Court of Human Rights has adopted a test based on the exercise of public powers outside the states' borders (*Loizidou v. Turkey (preliminary objections)* (1995) Series A no. 310; *Al-Skeini and others v. United Kingdom*, App. No. 55721/07 (ECtHR, July 7, 2011) with a limited exception for transboundary effects (*Issa and Others v. Turkey*, App. No. 31821/96 (ECtHR, November 16, 2004).

[22] [2007] S.C.J. No. 26, [2007] 2 S.C.R. 292, 2007 SCC 26 (S.C.C.) [hereinafter "*Hape*"].

[23] *R. v. Hape*, [2007] S.C.J. No. 26, [2007] 2 S.C.R. 292, 2007 SCC 26 (S.C.C.); *R. v. Cook*, [1998] S.C.J. No. 68, [1998] 2 S.C.R. 597 (S.C.C.).

[24] Anne Warner La Forest, *La Forest's Extradition to and from Canada*, 3d ed. (Aurora: Canada Law Book, 1991) c. 1–2.

[25] Anne Warner LaForest, "The Balance Between Liberty and Comity in the Evidentiary Requirements Applicable to Extradition Proceedings" (2002) 28 Queen's L. J. 95 at 95.

dence.[26]

While courts have said that a committal hearing should be analogized to a preliminary hearing and committal to stand trial,[27] in key ways extradition is wholly unlike any other committal to trial. Once extradition is affected, those extradited can no longer rely on the protections of the Charter. An individual extradited from Canada can, by definition, no longer benefit from the protections of what instantly becomes a foreign legal system. Instead, the only protections Canada can afford such an individual are whatever, often meagre and rare protections Canada has negotiated for them — usually restricted to conditions of imprisonment or protection from capital punishment. The effect of Canada's approach has meant eviscerating our Charter rights.

III. THE EXTRADITION FRAMEWORK

Every country approaches cooperation in criminal law differently. As Justice Rosenberg wrote in *Yang*, "[t]here is no single universal model for extradition in all countries or even in the same country."[28] It is for each country to determine how (and if) it will extradite Citizens and foreign nationals on its territory.[29] In so far as "[e]xtradition is primarily a matter between sovereign countries . . . [it is] established and controlled through treaties. The terms of those treaties reflect the intentions and expectations of the contracting nations."[30]

Extradition, like the criminal law generally, requires that a balance be struck between the tensions generated by protections afforded to the individual and the importance of the objectives the law seeks to accomplish. These objectives, "the investigation, prosecution, repression and punishment of both national and transnational crimes for the protection of the public,"[31] as Justice LaForest wrote in *United States of America v. Cotroni*, are of pressing and substantial concern, and are "essential to the maintenance of a free and democratic society".[32]

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[26] Many of the cases still cited in extradition cases as good call predate the 1999 reforms. I thank Leo Adler for drawing my attention to this point.

[27] *Argentina v. Mellino*, [1987] S.C.J. No. 25 at para. 20, [1987] 1 S.C.R. 536 (S.C.C.).

[28] *United States of America v. Yang*, [2001] O.J. No. 3577 at para. 31, 56 O.R. (3d) 52 (Ont. C.A.) [hereinafter "*Yang*"].

[29] Many civil law countries in fact will not extradite their nationals (see discussion at fn 177, *infra*).

[30] *Philippines (Republic) v. Pacificador*, [1993] O.J. No. 1753, 14 O.R. (3d) 321 at 331 (Ont. C.A.); see also *United States of America v. McVey*, [1992] S.C.J. No. 95, [1992] 3 S.C.R. 475 at 507–508 (S.C.C.).

[31] *United States of America v. Cotroni; United States of America v. El Zein*, [1989] S.C.J. No. 56, [1989] 1 S.C.R. 1469 at 1490 (S.C.C.).

[32] *United States of America v. Cotroni; United States of America v. El Zein*, [1989] S.C.J. No. 56, [1989] 1 S.C.R. 1469 at 1490 (S.C.C.).

The history of Canadian extradition law is conditioned by two key facts: our common law heritage and our geographical proximity to the United States. Our *Extradition Act* was adopted from the *British Act*,[33] but has evolved without the constraints of the jurisprudence of the European Court of Human Rights. Additionally, it reflects what Justice LaForest called a special relationship with the United States which must be sedulously fostered:

> Because of the facility with which criminals can escape from one country to the other, Canada and the United States have always been in the forefront of the development of this procedure. This special vulnerability — strongly accentuated today — made it imperative that little leniency be accorded citizens in this regard. . . . For well over one hundred years, extradition has been part of the fabric of our law.[34]

This theme of vulnerability is repeated again and again in extradition cases. That is, that absent comity and international cooperation, Canada will become a haven for foreign criminals.

Under the current *Extradition Act*,[35] the extradition process begins with a demand from a requesting state for the extradition of an individual physically present in Canada. Upon receipt of such requests, the Minister is empowered to ask the Attorney General of Canada — seemingly two separate officials, but in reality, one: *i.e.*, the Minister's alter ego — to apply for a provisional arrest warrant.[36] If the warrant is issued, an individual will then be arrested.

The Minister may then issue an Authority to Proceed ("ATP"), if the Minister is satisfied that the request properly specifies the name and description of the person sought and that the conduct which constitutes the alleged foreign offences for which the person is sought are also offences under Canadian law, for which a person could be punishable by two or more years in prison (unless the extradition treaty specifies otherwise).[37]

The Minister's ATP will trigger a committal hearing, presided over by a Superior Court judge (serving as an extradition judge). The role of the extradition judge is a modest one.[38] At the hearing, the test for committal is the same as at a pretrial hearing, namely "whether or not there is any evidence upon which a reasonable jury

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[33] *United States v. Allard*, [1991] S.C.J. No. 30 at para. 8, [1991] 1 S.C.R. 861 (S.C.C.) (noting that "[t]he Canadian [Extradition] Act was closely modelled on the British statute").

[34] *United States of America v. Cotroni; United States of America v. El Zein*, [1989] S.C.J. No. 56, [1989] 1 S.C.R. 1469 (S.C.C.); citing to see *Re Burley (1865)*, 60 B.F.S.P. 1241 at 1261.

[35] S.C. 1999, c. 18.

[36] *Extradition Act*, S.C. 1999, c. 18, ss. 11, 12.

[37] *Extradition Act*, S.C. 1999, c. 18, ss. 3, 15.

[38] *Ho v. Australia*, [2000] B.C.J. No. 2650 at para. 19, 2000 BCSC 153 (B.C.S.C.).

properly instructed could return a verdict of guilty",[39] and whether that verdict of guilty would be with respect to a crime for which the condition of double-criminality is met. Under the revised *Extradition Act, 1999*, the extradition judge may consider constitutional questions, but her powers are limited: "[w]hile a committal judge has the power to decide constitutional questions, *this jurisdiction extends only so far as is necessary for the judge to perform his or her function under s. 29(1) of the Extradition Act*."[40]

The narrow question to be decided by the extradition judge, as clarified in subsequent decisions, is whether there is evidence in the ROC that is available for trial and not manifestly unreliable, upon which a reasonable jury, properly instructed, could convict. It contemplates a two-stage process. First, the court determines whether the evidence in the ROC is available for trial and has attained threshold reliability to be admissible. Where the evidence provides sufficient *indicia* of reliability to make it worth consideration, it should be admitted and evaluated for the purposes of extradition.[41]

Then, under a process of limited weighing,[42] the court considers the remainder of the evidence (including defence evidence) to determine whether or not to commit the person sought.[43] An extradition judge may decline to commit for extradition

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[39] *United States of America v. Ferras; United States of America v. Latty*, [2006] S.C.J. No. 33 at para. 41, [2006] 2 S.C.R. 77, 2006 SCC 33 (S.C.C.) [hereinafter "*Ferras*"]; overturning *United States of America v. Shephard*, [1976] S.C.J. No. 106, [1977] 2 S.C.R. 1067 (S.C.C.).

[40] *United States of America v. Romano*, [2016] B.C.J. No. 2337 at para. 13, 2016 BCCA 444 (B.C.C.A.) [emphasis added].

[41] *United States of America v. Romano*, [2016] B.C.J. No. 2337 at para. 13, 2016 BCCA 444 (B.C.C.A.) [emphasis added].

[42] *United States of America v. Ferras; United States of America v. Latty*, [2006] S.C.J. No. 33 at para. 46, [2006] 2 S.C.R. 77, 2006 SCC 33 (S.C.C.) (cautioning that the weighing must be limited to avoid engaging in a substantial violation of foreign law and violating the rules of comity); *Arcuri*; *United States of America v. Lorenz*, [2007] B.C.J. No. 1376, 2007 BCCA 342, 222 C.C.C. (3d) 16 (B.C.C.A.); *United States of America v. Dhanda*, (February 19, 2009), Vancouver 24028 (B.C.S.C.) affd [2010] B.C.J. No. 954, 2010 BCCA 200 (B.C.C.A.); *United States of America v. Welch*, [2007] B.C.J. No. 2786, 2007 BCSC 1890 (B.C.S.C.).

[43] *France v. Diab*, [2011] O.J. No. 2551 at para. 32, 2011 ONSC 337, 236 C.R.R. (2d) 248 (Ont. S.C.J.), affd [2014] O.J. No. 2305, 2014 ONCA 374 (Ont. C.A.), leave to appeal refused [2014] S.C.C.A. No. 317 (S.C.C.). There is some divergence between courts of appeal as to exactly how to understand the test. The unreasonable verdict test was stated by the SCC in *R v. Yebes*, [1987] S.C.J. No. 51 at para. 23, [1987] 2 S.C.R. 168 (S.C.C.); *R. v. Biniaris*, [2000] S.C.J. No. 16 at para. 36, 2000 SCC 15 ("the test has both an objective assessment and, to some extent, a subjective one. It requires the appeal court to determine what verdict a reasonable jury, properly instructed, could judicially have arrived at, and, in doing so, to review, analyze and, within the limits of appellate disadvantage, weigh the evidence"). This was the test adopted in *France v. Diab*, [2011] O.J. No. 2551 at para. 138, 2011 ONSC 337, 236 C.R.R. (2d) 248 (Ont. S.C.J.), affd [2014] O.J. No. 2305, 2014 ONCA 374 (Ont. C.A.),

where the evidence is manifestly unreliable or where there is no evidence available for trial.[44] There need not be direct evidence. A conclusion justifying committal can be drawn, as in *Diab*, from circumstantial evidence.[45] Only circumstantial evidence which was so deficient as to prevent an inference of guilt would be sufficient to permit a judge to conclude that a reasonable jury could not convict.[46]

Additionally, deviating from the common law rule, evidence need not be received *viva voce*. All evidence which would be admissible in Canada is admissible under the *Extradition Act*.[47] Because of the difficulty in obtaining foreign witnesses or other evidence (and, courts have said, to meet our foreign obligations),[48] the

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leave to appeal refused [2014] S.C.C.A. No. 317 (S.C.C.).

However, in British Colombia, the test was more rigorous. The ONCA wrote in *Graham* that "the *Ferras* approach demands more; it demands a judicial appraisal of the case to ensure that there is a 'plausible case' and that the subject is not committed in a case where 'it would be dangerous or unsafe to convict, and the case should not go to a jury'. (para. 54)"; *United States of America v. Graham*, [2007] B.C.J. No. 1390 at para. 23, 2007 BCCA 345 (B.C.C.A), leave to appeal refused [2007] S.C.C.A. No. 467 (S.C.C.). There was previously some support for this position in Ontario where Moldaver J. (as he then was) wrote, in *United States of America v. Thomlison*, [2007] O.J. No. 246 at par. 45, 2007 ONCA 42 (Ont. C.A.):

> Unlike the situation that existed post *Shephard*, *Ferras* now authorizes extradition judges to assess the availability and quality of the evidence that can legitimately be included in the "some evidence" basket for sufficiency purposes. In my view, that enables them to discard evidence that is not realistically available for trial and/or evidence that is manifestly unreliable, i.e. evidence upon which it would clearly be dangerous or unsafe to convict.

This would no longer appear to be good law anywhere in Canada, however, following *M. (M.) v. United States of America*, [2015] S.C.J. No. 62 at para. 67, [2015] 3 S.C.R. 973 (S.C.C.).

[44] *United States of America v. Ferras; United States of America v. Latty*, [2006] S.C.J. No. 33 at para. 50, [2006] 2 S.C.R. 77, 2006 SCC 33 (S.C.C.) [hereinafter "*Ferras*"].

[45] *United States of America v. Dhanda* (19 February 2009), Vancouver 24028 (S.C.), affd [2010] B.C.J. No. 954, 2010 BCCA 200 (B.C.C.A.) (28. If the circumstantial evidence is reasonably capable of supporting a number of inferences, and if one of those inferences supports guilt, the person sought must be committed. The inferences need not be compelling or even easily drawn in order to be reasonable: *R. v. Katwaru*, [2001] O.J. No. 209 at paras. 39-41, 52 O.R. (3d) 321,153 C.C.C. (3d) 433 (Ont. C.A.). (A reasonable inference does not have to be the most probable inference).

[46] *United States of America v. Pal*, [2009] B.C.J. No. 2885 at paras. 22-27, 2009 BCSC 1930 (B.C.S.C.). Compare this approach to *R. v. Villaroman*, [2016] S.C.J. No. 33, 2016 SCC 33, [2016] 1 S.C.R. 1000 (S.C.C.).

[47] *Extradition Act*, S.C. 1999, c. 18, s. 32.

[48] *Government of Republic of Italy v Piperno* [1982] S.C.J. No. 10, 66 C.C.C. (2d) 1 (S.C.C.); See also *Re Phipps*, [1882] O.J. No. 159, 1 O.R. 586 (Ont. H.C.J.), affd [1883] O.J. No. 52, 8 O.A.R. 77 (Ont. C.A.) (the evidence was not sworn but the witness was warned of the requirement to tell the truth).

Extradition Act allows deposition and statements under oath to be received.[49] Documents shall be deemed to be authenticated and presumptively reliable if they are certified to be originals or true copies.[50] Hearsay and summaries have also been ruled to be admissible for extradition purposes, even if not admissible under Canadian law for domestic trials.[51]

The court in *United States of America v. Ferras; United States of America v. Latty*,[52] in finding that section 7 of the Charter was engaged by extradition, found that the accused must be given, pursuant to principles of fundamental justice, "a meaningful opportunity to rebut that presumption".[53] Section 32(1)(c) of the *Extradition Act* codified this by permitting the "person sought for extradition may challenge the sufficiency of the case including the reliability of certified evidence" if "the judge considers it reliable".[54]

Thus, in response to any evidence proffered as part of the extradition record, an individual may present other evidence during the committal hearing as a rebuttal. "[T]he question I must ask myself is whether the proposed evidence could lead me to the conclusion that there is evidence in the record of the case essential for committal that could be found manifestly unreliable or so defective that it should be removed when deciding the issue of committal."[55]

However, this right appears to be without any teeth. In *Diab*, the ONSC found that although the ROC was "unconventional"[56] (comprising in large part information provided via intelligence gathering), in so far as it was not relied upon by

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[49] *Extradition Act*, S.C. 1999, c. 18, s. 33; Anne Warner La Forest, *La Forest's Extradition to and From Canada*, 3d ed. (Aurora, Canada Law Book, 1991) at 151. For example, Article 10(2) of the U.S.-Canada extradition treaty reads. The obligations of foreign depositions and statements need not be strictly complied with. They should be liberally construed to meet our international obligations.

[50] *Extradition Act*, S.C. 1999, c. 18, s. 33; Anne Warner La Forest, *La Forest's Extradition to and From Canada*, 3d ed. (Aurora, Canada Law Book, 1991) at 152.

[51] *United States of America v. Anekwu*, [2009] S.C.J. No. 41, 2009 SCC 41 (S.C.C.).

[52] [2006] S.C.J. No. 33 at para. 53, [2006] 2 S.C.R. 77, 2006 SCC 33 (S.C.C.) [hereinafter "*Ferras*"].

[53] *France v. Diab*, [2014] O.J. No. 2305 at para. 4, 2014 ONCA 374 (Ont. C.A.), leave to appeal refused [2014] S.C.C.A. No. 317 (S.C.C.).

[54] *United States of America v. Ferras; United States of America v. Latty*, [2006] S.C.J. No. 33 at para. 53, [2006] 2 S.C.R. 77, 2006 SCC 33 (S.C.C.).

[55] *France v. Diab*, [2011] O.J. No. 2551 at para. 9, 2011 ONSC 337, 236 C.R.R. (2d) 248 (Ont. S.C.J.), affd [2014] O.J. No. 2305, 2014 ONCA 374 (Ont. C.A.), leave to appeal refused [2014] S.C.C.A. No. 317 (S.C.C.).

[56] *France v. Diab*, [2011] O.J. No. 2551 at para. 143, 2011 ONSC 337, 236 C.R.R. (2d) 248 (Ont. S.C.J.), affd [2014] O.J. No. 2305, 2014 ONCA 374 (Ont. C.A.), leave to appeal refused [2014] S.C.C.A. No. 317 (S.C.C.).

government counsel, it was not sufficient to make the evidence as a whole unreliable. Moreover, courts have repeatedly cautioned that the hearing is not to be transformed into a domestic criminal trial,[57] and must limit what evidence be included.[58] It is to be abbreviated because:

> . . . extradition is to be and remain an expedited process to ensure prompt compliance with Canada's international obligations that our statute and treaties reflect. These authorities, and others like them, remind extradition hearing judges that the hearing is not a trial, nor should it be allowed to become a trial, as though it were a domestic criminal proceeding. It is not simply a matter of degree. There is a difference in kind between an extradition hearing and the trial of a domestic criminal case.[59]

Unintentionally, in its decision in *Diab*, the ONSC showed the fragility of rights protections at the committal stage. Applying the test in that case, the extradition judge found that the test of manifest unreliability would only be met "[i]f the only available conclusion derived from the ROC and the evidence from the three experts presented on behalf of the person sought was that the French expert was biased, unqualified, and used improper methodology in every respect."[60] Absent "such an unequivocal finding", committal must be ordered.[61]

After a decision on committal has been made, it is for the Minister to make a determination as to whether an individual should be committed to await surrender.[62] The Minister's decision may be delayed where the individual undertakes an appeal

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[57] *France v. Diab*, [2011] O.J. No. 2551 at para. 195, 2011 ONSC 337, 236 C.R.R. (2d) 248 (Ont. S.C.J.), affd [2014] O.J. No. 2305, 2014 ONCA 374 (Ont. C.A.), leave to appeal refused [2014] S.C.C.A. No. 317 (S.C.C.):

> The fact remains that this was never meant to be a trial, or a hearing regarding the guilt or innocence of Mr. Diab. Canada signed an extradition treaty with the Republic of France, who suspect that Mr. Diab is responsible for a heinous crime. They have presented a *prima facie* case against him which justifies his having to face a trial in that country. It is presupposed, based on our treaty with France, that they will conduct a fair trial, and that justice will be done. This decision stands for that proposition, nothing more nothing less.

[58] *France v. Diab*, [2014] O.J. No. 2305 at para. 3, 2014 ONCA 374 (Ont. C.A.), leave to appeal refused [2014] S.C.C.A. No. 317 (S.C.C.).

[59] *Germany v. Schreiber*, [2000] O.J. No. 2618 at para. 57 (Ont. S.C.J.); see also *United States of America v. Aneja*, [2014] O.J. No. 2500, 2014 ONCA 423 (Ont. C.A.).

[60] *France v. Diab*, [2011] O.J. No. 2551 at para. 124, 2011 ONSC 337, 236 C.R.R. (2d) 248 (Ont. S.C.J.), affd [2014] O.J. No. 2305, 2014 ONCA 374 (Ont. C.A.), leave to appeal refused [2014] S.C.C.A. No. 317 (S.C.C.).

[61] *France v. Diab*, [2011] O.J. No. 2551 at para. 124, 2011 ONSC 337, 236 C.R.R. (2d) 248 (Ont. S.C.J.), affd [2014] O.J. No. 2305, 2014 ONCA 374 (Ont. C.A.), leave to appeal refused [2014] S.C.C.A. No. 317 (S.C.C.).

[62] *Extradition Act*, S.C. 1999, c. 18, s. 40(1).

against an order of committal,[63] although this is rarely done.[64] The Minister's decision may subsequently be subject to judicial review.[65]

Courts have found that the Minister's actions are subject to a more deferential standard of review. While constrained by the Charter, courts have made clear that extradition is fundamentally a two-stage process, where the courts make a factual determination and then the Minister makes a decision. The minister's post-committal decision is fundamentally a discretionary act that is "political in its nature".[66] In so far as Parliament chose to give discretionary authority to the

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[63] *Extradition Act*, S.C. 1999, c. 18, ss. 41(1)(a), 50.

[64] In practice, the decision of an extradition judge and the Minister's decision are often reviewed simultaneously (as occurred in *France v. Diab*, [2014] O.J. No. 2305, 2014 ONCA 374 (Ont. C.A.), leave to appeal refused [2014] S.C.C.A. No. 317 (S.C.C.)).

[65] *Extradition Act*, S.C. 1999, c. 18, s. 57(1): "Despite the *Federal Courts Act*, the court of appeal of the province in which the committal of the person was ordered has exclusive original jurisdiction to hear and determine applications for judicial review under this Act, made in respect of the decision of the Minister . . . .". The Court found in subsequent cases that the decision is to be refused under the administrative law framework: *United States of America v. Cotroni; United States of America v. El Zein*, [1989] S.C.J. No. 56, [1989] 1 S.C.R. 1469 at 1500 (S.C.C.): "I find the argument that the fact that the executive discretion to refuse surrender and the duty to present requests for extradition in court, both fall within the responsibilities of the Minister of Justice, somehow create an unacceptable conflict to have no merit."; cited approvingly in *Idziak v. Canada (Minister of Justice)*, [1992] S.C.J. No. 97, [1992] 3 S.C.R. 631 at 660 (S.C.C.).

[66] *Idziak v. Canada (Minister of Justice)*, [1992] S.C.J. No. 97 at para. 53, [1992] 3 S.C.R. 631 (S.C.C.). Cited approvingly (on the political point) in *France v. Diab*, [2014] O.J. No. 2305, 2014 ONCA 374 (Ont. C.A.), leave to appeal refused [2014] S.C.C.A. No. 317 (S.C.C.); *Ruiz Gomez c. Ministre de la Justice du Canada*, [2017] Q.J. no 13828, 2017 QCCA 1562 (Que. C.A.), leave to appeal refused [2017] S.C.C.A. No. 469 (S.C.C.). Affirming political nature in *Sriskandarajah v. United States of America*, [2012] S.C.J. No. 70, 2012 SCC 70 (S.C.C.), the Court reaffirmed the factors in *United States of America v. Cotroni*, [1989] S.C.J. No. 56, [1989] 1 S.C.R. 1469 (S.C.C.); *United States v. Kerfoot*, [2016] B.C.J. No. 1500 at para. 102, 2016 BCCA 306 (B.C.C.A.); *Vachon c. United States of America v. Cotroni; United States of America v. El Zein*, [1989] S.C.J. No. 56, [1989] 1 S.C.R. 1469 (S.C.C.), *Canada (Procureur général) (États-Unis d'Amérique)*, [2014] J.Q. no 12416 at para. 14, 2014 QCCA 2076 (Que. C.A.); *U.S.A. v. Adam*, [2014] B.C.J. No. 615 at para. 26, 2014 BCCA 136 (B.C.C.A.); *Bouarfa c. Canada (Procureure générale)*, [2015] J.Q. no 12887 at para. 11, 2015 QCCA 1970 (Que. C.A.); *Doyle Fowler c. Canada (Minister of Justice)*, [2013] Q.J. No. 5929 at para. 22, 2013 QCCA 1001 (Que. C.A.); *Lake v. Canada (Minister of Justice)*, [2008] S.C.J. No. 23 at para. 22, 2008 SCC 23, [2008] 1 S.C.R. 761 (S.C.C.); *Carruthers v. Canada (Minister of Justice)*, [2019] A.J. No. 1699 at para. 18, 2019 ABCA 490 (Alta. C.A.); *Németh v. Canada (Justice)*, [2010] S.C.J. No. 56 at para. 64, 2010 SCC 56, [2010] 3 S.C.R. 281 (S.C.C.); *United States of America v. Guevara-Mendoza*, [2018] B.C.J. No. 249 at para. 55, 2018 BCCA 55 (B.C.C.A.); *United States v. Muhammad 'Isa*, [2014] A.J. No. 796 at para. 21, 2014 ABCA 256 (Alta. C.A.); *Hungary v. Horvath*, [2007]

Minister of Justice, "who must consider the good faith and honour of this country in its relations with other states", it is to be subject to deference.[67]

Ultimately, the end result of the bifurcation of duties is that Charter protections can only be narrowly considered by the extradition judge, where they will be held to the more rigorous *Oakes* test, and more broadly considered by the Minister, where the review of her decisions will be subject to the less onerous *Doré* test and balanced against political considerations.[68]

IV. DEFERENCE AND SECTION 7

Most of the "action" during the extradition hearing revolves around section 7.[69] In principle, the extradition judge possesses the power, during the committal phase, in order to preserve the integrity of the court's own process, to grant section 7 remedies.[70] In one notorious case, the courts decline extradition where a prosecutor suggested that if a fugitive did not return voluntarily, he would be exposed to sexual violence in American prisons.[71]

In practice, however, absent extraordinary circumstances, Canadian courts have generally taken a very narrow view of section 7 protections in the extradition context. This practice has been supported by the SCC, which has adopted a particularly high standard of deference to executive action in extradition cases.[72] It has invoked comity, claiming that this deference derives from Canada's strong

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O.J. No. 4077 at para. 18, 2007 ONCA 734 (Ont. C.A.).

[67] *Idziak v. Canada (Minister of Justice)*, [1992] S.C.J. No. 97, [1992] 3 S.C.R. 631 at 659 (S.C.C.), cited approvingly (on the question of honour) in: *Kwok Canada v. Schmidt*, [1987] S.C.J. No. 24, [1987] 1 S.C.R. 500 (S.C.C.), *Mehanneche c. Canada (Procureure générale) (République française)*, [2016] J.Q. no 14572, 2016 QCCA 1732 (Que. C.A.); *Lunn v. Canada (Justice)*, [2016] N.S.J. No. 235, 2016 NSCA 49 (N.S.C.A.); *United States of America v. Guevara-Mendoza*, [2018] B.C.J. No. 249 at para. 76, 2018 BCCA 55 (B.C.C.A.).

[68] See, *e.g.*, *Doré v. Barreau du Québec*, [2012] S.C.J. No. 12, 2012 SCC 12, [2012] 1 S.C.R. 395 (S.C.C.).

[69] Courts have found, generally, that other Charter protections do not apply overseas, as discussed below.

[70] *United States of America v. Chang*, [2006] O.J. No. 369 at para. 50, 205 C.C.C. (3d) 258 (Ont. S.C.J.).

[71] *United States of America v. Cobb*, [2001] S.C.J. No. 20 at para. 43, [2001] 1 S.C.R. 587, 2001 SCC 19 (S.C.C.): "We do not condone the threat of sexual violence as a means for one party before the court to persuade any opponent to abandon his or her right to a hearing. Nor should we expect litigants to overcome well-founded fears of violent reprisals in order to be participants in a judicial process". But narrowed in *United States of America v. Chang*, [2006] O.J. No. 369 at paras. 41-49, 205 C.C.C. (3d) 258 (Ont. S.C.J.); *United States v. Haugen*, [2010] B.C.J. No. 69, 2010 BCSC 56 (B.C.S.C.); *United States of America v. Bonamie*, [2001] A.J. No. 1334, 2001 ABCA 267 (Alta. C.A.).

[72] Amanda J. Spencer, "Fugitive Rights: The Role of the Charter in Extradition Cases" (1993) 51 U. Toronto Fac. L. Rev. 54.

interest in international law enforcement activities in an increasingly globalized world.[73]

Extradition and comity require Canadian judges to embrace foreign and other unfamiliar principles. In *Kindler v. Canada (Minister of Justice)*, Justice McLachlin wrote that:

> While the extradition process is an important part of our system of criminal justice, it would be wrong to equate it to the criminal trial process. It differs from the criminal process in purpose and procedure and, most importantly, in the factors which render it fair. Extradition procedure, unlike the criminal procedure, is founded on the concepts of reciprocity, comity and respect for differences in other jurisdictions. This unique foundation means that the law of extradition must accommodate many factors foreign to our internal criminal law. While our conceptions of what constitutes a fair criminal law are important to the process of extradition, they are necessarily tempered by other considerations.[74]

Or, as Justice La Forest wrote earlier in *Canada v. Schmidt*, our extradition process need not conform with Canadian norms and standards.[75]

Writing in *Kindler*, Justice McLachlin, as she then was, cautioned that if Canada wishes to engage in cooperative international law enforcement, including having her own criminals extradited to Canada, it must be prepared to accept that different countries have different legal systems.[76] To that end, she found that "we must avoid extraterritorial application of the guarantees [*viz.* section 7] in our *Charter* under the guise of ruling extradition procedures unconstitutional".[77]

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[73] *United States of America v. Cotroni; United States of America v. El Zein*, [1989] S.C.J. No. 56, [1989] 1 SCR 1469 at 1485 (S.C.C.) holding that: "[t]he investigation, prosecution and suppression of crime for the protection of the citizen and the maintenance of peace and public order is an important goal of all organized societies [which] . . . cannot realistically be confined within national boundaries".; See also, *Kindler v. Canada (Minister of Justice)*, [1991] S.C.J. No. 63, [1991] 2 S.C.R. 779 at 843-844 (S.C.C.); *Libman v. The Queen*, [1985] S.C.J. No. 56, [1985] 2 S.C.R. 178 at 214 (S.C.C.); *Idziak v. Canada (Minister of Justice)*, [1992] S.C.J. No. 97, [1992] 3 S.C.R. 631 (S.C.C.).

[74] [1991] S.C.J. No. 63, [1991] 2 S.C.R. 779 at 844-845 (S.C.C.) [hereinafter "*Kindler*"].

[75] [1987] S.C.J. No. 24 at para. 50, [1987] 1 S.C.R. 500 (S.C.C.) [hereinafter "*Schmidt*"]: "A decision to surrender a fugitive for trial in a foreign country cannot be faulted as fundamentally unjust because the operation of the foreign law in the particular circumstances has not been subjected to scrutiny to see if it will conform to the standards of our system of justice".

[76] *Kindler v. Canada (Minister of Justice)*, [1991] S.C.J. No. 63, [1991] 2 S.C.R. 779 at 845 (S.C.C.).

[77] *Kindler v. v. Canada (Minister of Justice)*, [1991] S.C.J. No. 63, [1991] 2 S.C.R. 779 at 844 (S.C.C.). Quoting La Forest J. in *Canada v. Schmidt*, [1987] S.C.J. No. 24 (S.C.C.), she wrote that "the *Charter* cannot be given extraterritorial effect to govern how criminal proceedings in a foreign country are to be conducted" (*Canada v. Schmidt*, [1987] S.C.J. No. 24, [1987] 1 S.C.R. 500 at 518 (S.C.C.) [hereinafter "*Schmidt*"].

It is true that Canadian courts have found that comity is not unlimited in its applications. Writing in *Ferras*, Chief Justice of Canada McLachlin held that: "[i]nternational comity does not require the extradition of a person on demand or surmise. Nor does basic fairness to the person sought for extradition require all the procedural safeguards of a trial, provided the material establishes the case sufficient to put the person on trial."[78] In *Kindler*, the Court found that: "[t]he test for whether an extradition law or action offends s. 7 of the *Charter* on account of the penalty which may be imposed in the requesting state, is whether the imposition of the penalty by the foreign state 'sufficiently shocks' the Canadian conscience."[79] The test is ultimately "whether the provision or action in question offends the Canadian sense of what is fair, right and just".[80]

This is a stringent test.[81] In *Németh v. Canada (Justice)*, it was refined further such that the accused "must establish two things on the balance of probabilities: that the persecution would sufficiently shock the conscience or be fundamentally unacceptable to Canadian society *and* that they will in fact be subjected to this persecution"[82] or that the fugitive faces "a situation that is simply unacceptable", violating principles of fundamental justice.[83]

As a practical matter, the extension of comity has been virtually unlimited. Although *Ferras* was supposed to end rubber stamping,[84] that has very much not been the case. Canada has been extraordinarily solicitous to its extradition partners. In the last decade, the U.S. has requested that almost 800 accused be extradited; only eight refusals have been issued.[85] As lower level courts have described the matter, in Canada an extradition hearing is meant to be an expeditious process that has the limited purpose of determining whether a requesting State's evidence sets out a *prima facie* case of conduct that would constitute a criminal act in our country.[86]

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[78] *United States of America v. Ferras; United States of America v. Latty*, [2006] S.C.J. No. 33, [2006] 2 S.C.R. 77, 2006 SCC 33 at 21 (S.C.C.).

[79] *Kindler v. Canada (Minister of Justice)*, [1991] S.C.J. No. 63 at para. 55, 67 C.C.C. (3d) 1 (S.C.C.).

[80] *Canada v. Schmidt*, [1987] S.C.J. No. 24, 33 C.C.C. (3d) 193 at 215 (S.C.C.).

[81] *France v. Diab*, [2014] O.J. No. 2305 at para. 202, 2014 ONCA 374 (Ont. C.A.), leave to appeal refused [2014] S.C.C.A. No. 317 (S.C.C.).

[82] *Németh v. Canada (Justice)*, [2010] S.C.J. No. 56 at para. 7, 2010 SCC 56, [2010] 3 S.C.R. 281 (S.C.C.) (decision of minister rejected on other grounds).

[83] *U.S.A. v. Allard and Charette*, [1987] S.C.J. No. 20, 33 C.C.C. (3d) 501 at 508 (S.C.C.).

[84] *United States of America v. Ferras; United States of America v. Latty*, [2006] S.C.J. No. 33 at para. 25, [2006] 2 S.C.R. 77, 2006 SCC 33 (S.C.C.).

[85] Department of Justice, "Extradition Fact Sheet - statistics on requests from the United States", online: https://www.justice.gc.ca/eng/cj-jp/emla-eej/stat.html (if a request is not withdrawn, it is extraordinarily likely it will be granted).

[86] *France v. Diab*, [2011] O.J. No. 2551 at para. 3, 2011 ONSC 337, 236 C.R.R. (2d) 248

Fundamentally, the lack of success under the *Ferras* test results from the manner in which deference and comity constrain section 7 rights.[87] This occurs in three particular respects: first, the *Ferras* test limits Canadian oversight of potential foreign penalties. Second, it severely controls Canadian scrutiny of foreign evidence. Third, it prevents the scrutiny of foreign motives (in, *e.g.*, abuse of process claims). It does this while giving the Minister a reason to refuse arguments against surrender once committal has been ordered and limiting scrutiny of rights protections in foreign legal systems.

1. Shock the Conscience

With respect to substantive protection, absent the possibility of the death penalty,[88] Canadian courts will virtually never find that a penalty shocks the conscience. Comity requires, Canada courts have found, that we accept that different countries will impose different levels of punishment.[89] In making this determination, courts have continued to rely on the balancing process from *Kindler* and *Ng*.[90] Our extradition regime, the Court has found, "must be flexible enough to accommodate the different sentencing regimes of its respective treaty partners".[91] Charter protections generally will not govern the type of penalty which an individual will receive, except where the individual might receive the death penalty.[92] This is true even where a penalty of life without parole is available for a crime for which it would not be available in Canada.[93]

(Ont. S.C.J.), affd [2014] O.J. No. 2305, 2014 ONCA 374 (Ont. C.A.), leave to appeal refused [2014] S.C.C.A. No. 317 (S.C.C.).

[87] *United States of America v. Ferras; United States of America v. Latty*, [2006] S.C.J. No. 33 at para. 25, [2006] 2 S.C.R. 77, 2006 SCC 33 (S.C.C.).

[88] *United States v. Burns*, [2001] S.C.J. No. 8, 2001 SCC 7, [2001] 1 S.C.R. 283 (S.C.C.).

[89] *United States of America v. Cotroni; United States of America v. El Zein*, [1989] S.C.J. No. 56, [1989] 1 S.C.R. 1469 at page 222 (S.C.C.), *Chuck Sun Lau v. Australia*, 1999 CanLII 5373 at para. 101 (B.C.S.C.): "The principles of comity require that we accept different levels of punishment."

[90] *Reference Re Ng Extradition (Can)*, [1991] S.C.J. No. 64, [1991] 2 S.C.R. 858 (S.C.C.). In *United States of America v. Burns*, [2001] S.C.J. No. 8, [2001] 1 S.C.R. 283 (S.C.C.), the Court affirmed the balancing process set out in *Kindler v. Canada (Minister of Justice)*, [1991] S.C.J. No. 63, [1991] 2 S.C.R. 779 (S.C.C.), and *Reference Re Ng Extradition (Can.)*, [1991] S.C.J. No. 64, [1991] 2 S.C.R. 858 (S.C.C.). However, they found that Canada's attitude to the death penalty had evolved.

[91] *United States of America v Wilcox*, [2015] B.C.J. No. 164 at paras. 24, 25, 2015 BCCA 39 (B.C.C.A.), leave to appeal refused [2015] S.C.C.A. No. 124 (S.C.C.).

[92] *United States v. Burns*, [2001] S.C.J. No. 8 at para. 8, 2001 SCC 7 (S.C.C.) (requiring assurances in all but exceptional cases). *Canada v. Schmidt*, [1987] S.C.J. No. 24, 33 C.C.C. (3d) 193 at 214 (S.C.C.), *per* La Forest J.

[93] *Acosta v. Canada (Minister of Justice)*, [2013] B.C.J. No. 432 at para. 23, 2013 BCCA 105 (B.C.C.A.) (potential life sentence after being committed for extradition for the rape of

As the jurisprudence has evolved, courts have found that the more rigorous analysis that might be carried out under section 12 rather than section 7 does not apply. In *Kindler*, Justice McLachlin, as she then was, found, under the rather dubious logic that any punishment would be carried out by a foreign sovereign not captured by section 32(1) of the Charter, that section 12 guarantees would not apply.[94]

The severity of a sentence will not generally be found to shock the conscience of Canadians.[95] Thus, courts have found that a lengthy or long mandatory minimum prison sentence will not violate section 7,[96] including for possession of drugs and sale of drugs,[97] for fraud,[98] the possession of child pornography potentially resulting in long sentences,[99] or, in one extreme case, a 20-year mandatory minimum sentence for a first conviction for property crimes.[100] Moreover, arbitrariness in sentence length by itself would not violate section 7.[101] Courts have found very few exceptions in recent years. One would be a life sentence for a juvenile.[102] Another,

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a child); *United States of America v. K. (J.H.)*, [2002] O.J. No. 2341, 165 C.C.C. (3d) 449, 4 C.R. (6th) 382 (Ont. C.A.), leave to appeal refused [2002] S.C.C.A. No. 501 (S.C.C.) (in which the appellant faced extradition to Florida on a charge of sexual battery on his seven-year-old daughter. If convicted, he faced a mandatory life sentence without possibility of parole for 25 years); *United States of America v. Whitley*, [1994] O.J. No. 2478, 119 D.L.R. (4th) 693, 94 C.C.C. (3d) 99 at 118 (Ont. C.A.) (finding that a mandatory minimum 20-year sentence, which might be unconstitutional in Canada, would not shock the conscience of Canadians).

[94] This was one of the many disagreement in the case. In his dissent, Cory J. found that extradition would violate s. 12 of the Charter and could not be saved by s. 1. It also found that Canadian authorities could not hide behind the artifice that any actual execution would be carried out by American authorities (*Reference Re Ng Extradition (Can)*, [1991] S.C.J. No. 64, [1991] 2 S.C.R. 858 (S.C.C.)).

[95] *United States of America v. Wilcox*, [2015] B.C.J. No. 164 at para. 41, 2015 BCCA 39, 321 C.C.C. (3d) 82 (B.C.C.A.), leave to appeal refused [2015] S.C.C.A. No. 124 (S.C.C.).

[96] *United States v. K. (J.H.)*, [2002] O.J. No. 2341, 165 C.C.C. (3d) 449 (Ont. C.A.), leave to appeal refused [2002] S.C.C.A. No. 501 (S.C.C.).

[97] *United States of America v. Jamieson*, [1996] S.C.J. No. 24, [1996] 1 S.C.R. 465 (S.C.C.) (20-years for possession of cocaine would not shock the conscience), overturning *Jamieson v. The Minister of Justice* 1994 CanLII 5920 (Que. C.A.); *Carruthers v. Canada (Minister of Justice)*, [2019] A.J. No. 1699, 2019 ABCA 490 (Alta. C.A.); *Lake v. Canada (Minister of Justice)*, [2008] S.C.J. No. 23, 2008 SCC 23 (S.C.C.).

[98] *Canada v. Stewart*, 1998 CanLII 6226 (B.C.C.A.).

[99] *United States of America v. Lane*, [2017] O.J. No. 2621, 2017 ONCA 396 (Ont. C.A.), leave to appeal refused [2017] S.C.C.A. No. 390 (S.C.C.).

[100] *Berladyn v. United States of America*, 1992 CanLII 1773 (B.C.C.A.).

[101] *United States of America v. Lake*, 2006 CanLII 29924 at para. 35 (Ont. C.A.).

[102] *Doyle Fowler c. Canada (Ministre de la Justice)*, [2011] J.Q. no 6800, 2011 QCCA 1076, 96 CR (6th) 200 (Que. C.A.).

emerging exception, would be failure to consider the aboriginal status of an offender.[103]

In a similar manner, just as section 12 does not apply and defendants have had to rely on section 7 protections, section 11 protections likewise do not apply. Thus, protections against double jeopardy found in section 11(h) are not to be considered by extradition judges. Courts have found, drawing on Justice McLachlan's logic in *Kindler*, that in so far as the fugitive is not charged with an offence by one of the governments to which the Charter applies.[104] Courts have declined to find that section 11 is engaged merely by virtue of the government of Canada participating in an action which would, if carried out in Canada, violate section 11.

The first (and still most important) case to deal with the broad issue of section 11 protections was *Argentian v. Mellino*.[105] In that case, the Court was asked to consider if a failure by the requesting state to provide the necessary evidence for extradition meant that subsequent attempts at extradition must be rejected under section 11(b) for undue delay. The SCC chose to deal with the issues raised by the case predominantly under section 7 (as section 11 protections do not apply to the actions of foreign sovereigns).[106] It found that section 7 protections would only be triggered by a delay attributable to Canadian authorities.[107] It excused the failure of the Argentinian authorities to provide evidence at the first extradition hearing, which resulted in Mellino's release, holding that it was attributable to the complexity "in dealing with activities that reach across national boundaries and involve different systems of law and several levels of bureaucracies in the same way as that in local prosecutions".[108] It found that comity precluded it from supervising "the conduct of

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[103] *Sheck v. Canada (Minister of Justice)*, [2019] B.C.J. No. 2013, 2019 BCCA 364 (B.C.C.A.); relying on the SCC's holding in *R. v. Gladue*, [1999] S.C.J. No. 19, [1999] 1 S.C.R. 688 (S.C.C.).

[104] *The United States of America v. Akrami*, [2001] B.C.J. No. 174 at para. 5, 2001 BCSC 165 (B.C.S.C.); *Argentina v. Mellino*, [1987] S.C.J. No. 25, [1987] 1 S.C.R. 536 (S.C.C.) [hereinafter "*Mellino*"].

[105] [1987] S.C.J. No. 25, [1987] 1 S.C.R. 536 (S.C.C.) [hereinafter "*Mellino*"]; affd in *Bedford*, [2013] Q.J. No. 6943 at para. 19, 2013 QCCS 3661 (Que. S.C.); *Italy v. Seifert*, [2003] B.C.J. No. 1519, 2003 BCSC 991 (B.C.S.C.).

[106] It declined to apply s. 11(b) protections extraterritorially.

[107] *Argentina v. Mellino*, [1987] S.C.J. No. 25 at para. 24, [1987] 1 S.C.R. 536 (S.C.C.); cited approvingly in the similar *United States v. Allard*, [1987] S.C.J. No. 20, 33 C.C.C. (3d) 501 [1987] 1 S.C.R. 564 (S.C.C.).

[108] *Argentina v. Mellino*, [1987] S.C.J. No. 25 at para. 24, [1987] 1 S.C.R. 536 (S.C.C.) (it similarly held that there was no violation of the principle of *ne bis in idem*:

> Since a discharge at an extradition hearing for lack of evidence, like that at a preliminary hearing, is not final, it has long been recognized that new proceedings may be instituted on new, or even on the same evidence before the judge at the original hearing or another judge: see, for example, *Attorney General of Hong Kong v. Kwok A Sing* (1873), L.R.

the diplomatic and prosecutorial officials of a foreign state".[109]

The Court, in *United States of America v. Drysdale*, found that protections against double jeopardy were not to be dealt with under section 11(h) but rather under section 7 and that, in any event, were not properly considered at the committal, but at the ministerial stage of proceedings.[110] In practice, this has meant that successive ministers have allowed extradition cases where it would appear that similar prosecutions had already taken place. This has occurred because, when reviewing the decisions of the minister, the courts have found that the correct approach to double jeopardy is not conduct-based but offence-based.[111] Absent evidence that repeated attempts at prosecution of an individual amount to harassment of an individual sufficiently oppressive to prevent surrender, court have been highly unlikely to interfere after the minister has made a decision.[112]

In *Schmidt*, still good law, Justice La Forest wrote that the prosecution in the U.S. of an individual previously acquitted of kidnapping under the U.S. Federal Code for the crime of child-stealing in Ohio would not violate section 7 or shock the conscience of Canadians. In reasoning that is hard to find convincing, he struggled to distinguish the two offences, drawing on the *Commerce Clause* of the *Constitution of the United States of America*:

> the two offences involve quite different elements. The kidnapping offence is aimed at *regulating interstate and foreign commerce*, and maritime jurisdiction, as well as internationally protected persons. The state action is aimed at public order within the state, and is designed particularly to protect young persons. Various other elements and defences appear in one provision but not the other. Different interests are involved with different prosecutorial authorities following their own paths.[113]

The same approach continues to be followed. In *United States v. Qumsyeh*, the

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5 P.C. 179; *Re Harsha (No 2)* (1906), 11 C.C.C. 62 (Ont. H.C.); *Armstrong v. State of Wisconsin*, [1972] F.C. 1228 (C.A.) This was recognized by the judge and the parties, who acted on that basis."

[109] *Argentina v. Mellino*, [1987] S.C.J. No. 25 at paras. 23, 24, [1987] 1 S.C.R. 536 (S.C.C.).

[110] *United States of America v. Drysdale*, 2000 CanLII 22651 at para. 25 (Ont. S.C.J.); *United States of America v. K. (J. H.)*, [2002] O.J. No. 2341 at para. 24, 165 C.C.C. (3d) 449 (Ont. C.A.).

[111] *United States of America v. Lane*, [2017] O.J. No. 2621 at para. 59, 2017 ONCA 396 (Ont. C.A.), leave to appeal refused [2017] S.C.C.A. No. 390 (S.C.C.). Interestingly, the SCC has been quite happy to adopt a conduct-based approach to double criminality (*Canada (Justice) v. Fischbacher*, [2009] S.C.J. No. 46, 2009 SCC 46, [2009] 3 S.C.R. 170 at para. 47 (S.C.C.)).

[112] *Canada v. Schmidt*, [1987] S.C.J. No. 24 at para. 56, [1987] 1 S.C.R. 500 (S.C.C.).

[113] *Canada v. Schmidt*, [1987] S.C.J. No. 24 at para. 57, [1987] 1 S.C.R. 500 (S.C.C.) [emphasis added]; the *Commerce Clause* is contained in the *Constitution of the United States of America*, art. I, s. 8, cl. 3 (stating that the United States Congress shall have the power "[t]o

Minister and subsequently the courts, allowed extradition to the U.S. to permit prosecution for a murder where a sentence had already been served in Jordan for a lesser version of murder.[114] In *Lake v. Canada (Minister of Justice)*, the SCC allowed extradition to face a charge of trafficking in cocaine where the accused had already been convicted of conspiring to traffic cocaine, for the same transactions, in Canada.[115] In *United States of America v. Lane*, the courts allowed extradition to face a charge of running a large-volume crime ring distributing child pornography where the accused had already been convicted of distributing child pornography in Canada.[116] In *États-Unis d'Amérique v. Garz*, the QCCA permitted extradition of an individual who had already plead guilty in Canada for possession of marijuana to face trafficking charges for the same underlying act.[117] In fact, section 7 protections have been so toothless that, in *R. v. Van Rassel*, the SCC rejected a plea of *autrefois acquis* and permitted the prosecution in Canada for breach of trust for an individual who had been previously prosecuted in Florida for soliciting a bribe based on the same underlying facts.[118] Ultimately, our desire to play along has effectively undermined any double jeopardy protections under section 7.

2. Disclosure

Comity controls Canadian court's willingness to permit scrutiny of foreign evidence. While in rare instances courts will require disclosure, such cases, as in all other areas of extradition law, remain rare. In part, this is because of the new rules brought in during the revision of the *Extradition Act*.

In 1999, the former *Extradition Act* was repealed and replaced with new legislation. The new *Extradition Act*, in the words of one commentator, sought "to alter the judicial process of extradition to make the hearing more accessible to some of Canada's extradition partners, especially civil law states, which had experienced difficulties even with the more flexible admissibility rules applicable to the extradition hearing".[119] As rewritten, evidence no longer need be admissible

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regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes").

[114] *United States v. Qumsyeh*, [2015] O.J. No. 3919, 2015 ONCA 551 (Ont. C.A.), leave to appeal refused [2015] S.C.C.A. No. 370 (S.C.C.).

[115] [2008] S.C.J. No. 23 at para. 45, 2008 SCC 23, [2008] 1 S.C.R. 761 (S.C.C.): "In my view, it was reasonable for the Minister to conclude, relying upon the transcript of the sentencing hearing, that the appellant had not already been punished for the conduct underlying the U.S. indictment.".

[116] [2017] O.J. No. 2621, 2017 ONCA 396 (Ont. C.A.), leave to appeal refused [2017] S.C.C.A. No. 390 (S.C.C.).

[117] [2006] J.Q. no 1339, 2006 QCCA 222, 215 C.C.C. (3d) 429 (Que. C.A.).

[118] [1990] S.C.J. No. 11, [1990] 1 S.C.R. 225 (S.C.C.).

[119] Anne Warner La Forest, *La Forest's Extradition to and from Canada*, 3d ed. (Aurora: Canada Law Book, 1991) at 99.

according to the laws of Canada or the *Canada Evidence Act*.[120]

Instead, the extradition judge reviews the ROC, which contains a summary of the evidence that is admissible in the case rather than the evidence itself. That summary will contain certification from a judicial or prosecuting authority that the evidence therein "is available for trial and would be sufficient under the law of that state to justify prosecution".[121] The record could potentially include evidence which would be inadmissible in Canada, including unsworn evidence and hearsay, whether or not it is necessary or reliable, such as in *United States of America v. Anekwu*.[122]

Defendants have enjoyed limited success in obtaining, let alone attacking, foreign evidence. Initially, in responses to changes to the Act, defendants attempted to argue that the limited record used during extradition was unconstitutional. In *Yang*, the ONCA was asked to consider if the move away from admissible evidence in the revised *Extradition Act* violated the principle of fundamental justice embedded in section 7. It held that section 7 guarantees do not require the adoption of any specific format for evidence or require a judge to apply the reliability test to that evidence.[123]

Instead, citing *Kindler*, the Court relied on the doctrine of comity to find that courts should not impose Canadian evidentiary or procedural standards upon our extradition partners. It cautioned that Canadian courts should not find that a foreign justice system is "fundamentally unjust because it does not recognize certain safeguards that we would consider principles of fundamental justice".[124] Judicial procedures in foreign countries should not be subjected to nitpicking by Canadian courts.[125] Quoting Justice La Forest, the Court held that: "[a] judicial system is not, for example, fundamentally unjust — indeed it may in its practical workings be as just as ours — because it functions on the basis of an investigatory system without

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[120] R.S.C. 1985, c. C-5.

[121] Anne Warner La Forest, *La Forest's Extradition to and from Canada*, 3d ed. (Aurora: Canada Law Book, 1991) at 100.

[122] [2009] S.C.J. No. 41, 2009 SCC 41 (S.C.C.).

[123] *United States of America v. Yang*, [2001] O.J. No. 3577 at para. 43, 56 O.R. (3d) 52 (Ont. C.A.):

> . . . the pronouncements of the Supreme Court of Canada in post-*Charter* extradition cases and particularly the need to respect differences in other jurisdictions, the evidentiary provisions of the Extradition Act comply with the principles of fundamental justice. Put simply, if we are prepared to countenance a trial of persons, including our own citizens, in jurisdictions with very different legal systems from our own, it is open to Parliament to design an extradition procedure that, with appropriate safeguards, accommodates those differences. Our extradition process need only meet "the basic demands of justice".

[124] *United States of America v. Yang*, [2001] O.J. No. 3577 at para. 42, 56 O.R. (3d) 52 (Ont. C.A.).

[125] *Canada v. Schmidt*, [1987] S.C.J. No. 24, [1987] 1 S.C.R. 500 at 522 (S.C.C.).

a presumption of innocence or, generally, because its procedural or evidentiary safeguards have none of the rigours of our system."[126]

Subsequent cases clarified the role of comity when using foreign evidence in extradition cases. In *Ferras*, the Court was asked to refine the rules of evidence applicable during extradition. The Court portrayed the demands of fundamental justice as tempered by comity,[127] as fundamental justice requires only an independent and impartial judicial determination of the facts and no specific procedure.[128]

After failing to have the ROC method overturned, defendants next attempted to argue that they should be able to obtain the original evidence which formed the basis of the ROC to verify its accuracy and to create a record for *Charter* challenges. Here again, comity has been found to create a presumption of good faith on the part of foreign states.[129] The Court in *Ferras* held that deference to the requesting state is "justified by the principle of comity and the ability of Canada to determine who it will accept as extradition partners".[130] Where evidence has been certified, there is a presumption of reliability.[131]

The courts have found that section 7 creates a minimum standard in extradition cases. In *Ferras*, the SCC held that an individual could not be extradited absent a "showing that the evidence actually exists and is available for trial".[132] Sending a person to languish in prison without trial is antithetical to the principles of

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[126] *United States of America v. Yang*, [2001] O.J. No. 3577 at para. 42, 56 O.R. (3d) 52 (Ont. C.A.); citing *Canada v. Schmidt*, [1987] S.C.J. No. 24, [1987] 1 S.C.R. 500 at 522, 523 (S.C.C.), it remains to be seen what the courts would do if an individual was extradited to a system without a presumption of innocence.

[127] *United States of America v. Ferras; United States of America v. Latty*, [2006] S.C.J. No. 33 at para. 21, [2006] 2 S.C.R. 77, 2006 SCC 33 (S.C.C.) writing that: "The two purposes are complementary. International comity does not require the extradition of a person on demand or surmise. Nor does basic fairness to the person sought for extradition require all the procedural safeguards of a trial, provided the material establishes a case sufficient to put the person on trial."; Affirmed in *United Mexican States v. Ortega*; *United States of America v. Fiessel*, [2006] S.C.J. No. 34, [2006] 2 S.C.R. 120, 2006 SCC 34 (S.C.C.).

[128] Citing to *Glucksman v. Henkel, United States Marshal*, 221 U.S. 508 at 512 (1911) (holding that individuals cannot be extradited on mere suspicion).

[129] *United States of America v. Ferras; United States of America v. Latty*, [2006] S.C.J. No. 33 at para. 32, [2006] 2 S.C.R. 77, 2006 SCC 33 (S.C.C.) (Canada can rely on the "good faith and diligence of its extradition partners.").

[130] *United States of America v. Ferras; United States of America v. Latty*, [2006] S.C.J. No. 33 at para. 31, [2006] 2 S.C.R. 77, 2006 SCC 33 (S.C.C.).

[131] *United States of America v. Ferras; United States of America v. Latty*, [2006] S.C.J. No. 33 at para. 52, [2006] 2 S.C.R. 77, 2006 SCC 33 (S.C.C.).

[132] *United States of America v. Ferras; United States of America v. Latty*, [2006] S.C.J. No. 33 at para. 55, [2006] 2 S.C.R. 77, 2006 SCC 33 (S.C.C.); see, also, Maeve W. McMahon, "The Problematically Low Threshold of Evidence in Canadian Extradition Law:

fundamental justice. Nevertheless, *Diab* suggests that this standard will not be interpreted particularly stringently.

However, in so far as committal hearing is not intended nor designed to provide the discovery function of a domestic preliminary inquiry, courts have found that the usual protections, including the *R. v. Stinchcombe* disclosure rules,[133] do not apply.[134] Courts will instead demand that there be an "air of reality" to any accusations of fraud or abuse of process as part of the certification process before disclosure will be required.[135]

For instance, in *United States of America v. Dynar*, one of the earliest cases to consider the question, the fugitive alleged that Canadian authorities had violated his Charter rights when assisting American law enforcement in their investigation. The Court declined to order disclosure, finding that full section 7 protections did not apply.[136] In subsequent cases, the Court has found that the *Extradition Act* displaced the common law prohibition on hearsay, even with respect to evidence collected in Canada, and has found that such evidence need only be included in the record in summary form.[137]

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[133] [1991] S.C.J. No. 83, [1991] 3 S.C.R. 326 (S.C.C.).

[134] *United States of America v. Dynar*, [1997] 2 S.C.R. 432 at para. 133 (S.C.C.); *Bedford*, [2013] Q.J. No. 6943, 2013 QCCS 3661 (Que. S.C.); see also *R. v. Larosa*, [2002] O.J. No. 3219, 166 C.C.C. (3d) 449 (Ont. C.A.).

[135] *The Kingdom of Thailand v. Karas*, [2000] B.C.J. No. 2689 at paras. 38-40, 2000 BCSC 1717 (B.C.S.C.). There has been some suggestion that the test will be less onerous where torture has been alleged (*United States v. Muhammad 'Isa*, [2014] A.J. No. 796 at para. 30, 2014 ABCA 256 (Alta. C.A.); *R. v. Larosa*, [2002] O.J. No. 3219 at para. 76, 166 C.C.C. (3d) 449 (Ont. C.A.)).

[136] [1997] 2 S.C.R. 432 at para. 135 (S.C.C.); cited approvingly in *U.S.A. v. Akrami*, [2000] B.C.J. No. 2000, 2000 BCSC 1438 (B.C.S.C.); *Ho v. Australia*, [2000] B.C.J. No. 2650 at para. 19, 2000 BCSC 153 (B.C.S.C.); *United States of America v. Kwok*, [2001] S.C.J. No. 19 at paras. 97, 98, 2001 SCC 18, [2001] 1 S.C.R. 532 (S.C.C.):

> Throughout the process of his extradition, the appellant has sought disclosure of additional materials with a view to establishing unjustified violations of his *Charter* rights. More specifically, the appellant demanded disclosure of (i) all of the Canadian investigation into his alleged involvement in the trafficking of narcotics; (ii) all discussions between Canadian police and American investigative authorities; and (iii) all discussions between Canadian police and both Canadian and American prosecuting authorities concerning the decision to proceed in the United States rather than in Canada.

In my view, the decision of this Court in *Dynar* . . . is dispositive of the appellant's claim for disclosure in this case.

[137] *United States of America v. Anekwu*, [2009] S.C.J. No. 41 at para. 32, 2009 SCC 41 (S.C.C.).

It is worth pausing for a moment to consider how far Canadian courts have been willing, in the name of comity, to depart from Canadian norms of due process — including evidentiary safeguards — in order to avoid judging foreign legal systems.

3. Abuse of Process

In principle, improper conduct, arbitrary motives, or bad faith on the part of foreign authorities in extradition decision-making or evidence collecting can be grounds for a stay of extradition or lead to a finding that an extradition decision was not reasonable.[138] In one notable case, collusion between a defendant in a civil lawsuit and governmental authorities in the U.S. led to Canadian courts declining to extradite a British-Nigerian citizen from Canada.[139]

Yet again, however, such claims are hard to establish. With respect to due process concerns, the SCC has used comity as a means of limiting the court's supervision of Canada's extradition partners. In *Canada (Justice) v. Fischbacher*, the SCC held that comity prevented Canadian courts from inquiring into every aspect of foreign

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[138] *United States of America v. Cotroni; United States of America v. El Zein*, [1989] S.C.J. No. 56, [1989] 1 S.C.R. 1469 at 1498 (S.C.C.); *United States of America v. Kwok*, [2001] S.C.J. No. 19 at para. 96, 2001 SCC 18 (S.C.C.); *Lake v. Canada (Minister of Justice)*, [2008] S.C.J. No. 23 at paras. 30, 37, [2008] 1 S.C.R. 761 (S.C.C.). *United States of America v. Cobb*, [2001] S.C.J. No. 20 at para. 37, [2001] 1 S.C.R. 587 (S.C.C.): The committal judge's jurisdiction to grant a stay of proceedings for an abuse of process is rooted in the courts "inherent and residual discretion at common law to control [its] own process and prevent its abuse." *Korea v. Jung*, [2019] B.C.J. No. 2170 at para. 30, 2019 BCSC 1962 (B.C.S.C.).

[139] *United States of America v. Alfred-Adekeye* at paras. 27, 29 (May 31, 2011), Vancouver 25413 (B.C.S.C.) (unreported):

> Shortly after 5:00 p.m. on May 20, Mr. Adekeye was arrested during the course of his deposition at the Wedgewood Hotel. I viewed a video clip of the arrest, which I am bound to say was shocking. The most charitable characterization I can place on it was that Corporal Draflin was not aware that she was interrupting a legal proceeding. I heard her announce to all present at the deposition that she was going to have to "interrupt this meeting." Her actions could be compared to entering a courtroom and arresting a person during the course of his or her testimony. It is simply not done in a civilized jurisdiction that is bound by the rule of law. . . . Thus, we have a man who has no criminal record, who has made every possible effort to comply with United States immigration laws and procedures, but who dared to take on a multinational giant, rewarded with criminal charges that have been so grotesquely inflated as to make the average, well-informed member of the public blanche at the audacity of it all.

In that case, Cisco allegedly fabricated a criminal complaint against Alfred-Adekeye after he sued Cisco for abusing its market position. Cisco allegedly arranged to have Alfred-Adekeye arrested during a deposition, organized by Cisco's lawyers in Vancouver. The charges were dropped after the lawsuit settled. Video of the arrest is available online: <https://www.youtube.com/watch?v=t9XZeHcClFg>.

criminal law.[140] This has been broadened into a general principle judging the examination of foreign sovereign's legal or political arrangements.

The baseline rule is that abuse of process considerations should only be found where the violations are shocking and unjustifiable. Courts have phrased the test as one where conduct "falls so far below an expected reasonable standard to amount to a complete failure of due diligence"[141] or "which shocks the conscience of the community and displays improper motives or bad faith falls into this category",[142] or "[w]here the Requesting State has engaged in conduct that threatens the integrity of the committal process."[143]

Thus, in *United States of America v. Khadr*, the ONCA found that previous acts of torture carried out in Pakistan at the behest of the U.S. should lead to a stay of extradition for an Canadian citizen who had subsequently returned to Canada and whose extradition had been requested by the U.S.[144] In that case, the extradition judge had found that "the sum of the human rights violations suffered by Khadr is both shocking and unjustifiable"[145] and justified a stay.

As might be imagined, such a high bar leaves room for a fair amount of sharp dealing. Courts have found that bald, unsupported assertions of fact in the ROC, vague or unsubstantiated suggestions, conjecture and speculation, or allegations made in absence of proof do not amount to abuse of process.[146] The fact that a prosecution is being undertaken in spite "of the political nature of the alleged

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[140] [2009] S.C.J. No. 46 at paras. 51, 52, 2009 SCC 46, [2009] 3 S.C.R. 170 (S.C.C.).

[141] *United Kingdom v. Tarantino*, [2003] B.C.J. No. 1696 at para. 46, 2003 BCSC 1134 (B.C.S.C.). *Attorney General (Canada) v. Kerfoot*, [2013] B.C.J. No. 912, 2013 BCSC 776 (B.C.S.C.).

[142] *R. v. Power*, [1994] S.C.J. No. 29, [1994] 1 S.C.R. 601 (S.C.C.).

[143] *Korea v. Jung*, [2019] B.C.J. No. 2170 at para. 34, 2019 BCSC 1962 (B.C.S.C.) (finding that an allegation that a criminal process was used to compel payment of a civil debt would, if proven, amount to abuse of process); *United States v. Rogan*, [2014] B.C.J. No. 1130 at para. 38, 2014 BCSC 1016 (B.C.S.C.); *United States of America v. Tollman*, 2006 CanLII 31732 at para. 18 (Ont. S.C.J.).

[144] [2011] O.J. No. 2060, 106 O.R. (3d) 449, 2011 ONCA 358 (Ont. C.A.).

[145] *United States of America v Khadr*, [2010] O.J. No 3301 at para. 150, 2010 ONSC 4338 (Ont. S.C.J.) (meeting the clearest of the cases standard from *United States of America v. Ferras; United States of America v. Latty*, [2006] S.C.J. No. 33, [2006] 2 S.C.R. 77, 2006 SCC 33 (S.C.C.)).

[146] *R. v. Larosa*, [2002] O.J. No. 3219 at para. 85, 166 C.C.C. (3d) 449, 98 C.R.R. (2d) 210 (Ont. C.A.); *Turenne v. Canada (Minister of Justice)*, [2004] M.J. No. 190 at para. 5, 2004 MBCA 79 (Man. C.A.); *United States of America v. Wacjman*, [2002] Q.J. No. 5097 at para. 86, 171 C.C.C. (3d) 134 (Que. C.A.); *United States of America v. Hackney*, 2004 BCSC 2037 (B.C.S.C.); *United States of America v. Doak*, [2015] B.C.J. No. 638, 2015 BCCA 145 (B.C.C.A.).

offence" is not an abuse of process.[147]

In such situations, courts have found that it remains the role of the executive to determine if extradition should not be allowed because of "the general condition of the governmental and judicial apparatus or, more likely, because some particular individual may be subjected to oppressive treatment. *These are judgments, however, that are pre-eminently within the authority and competence of the executive to make*."[148] Courts must remember that an extradition treaty or request was initially permitted because of a determination by the executive that the situation in the country was such that mistreatment was unlikely.[149]

V. PERIPHERAL VIOLATIONS OF SECTION 6

While much of the action has occurred within the section 7 framework, the jurisprudence has also taken shape under the shadow of section 6 of the Charter. Subsection 6(1) of the Charter protects the rights of every citizen to enter, remain in, and leave Canada. Its protections are narrower than those of section 7, in so far as it protects only citizens, rather than everyone physically in Canada.[150] Unlike subsection 6(2), subsection 6(1) contains no internal limitations.

As the SCC has made clear, section 6 protects three separate rights (enter into, presence in, and the right to departure).[151] The court has held that the central purpose of section 6 is to prevent banishment.[152] While it does not require the federal government to facilitate return to Canada,[153] the government must, at a minimum, provide individuals with any necessary travel documents.[154] In the

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[147] *Pacificador v. Philippines (Republic of)*, 1993 CanLII 3381 (Ont. C.A.) (such a prosecution would only be prohibited if the prosecution itself was carried out for political or other illegitimate ends).

[148] Justice LaForest in *Argentina v. Mellino*, [1987] S.C.J. No. 25 at paras. 33-37, [1987] 1 S.C.R. 536 (S.C.C.) [emphasis added].

[149] *Argentina v. Mellino*, [1987] S.C.J. No. 25, [1987] 1 S.C.R. 536 (S.C.C.); *Ruiz Gomez c. Ministre de la Justice du Canada*, [2017] J.Q. no 13828 (Que. C.A.) (the minister must consider changes to the foreign country, however).

[150] *Solis v. Canada (Minister of Citizenship and Immigration)*, [2000] F.C.J. No. 407, 186 D.L.R. (4th) 512 (F.C.A.), leave to appeal refused, [2000] S.C.C.A. No. 249 (S.C.C.).

[151] *Divito v. Canada (Public Safety and Emergency Preparedness)*, [2013] S.C.J. No. 47 at para. 18, [2013] 3 S.C.R. 157, 2013 SCC 47 (S.C.C.); *Droit de la famille - 13328*, [2013] J.Q. no 1130 at paras. 38-40, 2013 QCCA 277 (Que. C.A.) (for a separate right to leave).

[152] *United States of America v. Cotroni; United States of America v. El Zein*, [1989] S.C.J. No. 56, [1989] 1 S.C.R. 1469 (S.C.C.) (like many extradition cases, *Cotroni* is an old case, but remains good law).

[153] *Divito v. Canada (Public Safety and Emergency Preparedness)*, [2013] S.C.J. No. 47, 2013 SCC 47 (S.C.C.).

[154] *Abdelrazik v. Canada (Minister of Foreign Affairs)*, [2009] F.C.J. No. 656, 2009 FC 580, [2010] 1 F.C.R. 267 (F.C.).

context of the right to return to Canada, it is not a right to be interfered with lightly.[155]

As might be expect, the courts have found that extradition implicates section 6(1).[156] However, relying on parliamentary debates, the court found that it was the view of the drafters of the Charter that section 6(1) did not prohibit extradition.[157] In typically soaring terms, Justice La Forest writing for the majority, wrote in *Cotroni*: "In a shrinking world, we are all our brother's keepers. In the criminal arena this is underlined by the international cooperative schemes that have been developed among national law enforcement bodies."[158] To that end, the courts have found that extradition only engages the edges of section 6.[159]

In *Cotroni*, the Court concluded that while a decision to extradite a Canadian citizen under the *Extradition Act prima facie* limits a citizen's section 6(1) right, it is a reasonable limit under section 1.[160] Moreover, the court has taken the view, on somewhat artificial grounds, that section 6(1) is only implicated at the extradition,

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[155] *Abdelrazik v. Canada (Minister of Foreign Affairs)*, 2009 FC 580 (CanLII), [2009] F.C.J. No. 656 at para. 43, 2009 FC 580, [2010] 1 F.C.R. 267 (F.C.), citing to *United States of America v. Cotroni; United States of America v. El Zein*, [1989] S.C.J. No. 56, [1989] 1 S.C.R. 1469 at 1480 (S.C.C.). In the criminal law context, however, courts have permitted interference, particularly in the context of requests to serve foreign sentences in Canada (see, *e.g.*, *Divito v. Canada (Public Safety and Emergency Preparedness)*, [2013] S.C.J. No. 47, [2013] 3 S.C.R. 157 (S.C.C.)).

[156] *United States of America v. Cotroni; United States of America v. El Zein*, [1989] S.C.J. No. 56, [1989] 1 S.C.R. 1469 at 1485 (S.C.C.); *Re Federal Republic of Germany and Rauca*, [1983] O.J. No. 2973, 4 C.C.C. (3d) 385 at 520 (Ont. C.A.); *Canada v. Schmidt*, [1987] S.C.J. No. 24, [1987] 1 S.C.R. 500 (S.C.C.).

[157] *United States of America v. Cotroni; United States of America v. El Zein* [1989] S.C.J. No. 56 at para. 14, [1989] 1 S.C.R. 1469 (S.C.C.); see also the discussion in *Re Federal Republic of Germany and Rauca*, [1983] O.J. No. 2973, 4 C.C.C. (3d) 385 at 399-406 (Ont. C.A.).

[158] *United States of America v. Cotroni; United States of America v. El Zein* [1989] S.C.J. No. 56 at para 29, [1989] 1 S.C.R. 1469 (S.C.C.), citing to *R. v. Libman*, [1985] S.C.J. No. 56, [1985] 2 S.C.R. 178 at 214 (S.C.C.).

[159] *United States of America v. Cotroni; United States of America v. El Zein*, [1989] S.C.J. No. 56 at para. 19, [1989] 1 S.C.R. 1469 (S.C.C.) (suggesting that extradition "lies at the outer edges of the core values sought to be protected by" s. 6); citing to *Brickman v. Federal Republic of Germany*, App. 1, No. 6242/73, C.D. 46, at pp. 202 and 210; P. Van Dijk & G. J. H. Van Hoof, *Theory and Practice of the European Convention on Human Rights* (1984) at 368.

[160] *United States of America v. Cotroni; United States of America v. El Zein*, [1989] S.C.J. No. 56 at paras. 18, 45, [1989] 1 S.C.R. 1469 (S.C.C.); *Sriskandarajah v. United States of America*, [2012] S.C.J. No. 70, [2012] 3 S.C.R. 609 (S.C.C.); see also *United States of America v. Swystun*, [1987] M.J. No. 519, 50 Man. R. (2d) 129 (Man. Q.B.).

rather than the committal stage, and therefore should be dealt with by courts at the appellate review stage.[161]

However, in a concession to the defendant Cotroni, who had argued that he could just as easily be prosecuted in Canada, the Court required the Minister to weigh a number of factors to determine if prosecution in Canada was realistic. Justice La Forest, writing for the majority, found that the Minister must, in making his decision, weigh the extradition decision's effect on section 6 rights versus the decision not to prosecute, consider: (1) where was the impact of the offence felt or likely to have been felt; (2) which jurisdiction has the greater interest in prosecuting the offence; (3) which police force played the chief role in developing the case; (4) which jurisdiction has laid charges; (5) which jurisdiction has the most comprehensive case; (6) which jurisdiction is ready to proceed to trial; (7) where evidence is located; (8) if the evidence is mobile; (9) the number of the accused involved and can they be gathered together in one place for trial; (10) the jurisdiction where most of the acts in furtherance of the crime committed; (11) the severity of the sentence the accused is likely to receive in each jurisdiction; and (12) the nationality and residence of the accused.[162] No one factor is to predominate nor have the courts proscribed any particular weighting of the factors.[163]

In this respect, the court has treated section 6(1) determinations much the same way as it treated the exercise of prosecutorial discretion.[164] "Of course", Justice La Forest wrote,

> the authorities must give due weight to the constitutional right of a citizen to remain in Canada. They must in good faith direct their minds to whether prosecution would be equally effective in Canada, given the existing domestic laws and international cooperative arrangements. They have an obligation flowing from s. 6(1) to assure

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[161] *United States of America v. Ferras; United States of America v. Latty*, [2006] S.C.J. No. 33 at paras. 82, 83, [2006] 2 S.C.R. 77, 2006 SCC 33 (S.C.C.); S*riskandarajah v. United States of America*, [2012] S.C.J. No. 70, [2012] 3 S.C.R. 609 (S.C.C.); *India v. Badesha*, [2017] S.C.J. No. 44, 2017 SCC 44 (S.C.C.).

[162] *United States of America v. Cotroni; United States of America v. El Zein*, [1989] S.C.J. No. 56 at paras. 55, 56, [1989] 1 S.C.R. 1469 (S.C.C.) (endorsing factors from *United States of America v. Swystun*, [1987] M.J. No. 519, 50 Man. R. (2d) 129 at 133-134 (Man. Q.B.)); S*riskandarajah v. United States of America*, [2012] S.C.J. No. 70 at para. 12, [2012] 3 S.C.R. 609 (S.C.C.).

[163] The weighing is to be carried out by the authorities themselves (*Lake v. Canada (Minister of Justice)*, [2008] S.C.J. No. 23 at para. 30, [2008] 1 S.C.R. 761 (S.C.C.); S*riskandarajah v. United States of America*, [2012] S.C.J. No. 70, [2012] 3 S.C.R. 609 (S.C.C.); *India v. Badesha*, [2017] S.C.J. No. 44 at paras. 12, 13, 2017 SCC 44 (S.C.C.).

[164] *R. v. Smythe*, [1971] S.C.J. No. 62, [1971] S.C.R. 680 at 686 (S.C.C.)) (the effective prosecution of crimes require that someone be vested with the decision to prosecute); *R. v. Lyons*, [1987] S.C.J. No. 62, [1987] 2 S.C.R. 309 at 348 (S.C.C.); *R. v. Beare*, [1987] S.C.J. No. 92, [1988] 2 S.C.R. 387 at 411 (S.C.C.) (both finding that prosecutorial discretion does not violate the Charter).

> themselves that prosecution in Canada is not a realistic option.[165]

But repeating a theme that has been highlighted before, courts have consistently fallen back on the Minister's discretion, which as a political decision attracts "a high degree of judicial deference".[166]

In *Cotroni*, Justice La Forest did not feel the need to rely on comity. Instead, he appealed to rationality: prosecuting in a foreign country was hardly "irrational".[167] It is "better that a crime be prosecuted where its harmful impact is felt and where the witnesses and the persons most interested in bringing the criminal to justice reside".[168] Justice La Forest, then went on to speculate about the consequences that might be posed by a more robust reading of section 6:

> It would often occur, for example, that a person could not be convicted in Canada because of lack of evidence here. Again, what initiative would law enforcement agencies in one country have to investigate a crime that could not be successfully prosecuted? As well, there are many cases where all the conspirators should be tried together. These are only a few of the difficulties that would arise.[169]

However, this speculation only makes sense if the primary concern is the prosecution of crimes and not the protection of rights. Moreover, the concerns would not seem borne out by the work of Canadian law enforcement, who are happy to investigate a crime that will lead to extradition and not be prosecuted in Canada.

Conversely, Justice La Forest suggested, "to require judicial examination of each individual case to see which could more effectively and fairly be tried in one country or the other would pose an impossible task and seriously interfere with the workings of the system".[170] What is so odd about this claim, however, is that the balancing of factors, including judicial convenience, is exactly what is required by the *Cotroni* factors and of the judicial review of administrative action generally.

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[165] *United States of America v. Cotroni; United States of America v. El Zein*, [1989] S.C.J. No. 56 at para. 55, [1989] 1 S.C.R. 1469 (S.C.C.), cited approvingly in *United States of America v. Kwok*, [2001] S.C.J. No. 19 at para. 60, 2001 SCC 18, [2001] 1 S.C.R. 532 (S.C.C.).

[166] *Sriskandarajah v. United States of America*, [2012] S.C.J. No. 70 at para. 11, [2012] 3 S.C.R. 609 (S.C.C.); also, *United States of America v. Kwok*, [2001] S.C.J. No. 19 at paras. 93-96, [2001] 1 S.C.R. 532 (S.C.C.); *Lake v. Canada (Minister of Justice)*, [2008] S.C.J. No. 23 at para. 34, [2008] 1 S.C.R. 761 (S.C.C.).

[167] *United States of America v. Cotroni; United States of America v. El Zein*, [1989] S.C.J. No. 56 at para. 34, [1989] 1 S.C.R. 1469 (S.C.C.).

[168] *United States of America v. Cotroni; United States of America v. El Zein*, [1989] S.C.J. No. 56 at para. 34, [1989] 1 S.C.R. 1469 (S.C.C.).

[169] *United States of America v. Cotroni; United States of America v. El Zein*, [1989] S.C.J. No. 56 at para. 49, [1989] 1 S.C.R. 1469 (S.C.C.).

[170] *United States of America v. Cotroni; United States of America v. El Zein*, [1989] S.C.J. No. 56 at para. 49, [1989] 1 S.C.R. 1469 (S.C.C.).

The dissents in *Cotroni* remain notable both for their concern for human rights, and the fact that they illustrate the weakness of the concept of comity. Justice Wilson had little patience for the majority's understanding of section 6: "It is not necessary in order that the appellants in this case be brought to justice that they be extradited to the United States. They can be brought to justice right here."[171] Mere convenience, however, or the fact that "Canada will appear to be uncooperative if it refuses to extradite them" should not be enough to overcome the rights of Canadians or meet the government's burden under section 1[172] Characterizing extradition as a peripheral violation, she wrote, is "alarm[ing]" and "a novel departure from the Court's traditional approach to the balancing process called for under s. 1 and one that could pose a very serious threat to the protection for the citizen which the *Charter* was intended to provide".[173] Most importantly, any loss of international cooperation is speculative; any restriction on the rights of Canadians is real.

Justice Wilson's conclusion highlights the poverty of the SCC's use of the word comity. She was the only judge to consider it, arguing that "the comity of nations fostered by extradition is not adversely affected by the [dissent's proposed] result . . . United States law enforcement agencies will continue to monitor the United States borders to prevent the importation of illegal drugs and these agencies will continue to cooperate with Canadian law enforcement agencies."[174] Tellingly, the majority did not bother to consider comity at all — suggesting that its usefulness was limited to situations where the court thought it necessary to rely on it to reach a result it could not reach otherwise.

Justice Sopinka, in his dissent, highlighted the potential consequences in extradition cases:

> Our citizens may be extradited not only to the United States but to countries where systems are radically different and whose laws provide none of the traditional protections for persons charged. If, for example, a Canadian citizen who is presumed to be innocent under our laws is extradited to a country that does not recognize the presumption of innocence, requires the accused to testify, does not permit bail, has no independent bar and imposes the death penalty for a number of different offences, I would consider the consequences of the breach of the citizen's right to remain in Canada as more than peripheral. Indeed, it is tantamount to

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[171] *United States of America v. Cotroni; United States of America v. El Zein*, [1989] S.C.J. No. 56 at para. 85, [1989] 1 S.C.R. 1469 (S.C.C.).

[172] *United States of America v. Cotroni; United States of America v. El Zein*, [1989] S.C.J. No. 56 at para. 85, [1989] 1 S.C.R. 1469 (S.C.C.).

[173] *United States of America v. Cotroni; United States of America v. El Zein*, [1989] S.C.J. No. 56 at para. 86, [1989] 1 S.C.R. 1469 (S.C.C.).

[174] *United States of America v. Cotroni; United States of America v. El Zein*, [1989] S.C.J. No. 56 at para. 96, [1989] 1 S.C.R. 1469 (S.C.C.).

banishment.[175]

Fundamentally, Justice Sopinka's prediction has proven correct. Canadians have been extradited to countries where the risk of mistreatment is high.[176] Moreover, I have been unable to find any case where a Minister has declined an extradition request in order to prosecute in Canada. In so far as courts have found that judicial review will provide for a timely, effective and complete Charter remedy for any section 6 infringement that may have occurred in the extradition process,[177] the Minister's decision with respect to the appropriateness of domestic prosecution has attracted a high degree of deference and virtually never been overturned.[178]

Moreover, by finding that section 6 is predominantly engaged at the Ministerial level,[179] courts have found that it is not the extradition judge's job to allow the accused to assemble an evidentiary record as to why he should be extradited.[180]

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[175] *United States of America v. Cotroni; United States of America v. El Zein*, [1989] S.C.J. No. 56 at para. 101, [1989] 1 S.C.R. 1469 (S.C.C.).

[176] See, *e.g.*, *India v. Badesha*, [2017] S.C.J. No. 44, [2017] 2 S.C.R. 127 (S.C.C.); *Thailand v. Saxena*, [2006] B.C.J. No. 446, 2006 BCCA 98 (B.C.C.A.), leave to appeal refused [2006] S.C.C.A. No. 147 (S.C.C.).

[177] *United States of America v. Kwok*, [2001] S.C.J. No. 19 at para. 67, 2001 SCC 18, [2001] 1 S.C.R. 532 (S.C.C.).

[178] *United States of America v. Kwok*, [2001] S.C.J. No. 19 at paras. 93, 95, 2001 SCC 18 (S.C.C.), [2001] 1 S.C.R. 532 (S.C.C.); *United States v. Burns*, [2001] S.C.J. No. 8, 2001 SCC 7 (S.C.C.); *Idziak v. Canada (Minister of Justice)*, [1992] S.C.J. No. 97, [1992] 3 SCR 631 (S.C.C.); *United States of America v. Whitley*, [1996] S.C.J. No. 25, [1996] 1 S.C.R. 467 (S.C.C.); *Canada v. Schmidt*, [1987] S.C.J. No. 24, [1987] 1 S.C.R. 500 (S.C.C.); *Gwynne v. Canada (Minister of Justice)*, [1998] B.C.J. No. 222, 103 B.C.A.C. 1 (B.C.C.A.), leave to appeal to Supreme Court of Canada denied, [1998] 1 SCR ix (S.C.C.), and *R. v. Power*, [1994] S.C.J. No. 29, [1994] 1 S.C.R. 601 (S.C.C.).

[179] *United States of America v. Kwok*, [2001] S.C.J. No. 19 at para. 63, 2001 SCC 18, [2001] 1 S.C.R. 532 (S.C.C.); *Idziak v. Canada (Minister of Justice)*, [1992] S.C.J. No. 97, [1992] 3 S.C.R. 631 at 658-660 (S.C.C.); *Canada v. Iaquinto*, [1991] O.J. No. 1263 (Ont. C.A.); *Canada v. Schmidt*, [1987] S.C.J. No. 24, [1987] 1 S.C.R. 500 at 515–516 (S.C.C.).

[180] *United States of America v. Kwok*, [2001] S.C.J. No. 19 at paras. 73, 74, [2001] 1 S.C.R. 532 (S.C.C.), Arbour J. said (in connection with s. 6 Charter rights). In limited circumstances however:

> If s. 6 issues are premature at the committal stage, it would follow that evidence dealing with an alleged s. 6 breach would be irrelevant and therefore inadmissible at the committal hearing. However, on efficiency grounds, it has been recognized that extradition judges could have the discretion to hear, without deciding, evidence on alleged s. 6 *Charter* violations when the allegations hold an air of reality: *Whitley* and *Pacificador, supra*. [*United States of America v. Whitley*, [1996] S.C.J. No. 25, [1996] 1 S.C.R. 467 (S.C.C.), affg [1994] O.J. No. 2478, 94 C.C.C. (3d) 99 (Ont. C.A.); *Pacificador v. Philippines (Republic of)* (1993), [1993] O.J. No. 1753, 83 C.C.C. (3d) 210 (Ont. C.A.), leave to appeal refused, [1994] 1 SCR x (S.C.C.)].

Instead, as with the reluctance to order disclosure under section 7, they have argued that: "[t]he Minister can reach a conclusion as to whether or not a fugitive could be effectively prosecuted in Canada by relying on an evaluation presented to him or her by responsible Department officials."[181]

VI. SAVING THE RIGHTS OF CANADIANS

As this article has shown, comity serves two competing functions in our Charter jurisprudence. It serves as a heuristic device which constrains how courts interpret the rights of Canadians. Moreover, when evaluating competing rights, it is also a free-standing value granted weight by courts when weighing the limitation of rights under sections 1, 6 and 7.

It is worth pausing to note that extradition of nationals is by no means settled international practice. At least 73 countries around the world have a constitutional or legislative prohibition on the extradition of nationals.[182] However, like many common law jurisdictions (and unlike many civil law jurisdictions), Canada will extradite its own nationals.

This was not always the rule at common law. In the 19th century, it was by no means certain the U.K. would extradite its own nationals. The rule was repealed after it came under judicial criticism. In *R. v. Wilson*, Lord Cockburn called the nationality exception to extradition a "blot on the law".[183] It was, in the words of one commentator: "a form of legal xenophobia no longer warranted today, especially since treaties provide for adequate safeguards".[184]

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[181] *United States of America v. Kwok*, [2001] S.C.J. No. 19 at para. 89, 2001 SCC 18, [2001] 1 S.C.R. 532 (S.C.C.).

[182] Library of Congress, "Law on Extradition of Citizens, A chart with information on extradition laws relating to citizens in 157 jurisdictions" (July 2013), online: <https://www.loc.gov/law/help/extradition-of-citizens/chart.php>. In some cases, an exception is made for regional groups such as the EU. Many further states will only extradite based on pre-existing treaties. Canada, conversely, is one of the most extradition-friendly jurisdictions. Many Canadian treaties contain such provisions, such as the extradition treaty with France, which provides:

> The requested State shall not be bound to extradite its own nationals. Nationality shall be determined as of the date of the offence for which extradition is requested. If the request for extradition is refused solely because the person sought has the nationality of the requested State, that State shall, at the request of the requesting State, refer the matter to its competent authorities for prosecution. For this purpose, the files, documents and exhibits relating to the offence shall be transmitted to the requested State. That State shall inform the requesting State of the action taken on its request

(Extradition Treaty between the Government of Canada and the Government of France (November 17, 1988), Can. T.S. 1989, No. 38, Art. 3).

[183] (1877), 3 Q.B.D. 42 at 44.

[184] Jean-Gabriel Castel and Sharon A. Williams. "The Extradition of Canadian Citizens

Lord Cockburn, who after his decision in *Wilson* chaired the *Royal Commission on Extradition*, recommended getting rid of the rule.[185] Eventually the rule was abandoned. Cockburn's fear of judicial nationalism has been embraced in Canada, with Justice La Forest writing in *Cotroni*:

> I do not think that the free and democratic society that is Canada, any more than any other modern society, should today confine itself to parochial and nationalistic concepts of community. Canadians today form part of an emerging world community from which not only benefits but responsibilities flow. . .. [W]e should not be indifferent to the protection of the public in other countries.[186]

As it stands now, courts have been extraordinary fearful that a failure to extradite would embolden criminals. Writing for the majority in *R. v. Stonojlovic*, Justice McClung summarized judicial fears aptly:

> Participants in international crime may be expected to act rationally. If Canada's extradition laws are understood to be watery and easily undone, Canada becomes, on a cost/benefit analysis, an attractive country in which to do business, or if necessary, a good place to be caught.[187]

Breaking the rule against arguing that a conclusion is common sense, he concluded that the fear that Canada would become a safe haven "is not so much international comity but unbordered common sense".[188]

From this perspective, it is easy to see why Canadian courts have drawn on comity as they have. Comity has been taken to preclude a detailed examination of foreign sovereign's legal or political arrangements, including whether foreign delays in acting violated the principles of fundamental justice, the severity of most potential sentences, and the good will of foreign sovereigns. This is a particularly troublesome finding, as it means that section 7 *mens rea* requirements need not necessarily apply in extradition cases. It has limited the rights of Canadians to remain in Canada.

However, as discussed above, no positive rule of international law requires this, as state practice shows.[189] With respect to section 6, Canada could just as easily

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and Sections I and 6(I) of the Canadian Charter of Rights and Freedoms"(1987) 25 C.Y.I.L. 263 at 268.

[185] *Report of the Royal Commission on Extradition*, Parliamentary Papers, 1878, vol. 24, Reports, 907–17.

[186] *United States of America v. Cotroni; United States of America v. El Zein*, [1989] S.C.J. No. 56 at para. 29, [1989] 1 S.C.R. 1469 (S.C.C.).

[187] *R. v. Stonojlovic*, [1998] A.J. No. 915 at para. 3, 1998 ABCA 270 (Alta. C.A.).

[188] [1998] A.J. No. 915 at para. 3, 1998 ABCA 270 (Alta. C.A.).

[189] Other common law states appear to consider delay by the requesting state, at least in exceptional circumstances, as grounds to decline to extradite: *Kakis v. Government of the Republic of Cyprus*, HL 1978 [1978], 1 WLR 779, [1978] 2 All ER 634; *Gomes v. Trinidad and Tobago*, [2009] UKHL 21, [2009] 3 All ER 549, [2009] 1 WLR 1038, [2009] WLR 1038.

adopt the practice of those domestic courts which prosecute nationals for crimes committed abroad.[190] While this would provide imperfect perfection (as it would not prevent the extradition of non-nationals), it would protect some individuals apprehended on Canadian territory.

The Diab affair has led to multiple proposals for reform. Currie, in a recent paper, has argued that a key problem is that extradition cases often feature the active collaboration of Crown officials with a foreign state to shore up a case that was weak from the start.[191] Currie suggests that potential reforms including more fulsome disclosure would make extradition fairer.[192] However, Currie's proposal fails to address the underlying problem of Canadian's courts reluctance to evaluate the actions of foreign sovereigns.

Undoubtedly, the fact that the Crown is so heavily involved helping our foreign partners puts lie to the idea that comity prevents close scrutiny of the actions of foreign prosecutors. This alone should be enough to put lie to the idea that extradition principally involves foreign actions and legal systems.

To reform its section 7 jurisprudence, Canada should first abandon Justice McLachlin's legal fiction from *Kindler* that the Charter is not implicated where Canada, through deportation, assists a foreign government in committing an action that would amount to a Charter violation if committed in Canada. This would prevent the collaboration between Canada and foreign authorities from being immune to Charter scrutiny.

This need not lead to anarchy. There is no evidence that Canada will become a haven for criminals, *pace* judicial fears. In fact, Justice Bastarache proposed a framework in *Hape* to allow section 7 scrutiny of foreign actions to occur. Where foreign actions violate Charter rights, the court can always engage in a section 1 analysis to see if foreign actions are in substantial compliance with Charter rights.

Alternatively, where the actions of a foreign sovereign are aided by the Canadian government produce effects in Canada, there is no reason not to apply the Charter. For instance, the reasoning in *Mellino* belies the obvious fact that extradition required the involvement of Canadian authorities. In a similar future case, the SCC could apply the test from *R. v. Jordan*, creating a rebuttable presumption that delays

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[190] Canada already exercises universal jurisdiction or jurisdiction over its nationals for various foreign crimes, including foreign bribery, crimes against humanity, war crimes and child prostitution.

[191] Robert J. Currie, "Wrongful Extradition: Reforming the Committal Phase of Canada's Extradition Law" (July 31, 2020) at 51, online: <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3664754>.

[192] Robert J. Currie, "Wrongful Extradition: Reforming the Committal Phase of Canada's Extradition Law" (July 31, 2020) at 52, online: <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3664754>.

are due to state action.[193] It could then look to extenuating circumstances or save the government action under section 1.

In short, eliminating comity would not mean that everything goes. Our Charter already contains a provision to permit balancing. Eliminating comity would merely restore section 1 to its proposal role.

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[193] [2016] S.C.J. No. 27, [2016] 1 S.C.R. 631, 2016 SCC 27 (S.C.C.) (admittedly, *Jordan* was decided on s. 11(b) and not s. 7 grounds).

Chapter 4

FORGOTTEN FREEDOMS AND THE RULE OF LAW

Dwight Newman, QC[*] and Monica Fitzpatrick[**]

I. INTRODUCTION

As part of a larger project on forgotten freedoms,[1] we have recently discussed what we called the forgotten inner freedoms contained in some of the text of section 2(b) of the *Canadian Charter of Rights and Freedoms*.[2] While many tend to refer to section 2(b) as the "freedom of expression" provision, it also contains protections for a number of other freedoms, including the freedoms of thought, belief and opinion. These three freedoms are "inner freedoms" in so far as they protect aspects of the internal forum of the person.[3] They are "forgotten freedoms" in the sense that

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[1] See generally Dwight Newman, Derek Ross & Brian Bird, eds., *The Forgotten Fundamental Freedoms of the Charter* (Toronto: LexisNexis Canada, 2020). This collection is part of a larger research initiative, the Forgotten Freedoms Project, explained, articulated and argued further within that work.

[2] Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 ("Charter"). See Monica Fitzpatrick & Dwight Newman, "Freedoms of Thought, Belief and Opinion as Protected Inner Freedoms" (2020) 98 S.C.L.R. (2d) 249.

[3] Cf. also Brian Bird, "Are All Charter Rights and Freedoms Really Non-Absolute?" (2017) 40 Dal. L.J. 107 at 118 (making a prior claim about the potential absoluteness of the inner freedoms, a matter to which we will return: "I believe Charter rights and freedoms that deal exclusively with the internal forum of the person are candidates for absolute status. Here I have in mind freedom of thought, belief, and opinion under section 2(b) of the Charter"). Obviously, important aspects of freedom of conscience and freedom of religion are also inner freedoms, although the main matters discussed on those freedoms often pertain to their external manifestations. In our work, we have focused on thought, belief and opinion. On conscience, we would refer the reader generally to Bird's important, growing body of work. See *e.g.*, Brian Bird, "Understanding Freedom of Conscience", *Policy Options* (August 2,

they are contained within the legal text of the Charter and would be recognized as legally valid freedoms on a correct interpretation of this text, but they have received little or no scholarly and judicial attention.[4] Consequences of this lack of scholarly and judicial attention include that their interpretation remains less clear than it could be, that those litigating cases may be tempted to try to shoehorn claims that would properly fall within the scope of these freedoms into other freedoms, and generally that they are less usable than they would otherwise be.

Those consequences are serious, as are others we have already discussed,[5] but there are further implications for the rule of law that we have not directly discussed previously. Put simply, when certain constitutionally entrenched freedoms come to be forgotten, there are corroding effects on the rule of law, and this problem is perhaps especially significant in respect of such forgotten inner freedoms as freedom of thought, freedom of belief and freedom of opinion.

In this short paper, we make this claim with specific reference to an aspect of the rule of law that itself warrants more attention than it sometimes receives, that of the accessibility of law. In Part II, we discuss how the presence of forgotten freedoms in a constitutional order undermines the accessibility and, thus, the promulgation of law in a manner that gives rise to rule of law concerns. In Part III, we discuss some broader concerns arising from the forgetting of inner freedoms, noting a broader distortion in the understanding of the relationship between the state and individual human persons that arises from this departure from the rule of law. In Part IV, we sketch out some of the resulting conclusions, noting the need for many actors to work to ensure that constitutionally entrenched freedoms not be forgotten and some tangible implications in terms of the need for ongoing study of established fundamentals in place of a sole focus on the pursuit of evanescent novelties.

II. THE PROBLEM OF PROMULGATED BUT FORGOTTEN FREEDOMS

Part of the concept of the rule of law is the accessibility of the law, the idea that the law be subject to being comprehended in some reasonable way, such that individuals can be guided by the law in a manner that they can predict. This idea is closely associated with the requirement that a law naturally must be promulgated if

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2017); Brian Bird, "The Call in *Carter* to Interpret Freedom of Conscience" (2018) 85 S.C.L.R. (2d) 107; Brian Bird, "The Reasons for Freedom of Conscience" (2020) 98 S.C.L.R. 111.

[4] For discussion of a precise definition of forgotten freedoms, see Dwight Newman, "Recovering Forgotten Freedoms" (2020) 98 S.C.L.R. 47 at 49.

[5] See Monica Fitzpatrick & Dwight Newman, "Freedoms of Thought, Belief and Opinion as Protected Inner Freedoms" (2020) 98 S.C.L.R. (2d) 249 at 271 (noting the resulting denial of these freedoms and the negative effects on a holistic reading of the Charter); Dwight Newman, "Recovering Forgotten Freedoms" (2020) 98 S.C.L.R. 47 at 62 (noting similar concerns for the loss of these freedoms and their broader holistic implications, and also noting the potential failure to recognize intersectional freedom violations).

it is to be a law at all: "Promulgation is of the very essence of law, and a *sine qua non* of legal obligation."[6]

In a complex regulatory environment, of course, some law will be technical in nature, and the layperson may need a lawyer to assist in interpreting these technical aspects of law.[7] But the law must nonetheless be public and be, in principle, subject to being comprehended. A secret law is no law at all, and the government that claims to act on law that is not "in the books" is despotic.

The presence of legal text in the books that does not become part of the "law in action",[8] though, might seem at first glance an opposite and thus unrelated problem. The issue, one might suggest, is not an absence of promulgation but one of "too much" promulgation. In a sense, in this situation, more law has been written down and promulgated than is going to be respected.

The problem, though, is not so distant from that first at issue. If the legal text represents to the reader that there are constitutional freedoms of thought, belief and opinion but these freedoms are then forgotten and thus effectively unusable in the legal system, a problem arises. The individual who would have been guided in interaction with other parts of the legal system by an assumption that it is to be read subject to some plausible conception of these freedoms will face unexpected demands from state actors. The problem of promulgated but forgotten freedoms damages the accessibility of the individual's legal obligations and harms his or her ability to be guided by the law as surely as if there were a simple failure to promulgate the law.

The failure to maintain constitutional freedoms as living freedoms raises, then, a problem not only of the denial of freedoms to which individuals are rightly entitled but also a corrosion of the rule of law. Legal text must be given meaning if its presence is not to deceive the individual seeking to be guided by the law.

III. BROADER DISTORTIONS FROM THE FORGETTING OF THE INNER FREEDOMS

While the problem of forgotten freedoms is broader in scope than just the inner freedoms we have discussed in our recent work,[9] the forgetting of these inner

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[6] Gilbert Bailey, "The Promulgation of Law" (1941) 35 Am. Pol. Sci. Rev. 1059 at 1059. See also Fuller's discussion of the requirement that the law be public: Lon Fuller, *The Morality of Law* (New Haven: Yale University Press, 1964).

[7] See Max Weber, *Economy and Society*, vol. 2, ed. by Guenther Roth & Claus Wittich (Berkeley: University of California Press, 1968 [1922]) at 882–95.

[8] We allude obviously to the distinction from Roscoe Pound, "Law in Books and Law in Action: Historical Causes of Divergence between the Nominal and Actual Law" (1910) 44 Am. L. Rev. 12.

[9] See generally Dwight Newman, "Recovering Forgotten Freedoms" (2020) 98 S.C.L.R. 47.

freedoms does present some distinctive issues. Indeed, we will argue that to forget these inner freedoms is to forget some of the aspects of human nature associated with the very value of the rule of law.

Notably, the inner freedoms in the Charter were not inventions of the moment but have a longer legal lineage, carrying forward historically recognized freedoms discussed at length at the time of their incorporation in the *Universal Declaration of Human Rights* ("UDHR").[10] Describing those discussions, Lebanese delegate Charles Malik wrote in a mid-1948 article, "What are Human Rights?", that the UDHR cannot be focused on protection of economic gain alone, but that it must be oriented more philosophically to what distinguishes human beings from animals and to why human beings deserve freedoms.[11] The drafting discussions encompassed the idea that "[e]ven if the list of social, economic, political and juridical rights of man were complete and adequate, it would count for nothing if man were denied freedom of thought and belief. Those were essential freedoms which made life richer and constituted the supreme goal of all aspirations".[12]

Of course, Canada does not forget these concepts, and some might say that it has been possible to see their constitutional entrenchment become forgotten precisely because they are not violated in our day-to-day lives.[13] But the reality that the constitutionally entrenched inner freedoms become forgotten in legal contexts, even where they could be used, implies tendencies toward the loss of a fully formed conception of human nature, of human freedom, and ultimately of human agency. The commands of the law mean something different when directed to those whom the law does not regard fully as human agents as opposed to when the law sets forth coordination in the pursuit of human flourishing.

The discussions of the inner freedoms during the drafting process for the UDHR assumed a human person who warranted the absolute protection of such inner freedoms as thought, belief and opinion. During the drafting discussions, the French delegate René Cassin, a leading philosophical visionary of the UDHR, strongly expressed at several points his view that the inner freedoms could not be subjected to limits.[14] We have discussed in our recent work the implications of this view in the

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[10] GA Res. 217A(III), UNGAOR, 3d Sess., Supp. No. 13, UN Doc. A/810 (1948) 71.

[11] Charles Malik, "What Are Human Rights?" The Rotarian (August 1948) at 9, quoted in Linde Lindkvist, *Religious Freedom and the Universal Declaration of Human Rights* (Cambridge: Cambridge University Press, 2017) at 45.

[12] Summary Record of the 127th Meeting [of the Third Committee], UN Doc. A/C.3/SR.127 (November 9, 1948) in William A. Schabas, ed., The Universal Declaration of Human Rights: The Travaux Préparatoires (Cambridge: Cambridge University Press, 2013) at 2497.

[13] We explore such rationalizations in Brian Bird, Dwight Newman & Derek Ross, "The Charter's Forgotten Fundamental Freedoms" *Policy Options* (June 16, 2020).

[14] On Cassin's agreement with Malik within this discussion, see Linde Lindkvist,

Canadian Charter context, where there ought properly to be an absolute core to these rights along with the possibility of justified limits on some external manifestations of them, but with the idea of absolute rights calling for changes in Canadian constitutional theory.[15] A legal system that recognizes certain absolute protections for the human person is qualitatively different from one that would incessantly, and even insidiously, balance off rights in various proportionality analyses.[16] Forgetting the inner freedoms means forgetting aspects of what the law is and how the state is to interact with free human persons.

IV. IMPLICATIONS

The position we have been able to articulate here only briefly within the requisite space constraints is essentially that the forgotten inner freedoms, which we have begun discussing elsewhere, raise particular issues in respect of the rule of law. The very fact that they have been permitted to be forgotten raises rule of law issues related to the accessibility and promulgation aspects of the rule of law. The fact that these inner freedoms, in particular, have been forgotten from the law has particular implications in terms of the law forgetting aspects of human nature, the human person, and human agency that are actually essential to the enterprise of law itself.

One important implication of our position is that the law cannot properly be discussed independently of its deeper heritage and deeper values. While it is proper to use the law to advocate for causes, to work with the law in a contemporary setting should not be solely about playing with a set of rules malleable to causes of the day. To work with the law is to be immersed in a deeper human enterprise that recognizes the absolute value of the human person. It is to be engaged with a deeper tradition of freedoms that have unfortunately sometimes become forgotten. It is to be engaged with the deep foundations of the rule of law.

There are yet more practical implications that flow from these underpinnings. For example, while certain professional academic pressures are oriented toward "knowledge generation", there is a real need within the humanistic enterprise of law also for knowledge preservation, the conservation of the great traditions of the law, and ongoing work on legal issues that may not always seem like they fit in the headlines of today but that are part of the deeper lifelines of humanity over the generations.[17]

Religious Freedom and the Universal Declaration of Human Rights (Cambridge: Cambridge University Press, 2017) at 27–29.

[15] Monica Fitzpatrick & Dwight Newman, "Freedoms of Thought, Belief and Opinion as Protected Inner Freedoms" (2020) 98 S.C.L.R. (2d) 249 at 269–70.

[16] See also Dwight Newman, "Proportionality Analysis: 5 ½ Myths" (2016) 73 S.C.L.R. (2d) 93; Dwight Newman, "The Limitation of Rights: A Comparative Evolution and Ideology of the *Oakes* and *Sparrow* Tests" (1999) 62 Sask. L. Rev. 543.

[17] We note the salience with the historical project of Ryan Alford, *Seven Absolute Rights: Recovering the Historical Foundations of Canada's Rule of Law* (Montreal: McGill-Queen's University Press, 2020) and look forward to him and others going on to further treatment of

Even while also being ready to discuss novel manifestations of conflict and coordination in human life, law faculties and legal scholars have resulting normative obligations to continue to engage with a certain established corpus and curriculum of legal knowledge.

Legal scholars, legal practitioners and judges have mutual challenges in maintaining life in forgotten freedoms and forgotten foundations of law. To fail to do so is to deny individuals part of their birthright as free persons in proper relation with the order of the state, and it is also to do something that has corrosive effects upon the rule of law. This challenge too implies normative obligations to make continuing efforts to conserve the forgotten freedoms by referencing them, by expositing them, and by being ready to apply them without hesitation and without having to search them out in some dust-encrusted tome.

There is a role here even for those embarking on the enterprise of law. We hope that those concerned with deep values continue to become law students, and we hope that law students continue to ask the intellectually challenging questions, continue to form associations through which they wrestle with deep meaning, and continue toward the roles through which in the noblest traditions of the profession they may serve the rule of law.

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the historical foundations he has been exploring.

Chapter 5

THE NOTWITHSTANDING CLAUSE AND THE RULE OF LAW

Brian Bird*

The "notwithstanding clause" of the *Canadian Charter of Rights and Freedoms*[1] has, in recent years, often been in the limelight. From Saskatchewan funding non-Catholic students in Catholic schools, to Ontario removing seats on Toronto's city council during a municipal election campaign, to Quebec banning certain public servants from wearing religious symbols, to New Brunswick obliging schoolchildren to be vaccinated without exemptions for religious or conscientious objections, the use or threatened use of the notwithstanding clause to insulate controversial legislation from judicial scrutiny for compliance with the Charter is a familiar headline of late.

Whenever the notwithstanding clause appears on Canada's politico-legal radar, fresh debate on the merits and demerits of the clause ensue. There has been no shortage of back and forth on the wisdom of the clause since it arrived in 1982 as part of the Charter. This paper does not engage directly with this dimension of the debate on the notwithstanding clause. Rather, this paper is a modest attempt to engage with theoretical contours of the debate. My essential claim is that opposition to the notwithstanding clause is to a significant degree rooted in the conviction that a law which violates basic norms of justice is, for all intents and purposes, not a true law.

More specifically, this paper explores the relationship between the notwithstanding clause and the rule of law. The rule of law is an underlying principle of the Canadian Constitution. This principle is often described as unwritten, but it makes a textual appearance not far from the notwithstanding clause. The preamble to the Charter declares that Canada is "founded upon principles that recognize the supremacy of God and the rule of law".[2] The relationship between the notwith-

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[1] Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 ("Charter").

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

standing clause and the rule of law, how the clause and the concept speak to each other, is largely untheorized.

The rule of law — the rule that law rather than raw power governs a society — is a complex, nuanced and contested concept. Scholarship has given rise to a spectrum with "thin" and "thick" accounts of the concept at both ends.[3] The thin (formal) version says that the rule of law is respected where law is enacted according to prescribed steps and procedures. The thick (substantive) version, in addition to the content of the thin conception, says that the rule of law entails fidelity to norms of justice and human rights. The distinction between the two accounts can be distilled to the rule of duly enacted law on the one hand and the rule of just law on the other hand. The Supreme Court of Canada has, to date, described the rule of law in Canada in thin terms.[4]

The notwithstanding clause, meanwhile, resides in section 33 of the Charter. The clause provides that a legislature in Canada can "expressly declare" in a law which it enacts that the law (or a part of the law) will "operate notwithstanding" certain provisions of the Charter.[5] These provisions are section 2 and sections 7 to 15.[6]

On its face, the clause enables the enactment of legislation that need not respect these Charter rights and freedoms. Where the notwithstanding clause is used, that use is valid for five years.[7]

Use of the clause is renewable by the legislature's reenactment of the declaration.[8]

It is often said that use of the notwithstanding clause "overrides" the Charter. Here, the relationship between the clause and the rule of law quickly becomes distorted. The notion that the clause overrides the Charter, which forms part of the Constitution, carries great import for the rule of law. The Constitution is the "supreme law" of Canada. To simply state that the notwithstanding clause *overrides*

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[3] See Jørgen Møller & Svend-Erik Skaaning, *The Rule of Law: Definitions, Measures, Patterns and Causes* (Basingstoke: Palgrave Macmillan, 2014).

[4] See *Reference re Secession of Quebec*, [1998] S.C.J. No. 61, [1998] 2 S.C.R. 217 (S.C.C.).

[5] *Canadian Charter of Rights and Freedoms*, s. 33(1), Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

[6] Section 2 of the Charter guarantees several "fundamental freedoms" such as "freedom of conscience and religion", "freedom of association" and "freedom of peaceful assembly". Section 7 guarantees the right to life, liberty and security of the person (and the right not to be deprived of these interests unless the deprivation accords with principles of fundamental justice). Sections 8 to 14 guarantee rights that, in general terms, pertain to criminal proceedings. Section 15 guarantees equality before and under the law.

[7] *Canadian Charter of Rights and Freedoms*, s. 33(3), Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

[8] *Canadian Charter of Rights and Freedoms*, s. 33(4), Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

the supreme law is to give the distinct impression that the clause *violates* the supreme law. It suggests that use of the notwithstanding clause is, at some level or in some respect, unlawful.

The notwithstanding clause forms part of the Constitution, so use of the clause cannot override it. The clause, according to the thin version of the rule of law, is a legal exercise of state power. The thin version, as stated above, only requires formal legality for the rule of law to be respected. At times, critics of the notwithstanding clause seem to gloss over this requirement. They appear to view the notwithstanding clause as illegitimate within a liberal democracy that has entrenched a bill of rights. One could say that, in their criticism of the clause, these critics smuggle concepts such as justice, dignity and equity from the thick into the thin version of the rule of law.

Alternatively, one could say — as I do — that this criticism of the notwithstanding clause is a nod to the thick version of the rule of law at work in Canada. If the clause does not override the Constitution and thus satisfies the thin version of the rule of law, does the unease created by the existence and use of the clause gesture to the presence of the thick version? In other words, do the negative reactions sparked by the notwithstanding clause reveal support for a conception of the rule of law that, beyond formal legality, demands normative legitimacy for a purported law to truly be a law? If the clause does not violate legality in the thin sense, does the clause violate legality in the thick sense?

To tackle these questions, consider a common critique of the clause: it enables legislation that violates human rights and the values that inform them. Bill 21 in Quebec — a law that bans certain public servants from wearing religious symbols such as face coverings — is a useful case study.[9] Forceful criticisms of Bill 21, which point to religious freedom and gender equality, seem to be inspired by concerns that run deeper than the notion that Bill 21 infringes parts of the Charter that protect these interests. Opposition to Bill 21 springs first, it seems, from the view that the legislation is inherently unjust and unworthy of being called a law, before the Charter even enters the picture.

Even so, the existence and content of the Charter certainly reinforces this view on the legal legitimacy of Bill 21. There are substantive implications for the rule of law that follow from entrenching a bill of rights like the Charter. It would be odd to ask whether we are dealing with a law when Parliament enacts legislation that the Constitution only allows a province to enact (or vice versa). We are more likely to ask this question, however, when a legislature enacts legislation that violates interests like equality, freedom of expression, or the right not to be arbitrarily detained or imprisoned. We are more likely to question whether these latter examples satisfy the definition of "law".

If the supreme law of a society affirms inescapably normative concepts like

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[9] *An Act respecting the laicity of the State*, S.Q. 2019, c. 12.

freedom and equality, there will be, in my view, an inevitable effect on the rule of law. Legislation that disrespects these normative concepts will be viewed as more than merely unconstitutional, according to the degree to which it disrespects them. The legislation will be viewed at some level as lacking legality — even if, from the formal point of view, it is enacted through use of a mechanism such as the notwithstanding clause. This view, I submit, lies beneath the surface of negative reactions engendered by use of the clause, especially where use of the clause strikes us as permitting a fundamental injustice.

My view, in other words, is that the constitutional commitment of a society to protect fundamental rights and freedoms from unreasonable limitation by the state necessarily entails a commitment to a thicker version of the rule of law — to the rule of just law — in that society. Illegitimate use of the notwithstanding clause, a topic to which I will soon turn, betrays these commitments.

There is certainly room for debate on the extent to which a commitment to a thicker version of the rule of law in Canada predates the Charter and the extent to which the adoption of the Charter accelerated the growth of this version of the rule of law. Arguably, this commitment would have largely if not entirely arrived without the Charter, as it has in advanced liberal democracies such as Australia (which lacks an entrenched bill of rights) or even in the United Kingdom (which has an unwritten Constitution).

I submit that support in Canada for the idea that law — to be properly understood as law — demands more than formal legality long predates the Charter. It has become common for Canadians to think that legal concern for human rights began in 1982 with the arrival of the Charter. Legislation in Canada protecting human rights existed before the Charter, and our inheritance of a Constitution "similar in Principle" to that of the United Kingdom means that a firm commitment to basic civil liberties existed in Canada from Confederation in 1867.[10] The Charter did not give birth to the idea that law in Canada — to truly count as law — must satisfy certain normative standards, but the Charter has served to more tightly weave this norm into the fabric of Canadian society.

What does the foregoing mean for the notwithstanding clause? Given what has been said, is the notwithstanding clause incompatible with the version of the rule of law that follows from the entrenchment of fundamental rights and freedoms? Put at its strongest, was notwithstanding clause a dead letter from the moment the ink dried?

The answer, in my view, is not straightforward because not all uses of the notwithstanding clause are made equal. The notwithstanding clause can be and has been used in varied contexts and for varied reasons. There may well be instances in which recourse to the clause serves a laudable and just purpose, in which case

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[10] Preamble to the *Constitution Act, 1867* (UK), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, Appendix II, No. 5.

concerns about violating the rule of just law disappear. Saskatchewan's decision to invoke the notwithstanding clause to maintain funding for non-Catholic students in Catholic schools was generally well received even though a court ruled that the policy violated the state's duty of religious neutrality.[11] Indeed, both the province and the Catholic school authorities shared the position that the policy should continue.

The clause may also be used in response to a judicial interpretation of the Charter that is, in the eyes of a legislature, incorrect. Where a government believes that a court has misinterpreted the Charter, use of the notwithstanding clause may safeguard rather than suppress the Charter. Setting aside the wisdom of a law in Ontario that shrank the seat count on Toronto's city council during a municipal election campaign, the use of the clause in response to a court decision that struck down the law on what many legal observers considered to be shaky constitutional reasoning would serve rather than subvert constitutionalism.[12]

The notwithstanding clause has even been suggested as a way for legislatures to buy time to craft new legislation after existing legislation has been found unconstitutional by a court and invalidation of the law in the absence of new legislation would cause social upheaval. Discussion of this use of the clause occurred in the wake of the Supreme Court's ruling that invalidated the crime of assisted suicide and thereby opened the door to physician-assisted death in Canada.[13]

But where the notwithstanding clause is used to oust or substantially imperil a Charter right or freedom without justification, there is good reason — based on what has been posited in this paper — to conclude that such a use of the clause offends the rule of just law and is, for that reason, illegitimate and even unlawful. The matter of determining when the clause has been used "without justification" is of course contestable, but we can think of examples of when this threshold will surely be reached. If a province, out of hostility to religion, were to use the clause to enact a law that bans worship, this would offend the thick form of the rule of law. The same would be true if Parliament were to use the clause to bypass the right not to be arbitrarily detained or imprisoned to legislate the internment of certain races for odious reasons animated by social Darwinism.[14]

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[11] "Sask. Government invokes notwithstanding clause over Catholic school ruling" *CBC News* (November 8 2017), online: <https://www.cbc.ca/news/canada/saskatchewan/sask-notwithstanding-schools-1.4392895>.

[12] Paola Loriggio, "Law that cut Toronto city council nearly in half is constitutional, appeal court rules" *CTV News* (September 19, 2019), online: <https://toronto.ctvnews.ca/law-that-cut-toronto-city-council-nearly-in-half-is-constitutional-appeal-court-rules-1.4600716>.

[13] Sarah Burningham, "Sarah Burningham: Use the notwithstanding clause, if you must" *National* Post (December 21, 2015), online: <https://nationalpost.com/opinion/sarah-burningham-use-the-notwithstanding-clause-if-you-must>.

[14] Regarding a standard for determining whether use of the clause is legitimate, using

I say that these uses of the notwithstanding clause may even be unlawful because the Supreme Court has found that the rule of law — as an underlying constitutional principle — will, in certain circumstances, dictate substantive legal outcomes. In *Re Manitoba Language Rights*, the Court found that most of Manitoba's laws were unconstitutional because they were not enacted in French as well as in English.[15] As a result, most of the laws in Manitoba were "of no force or effect".[16] The Court found that such an outcome would violate the rule of law, which requires a stable body of laws by which a society is ruled. To resolve the impasse, the Court temporarily prolonged the validity of the unconstitutional laws so that the Manitoba legislature could calmly cure the defect.

Based on the reasoning of the Court in *Manitoba Language Rights*, there is no glaring bar to it applying in the context of a use of the notwithstanding clause that offends the thick version of the rule of law. Whether the reasoning is sound is a separate question that requires further exploration elsewhere.

I reiterate my view, in closing, that the common critique of the notwithstanding clause as being antithetical to the project of entrenching a bill of rights is, in effect, an articulation of the idea that this project entails an endorsement of a thicker version of the rule of law by the society in question. The existence of the notwithstanding clause along with certain uses of it do not inherently betray a thick version of the rule of law, but the existence of the clause certainly opens the door to legislation that commits this betrayal.

When the notwithstanding clause arrived in 1982, many politicians and scholars accurately predicted that it would not be widely used due to the political cost of using of the clause. Apart from political considerations, it seems plausible to suggest that scant usage of the clause over the nearly four decades of its existence stems in part from a recognition of the conceptual friction between the clause and what the rule of law means in a society that has inserted a bill of rights into its supreme law.

I suspect that much of the discomfort with the notwithstanding clause stems from a profound tension between it and the endorsement by Canadian society of the view that the rule of law is, properly understood, the rule of just law — something more than a formal commitment to justice, equality human rights. We have not wrestled sufficiently with this possibility. This paper is, I hope, a starting point.

New Brunswick's mandatory vaccination law as a case study, see Mark Mancini & Geoffrey Sigalet, "What constitutes the legitimate use of the notwithstanding clause" *Policy Options* (January 20, 2020), online: <https://policyoptions.irpp.org/magazines/january-2020/what-constitutes-the-legitimate-use-of-the-notwithstanding-clause/>.

[15] *Re Manitoba Language Rights*, [1985] S.C.J. No. 36, [1985] 1 S.C.R. 721, 19 D.L.R. (4th) 1 (S.C.C.).

[16] *Constitution Act, 1982*, s. 52(1), being Schedule B to the *Canada Act 1982* (UK), 1982, c. 11.

Chapter 6

TIMELY, AND LOOKING FORWARD TO VOLUME TWO: BOOK REVIEW OF *SEVEN ABSOLUTE RIGHTS: RECOVERING THE HISTORICAL FOUNDATIONS OF CANADA'S RULE OF LAW*

Gerard J. Kennedy*

I. INTRODUCTION

Every so often, one wonders if a book's author had a crystal ball to forecast just how relevant it was to become. Ryan Alford's recent *Seven Absolute Rights: Recovering the Historical Foundations of Canada's Rule of Law*[1] is one such book. Events taking place in the months prior to its publication underscored the importance of its engrossing and majestic history lesson. As Alford notes, the concept of the rule of law was shaken after the historical events of 1929 and 1968;[2] the events of late 2019 and early 2020 may well be a turning point in how we conceive of this concept and its role in Canada's constitutional order. The volume makes a convincing case that understanding the history of the constitutional concept of the rule of law leads to a doctrine that is substantive as well as procedural, with history rather than moral philosophy constraining the mischief that can arise when unwritten constitutional principles are given substantive meaning. Using the word "volume" to describe the book is appropriate as further important questions are raised by it and, in the book's final pages, the author acknowledges that these will require another volume to be addressed. Though I will be reading that future volume with interest!

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1 Ryan Alford, *Seven Absolute Rights: Recovering the Historical Foundations of Canada's Rule of Law* (Montreal: McGill-Queens' University Press, 2020).

2 Ryan Alford, *Seven Absolute Rights: Recovering the Historical Foundations of Canada's Rule of Law* (Montreal: McGill-Queens' University Press, 2020) at 182.

Part II of this review briefly summarizes the book. Part III discusses how timely and important it is in light of current political events, and associated topical legal questions, while also expressing some concerns. Part IV notes limitations of the author's methodology *vis-à-vis* answering contemporary legal questions: in other words, it starts, but does not finish, the legal analysis, and may not appeal to all jurists and scholars. Part V flags questions raised by reading the book, some of which will hopefully be addressed in the follow-up volume.

II. SUMMARY

The volume's seven chapters are divided into three parts, which indeed accomplish three different tasks. The Introduction describes the rule of law as a key concept in Canadian constitutional law, imported from the U.K., specifically through the *Constitution Act, 1867* prescribing that Canada's constitution is "in principle similar to that of the United Kingdom".[3] He also lists the seven "absolute" and non-derogable (the language of international law[4]) rights which he posits have been imported into Canadian law through the preamble to the *Constitution Act, 1867* and preserved through section 26 of the *Canadian Charter of Rights and Freedoms*.[5] These are:

1. protection against punishment without due process;
2. government may not act without legal or constitutional basis, even in an "emergency";
3. absolute prohibition of torture;
4. parliamentary privilege;
5. no one may be punished or denied bail without statutory authority;
6. *habeas corpus*; and
7. judges must be impartial and protected from state interference.[6]

Part I emphasizes the importance of the rule of law in Canadian constitutionalism. Chapter One looks at its emphasis in Canadian jurisprudence, notably the 1997 *Provincial Judges' Reference*.[7] He responds to criticism of the decision,[8] and notes the unfortunate if understandable (in light of the unpopular litigant at issue) retreat

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[3] (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, Appendix II, No. 5.

[4] *International Covenant on Civil and Political Rights*, 999 UNTS 172, art. 4(2).

[5] Part I of the *Constitution Act, 1982*, being Schedule B of *Canada Act 1982* (U.K.), 1982, c. 11, reads at s. 26: "The guarantee in this Charter of certain rights and freedoms shall not be construed as denying the existence of any other rights or freedoms that exist in Canada."

[6] Ryan Alford, *Seven Absolute Rights: Recovering the Historical Foundations of Canada's Rule of Law* (Montreal: McGill-Queens' University Press, 2020) at 8-9.

[7] *Reference re Remuneration of Judges of the Provincial Court (P.E.I.)*, [1997] S.C.J. No. 75, [1997] 3 S.C.R. 3 (S.C.C.).

[8] See, *e.g.*, Ryan Alford, *Seven Absolute Rights: Recovering the Historical Foundations of*

in *British Columbia v. Imperial Tobacco*.[9] He then pivots to Chapter Two's topic of contemporary British conceptualizations of the rule of law as a substantive constitutional principle, largely through emphasizing the jurisprudence and scholarship of former Lord Chief Justice Tom Bingham.

Part II is a captivating history of British constitutionalism. This begins in the time of Henry II, and his bringing a "common law" to England.[10] Chapter Three emphasizes *Magna Carta* and how it came to be viewed as constitutionalizing British law and constraining the power of the monarch, especially in the reigns of Kings John, Henry III and Edward I. By Chapter Four's beginning centuries later, Elizabeth I has accepted constraints on her power.[11] But James I and Charles I had different takes on matters, leading to conflicts, notably with eminent jurist Edward Coke. A generation later, Charles I lost his head. Chapter Five witnesses the restoration of the monarchy but primarily looks at the Glorious Revolution and the demise of James II's reign, with William III and Mary II assuming the throne on very explicit understandings of their powers being constitutionally constrained.[12] Throughout Part II, Alford describes other statutes that were widely accepted to have become part of the constitutional order, and have subsequently been cited in British and Canadian case law.

Part III returns to Canada. Chapter Six describes the acceptance of the rule of law, as developed through important British statutes, in pre-Confederation Canada. It particularly notes the roles of Robert Baldwin and Louis-Hippolyte Lafontaine in ensuring that British constitutional rights were recognized and respected in Canada.[13] As such, it would have been beyond doubt by the writing of the *Constitution Act, 1867* that the understanding of a constitution "in principle similar to that of the United Kingdom" would include protection of the seven rights Alford identifies.[14] Chapter Seven notes academic defences and critiques of the rule of law, with the latter leading to what Alford posits is a failure to appreciate its rich constitutional significance. This complements his previous work on "hostility"

Canada's Rule of Law (Montreal: McGill-Queens' University Press, 2020) at 32.

[9] *British Columbia v. Imperial Tobacco Canada Ltd.*, [2005] S.C.J. No. 50, 2005 SCC 49, [2005] 2 S.C.R. 473 (S.C.C.).

[10] Ryan Alford, *Seven Absolute Rights: Recovering the Historical Foundations of Canada's Rule of Law* (Montreal: McGill-Queens' University Press, 2020) at 80.

[11] Ryan Alford, *Seven Absolute Rights: Recovering the Historical Foundations of Canada's Rule of Law* (Montreal: McGill-Queens' University Press, 2020) at 101.

[12] Ryan Alford, *Seven Absolute Rights: Recovering the Historical Foundations of Canada's Rule of Law* (Montreal: McGill-Queens' University Press, 2020) at 116.

[13] Ryan Alford, *Seven Absolute Rights: Recovering the Historical Foundations of Canada's Rule of Law* (Montreal: McGill-Queens' University Press, 2020) at 152.

[14] Ryan Alford, *Seven Absolute Rights: Recovering the Historical Foundations of Canada's Rule of Law* (Montreal: McGill-Queens' University Press, 2020) at 189.

towards the concept of the rule of law in Canadian academia.[15] The Epilogue promises a second volume that will address questions that were raised during the reading of the book — these will be addressed in more detail below.

III. A TIMELY – AND IMPORTANT – CONTRIBUTION

The book is first and foremost a history of British constitutional law, illustrating what it means to say that Canada's constitution is "in principle" similar to the U.K. from the perspective of rights encompassed in the concept of the rule of law. An incredibly entertaining (at times, quite amusing[16]) read, Alford states at the outset that he may occasionally err in terms of being excessively majestic in journeying through history.[17] But that is forgivable given the quality of the narrative in introducing a new generation of Canadian lawyers, judges, law students and scholars to the history of the concept of the rule of law.

Constitutional history is emphasized to the point where developing and defending the "seven absolute rights" takes second fiddle. The book's title and subtitle could have been reversed. This is not a criticism of the scholarship. But it does flag that the history of the rule of law permeates the seven chapters, rather than a detailed history of the seven rights.

More importantly, the constitutional principle of the rule of law encompassing substantive — and not just procedural — content is an important hypothesis to air. This will become more important if section 33 of the Charter is used more frequently in the future. This is very possible, given recent attempts to invoke it in Ontario,[18] Quebec[19] and Saskatchewan,[20] and with academics, perhaps in light of this likelihood, suggesting considerations for the circumstances in which it should be used.[21] The phenomenon of "abusive legalism" — governments adhering to the

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[15] Ryan Alford, "The Origins of Hostility to the Rule of Law In Canadian Academia: A History Of Administrativism & Anti-Historicity" (2019) 92 S.C.L.R., 2ed, 47.

[16] Be sure to watch out to analogies to chess and prohibition of hunting foxhounds that are sure to entertain.

[17] Ryan Alford, *Seven Absolute Rights: Recovering the Historical Foundations of Canada's Rule of Law* (Montreal: McGill-Queens' University Press, 2020) at xvii.

[18] See John Mascarin, "This Is Why We Can't Have Nice Things — Ontario's *Better Local Government Act, 2018* and the Reconstitution of Municipal-Provincial Relations" (2018) 80 M.P.L.R., 5ed, 35.

[19] See *Hak c. Procureure générale du Québec*, [2019] J.Q. no 10839, 2019 QCCA 2145 (Que. C.A.), leave to appeal refused [2020] S.C.C.A. No. 4 (S.C.C.).

[20] See Dwight Newman, "Premier Wall's decision to override a messy court decision is completely proper" *National Post* (May 9, 2017), online: <https://nationalpost.com/opinion/dwight-newman-premier-walls-decision-to-override-a-messy-court-ruling-is-completely-proper>.

[21] Notably Dwight Newman in "Canada's Notwithstanding Clause, Dialogue, and Constitutional Identities" in, Geoffrey Sigalet, Grégoire Webber & Rosalind Dixon, eds.,

letter of constitutional law while destroying its spirit — also underscores the volume's importance.[22] Alford makes a compelling case that unwritten constitutional principles can address such phenomena.[23]

Remarkably, the timeliness of the volume has become even more apparent since Alford wrote the book but before it was published, as at least three important events intersected with themes of the book. First, in December 2019, the Supreme Court of Canada centred the rule of law in its decision, *Canada (Minister of Citizenship and Immigration) v. Vavilov*.[24] The emphasis on the rule of law as requiring correctness review of administrative action in certain circumstances led to praise in some circles,[25] but also dismay from segments of legal academia[26] of which Alford seems suspicious. Second, in February 2020, police were reluctant to enforce an injunction removing blockades enacted by hereditary Wet'suwet'en chiefs. This led to commentators criticizing perceived failure to uphold the rule of law,[27] and retorts that this was an impoverished understanding of the rule of law.[28] Third, the COVID-19 pandemic that engulfed the world in early 2020 has led governments to undertake actions in the name of an "emergency" that would otherwise be

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Constitutional Dialogue: Rights, Democracy, Institutions (Cambridge: Cambridge University Press, 2019).

[22] Alvin YH Cheung, "An Introduction to Abusive Legalism" (February 22, 2018) LawArXiV, online: <https://osf.io/preprints/lawarxiv/w9a6r/>.

[23] Ryan Alford, *Seven Absolute Rights: Recovering the Historical Foundations of Canada's Rule of Law* (Montreal: McGill-Queens' University Press, 2020) at 194.

[24] [2019] S.C.J. No. 65, 2019 SCC 65, 441 D.L.R. (4th) 1 (S.C.C.).

[25] See, *e.g.*, Mark Mancini, "Vavilov: A Step Forward" *Advocates for the Rule of Law* (December 19, 2019), online: <http://www.ruleoflaw.ca/vavilov-a-step-forward/>; Gerard Kennedy, "20 Things to Be Grateful For as Administrative Law Enters the 2020s" *Advocates for the Rule of Law* (December 23, 2019), online: <http://www.ruleoflaw.ca/20-things-to-be-grateful-for-as-administrative-law-enters-the-2020s/>.

[26] See, *e.g.*, Mary Liston, "Bell is the Tell I'm Thinking Of" *Administrative Law Matters* (April 27, 2020), online: <https://www.administrativelawmatters.com/blog/2020/04/29/bell-is-the-tell-im-thinking-of-mary-liston>.

[27] See, *e.g.*, Leonid Sirota & Asher Honickman, "What the rule of law is, and why it matters — for everyone" *The National Post* (February 18, 2020), online: <https://nationalpost.com/opinion/opinion-what-the-rule-of-law-is-and-why-it-matters-for-everyone>.

[28] See, *e.g.*, Corey Shefman, "Wet'suwet'en blockades: Rule of law is a convenient weapon" *Hamilton Spectator* (February 28, 2020), online: <https://www.niagarafallsreview.ca/opinion-story/9870479-wet-suwet-en-blockades-rule-of-law-is-a-convenient-weapon/>; and the comments of Beverly Jacobs as reported in Brett Forester, "The rule of law is 'racist' says Mohawk law professor Beverly Jacobs" *APTN News* (February 21, 2020), online: <https://aptnnews.ca/2020/02/21/the-rule-of-law-is-racist-says-mohawk-law-professor-beverly-jacobs/>. See also Jeremy Waldron, "The Rule of Law and the Importance of Procedure" (2011) 50 Nomos 3.

unthinkable.[29] In such times, a proper conception of the rule of law is incredibly important, and Alford has assisted developing one in *Seven Absolute Rights*.

I was somewhat concerned that Alford was overstating seeming "hostility" to the rule of law from certain segments in legal academia. There is likely some truth in this, both due to limited viewpoint diversity in the academy[30] and specific instances that Alford notes. (Anecdotally, I barely knew of constitutional scholar W.P.M. Kennedy before reading this book.) There is apparent schadenfreude for academics whose work he rightly criticizes, as they revealed themselves to be Johnny-come-lately defenders of the rule of law when the executive was filled with actors with whom they disagreed.[31] This is amusing but seems unlikely to persuade.[32] Moreover, there are many examples of legal academics defending the upholding of the rule of law.[33] They do not always adhere to Alford's history-based conception of

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[29] Though this is not strictly related to the rule of law, Alford observes that being in prison for a "short" period of time can be a death sentence in times of rampant disease, and was in the 17th century: Ryan Alford, *Seven Absolute Rights: Recovering the Historical Foundations of Canada's Rule of Law* (Montreal: McGill-Queens' University Press, 2020) at 130. It may also be an incredible health risk in the time of COVID-19: see, *e.g.*, Craig Desson, "Canada's prison watchdog calls out federal corrections for 'extreme' confinement as COVID-19 cases surge" *CBC News* (April 25, 2020), online: <https://www.cbc.ca/news/canada/montreal/canada-prison-conditions-covid-19-human-rights-1.5545303>.

[30] See Jonathan Haidt, "Viewpoint Diversity in the Academy" *The Righteous Mind* (2015), online: <https://righteousmind.com/viewpoint-diversity/>; George W. Dent, Jr., "Toward Improved Intellectual Diversity in Law Schools" (2014) 37 Harv. J. L. & Pub. Pol'y 165. These admittedly concentrate on the *status quo* in the U.S., but there appears no reason to believe that this would be different in Canada. Indeed, there is some suggestion that the same may be true: Bryan P. Schwartz, "The Next Great Transition in Canadian Legal Education" (2016) 39 Man L.J. xxiii at xxvii, xxxv, citing, *inter alia*, Steven C. Bahls, "Political Correctness and the American Law School" (1991) 69:4 Wash ULQ 1041; Legal Affairs: Debate Club, "Do Law Schools Need Ideological Diversity?: Peter H. Schuck and Brian Leiter debate" (January 23, 2006), online: <https://legalaffairs.org/webexclusive/debateclub_diversity0106.msp>; and Walter Olson, *Schools for Misrule: Legal Academia and on Overlawyered America* (New York: Encounter Books, 2011) at, *e.g.*, 14-15.

[31] Ryan Alford, *Seven Absolute Rights: Recovering the Historical Foundations of Canada's Rule of Law* (Montreal: McGill-Queens' University Press, 2020) at 188-89.

[32] See also Ryan Alford, *Seven Absolute Rights: Recovering the Historical Foundations of Canada's Rule of Law* (Montreal: McGill-Queens' University Press, 2020) at 32, noting criticism of *Provincial Judges' Reference* as "notably waspish". This also seems unlikely to persuade.

[33] See, *e.g.*, Michelle Bloodworth *et al.* "The Rule of Law in Canada? A Global Template" (2013) 31 Nat'l J. Const. L. 111; Evan Fox-Decent, "Is the Rule of Law Really Indifferent to Human Rights?" (2008) 27 Law and Philosophy 533; Peter W. Hogg & Cara F. Zwibel, "The Rule of Law in the Supreme Court of Canada" (2005) U.T.L.J. 715.

the concept (though some do, as Alford concedes himself[34]). As will returned to below, many of these scholars offer competing visions of the rule of law that require philosophical rather than historical retorts. And, for better or for worse, many academics who purport to adhere to indeterminist views of law actually teach in a fairly formalist way.[35] So I have some reticence to cast aspersions in this way.

Even so, Alford emphasizes that his commitment is to preserving our memories of legal history while we can. It bears emphasis that, insofar as the book is "conservative", it is so in the sense of "preserving of tradition". Alford illustrates how opposite ends of the political spectrum can find the rule of law frustrating, which suggests just how valuable the concept is as a check on government power.

IV. "HISTORY FIRST" AND THE BOOK'S APPEAL

I fear that the volume's emphasis on history may turn off scholars and judges who find the constitution's original meaning to be of little import in applying it in the modern era.[36] Few scholars or judges view original meaning and purpose as irrelevant.[37] And Alford explains how understanding the rule of law's history leads to it being adaptable in many circumstances and compatible with a "living tree" approach to constitutional interpretation,[38] something Léonid Sirota and Benjamin Oliphant have also observed.[39] But there remain scholars and judges who downplay the relevance of history.[40] They are unlikely to be persuaded why the history and

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[34] Ryan Alford, *Seven Absolute Rights: Recovering the Historical Foundations of Canada's Rule of Law* (Montreal: McGill-Queens' University Press, 2020) at 188.

[35] See David Sandomierski, *Aspiration and Reality in Legal Education* (Toronto: University of Toronto Press, 2020).

[36] See, *e.g.*, The Honourable Claire L'Heureux-Dubé, "The Importance of Dialogue: Globalization and the International Impact of the Rehnquist Court" (1998) 34:1 Tulsa LJ 15 at, *e.g.*, 33; The Honourable Mr. Justice Michel Bastarache, "Section 33 and the Relationship Between Legislatures and Courts" (2005) 14:3 Const Forum Const 1 at 1; Justice Ian Binnie, "Constitutional Interpretation and Original Intent" *Constitutionalism in the Charter Era* (2004) S.C.L.R. (2d) 345 at paras. 66*ff* (QL); Hugo Cyr, "Conceptual Metaphors for an Unfinished Constitution" (2014) 19:1 Rev. Const. Stud. 1 at 8-9. Léonid Sirota & Benjamin Oliphant, "Has the Supreme Court of Canada Rejected 'Originalism' " (2017) 42:1 Queen's L.J. 107at 116-21 note the literature in this area very comprehensively.

[37] See, Léonid Sirota & Benjamin Oliphant, "Has the Supreme Court of Canada Rejected 'Originalism' " (2017) 42:1 Queen's L.J. 107; Léonid Sirota & Benjamin Oliphant, "Originalist Reasoning in Canadian Constitutional Jurisprudence" (2017) 50:2 U.B.C. L. Rev. 505.

[38] Ryan Alford, *Seven Absolute Rights: Recovering the Historical Foundations of Canada's Rule of Law* (Montreal: McGill-Queens' University Press, 2020) at, *e.g.*, 10, 189.

[39] Léonid Sirota & Benjamin Oliphant, "Has the Supreme Court of Canada Rejected 'Originalism' " (2017) 42:1 Queen's L.J. 107 at 133-34.

[40] As Alford notes: Ryan Alford, *Seven Absolute Rights: Recovering the Historical*

tradition that Alford conveys is so important through a historical argument.[41]

A strong deontological bent is also apparent in *Seven Absolute Rights*. Alford is concerned about rules that exist without exceptions, evidenced in the book's title. He notes these rules' good consequences, including protecting individuals from torture and ensuring government transparency through parliamentary privilege. But it appears the upholding of rules rather than the consequences *per se* that most concerns him. Indeed, he explicitly critiques utilitarianism in general[42] and Jeremy Bentham in particular.[43] I am highly sympathetic to the importance of deontological considerations in various facets of law.[44] Nonetheless, Alford's analysis seems unlikely to persuade a committed utilitarian. Moreover, much recent constitutional jurisprudence[45] has been highly concerned with utilitarian consequences, with there being limited pushback.[46] Even aspects of constitutional doctrine purporting to be deontological frequently have strong consequentialist undercurrents.[47]

V. QUESTIONS REMAINING

Some questions remain at book's end. First, why are there only seven absolute rights? I gather that Alford delved through British constitutional history and concluded that only seven of them could fairly be called "absolute rights", but I hoped for more detail about how he made this determination.

Second, and turning to the rights, I wanted further elaboration on how they came to be viewed as absolute and unable to be infringed by the legislature, as opposed to existing *vis-à-vis* the executive but possibly having their contours curtailed by legislation. For instance, *habeas corpus* may be suspended by the United States

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Foundations of Canada's Rule of Law (Montreal: McGill-Queens' University Press, 2020) at 179-85.

[41] Such a philosophical argument is given by, *e.g.*, Lawrence B. Solum, "Surprising Originalism: The Regula Lecture" (2018) 9 ConLawNow 235.

[42] Ryan Alford, *Seven Absolute Rights: Recovering the Historical Foundations of Canada's Rule of Law* (Montreal: McGill-Queens' University Press, 2020) at 176-77.

[43] Ryan Alford, *Seven Absolute Rights: Recovering the Historical Foundations of Canada's Rule of Law* (Montreal: McGill-Queens' University Press, 2020) at 173.

[44] Gerard J Kennedy, [FORTHCOMING] at X.

[45] See, *e.g.*, *Carter v. Canada (Attorney General)*, [2015] S.C.J. No. 5, 2015 SCC 5, [2015] 1 S.C.R. 331 (S.C.C.); *Bedford v. Canada (Attorney General)*, [2013] S.C.J. No. 72, 2013 SCC 72, [2013] 3 S.C.R. 1011 (S.C.C.).

[46] For a notable exception, see Grégoire Webber, "The Remaking of the Constitution of Canada" *UK Constitutional Law Association* blog (July 1, 2015), online: <https://ukconstitutionallaw.org/2015/07/01/gregoire-webber-the-remaking-of-the-constitution-of-canada/>.

[47] See, *e.g.*, Dwight Newman, "The Limitation of Rights: A Comparative Evolution and Ideology of the *Oakes* and *Sparrow* Tests" (1999) 62 Sask. L. Rev. 543.

Congress, though not the President or cabinet,[48] and "due process" has been argued to not necessarily require judicial process.[49] Why is something analogous not the case in Canada given the principle of parliamentary supremacy? I also wanted to know why the Fathers of Confederation's intimate knowledge of the British constitution meant that the constitution being "in principle" similar to that of the U.K. necessarily imported ***these*** seven rights, or whether they may have entered Canadian law in a "similar" but distinguishable fashion. And assuming substantive rights have been imported pursuant to the unwritten constitutional principle of the rule of law, how could this be amended? Alford acknowledges concerns such as these in the book's final pages.[50] One looks forward to his answers in a future volume.

Third, I was hoping for more on how to prevent the rule of judges in the face of legal uncertainty. This leads to a final paradox regarding the rule of law. The rule of law — at least its Diceyan procedural form — demands certainty. However, as Joseph Raz notes, this conception may be amoral.[51] As Justice Abella has noted, this can justify monstrous acts.[52] Alford argues throughout this volume that this can be solved by conceptualizing the rule of law as encompassing substantive principles. But that expansive conception creates the risks of uncertainty and the rule of judges. Alford remains relatively sanguine about dangers of judicial power compared to legislative and especially executive power. He praises the Canadian judiciary's open-mindedness.[53] He persuasively suggests that history can constrain judges

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[48] *Ex parte Merryman*, 17 F. Cas. 144 (CCD Md 1861). Abraham Lincoln — perhaps the most revered President of the United States — infamously ignored this ruling. But even though it was authored by Roger Taney — perhaps the most reviled Chief Justice of the United States — there seems widespread acknowledgment that his decision is correct on this point: see, *e.g.*, Amanda Taylor, *Habeas Corpus in Wartime: From the Tower of London to Guantanamo Bay* (London: Oxford University Press, 2017) at, *e.g.*, 268, summarizing, *e.g.*, *Boumediene v. Bush*, 553 US 723 (2008).

[49] See, *e.g.*, Norman W. Spaulding, "Due Process Without Judicial Process?: Antiadversarialism in American Legal Culture" (2017) 85 Fordham L. Rev. 2249.

[50] Ryan Alford, *Seven Absolute Rights: Recovering the Historical Foundations of Canada's Rule of Law* (Montreal: McGill-Queens' University Press, 2020) at 204.

[51] Joseph Raz, *The Authority of Law: Essays on Law and Morality* (Oxford: Clarendon Press, 1979) at 225, as discussed in Devrin Froese, "Professor Raz, the Rule of Law, and the *Tobacco Act*" (2006) 19 Can. JL & Juris 161 at 169. I am not certain I agree with that as certainty is, other things being equal, positive. Though it seems a proposition worth granting for this section of this book review.

[52] Sean Fine, "Doing justice to her father's dream" *The Globe and Mail* (July 29, 2016), online: <https://www.theglobeandmail.com/news/national/doing-justice-to-her-fathersdream/article31207151/>.

[53] Ryan Alford, *Seven Absolute Rights: Recovering the Historical Foundations of Canada's Rule of Law* (Montreal: McGill-Queens' University Press, 2020) at 47.

abusing their powers, certainly more so than legal philosophy.[54] This is an important insight as many modern philosophical conceptions of the rule of law encompass contestable normative values.[55] But even though he rightly criticizes extreme indeterminists for being disingenuous and dangerous[56] (or to quote Jeffrey Tobin, hardly a legal conservative, "nihilistic"[57]) achieving perfect legal predictability is impossible. For instance, torture is notoriously difficult to define[58] and it, like genocide,[59] could be subject to "concept creep"[60] and an unprincipled increase in judicial power. I am thus more sympathetic than Alford to the Federal Court of Appeal judge who reminded counsel that the rule of law is not an "empty vessel" but rather has a distinct and "specific" meaning in Canadian constitutional law.[61] Ultimately, Raz's contentment to view the rule of law as a procedural doctrine[62] is understandable if the alternative if an unpredictable smorgasbord of considerations. I am sure that Alford has practical suggestions on how to prevent the rule of judges, and I look forward to reading them in his next volume.

VI. CONCLUSION

"Recovering" history is not necessarily dispositive of how to act in the modern era. I doubt Alford would dispute that. But he does remind us that "recovering" history is an essential, even if not necessarily sufficient, step in conceptualizing the

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[54] Ryan Alford, *Seven Absolute Rights: Recovering the Historical Foundations of Canada's Rule of Law* (Montreal: McGill-Queens' University Press, 2020) at, *e.g.*, 188.

[55] See, *e.g.*, Michelle Bloodworth *et al.*, "The Rule of Law in Canada? A Global Template" (2013) 31 Nat'l J. Const. L. 111; Evan Fox-Decent, "Is the Rule of Law Really Indifferent to Human Rights?" (2008) 27 Law and Philosophy 533.

[56] Ryan Alford, *Seven Absolute Rights: Recovering the Historical Foundations of Canada's Rule of Law* (Montreal: McGill-Queens' University Press, 2020) at 187-88.

[57] *The Nine: Inside the Secret World of the Supreme Court* (New York: First Anchor Books Edition, 2008) at 16.

[58] See, *e.g.*, Paul D. Kenney, "The Meaning of Torture" (2010) 42:2 Polity 131.

[59] See, *e.g.*, Jonathan Kay, "The Ultimate 'Concept Creep': How a Canadian Inquiry Strips the Word 'Genocide' of Meaning" *Quillette* (June 3, 2019), online: <https://quillette.com/2019/06/03/the-ultimate-concept-creep-how-a-canadian-inquiry-strips-the-word-genocide-of-meaning/>. This is putting aside about whether this is an instance of this phenomenon, but it is arguable. And the fear certainly seems legitimate.

[60] A phenomenon whose modern presence in modern academic life is noted in, *e.g.*, Gregg Lukianoff & Jonathan Haidt, *The Coddling of the American Mind: How Good Intentions and Bad Ideas are Setting Up a Generation for Failure* (New York: Penguin Books, 2018) at 24-27.

[61] *Galati v. Canada (Prime Minister)*, [2016] F.C.J. No. 123 at para. 43, 2016 FCA 39, 394 D.L.R. (4th) 555 (F.C.A.), leave to appeal refused [2016] S.C.C.A. No. 152 (S.C.C.).

[62] Joseph Raz, *The Authority of Law: Essays on Law and Morality* (Oxford: Clarendon Press, 1979) at 225, as discussed in Devrin Froese, "Professor Raz, the Rule of Law, and the *Tobacco Act*" (2006) 19 Can. JL & Juris 161 at 169.

rule of law in contemporary Canadian constitutional law. His volume is thus an extremely important contribution to understanding this concept. It could not have been more timely, and I anxiously await the next volume.

Chapter 7

RIGHTS AGAINST THE RULE OF LAW?

Geoffrey Sigalet*

I. INTRODUCTION

How should *Canadian Charter of Rights and Freedoms*[1] rights be "limited" in accordance with the rule of law? There are at least two conceptual approaches to the "reasonable limits" that legislatures may enact concerning Charter rights under section 1: the first *proportionality* approach conceives of limits on rights as "infringements" that can be justified (or not) by balancing interests; the second *constructive* approach understands limits on rights as specifications of the content and scope of rights. Which of these two approaches better protects the rule of law?

In this article, I shall argue that the proportionality approach to limiting rights has likely made the adjudication of Charter rights more arbitrary, less legitimate, and more uncertain. Proportionality may thereby set Charter rights against the rule of law. In contrast, the constructive approach promises to better align Charter rights with the values of the rule of law.[2] The argument uses the recent non-resident voting case of *Frank v. Canada (Attorney General)* to illustrate how the proportionality and constructive approaches can help set rights adjudication against or in alignment with the rule of law.[3]

II. RIGHTS ADJUDICATION AND THE RULE OF LAW

Before exploring how the proportionality and constructive approaches to rights relate to the rule of law, it is worth first explaining how the principle of the rule of

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1 Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 ("Charter").

2 This argument does not purport to resolve the more empirical question of which approach to limiting rights better characterizes the historical development of the Supreme Court of Canada's approach to Charter rights under the "Oakes test". For an account of this development, see Geoffrey Sigalet "American Rights Jurisprudence Through Canadian Eyes" 2020 (23) University of Pennsylvania Journal of Constitutional Law (forthcoming).

3 [2019] S.C.J. No. 1, [2019] 1 S.C.R. 3 (S.C.C.) ("*Frank*").

law itself relates to adjudication. This section will explain how the task of adjudicating Charter rights raises the rule of law problems of judicial complicity in arbitrary, illegitimate and uncertain types of state action. These problems are mitigated through the *legally directed* reasoning of judges about the requirements of rights.

Francisco Urbina has helpfully identified three intrinsic rule of law problems facing adjudication: (1) *the problem of the subdued party*; (2) *the problem of legitimacy*; and (3) *the problem of uncertainty*.[4] The way legally directed adjudication deals with these problems corresponds to principles the Supreme Court has attributed to the rule of law in Canada.

The problem of (1) the subdued party concerns the subjection of parties to the arbitrary personal will of judges rather than the application of "impartial and publicly available" laws.[5] Independent courts are designed to help mitigate the arbitrariness of state decision-making by ensuring that the decisions of state actors follow impartial legal rules and standards.

This requires judicial reasoning about legal disputes to be constrained by impartial legal rules and standards. Without legally constrained adjudication, parties in similar circumstances may receive different judicial decisions as a simple matter of being assigned a different judge or panel of judges. Legally directed reasoning constrains and coordinates judicial decision-making to allow subjects of state interference to be treated with a degree of impartial uniformity across courts. The Supreme Court of Canada has recognized the problem of the subdued party by affirming that the rule of law is the supreme constraint on arbitrary state and private decisions.[6] It has also tied the mitigation of arbitrary decision-making to keeping adjudicative reasoning impartially sourced in positive law.[7] In a similar vein, it has acknowledged that the rule of law must constrain the adjudication of disputes

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[4] Francisco Urbina, *A Critique of Proportionality and Balancing* (Cambridge: Cambridge University Press, 2017) at 181-85. Urbina distinguishes between "outcome" and "intrinsic" problems facing the task of adjudicative reasoning. Outcome problems facing adjudication concern matters that make it less likely for a well-meaning judge to resolve issues reasonably, *e.g.*, a confused, overly passionate or unduly influenced judge. Intrinsic problems stem from the way an issue is decided. In this article I am primarily concerned with intrinsic rule of law problems. Francisco Urbina, *A Critique of Proportionality and Balancing* (Cambridge: Cambridge University Press, 2017) at 161.

[5] Francisco Urbina, *A Critique of Proportionality and Balancing* (Cambridge: Cambridge University Press, 2017) at 181.

[6] *Re Manitoba Language Rights*, [1985] S.C.J. No. 36, [1985] 1 S.C.R. 721 at 748 (S.C.C.).

[7] *Ref re Remuneration of Judges of the Prov Court of PEI; Ref re Independence and Impartiality of Judges of the Prov Court of PEI*, [1997] S.C.J. No. 75 at para. 111, [1997] 3 S.C.R. 3 (S.C.C.).

concerning Charter rights.[8]

The problem of (2) legitimacy concerns the connection between state decision-making and the authority of the political community.[9] The law partly derives its legitimacy from its ability to minimize the arbitrary decision-making of state officials, but also from the democratic will of the people and the justice of the law's substantive requirements.[10] Insofar as the law is a source of political legitimacy, then adjudication that is not guided and constrained by legal rules and standards risks interfering with parties subject to its power beyond what is authorized by the political community. Legally directed adjudication does not itself guarantee legitimacy, but it does directly imbue judicial decision-making with the legitimacy of minimizing the problem of the subdued party. It also allows adjudication to channel whatever other sources of legitimacy may flow into the law of the political community. The Supreme Court has reasoned that legitimate adjudication must respect the "creation and maintenance of an actual order of positive laws which preserves and embodies the more general principles of the normative order".[11]

The problem of (3) uncertainty relates to how reliably and predictably the state will interfere in the lives of its subjects.[12] In Lon Fuller's famous parable of King Rex, the King's pursuit of good ends was frustrated by his own incompetence.[13] As in the case of Rex, the uncertain enforcement change, and application of the state's laws can undermine its ability to achieve good ends for its subjects. Legally directed adjudication helps to make the patterns of state decision-making more reliable and predictable by enforcing and following consistent rules and standards. The Supreme Court has relied on the "legal certainty and predictability" supplied by adjudication under the rule of law in justifying its own power of constitutional judicial review.[14]

III. TWO APPROACHES TO LIMITING CHARTER RIGHTS

The rule of law is by no means the only value at stake in rights adjudication, as we undoubtedly value the substantive requirements of rights as proper ends. But the substantive value of rights could be better realized by legally directed forms of

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[8] *RWDSU v. Dolphin Delivery Ltd.*, [1986] S.C.J. No. 75 at para. 36, [1986] 2 S.C.R. 573 (S.C.C.) ("the Courts are, of course, bound by the *Charter* as they are bound by all law").

[9] Francisco Urbina, *A Critique of Proportionality and Balancing* (Cambridge: Cambridge University Press, 2017) at 183-84.

[10] Jürgen Habermas, "Constitutional Democracy: A Paradoxical Union of Contradictory Principles" (2001) 29 Political Theory 766.

[11] *Re Manitoba Language Rights*, [1985] S.C.J. No. 36, [1985] 1 S.C.R. 721 at 749 (S.C.C.).

[12] Francisco Urbina, *A Critique of Proportionality and Balancing* (Cambridge: Cambridge University Press, 2017) at 184-85.

[13] Lon. L. Fuller, *The Morality of Law* (New Haven: Yale University Press, 1969) at 34.

[14] *Reference re Secession of Quebec*, [1998] S.C.J. No. 61 at para. 53, [1998] 2 S.C.R. 217 (S.C.C.).

adjudication that help to resolve rule of law problems.[15] The rule of law in many cases protects substantive rights as the efficient means for protecting their requirements the same way that the sharpness of a knife is the chef's means to slice ingredients for a delicious meal.[16]

How legally constrained are different approaches to the adjudication of Charter rights? In this section, I will first (a) use the voting rights case of *Frank* to outline the basic elements of the proportionality approach and then argue that majority's proportionality-based adjudication in that case exacerbated the problems of the subdued party, legitimacy and uncertainty. I will then (b) make the case that Justices Côté and Brown's constructive approach to voting rights in the dissent better directs rights adjudication as law.

1. Proportional Voting Rights and the Rule of Law

In *Frank*, the majority opinion of Chief Justice Wagner held that sections of the *Canada Elections Act*[17] unreasonably limited citizens' section 3 Charter right to vote by denying non-residents who are absent from Canada for five years the right to vote in until they resume residence. Justices Côté and Brown dissented, with Justice Brown writing the dissenting justification of the federal residency voting requirements as reasonable means "to define and shape the boundaries of a positive entitlement which, as such, necessarily requires legislative specification".[18] *Frank* featured explicit disagreement between the Justices over how to deal with the "reasonable limits" that section 1 of the Charter permits legislatures to enact when "demonstrable justified in a free and democratic society". In my view, the majority opinion in *Frank* showcases the rule of law difficulties facing the proportionality approach.

The landmark case for understanding section 1 "reasonable limits" on Charter rights is *R. v. Oakes*, in which the Supreme Court developed the "Oakes test" for assessing the justification for rights limitations.[19] *Oakes* separated the analysis of the

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[15] Grégoire Webber, "Rights and the Rule of Law in the Balance" (2013) 129 Law Quarterly Review 399.

[16] Joseph Raz "The Rule of Law and its Virtue" in *The Authority of Law* (Oxford: Oxford University Press, 1979) at 211.

[17] S.C. 2000, c. 9, ss. 3, 6, 8, 11(d), 127, 191(d), 220, 222, 223(1)(e), (f), 226(f), Part 11; *Frank v. Canada (Attorney General)*, [2019] S.C.J. No. 1 at para. 83, [2019] 1 S.C.R. 3 (S.C.C.). Justice Rowe concurred with the plurality holding, while insisting that residency requirements can have a rational connection to electoral fairness and could thereby justify limits on the right to vote other than the specific provisions challenged in *Frank v. Canada (Attorney General)*, [2019] S.C.J. No. 1 at para. 91, [2019] 1 S.C.R. 3 (S.C.C.).

[18] *Frank v. Canada (Attorney General)*, [2019] S.C.J. No. 1 at para. 124, [2019] 1 S.C.R. 3 (S.C.C.).

[19] *R. v. Oakes*, [1986] S.C.J. No. 7, [1986] 1 S.C.R. 103 (S.C.C.) ("*Oakes*").

"violation" of a right from the question of its justified "limitation" under section 1.[20] It articulated the "Oakes test" for assessing the justification for limitations as a matter of the impugned legislation's (1) rational connection to a substantial aim, (2) it's minimal impairment of the right and (3) the overall proportionality of the law's good over its deleterious effects.[21] *Oakes* inadvertently created the problem that analysis of the aim, rational connection, *etc.* of laws challenged under the Charter can be crucially relevant to understanding whether or not laws violate rights. It also oversimplified the scope of rights to the basic jural structure "P has the right to ϕ", such that Charter rights became defined as ubiquitous interests that are regularly and easily violated by laws.[22] These problems have even led Canadian courts into the awkward position of reasoning about limitations as *necessary* violations of rights.[23]

Chief Justice Wagner's opinion emphasized the proportionality approach to limitations by treating federal residency requirements as "infringements" on the right to vote in need of justification under the "Oakes test".[24] The Chief Justice argued that "limits" on the "scope" of voting rights must take the form of "internal limits" separate from section 1, and that because section 3 of the Charter links voting rights to citizenship alone, it "does not allow for residence to operate as an internal limit on the right to vote".[25] A few paragraphs later, the Chief Justice dismissed the dissenting Justices' concerns about treating section 1 "limits" as "infringements" as "semantic in nature" and a "departure from decades of Charter jurisprudence".[26] The plurality opinion then goes on to explain how the voting residency requirements are not sufficiently rationally connected to the substantial objective of ensuring electoral fairness, nor minimally impairing and proportionate in their effects.[27]

How legally directed is this reasoning about the right to vote? It is best characterized as a kind of legally unconstrained moral reasoning about the violation of rights. By focusing his analysis on the government's justification for violating voting rights, Chief Justice Wagner's approach exacerbated the problems of the subdued party, legitimacy and uncertainty.

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[20] *R. v. Oakes*, [1986] S.C.J. No. 7 at para. 60, [1986] 1 S.C.R. 103 (S.C.C.).

[21] *R. v. Oakes*, [1986] S.C.J. No. 7 at paras. 69-71, [1986] 1 S.C.R. 103 (S.C.C.).

[22] Grégoire Webber *et al.*, *Legislated Rights* (Cambridge: Cambridge University Press, 2018) at 28-32.

[23] *R. v. Sharpe*, [2001] S.C.J. No. 3 at para. 29, [2001] 1 S.C.R. 45 (S.C.C.).

[24] *Frank v. Canada (Attorney General)*, [2019] S.C.J. No. 1 at para. 40, [2019] 1 S.C.R. 3 (S.C.C.).

[25] *Frank v. Canada (Attorney General)*, [2019] S.C.J. No. 1 at para. 31, [2019] 1 S.C.R. 3 (S.C.C.).

[26] *Frank v. Canada (Attorney General)*, [2019] S.C.J. No. 1 at paras. 40, 41, [2019] 1 S.C.R. 3 (S.C.C.).

[27] *Frank v. Canada (Attorney General)*, [2019] S.C.J. No. 1 at paras. 59-82, [2019] 1 S.C.R. 3 (S.C.C.).

First, although simplifying the jural structure of the right to vote may appear to favour subdued parties such as non-residents; the opposite is likely true. To be sure, understanding the right to vote in federal elections as simply extending to all Canadian citizens, everywhere, without qualification, *prima facie* appears to inclusively protect citizens from the arbitrary interference of the state with this right. But interpreting citizenship as the "internal limit" of the text of section 3 on the scope of the right to vote, to the *exclusion* of other limits such as residency, spreads the scope of the right too thin. This renders not only residency requirements and prisoner disenfranchisement, but also age, election timing, constituency, elections official status *etc.* based voting qualifications as violations of the right to vote. And so, whether these alleged violations of the rights of subdued parties are justified becomes a matter of whether a judge concludes that they are rationally connected to substantive ends, minimally impairing, and proportionate. The parties to the alleged violation of rights, which in this case includes the government of Canada, rely more on the morally preferences of judges than the law concerning the scope of the right. The potentially subdued parties are forced to rely less on the law's guidance concerning the scope of the right to vote than on the moral reasoning of judges inclined to value ex-patriate voting.

Second, the majority opinion's treatment of the right to vote frustrates the goal of legitimacy. As Jeremy Waldron has argued, the kinds of rights entrenched in bills of rights are often vague and subject to good faith reasonable disagreement by democratic citizens.[28] This heightens the problem of legitimacy in the context of rights adjudication, as judges often have less detailed legal text to guide their reasoning. In my view, citizens of democratic societies can reasonably disagree about whether different ways of restricting voting to residents threatens or protects the right to vote. At the very least, the paucity of qualifications on the right to vote in the Charter leaves open how the right relates to this disagreement. As mentioned above, in *Frank* the parties to the case included the government of Canada, defending a law enacted by a Parliament that was elected by millions of voters. Basing the invalidation of a democratic enactment on the allegedly unjustified infringement of the right to vote illegitimately *distorts* the position of those who might think of residency restrictions as a reasonable means of protecting and constituting citizens' right to vote.[29] Instead of arguing, for instance, that residency restrictions ensure that voting enables citizens to equally exercise influence over issues facing local constituencies, as part of the *protection* of the right to vote, the proponent of restrictions is caricatured as advocating the *violation* of the voting rights of non-residents.[30]

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[28] Jeremy Waldron, *Political Political Theory* (Cambridge: Harvard University Press, 2016) at 199-202.

[29] Geoffrey Sigalet, "Dialogue and Domination" in G. Sigalet, G. Webber & R. Dixon, eds., *Constitutional Dialogue* (Cambridge: Cambridge University Press, 2019) at 85-125.

[30] Justice Brown correctly chastises the Attorney General of Canada for perpetuating the

Furthermore, legitimacy is threatened by the way the minimal impairment and *stricto sensu* proportionality steps of the "Oakes test" allow C.J. Wagner discretion to weigh the importance of an enumerated right against other extra-constitutional interests. If Chief Justice Wagner counter-factually *upheld* the residency requirements *as justified infringements*, his approach could illegitimately treat the enumeration of voting rights as less important than other unenumerated rights and interests.[31] That creates judicial discretion to illegitimately devalue the importance of the *particular* rights that the political community has entrenched in the constitution. The problem of legitimacy is thus doubly heightened by the distorting and devaluing effects of justifying legislation concerning rights *against* rights.

Finally, the Chief Justice's approach creates uncertainty about the right to vote. By expanding the scope of the right to vote to any qualification on the right beyond citizenship, *Frank* potentially endangers all other manner of legal rules and regulations qualifying the ability of citizens to vote in elections. *Frank* renders other reasonable limitations on the right to vote, such as the limitation of the franchise to adults aged 18 years and older, *prima facie* violations of the right that may or may not one day fail any one of the prongs of the "Oakes test" depending on the moral preferences of judges. That reduces the certainty of Charter adjudication.[32]

2. Constructive Rights and the Rule of Law

Justice Brown's dissenting opinion in *Frank* demonstrates an alternative *constructive* approach to limiting Charter rights that better minimizes the problems of the subdued party, legitimacy and uncertainty. The constructive approach helps resolve the rule of law difficulties raised by *Oakes*.

Justice Brown argues that by restricting the scope of voting rights to the "internal limit" of citizenship in section 3, and by treating section 1 "limits" as requiring "justified infringements", the majority treats section 1 as "dead letter", impugns other reasonable limits on voting rights, and engages in legally undirected philosophical reasoning.[33] Chief Justice Wagner's opinion treats section 1 as "dead letter" because it treats section 1 "limits" as analogous to "infringements", such that all legislative qualifications on the right to vote outside of citizenship are set *against* the right to vote. Even the use of "internal limit" to describe the qualification of

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"analytical error of conceding an 'infringement' ". *Frank v. Canada (Attorney General)*, [2019] S.C.J. No. 1 at para. 123, [2019] 1 S.C.R. 3 (S.C.C.).

[31] Grant Huscroft, "Proportionality and the Relevance of Interpretation" in G. Huscroft, B. Miller & G. Webber, eds., *Proportionality and the Rule of Law* (Cambridge: Cambridge UP, 2014) at 186-202.

[32] It may be that settled expectations about the moral and political preferences of the current membership of the Supreme Court reduces such uncertainty, but judicial preferences and membership can change.

[33] *Frank v. Canada (Attorney General)*, [2019] S.C.J. No. 1 at paras. 142-146, [2019] 1 S.C.R. 3 (S.C.C.).

citizenship in section 3 shows that the term "limit" in section 1 can relate to reasonable articulations of the scope of rights. By ignoring this, the Court turns a blind eye to the legal work that could be done by understanding certain qualifications (age, residency, *etc.*) on the right to vote as section 1 "limits" that "define and shape the boundaries of a positive entitlement".[34] This epitomizes what I call the *constructive* approach to limiting rights, because it conceives of justified limits on rights not as infringements, but as constructions of the scope and nature of rights.

Justice Brown's dissent makes an eloquent case for the constructive approach. He argues that it is more legally constrained to reason about whether Parliament's voting qualifications are sources of law reasonably settling "the unavoidability of moral philosophical considerations in defining the boundaries of that right".[35] This helps solve the problems of the subdued party and legitimacy by guiding the Court away from arbitrary moral judgments that depend more on the political morality than on the content of the law. Some moral judgements about the reasonable range of views on the scope of rights may be inevitable, but judicial reasoning can become less arbitrary and more legitimate where it acknowledges and defers to legislation reasonably *specifying* rights. That constrains arbitrary moralizing to some degree by recognizing that legislation can help articulate the scope of Charter rights under the "reasonable limits" authorized by section 1.

This approach also makes the law more certain by renovating the "Oakes test" so that it is more of a unified inquiry. The constructive method restructures the inquiries of the "Oakes test" toward establishing the scope of Charter rights. Justice Brown finds that the residency requirements are rationally connected to a goal of protecting "a relationship of currency between electors and their communities" as a reasonable construction of the right to vote.[36] He then argues that the five-year residency limit is minimally impairing because it was within the range of reasonable options available to Parliament, and proportionate because the right to vote remains open to any Canadian who takes up residence in Canada.[37] This turns the rational connection inquiry into the heart of the "Oakes test" because it outlines how the means and purpose of the legislation violate or protect the right. The minimal impairment and proportionality prongs become elaborations of how the means and purpose of legislation is reasonable. This makes laws more likely to succeed or fail on *all* the prongs of the test, thereby allowing for more coherent and reliable judgements.

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[34] *Frank v. Canada (Attorney General)*, [2019] S.C.J. No. 1 at para. 124, [2019] 1 S.C.R. 3 (S.C.C.).

[35] *Frank v. Canada (Attorney General)*, [2019] S.C.J. No. 1 at para. 146, [2019] 1 S.C.R. 3 (S.C.C.).

[36] *Frank v. Canada (Attorney General)*, [2019] S.C.J. No. 1 at paras. 160-162, [2019] 1 S.C.R. 3 (S.C.C.).

[37] *Frank v. Canada (Attorney General)*, [2019] S.C.J. No. 1 at para. 172, [2019] 1 S.C.R. 3 (S.C.C.).

In my view, Justice Brown's dissent in *Frank* offers a roadmap for turning section 1 analysis toward constructing the limits of Charter rights, rather than justifying their infringements. This constructive approach promises to better align the adjudication of Charter rights with the rule of law by building fewer but sounder constitutional protections for fundamental rights.

Chapter 8

INDIGENOUS INSTITUTIONS AND THE RULE OF INDIGENOUS LAW

Malcolm Lavoie[*] & Moira Lavoie[**]

I. INTRODUCTION

Who speaks for Indigenous nations? That question was asked with increasing urgency over the past year, as nation-wide protests effectively shut down sectors of the Canadian economy in solidarity with Wet'suwet'en hereditary chiefs.[1] Those hereditary chiefs opposed the construction of the Coastal GasLink pipeline, a project that would run through traditional Wet'suwet'en territory. However, the pipeline was supported by the elected *Indian Act*[2] band councils associated with the Wet'suwet'en, as well as some other hereditary chiefs. Many Wet'suwet'en members supported the pipeline and the economic benefits it promised to bring to their communities,[3] while

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[1] See *e.g.*, online: CTV News <http://www.ctvnews.ca/business/as-economic-impact-of-rail-blockades-grows-protesters-say-fundamental-rights-are-at-stake-1.4812632>; online: Edmonton Journal <http://edmontonjournal.com/news/local-news/farmer-worry-about-rail-access-as-wetsuweten-protests-continue/wcm/d881649a-63b2-4a3d-85d6-b5794bb440fa>; online: McGill Journal of Political Studies <http://mjps.ssmu.ca/2020/02/19/railway-blockades-and-pipeline-protests-why-the-crisis-requires-immediate-action>.

[2] R.S.C. 1985, c. I-5.

[3] See *e.g.*, *Coastal GasLink Pipeline Ltd. v. Huson*, [2019] B.C.J. No. 2532 at paras. 69, 70, 2019 BCSC 2264 (B.C.S.C.) ["*Coastal GasLink*"]; online: CBC News <http://www.cbc.ca/news/business/wet-suwet-en-coastal-gas-link-pipeline-lng-1.5469401>; online: CTV News <http://www.ctvnews.ca/canada/wet-suwet-en-supporters-of-pipeline-don-t-think-their-message-is-being-heard-1.4833878>. The economic benefits of the project include an estimated $338 million for Indigenous communities along the route under project benefit agreements: *Coastal GasLink Pipeline Ltd. v. Huson*, [2019] B.C.J. No. 2532 at para. 13, 2019 BCSC 2264 (B.C.S.C.).

others were opposed on environmental and other grounds.[4]

The answer to the question of who speaks for the Wet'suwet'en nation turns out to be rather complicated.[5] It has been made so largely by the historical legacy of colonialism. Beginning particularly in the 19th century, government policy sought to displace Indigenous cultures, norms and institutions. With respect to local governance, the *Indian Act* established a one-size-fits-all political system for First Nations, which were categorized into relatively small "bands" that typically encompassed only parts of traditional nations.[6] Under the *Indian Act*, the federal government recognized authority as residing in an elected chief and band council, often without taking account of the traditions and norms of legitimacy within communities.[7]

In some cases, First Nations communities came to accept band councils as their legitimate leadership, sometimes taking advantage of a provisions in the *Indian Act* that allowed for departures from the standard governance model.[8] However, in other cases, Indigenous communities maintained separate traditional governance structures alongside *Indian Act* institutions, a remarkable feat of cultural resiliency. With respect to the Wet'suwet'en nation, a complex and nuanced system of governance based on clans and houses co-exists with the elected band councils, raising questions as to the jurisdiction of each set of institutions.[9] This brief article is about the challenges of Indigenous institution-building in the aftermath of colonialism, using

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[4] See *e.g.*, online: The Guardian <http://www.theguardian.com/world/2020/feb/14/wetsuweten-coastal-gaslink-pipeline-allies>; online: Globe and Mail <http://www.theglobeandmail.com/canada/british-columbia/article-wetsuweten-hereditary-system-coastal-gaslink-pipeline-protests-bc>.

[5] Online: Globe and Mail <http://www.theglobeandmail.com/opinion/article-who-speaks-for-the-wetsuweten-people-making-sense-of-the-coastal/>; online: First Nations Drum <http://www.firstnationsdrum.com/2019/02/the-complicated-history-of-hereditary-chiefs-and-elected-councils/>; online: Globe and Mail <http://www.theglobeandmail.com/canada/article-its-the-people-who-decide-whos-leading-the-pro-wetsuweten>.

[6] *Indian Act*, R.S.C. 1985, c. I-5, see *e.g.*, ss. 2(1), 74; Jack Woodward, *Native Law* (Toronto: Carswell, 1989) (loose-leaf updated 2019), c. 7 at E-H.

[7] Jack Woodward, *Native Law* (Toronto: Carswell, 1989) (loose-leaf updated 2019), c. 7 at E-F.

[8] *Indian Act*, s. 74; online: Indigenous Services Canada <http://www.sac-isc.gc.ca/eng/1433166668652/1565371688997>.

[9] Online: National Post <http://nationalpost.com/pmn/news-pmn/canada-news-pmn/a-primer-on-the-governance-system-of-the-wetsuweten-nation>; online: Globe and Mail <http://www.theglobeandmail.com/canada/british-columbia/article-wetsuweten-hereditary-system-coastal-gaslink-pipeline-protests-bc>; John Borrows, "Wet'suwet'en and the Coastal Gaslink Pipeline" (University of Victoria, March 18, 2020), online: University of Victoria <http://www.uvic.ca/law/home/news/current/video-john-borrows-on-the-wetsuweten-and-the-costal-gaslink-pipeline.php>.

the Wet'suwet'en dispute over the Coastal GasLink pipeline as a case study.

II. WET'SUWET'EN GOVERNANCE AND THE COASTAL GASLINK PIPELINE

The hereditary system of the Wet'suwet'en is made up of five clans, under which there are 13 house groups.[10] Each house has a head hereditary chief — the highest hereditary title for the Wet'suwet'en — as well as a sub-chief or wing chief. Hereditary titles and land traditionally pass through the mother's clan.[11] Historically, a hereditary chieftainship was based not only on bloodlines, but also on the moral character of the individual in question.[12] The Office of the Wet'suwet'en was established in 1994 to represent the hereditary house chiefs in treaty negotiations and to deliver various services.[13] One of the 13 houses (Dark House, or Yex T'sa wil_k'us) currently operates independently of the Office.[14] The Wet'suwet'en are also comprised of five *Indian Act* bands, each with an elected *Indian Act* chief and council.[15] There is often overlap between leaders who serve both as elected *Indian Act* councillors and as hereditary leaders.[16]

While elements of the present-day hereditary governance structure of the Wet'suwet'en have longstanding roots in traditional Wet'suwet'en law, it currently suffers from considerable instability, which has also compromised the authority of the elected *Indian Act* band councils.[17] These challenges were starkly evident in the controversy around the proposed Coastal GasLink pipeline project. The provincial

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[10] *Coastal GasLink Pipeline Ltd. v. Huson*, [2019] B.C.J. No. 2532 at para. 54, 2019 BCSC 2264 (B.C.S.C.).

[11] Online: Office of the Wet'suwet'en <http://www.wetsuweten.com/culture/governance>; see also *Delgamuukw v. British Columbia*, [1997] S.C.J. No. 108, [1997] 3 S.C.R. 1010 at 1031 (S.C.C.) ["*Delgamuukw*"].

[12] Online: Globe and Mail <http://www.theglobeandmail.com/canada/british-columbia/article-wetsuweten-hereditary-system-coastal-gaslink-pipeline-protests-bc>.

[13] Online: Office of the Wet'suwet'en <http://www.wetsuweten.com/office/about-us>; online: BC Treaty Commission <http://www.bctreaty.ca/wetsuweten-hereditary-chiefs>.

[14] *Coastal GasLink Pipeline Ltd. v. Huson*, [2019] B.C.J. No. 2532 at para. 55, 2019 BCSC 2264 (B.C.S.C.).

[15] *Coastal GasLink Pipeline Ltd. v. Huson*, [2019] B.C.J. No. 2532 at para. 56, 2019 BCSC 2264 (B.C.S.C.).

[16] Online: Globe and Mail <http://www.theglobeandmail.com/canada/british-columbia/article-wetsuweten-hereditary-system-coastal-gaslink-pipeline-protests-bc>.

[17] Community groups who oppose the Coastal GasLink Project claim that the *Indian Act* band councils only have jurisdiction over federal reserve lands, not the broader traditional territories that are implicated in the Project; the band councils dispute this: *Coastal GasLink* at paras. 67, 68. This has resulted "in considerable tension" within the community and between the various groups claiming to represent the interests of the Wet'suwet'en peoples (*Coastal GasLink* at para. 68) as described by various community members during the *Coastal GasLink* litigation: see paras. 69, 70.

Environmental Assessment Office directed Coastal GasLink to consult with the Office of the Wet'suwet'en, Dark House and the five *Indian Act* bands.[18] All five *Indian Act* bands ultimately signed impact-benefit agreements in support of the Project, as did each of the 20 other *Indian Act* bands along the Project route.[19] While the Office of the Wet'suwet'en initially participated in the consultation process, they have opposed the project since 2014, when Coastal GasLink rejected the Office's proposal to reroute the pipeline.[20] Dark House did not participate in formal consultations, despite being invited to do so, and through its spokespeople maintained its opposition to the Project throughout the process.[21]

Three of the hereditary chiefs who disagreed with the opposition of the Office of the Wet'suwet'en to the pipeline were subsequently stripped of their hereditary titles.[22] They went on to establish the Wet'suwet'en Matrilineal Coalition in 2015, with the intention of negotiating with Coastal GasLink on behalf of the hereditary clans.[23]

Meanwhile, several other groups claim varying degrees of legal authority over Wet'suwet'en territories. The Unist'ot'en were responsible for at least one of the

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[18] *Coastal GasLink Pipeline Ltd. v. Huson*, [2019] B.C.J. No. 2532 at para. 57, 2019 BCSC 2264 (B.C.S.C.).

[19] *Coastal GasLink Pipeline Ltd. v. Huson*, [2019] B.C.J. No. 2532 at para. 66, 2019 BCSC 2264 (B.C.S.C.).

[20] *Coastal GasLink Pipeline Ltd. v. Huson*, [2019] B.C.J. No. 2532 at paras. 58-60, 2019 BCSC 2264 (B.C.S.C.).

[21] *Coastal GasLink Pipeline Ltd. v. Huson*, [2019] B.C.J. No. 2532 at paras. 45-50, 61, 62, 2019 BCSC 2264 (B.C.S.C.).

[22] Online: Globe and Mail <http://www.theglobeandmail.com/business/article-wetsuweten-chiefs-remove-hereditary-titles-of-three-women-who>; online: APTN National News <http://www.aptnnews.ca/national-news/hereditary-chiefs-of-the-wetsuweten-nation-in-b-c-say-lng-pipeline-doesnt-have-unanimous-consent>; online: Globe and Mail <http://www.theglobeandmail.com/canada/british-columbia/article-wetsuweten-hereditary-system-coastal-gaslink-pipeline-protests-bc>; Transcript from Theresa Tait-Day's March 10 appearance before the House Committee on Indigenous and Northern Affairs, online: Parliament of Canada <http://www.ourcommons.ca/DocumentViewer/en/43-1/INAN/meeting-4/evidence#Int-1080090>; online: Cision <http://www.newswire.ca/news-releases/wet-suwet-en-hereditary-chief-theresa-tait-day-wi-haliy-te-tells-federal-government-women-s-voices-are-being-silenced-in-governance-and-resource-debates-828746342.html>; online: APTN News <http://www.aptnnews.ca/national-news/wetsuweten-sub-chief-who-supports-coastal-gaslink-says-supporters-elected-chiefs-arent-being-heard>.

[23] Coastal GasLink Pipeline Ltd. v. Huson, [2019] B.C.J. No. 2532 at paras. 76, 78-82, 2019 BCSC 2264 (B.C.S.C.); see also online: Globe and Mail <http://www.theglobeandmail.com/canada/article-wetsuweten-matriarch-calls-for-hereditary-governance-to-reflect>; online: CBC News <http://www.cbc.ca/news/canada/british-columbia/wetsuweten-whos-who-guide-1.5471898>.

several blockades erected along the Coastal GasLink route.[24] While they claim clan-based hereditary authority in association with Dark House, this group's description has changed repeatedly over the course of the project's lifetime.[25] At least three other groups claiming clan-based authority have also emerged in opposition to the Project.[26]

The conflict over the Coastal GasLink pipeline has been temporarily resolved by an agreement between the federal and provincial governments and the hereditary chiefs.[27] However, the elected band councils continue to contest the legitimacy of a negotiation process that has so far excluded them.[28] The question of how Wet'suwet'en institutions will operate going forward, including how the elected and hereditary governments will relate to each other, remains somewhat open. It is to be hoped that the recent dispute, which has led to negotiations over the recognition of Wet'suwet'en self-government powers, will lead to a period of institution-building that will bring clarity to these and other issues. As we will discuss in the next section, the stakes for Indigenous institution-building of this nature are high, and extend far beyond the fate of a single pipeline project.

III. INDIGENOUS INSTITUTIONS AND CULTURAL MATCH

Indigenous institution-building must be led by Indigenous nations themselves. Indeed, there is no single answer to the question of which types of governance institutions are "best". Many Indigenous communities have sought to adapt their band council governance structures to their present circumstances, while others have

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[24] *Coastal GasLink Pipeline Ltd. v. Huson*, [2019] B.C.J. No. 2532 at paras. 14-23, 31-38, 2019 BCSC 2264 (B.C.S.C.); online: CBC News <http://www.cbc.ca/news/canada/british-columbia/wetsuweten-whos-who-guide-1.5471898>; online Global News <http://globalnews.ca/news/6532407/7-arrested-northern-bc-pipeline-blockade>; online: National Observer <http://www.nationalobserver.com/2020/01/14/opinion/rcmp-let-journalists-witness-unistoten-camp>.

[25] *Coastal GasLink Pipeline Ltd. v. Huson*, [2019] B.C.J. No. 2532 at paras. 71-74, 2019 BCSC 2264 (B.C.S.C.); online: Unist'ot'en <http://unistoten.camp/about/governance-structure>.

[26] *Coastal GasLink Pipeline Ltd. v. Huson*, [2019] B.C.J. No. 2532 at paras. 83-88, 2019 BCSC 2264 (B.C.S.C.). These groups are Gidumt'en, Sovereign Likhts'amisyu, and Tsaya Land Defenders.

[27] Government of Canada, Memorandum of Understanding between Canada, British Columbia and Wet'suwet'en as agreed on February 29, 2020, online: <http://www.rcaanc-cirnac.gc.ca/eng/1589478905863/1589478945624>.

[28] See *e.g.*, online: APTN National News <http://www.aptnnews.ca/national-news/wetsuweten-hereditary-leaders-sign-rights-and-title-mou-with-feds-province>; online: MacDonald-Laurier Institute <http://www.macdonaldlaurier.ca/wetsuweten-revitalize-political-system>; online: CBC News <http://www.cbc.ca/news/politics/stefanovich-wetsuweten-elected-chiefs-mou-fallout-1.5565243>; online: National Post <http://nationalpost.com/news/they-created-a-problem-chiefs-say-trudeau-liberals-wetsuweten-deal-opens-up-fresh-conflicts>.

opted instead to reinvigorate traditional institutions. A range of different factors can inform a community's assessment of what governance regime is best suited to members' current needs, including the values, traditions, priorities, and economic and political circumstances in the community.[29] However, one idea that has received particular attention in the Indigenous economic development literature is the importance of "cultural match": aligning a community's formal governance institutions with its underlying norms of political power and authority.[30]

One of the legacies of colonialism was the erosion of traditional governance structures. A core challenge faced by Indigenous communities today, therefore, is how to re-establish systems of law and governance aligned with norms of legitimacy among members. The importance of aligning governance institutions with norms of legitimacy cannot be understated. It has implications for the rule of law both within Indigenous communities and in Canadian society more broadly.

Where formal governance institutions are aligned with the prevailing norms of a community, a culture of legality is able to flourish. Government officials and ordinary citizens are willing to abide by the requirements of the law not just out of a fear of sanction, but because they believe in the law's authority.[31] The law is also more readily ascertainable when it conforms with pre-existing customs and norms in a community. Individuals can adhere to widely known norms of conduct, safe in the assumption that the formal law is consistent with those norms.[32] If people can readily know what the law is, and believe they ought to follow it, the law is able to fulfil its function in guiding human conduct. This serves to render the exercise of government authority predictable, which in turn has a range of desirable consequences. Liberty is enhanced when arbitrary or unpredictable government action is limited.[33] There are also significant economic benefits associated with a stable and

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[29] See Malcolm Lavoie, "Models of Indigenous Territorial Control in Common Law Countries: A Functional Comparison" in Dwight Newman, ed., *Research Handbook on the International Law of Indigenous Rights* (Cheltenham, UK: Edward Elgar, 2020) [forthcoming].

[30] The Harvard Project on American Indian Economic Development, *The State of the Native Nations: Conditions under US Policies of Self-Determination* (Oxford: Oxford University Press, 2008) at 125-26.

[31] The Harvard Project on American Indian Economic Development, *The State of the Native Nations: Conditions under US Policies of Self-Determination* (Oxford: Oxford University Press, 2008) at 125-26.

[32] Compare the claim that the common law has traditionally been developed in a manner that aligns with pre-existing customs and norms. See F.A. Hayek, *Law, Legislation and Liberty*, vol. 1 (Chicago: University of Chicago Press, 1973) at 98-101, 106-110.

[33] John Rawls, *A Theory of Justice*, revised ed. (Cambridge, MA: Harvard University Press, 1999) at 206-13; F.A. Hayek, *The Constitution of Liberty* (New York: Routledge, 2006) at 180-92.

predictable legal regime.[34] Parties can make plans for their own businesses and families while knowing what the rules of the game are. In the case of Indigenous communities, the establishment of robust and effective governance aligned with local values is also an act of resiliency in the face of state action that has historically worked to undermine self-government.

While formal governance structures that are out of line with community norms are undesirable from the perspective of the rule of law, so too is a situation in which a community is governed by separate sets of institutions, with overlapping and competing claims to legitimacy. In these cases, the result is an undermining of the culture of legality and the predictability that it fosters, both within and outside of the Indigenous community. In principle, band councils and traditional governance institutions can co-exist, but they need a clear delineation of jurisdiction in order to avoid undermining each other's legitimacy and authority to represent the community.

The establishment of effective and legitimate governance institutions in Indigenous communities is not just an important issue for those communities. The rule of law in Canada is made up of an interconnected web of institutions, including federal, provincial and Indigenous governments. The rule of law depends on the efficacy and legitimacy of each of these institutions, and on clear and accepted principles for delineating their jurisdiction. Where institutions are misaligned in one setting, there are ripple effects in others.

The Wet'suwet'en dispute provides an excellent example of how Indigenous and non-Indigenous institutions are interconnected. Canadian law provides a mechanism for establishing Aboriginal rights and title, as well as consultation requirements that can apply prior to the definitive establishment of rights or title. The Wet'suwet'en nation has a strong Aboriginal title claim, though Aboriginal title has not yet been established.[35] The Office of the Wet'suwet'en has represented the Wet'suwet'en in treaty negotiations, which could eventually lead to the recognition of robust self-government with jurisdiction over an established territory, but those negotiations have so far been unsuccessful.[36]

In the case of the Coast GasLink project, the consent obtained from the elected

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[34] See Dani Rodrik, Arvind Subramanian & Francesco Trebbi, "Institutions Rule: The Primacy of Institutions over Geography and Integration in Economic Development" (2004) 9 J. Economic Growth 131; Daron Acemoglu, Simon Johnson & James A. Robinson, "The Colonial Origins of Comparative Development: An Empirical Investigation" (2001) 91:5 American Economic Rev. 1369; Daron Acemoglu & James A. Robinson, *Why Nations Fail: The Origins of Power, Prosperity, and Poverty* (New York: Crown Business, 2012) at 429-430.

[35] *Delgamuukw v. British Columbia*, [1997] S.C.J. No. 108, [1997] 3 S.C.R. 1010 (S.C.C.).

[36] Online: BC Treaty Commission <http://www.bctreaty.ca/wetsuweten-hereditary-chiefs>.

band councils was not seen as legitimate by some Wet'suwet'en members. And that, in turn, called into question the legitimacy of the broader Canadian legal system. The widespread protests that ensued help to demonstrate that the effectiveness and legitimacy of Indigenous institutions has implications that extend well beyond these communities.

Indigenous institution-building is an important issue for the rule of law in Canada. We should all hope to see Indigenous nations (re-)establish effective governance structures that are consistent with community norms, whether these are based on adaptations of the band councils that have now been in place for generations or the reinvigoration of traditional governance structures. While this process must be Indigenous-led, there are important ways that outside governments can support it. Indigenous nations should be able to find ready partners at the negotiating table for self-government and comprehensive land claims agreements, which often provide opportunities for effective institution-building.[37]

Non-Indigenous Canadians clearly have an interest in effective and legitimate Indigenous institutions that uphold the rule of law. Yet as we discuss in the next section, it would be wrong to view the rule of law as a purely Western ideal at odds with Indigenous traditions, values and interests.

IV. THE RULE OF INDIGENOUS LAW

A growing body of Indigenous scholarship and public policy work identifies the rule of law as a fundamental element of traditional Indigenous governance.[38] Other sources enumerate principles that are typically associated with the rule of law, for instance accountability, transparency, and equality and fairness under the law.[39] This

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[37] See e.g., online (pdf): Nisga'a Lisims Government <http://www.nisgaanation.ca/sites/default/files/Nisga%27a%20Final%20Agreement%20-%20Effective%20Date.PDF> at 159; online: Nunavut Tunngavik <; online (pdf): Westbank First Nation <http://www.wfn.ca/docs/self-government-agreement-english.pdf" type="http">http://nlca.tunngavik.com/?lang=en>; online (pdf): Westbank First Nation <http://www.wfn.ca/docs/self-government-agreement-english.pdf>.

[38] Royal Commission on Aboriginal Peoples, vol. 2, *Restructuring the Relationship* (Ottawa: Canada Communication Group, 1996) at 115 ("RCAP Report"). The full list of RCAP principles of Indigenous traditions of governance is as follows: (1) the centrality of the land; (2) individual autonomy and responsibility; (3) the rule of law; (4) the role of women; (5) the role of elders; (6) the role of the family and the clan; (7) leadership and accountability; and (8) consensus in decision-making; online (pdf): Centre for First Nation Governance <http://www.fngovernance.org//publication_docs/Five_Pillars-CFNG.pdf> at 11.

[39] See *e.g.*, Royal Commission on Aboriginal Peoples, vol. 2, *Restructuring the Relationship* (Ottawa: Canada Communication Group, 1996); online (pdf): First Nations Financial Management Board <http://fnfmb.com/sites/default/files/2018-09/2018_FN-Governance_Project_phase1-low-res_update.pdf> at 7; Taiaiake Alfred, *Peace, Power, Righteousness: An Indigenous Manifesto*, 1st ed. (Don Mills, Ontario: Oxford University Press, 1999) at 82. The full list of Alfred's "characteristics of a strong Indigenous nation" is

is not surprising, given that the maintenance of community cohesion and consensus in decision-making are deeply ingrained in traditional governance systems.

The Centre for First Nations Governance[40] explains that the rule of law "provides clear instruction on acceptable behaviour — behaviour that benefits the community" and "exists to minimize conflict".[41] The final report of the Royal Commission on Aboriginal Peoples notes that within traditional Indigenous governance systems, "the law is grounded in instructions from the Creator or, alternatively, a body of basic principles embedded in the natural order".[42] As such, "any failure to live by the law is to turn one's back on the Creator's gifts, to abdicate responsibility and to deny a way of life".[43]

In short, while the rule of law in Indigenous governance traditions "might be rooted in spiritual learning and oral traditions rather than written legislation",[44] arbitrary or unaccountable governance structures are as much at odds with Indigenous governance principles as they are with Western governance ideals.

A range of successful models exist for how Indigenous communities can (re)develop institutions that achieve a rule of law in keeping with their values and principles. Despite their diversity, effective Indigenous governance systems tend to share certain characteristics. For instance, they typically have robust, culturally-aligned processes for resolving disputes among members and leaders and, ideally,

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as follows: (1) wholeness with diversity; (2) shared culture; (3) communication; (4) respect and trust; (5) group maintenance; (6) participatory and consensus-based government; (7) youth empowerment; and (8) strong links to the outside world; John Borrows, *Canada's Indigenous Constitution*, c. 3 at 59-106; John Borrows, "Wet'suwet'en and the Coastal Gaslink Pipeline" (University of Victoria, March 18, 2020), online: University of Victoria <http://www.uvic.ca/law/home/news/current/video-john-borrows-on-the-wetsuweten-and-the-costal-gaslink-pipeline.php> at 38:24-42:00; Jason Madden, John Graham & Jake Wilson, in their report "Exploring Options for Métis Governance in the 21st Century" (Institute on Governance, September 2005), identify the following "universal" principles of good governance: (1) legitimacy and voice; (2) fairness; (3) accountability; (4) performance;and (5) direction.

[40] The Centre notably includes a sitting board member who has held a hereditary Wet'suwet'en chieftainship, online: <http://www.fngovernance.org/about/our_team> (see Herb George).

[41] Online (pdf): Centre for First Nation Governance <http://www.fngovernance.org//publication_docs/Five_Pillars-CFNG.pdf> at 11.

[42] Royal Commission on Aboriginal Peoples, vol. 2, *Restructuring the Relationship* (Ottawa: Canada Communication Group, 1996) at 115.

[43] Royal Commission on Aboriginal Peoples, vol. 2, *Restructuring the Relationship* (Ottawa: Canada Communication Group, 1996) at 116.

[44] Online (pdf): First Nations Financial Management Board <http://fnfmb.com/sites/default/files/2018-09/2018_FN-Governance_Project_phase1-low-res_update.pdf> at 13.

the Crown and other external actors.[45] Many communities have focused on re-building traditional governance over discrete policy areas including management of reserve lands,[46] health,[47] education[48] and election processes.[49]

There is also a growing number of Indigenous-led institutions in Canada that focus on Indigenous institution-building outside of the confines of the *Indian Act*. Some are the product of federal legislation — for instance the First Nation Finance Authority,[50] the First Nations Financial Management Board,[51] the First Nation Lands Advisory Board,[52] and the First Nations Tax Commission[53] — while others are not — for instance the Centre for First Nations Governance (mentioned above),[54] the National Aboriginal Lands Managers Association,[55] the New Relationship Trust in British Columbia,[56] or the Aboriginal Financial Officers Association.[57]

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[45] See John Borrows, "Wet'suwet'en and the Coastal Gaslink Pipeline" (University of Victoria, March 18, 2020), online: University of Victoria <http://www.uvic.ca/law/home/news/current/video-john-borrows-on-the-wetsuweten-and-the-costal-gaslink-pipeline.php> at 31:00; see discussion in *Intercultural Dispute Resolution in Aboriginal Contexts*, Catherine Bell & David Kahane, eds., Part 3 (Vancouver: UBC Press, 2004); see examples from the Centre for First Nations Governance's Governance Pilot Project - Madawaska Maliseet First Nation, online: National Centre For First Nations Governance <; Nisga'a Nation, online: National Centre For First Nations Governance <http://www.fngovernance.org/toolkit/best_practice/nisgaa_nation″ type=″http″>http://www.fngovernance.org/ncfng_research/patricia_mcguire.pdf>; Nisga'a Nation, online: National Centre For First Nations Governance <http://www.fngovernance.org/toolkit/best_practice/nisgaa_nation>; and the Anishinaabe, online: National Centre For First Nations Governance <http://www.fngovernance.org/ncfng_research/patricia_mcguire.pdf>.

[46] *First Nations Lands Management Act*, S.C. 1999, c. 24; see *e.g.*, the Skowkale, Aitchelitcz and Yakweakwioose First Nations (all part of the Stolo Nation in BC) who share land management governance under the *First Nations Lands Management Act.*

[47] See *e.g.*, online: First Nations Health Authority <https://www.fnha.ca>.

[48] See *e.g.*, Mi'kmaw Kina'matnewey in Atlantic Canada who have dramatically improved education outcomes for their communities while governing education consistent with Indigenous principles; online: Mi'kmaw Kina'matnewey <http://kinu.ca>.

[49] *First Nations Elections Act*, S.C. 2014, c. 5.

[50] Online: First Nations Financial Authority <http://www.fnfa.ca/en>.

[51] Online: First Nations Financial Management Board <http://fnfmb.com/en>.

[52] Online: Lands Advisory Board <http://landsadvisoryboard.ca>.

[53] Online: First Nations Tax Commission <http://fntc.ca>.

[54] Online: Centre for First Nations Governance <http://www.fngovernance.org>.

[55] Online: National Aboriginal Lands Managers Association <http://nalma.ca/about/history>.

[56] Online: New Relationship Trust <http://www.newrelationshiptrust.ca>.

[57] Online: AFOA Canada <http://www.afoa.ca>.

These models and resources are likely to be useful to Indigenous communities, but models cannot be adopted reflexively. The task of institution-building is ultimately one for communities themselves. Local members and leaders can best determine which institutions are suited to a community, in light of local norms, traditional governance structures, and a range of other factors. To this end, Indigenous legal scholar John Borrows suggests that the recent Wet'suwet'en controversy may provide an opportunity for the Wet'suwet'en to rebuild their governance system, potentially "blend[ing] elements of hereditary and elected systems".[58] Borrows states that ideally, by "get[ting] past the stereotypes and generalizations and acrimony and think[ing] what are the issues in play, it is possible [for the Wet'suwet'en] to move . . . through a process of resolution".[59] The rule of Indigenous law will look different from one community to the next. But Indigenous-led institution-building aligned with Indigenous values will ultimately benefit all Canadians.

V. CONCLUSION

Building up effective and legitimate Indigenous governance institutions will not eliminate disputes over resource development and other issues, but it can at least provide clear parameters for resolution. At the same time, robust governance institutions aligned with Indigenous values help to re-establish an Indigenous rule of law as part of Canada's legal heritage.

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[58] Online: Globe and Mail <article-wetsuweten-hereditary-system-coastal-gaslink-pipeline-protests-bc″ type=″http″>http://www.theglobeandmail.com/canada/british-columbia/article-wetsuweten-hereditary-system-coastal-gaslink-pipeline-protests-bc>.

[59] Online: Globe and Mail <http://www.theglobeandmail.com/canada/british-columbia/article-wetsuweten-hereditary-system-coastal-gaslink-pipeline-protests-bc>.

Chapter 9

Emergencies, Absolute Rights and the Legitimacy of the Notwithstanding Clause

Ryan Alford*

The primeval question that any grave emergency puts to constitutionalists and civil libertarians is this: Are there any fundamental legal rights that both the federal government and the provinces are bound to respect, despite the severity of the crisis? If so, these must be sought outside of the *Canadian Charter of Rights and Freedoms*,[1] owing to its provisions for limitation and derogation of rights (*i.e.*, sections 1 and 33), and they must also be anterior to sections 91 and 92 of the *Constitution Act, 1867*,[2] as these provisions merely divide the heads of power that authorize emergency powers between Parliament and the provincial legislatures. As I argued in my recently published book *Seven Absolute Rights*,[3] it is in our constitution's grand entrance hall that Canadians should seek the principles that safeguard our most fundamental rights — even during a future war, pandemic or public order emergency.

As I will establish in the first half of this article, should these principles receive explicit recognition by the Canadian judiciary, it would be indisputable that Canada remains in compliance with its most fundamental international obligations, namely to observe at all times the non-derogable rights enumerated in Section 4.2 of the International Covenant on Civil and Political Rights (as interpreted by the Siracusa Principles on the Limitation and Derogation of Rights in the ICCPR and General Comment 29 to the ICCPR of the United Nations Human Rights Committee). In the second half of this article, I will argue that despite placing certain rights beyond the scope of legislative override, recognition of a set of non-derogable rights would reinforce, not undermine, the political, legal, and constitutional legitimacy of the use

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[1] Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 ("Charter").

[2] (U.K.), 30 & 31 Vict., c. 3.

[3] Ryan Alford, *Seven Absolute Rights*: *Recovering the Historical Foundations of Canada's Rule of Law* (Montreal: McGill-Queen's University Press, 2020).

of section 33, even during a serious public emergency.

I. THE RIGHTS GUARANTEED BY A CONSTITUTION SIMILAR IN PRINCIPLE TO THAT OF THE UNITED KINGDOM

The COVID-19 emergency demonstrates the importance of acknowledging the non-derogable rights protected by the ICCPR (and, I argue, by the principles found in English statutes of constitution significance entrenched by the Preamble's guarantee of a constitution similar in principle to that of the United Kingdom). This is especially true because public health emergencies are largely committed to the provincial authorities by Canada's division of powers. The federal *Emergencies Act*[4] recognizes the substantive limits of the federal government's emergency powers: its Preamble notes that while the Act authorizes "special temporary measures that may not be appropriate in normal times . . . the Governor in Council . . . must have regard to the International Covenant on Civil and Political Rights, particularly with respect to those fundamental rights that are not to be limited or abridged even in a national emergency."[5] Unfortunately, copious COVID-19 emergency orders powers have been authorized by provincial emergency statutes — none of which recognize the existence of non-derogable rights, or indeed any substantive limitations on the power to protect public health during a crisis.

Additionally, unlike the *Emergencies Act*, provincial emergency statutes frequently contain residual clauses that empower the Lieutenant-Governor in Council to issue orders of a type not otherwise enumerated, as long as they are deemed necessary to addressing the emergency.[6] Paradoxically, the procedural safeguards of the *Emergencies Act* shifted the locus for the authorization of emergency powers to provincial statutes that do not recognize the existence of non-derogable rights, let alone the requirement to respect them in every emergency, no matter how severe.

These developments have led to sweeping and unprecedented measures that seem to call into question whether there are any limits within the Canadian constitutional order on what can be done to protect public health, especially if the notwithstanding clause were to be invoked to override Charter *rights*, as was recently contemplated to accomplish comprehensive mandatory vaccination in New Brunswick. As Mancini and Sigalet noted,[7] it was unclear which rights the province intended to derogate; this could have potentially included even the right to life, liberty and security of the person. The question of whether or not legislation of that type would

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[4] R.S.C. 1985, c. 22 (4th Supp.).

[5] *Emergencies Act*, R.S.C. 1985, c. 22 (4th Supp.), preamble.

[6] See, *e.g.*, *Emergency Management and Civil Protection Act (Ontario)*, R.S.O. 1990, c. E.9, s. 7.0.2(4)(14).

[7] Mark Mancini & Geoff Sigalet, "What constitutes the legitimate use of the notwithstanding clause?" *Policy Options* (January 20, 2020), online: <https://policyoptions.irpp.org/magazines/january-2020/what-constitutes-the-legitimate-use-of-the-notwithstanding-clause/>.

be held constitutional in the event that serious questions were to be raised about the safety of a COVID-19 vaccine with a truncated (but potentially justifiable) human testing process has already been raised before a court.[8] It is lamentable that to date no clear answers about the limits of the use of the notwithstanding clause to derogate section 7 of the Charter have been forthcoming.

Fortunately, on the eve of the 21st century a signpost was erected, one that points the way to the ultimate source of our most fundamental rights. It came in the form of the *Provincial Judges Reference*,[9] in which Chief Justice Lamer recognized that the Preamble to the *Constitution Act, 1867* had embedded the principle of judicial independence of the *Act of Settlement, 1701* into the Constitution, thereby creating a substantive limit to both federal and provincial legislation. This principle undergirds the narrower Charter right to judicial independence (which, unlike the right protected by the unwritten constitutional principle, is also subject to both limitation and derogation). In *Seven Absolute Rights*, I demonstrated how the Preamble's guarantee to Canada of a constitution similar in principle to that of the United Kingdom entrenched not only the principle of the *Act of Settlement* that protects an independent judiciary, but also the principles found in five other statutes, all of which were universally considered at the time of Confederation to be essential elements of the Constitution of the United Kingdom.[10]

These statutes memorialize the constitutional principles that protect the rights not to be extrajudicially killed, or subjected to emergency powers not authorized by statute, or tortured, or subjected to indefinite arbitrary detention, or punished for what is said during parliamentary proceedings, or subjected to cruel and unusual punishment or excessive bail.[11] This set of rights, which is broadly congruent with those found in Article 4.2 of the ICCPR, was entrenched precisely because it was these rights that had been abused during wars, insurrections and emergencies. After a series of constitutional crises, English constitutionalists learned that if these rights are routinely infringed — especially in the course of a crisis that purportedly justifies the aggrandizement of the executive — the rule of law will cannot survive.

After the COVID-19 pandemic, one can easier imagine measures being enacted

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[8] Statement of Claim, *Vaccine Choice Canada v. Trudeau*, June 6, 2020, Ontario Superior Court of Justice CV-20-00643451-000, online: <https://vaccinechoicecanada.com/wp-content/uploads/vcc-statement-of-claim-2020-redacted.pdf>.

[9] *Reference re Remuneration of Judges of the Provincial Court (P.E.I.)*, [1997] S.C.J. No. 75, [1997] 3 S.C.R. 3 (S.C.C.).

[10] Ryan Alford, *Seven Absolute Rights*: *Recovering the Historical Foundations of Canada's Rule of Law* (Montreal: McGill-Queen's University Press, 2020).

[11] Namely, *Confirmatio Cartarum 1297* (the statutory enactment of Magna Carta, as clarified and amplified by the Six Statutes of Due Process); the *Petition of Right, 1628*, the *Act Abolishing the Star Chamber, 1640*, the *Habeas Corpus Act, 1679*, the *Bill of Rights, 1689*; see Ryan Alford, Seven Absolute Rights: Recovering the Historical Foundations of Canada's Rule of Law (Montreal: McGill-Queen's University Press, 2020), n 1, 73-134.

during public welfare emergencies that would infringe even our most fundamental rights, for example, authorizing mandatory vaccination of those with particular and well founded health-based exceptions to vaccinations, or by mandating widespread and indefinite arbitrary detention in the form of lockdowns and curfews. If provincial legislation mandating an open ended shelter-in-place order were to be challenged in court, only the unwritten constitutional principle entrenched by the Preamble would unequivocally prevent the infringement of this absolute right (which is recognized in international law as non-derogable).[12] It follows from the construction of the Preamble which I have elucidated that the principles of the *Habeas Corpus Act, 1679* are also constitutionally entrenched and absolute. This principle is the only source of that right which would continue to provide protection should a legislature invoke the notwithstanding clause to override the Charter right not to be subjected to arbitrary detention, as section 9 is explicitly subject to section 33.

Recognition of the Preamble's entrenchment of this unwritten constitutional principle would also fulfil the requirement in international law that "the protection of rights explicitly recognized as non-derogable . . . must be secured by procedural guarantees".[13] The untrammelled ability to petition for the great writ, which compels the government to produce the detainee in open court and to provide a rational basis for continued detention, also serves to preclude involuntary disappearances during major public order emergencies. This protection is essential in those circumstances, as unacknowledged detentions all too frequently enable serious violations of other fundamental and non-derogable rights, such as the right not to be tortured.

II. A Floor for Derogation Promotes Better Discussions About the Appropriateness of Section 33

Recognizing that certain rights are beyond legislative derogation might appear to retrench upon legislative power. However, as I have demonstrated in *Seven Absolute Rights*, this is not an actual reduction in the powers of the legislatures, at least when defined by the original public meaning of the Preamble's guarantee. Furthermore, the recognition of a small number and historically-defined set of non-derogable rights could have the effect of increasing legislative power in practice. This is because reconciling parliamentary sovereignty with Canada's recognition that certain fundamental liberties must be respected at all times would serve to insulate section 33 from inflammatory claims about the eradication of rights. The increased perception of the limits and legitimacy of the notwithstanding clause as an integral element of the Constitution of Canada — as it exists within a well-structured

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[12] Siracusa Principles on the Limitation and Derogation of Provisions in the International Covenant on Civil and Political Rights, s. 70(b), Annex, UN Doc E/CN.4/1984/4 (1984).

[13] Human Rights Committee, General Comment 29, States of Emergency (article 4), s. 14, U.N. Doc. CCPR/C/21/Rev.1/Add.11 (2001).

relationship with other elements, such as the aforementioned seven absolute rights — could encourage legislators to invoke it when appropriate. This would contribute to a renaissance of this moribund but indispensable provision, both generally and in the context of public emergencies — where it is of particular importance.

As Dwight Newman has conclusively demonstrated, the original intent of the framers of the *Constitution Act, 1982* was to grant legislators the authority to substitute their own interpretation of the scope of rights when derogating from particular sections of the Charter.[14] While prominent commentators such as Andrew Coyne and others have posited that any invocation by Parliament of the notwithstanding clause would ignite a tinderbox and create a bonfire of the liberties,[15] this ignores the far more important underlying concern: a dismissive attitude toward rights, which is considerably more serious than the potential misuse of one particular constitutional provision.[16] These commentators have failed to note that this acerbic attitude is catalyzed by the perception of judicial overreaching, particularly when there is no remedy available to the legislature.

Additionally, Coyne's rhetoric shows how the taboo on the use of the notwithstanding clause stems in no small part from arguments that equate any potential invocation of this provision with an attempt to run roughshod over even the most fundamental Charter rights (such as the potential infringement of section 7's right to security of the person by the measures introduced by Bill C-51 in 2015).[17] However, the dialogue that followed Premier Brad Wall's revival two years later of what, in the words of Joanna Baron and Geoffrey Sigalet, had almost become a "zombie law"[18] demonstrated that it is possible to formulate more sophisticated arguments

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[14] Dwight Newman, "Canada's Notwithstanding Clause, Dialogue, and Constitutional Identities" in Geoffrey Sigalet, Grégoire Webber & Rosalind Dixon, eds., *Constitutional Dialogue: Rights, Democracy, Institutions* (Cambridge: Cambridge University Press, 2019) at 227.

[15] Andrew Coyne, "Imperious Conservatives and runaway Supreme Court set to Collide" *National Post* (March 9, 2015), online: <http://news.nationalpost.com/2015/03/09/andrew-coyne-imperious-conservatives-and-runaway-supreme-court-set-to-collide/>.

[16] See Geoff Sigalet, "Conservatives might be enabling a healthier dialogue between Parliament and the Court" *National Post* (March 19, 2015), online: <https://nationalpost.com/opinion/geoff-sigalet-conservatives-might-be-enabling-a-healthier-dialogue-between-parliament-and-the-court>.

[17] See Geoff Sigalet, "Conservatives might be enabling a healthier dialogue between Parliament and the Court" *National Post* (March 19, 2015), online: <https://nationalpost.com/opinion/geoff-sigalet-conservatives-might-be-enabling-a-healthier-dialogue-between-parliament-and-the-court>.

[18] Joanna Baron & Geoffrey Sigalet, "Saskatchewan's use of the notwithstanding clause could rehabilitate the democratic reputation of the *Charter* and breathe life into section 33" *Policy Options* (May 19, 2017), online: <https://policyoptions.irpp.org/magazines/may-2017/saskatchewans-brad-wall-rehabilitation-charter/.

about appropriate and inappropriate rationales for derogation. While scholars such as Leonid Sirota were correct to note that Wall did not initially provide a compelling argument for its use,[19] it remained plausible to assert that the notwithstanding clause had been appropriately invoked, owing to legitimate concerns about the over-extension of rights after a court held the Charter mandated taxpayer funding for non-Catholic students in Catholic denominational schools.[20]

In the following year, the Ford government's threat to invoke the notwithstanding clause in legislation that would streamline the Toronto City Council once again provoked considerable alarm.[21] As had been the case in the past, no small part of what prompted that reaction was the perception of a slippery slope with no guard-rail.[22] The recognition of the seven absolute rights roughly comparable with Canada's baseline obligations under Article 4 of the ICCPR would allay precisely that concern. Rather than responding to fear-mongering, more attention could instead be devoted by scholars to the substantive issues related to derogation, particularly whether bills that contain the notwithstanding clause violate rights unjustifiably,[23] or whether the legislative override was invoked on the basis of a compelling and well-articulated rationale. Additionally, those who are uneasy with the concept of legislative derogation of entrenched rights would be better-served by being steered away from an emotive yet unlikely parade of horribles and toward theoretically grounded critiques of the notwithstanding clause, such as Sirota's.[24]

Finally, a definitive judicial enumeration of non-derogable Canadian constitutional rights that are beyond the reach of the notwithstanding clause, if it led to increased legitimacy and acceptance of its well-motivated use, might also mitigate the effects of the Schmittian paradox identified by St-Hilaire.[25] Such a future, in

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[19] Leonid Sirota, "Not Withstanding Scrutiny" *Double Aspect* (May 4, 2017), online: <https://doubleaspect.blog/2017/05/04/not-withstanding-scrutiny/>.

[20] *Good Spirit School Division No. 204 v. Christ the Teacher Roman Catholic Separate School Division No. 212*, [2017] S.J. No. 150, 2017 SKQB 109 (Sask. Q.B.), revd [2020] S.J. No. 92, 2020 SKCA 34 (Sask. C.A.).

[21] Sean Fine, "Experts split over Ford's use of notwithstanding clause" *The Globe and Mail* (September 12, 2018), online: <https://www.theglobeandmail.com/canada/article-experts-split-over-fords-use-of-notwithstanding-clause/>.

[22] Comments of Professor Benjamin Perrin, *id.*

[23] See: Mark Mancini & Geoff Sigalet, "What constitutes the legitimate use of the notwithstanding clause?" *Policy Options* (January 20, 2020), online: <https://policyoptions.irpp.org/magazines/january-2020/what-constitutes-the-legitimate-use-of-the-notwithstanding-clause/>.

[24] See Leonid Sirota, "Things I Dislike about the Constitution" *Double Aspect* (September 4, 2018), online: <https://doubleaspect.blog/2018/09/04/things-i-dislike-about-the-constitution/>.

[25] Maxime St-Hilaire, "Are Quebec and Canada Having a 'Schmittian' (or Iheringian) Moment?'" (May 25, 2020) *Pandemic Powers and the Constitution Blog*, online: <https://

which the notwithstanding clause becomes available as a tool to deal with emergencies (accompanied by duly filed notices of derogation to the Secretary-General, as the ICCPR requires, which also promotes awareness of Article 4.2's guarantee of absolute rights)[26] would balance effective emergency measures with the explicit recognition that the government must continue to respect the rights recognized both domestically and internationally as non-derogable during every crisis, no matter serious. This would transcend the "Schmittian paradox" because governments would be free to derogate from rights during of a serious public emergency, but would also be required to be transparent when doing so. This would encourage effective but more well-tailored and carefully explained suspensions of rights, while preserving protection for the absolute rights at the core of Canada's rule of law.

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ualawccsprod.srv.ualberta.ca/2020/05/are-quebec-and-canada-having-a-schmittian-or-iheringian-moment/>.

[26] Martin Scheinin, "To Derogate or Not to Derogate" (April 6, 2020) *Opinio Juris*, online: <https://opiniojuris.org/2020/04/06/covid-19-symposium-to-derogate-or-not-to-derogate/>.

Chapter 10

An Inconvenient Constitution? The Troubles with Suspended Declarations of Invalidity

Carissima Mathen

I. Introduction

It is sometimes observed that the mark of a successful society is the willingness of its members to form a queue. The small gesture conceals much: acceptance that all deserve equal treatment; recognition of fellow citizens as entitled to benefits as oneself; and confidence that the desired service or good will not disappear. It reflects a powerful expectation about the conditions under which people engage a shared political community. And it requires a society governed by the rule of law, where actors are subject to legal limits and there is general assurance of the means by which those limits are enforced.

Courts play an essential role in upholding and safeguarding those expectations. In constitutionally bounded systems, they are charged with the responsibility for enforcing a number of limits on other actors. Over the course of Canada's legal development, courts have discharged this duty with admirable resolve. There is, however, one discordant note: the suspended declaration of invalidity.[1] The idea that it is both possible, and appropriate, for a court to delay the effect of its constitutional remedy has become deeply entrenched, so much so that delay is only occasionally the subject of sustained legal argument by parties or by judges themselves.

In this paper, I argue that suspended declarations are problematic, with a focus on the domain of criminal law. Such remedies complicate the separation of powers, produce profound individual unfairness, and increase uncertainty. They detract from the integrity-promoting or detracting decisions of key institutions, and they put at risk citizens' faith in, and loyalty to, the constitution. No matter how much they have become normalized, they remain difficult if not impossible to reconcile with the rule of law.

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[1] Robert Leckey, "The Harms of Remedial Discretion" (2016) 14:3 International Journal of Constitutional Law 584-607.

II. REMEDIES UNDER THE *CONSTITUTION ACT*

Section 52 of the *Constitution Act 1982* expresses the constitution as Canada's supreme law. All other laws must comply with it; to the extent that laws do not, they have no force or effect.[2] While silent about the role of the courts, section 52 has been seized upon as the primary source of their remedial authority.[3] Indeed, judges have gone much further than the clause's plain meaning, developing a host of remedies beyond simple invalidation.[4]

The most dramatic of those, by far, is the idea that a court may "suspend" the effect of a remedy for a period of time. The technique originated in a seminal constitutional reference: *Re Manitoba Language Rights*.[5] For over a century, Manitoba had flouted one of the conditions of its entry into Confederation: that it publish statutes in both official languages.[6] In consequence, it would appear, its entire regime of positive law was null.

Manitoba Language presented an exceptional circumstance. The Court noted that other jurisdictions, facing civil war, insurgency and constitutional transition, had invoked a "necessity doctrine" to suspend the ordinary application of law.[7] Those examples demonstrated that a decision apparently contrary to the constitution's text could draw on a broader sense of legitimate. Facing a similarly unpalatable result, the Supreme Court stated that the constitution could not sanction the creation of "chaos and disorder".[8] Instead, the Court advised that it would declare the laws invalid but delay the declaration's effect for the minimum period required to re-enact the laws in a constitutional form.[9]

It is hard to fault the Court for resisting an outcome that would have entailed the destruction of a province's legal order. The Court may also have been swayed by the

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[2] To be clear, this was not new in 1982 but, arguably, an element of the constitutional order dating back to the *Colonial Laws Validity Act 1865* 28 & 29 Vict. c. 63.

[3] To this, one might add s. 24 of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 which empowers courts to grant appropriate remedies for individual rights violations.

[4] *R. v. Keegstra*, [1990] S.C.J. No. 131, [1990] 3 S.C.R. 697 (S.C.C.); *Vriend v. Alberta*, [1998] S.C.J. No. 29, [1998] 1 S.C.R. 493 (S.C.C.); *Saskatchewan (Human Rights Commission) v. Whatcott*, [2013] S.C.J. No.11, 2013 SCC 11 (S.C.C.); *R. v. Sharpe*, [2001] S.C.J. No. 3, 2001 SCC 2 (S.C.C.).

[5] *Reference re: Manitoba Language Rights (Man.)*, [1985] S.C.J. No. 36, [1985] 1 S.C.R. 721 (S.C.C.). For a discussion of the incongruity of developing a constitutional remedy while issuing an advisory opinion, see Carissima Mathen, *Courts Without Cases: The Law and Politics of Advisory Opinions* (London: Hart, 2019), c. 10.

[6] *Manitoba Act, 1870*, R.S.C. 1970, App. II.

[7] *Schachter v. Canada*, [1992] S.C.J. No. 68, [1992] 2 S.C.R. 679 (S.C.C.).

[8] *Schachter v. Canada*, [1992] S.C.J. No. 68, [1992] 2 S.C.R. 679 (S.C.C.).

[9] *Schachter v. Canada*, [1992] S.C.J. No. 68, [1992] 2 S.C.R. 679 (S.C.C.).

fact that the legal deficiency at issue was purely form-based, and for which there was a clear, if time-consuming, remedy.

Unfortunately, the precedent set by *Manitoba Language* proved irresistible in subsequent cases. And those cases diverged from it in two important ways. First, they invariably failed to present anything near the same level of societal peril. And, second, far from being limited to violations of form, they involved serious infringements of individual rights and liberties.

The divergence began in *Schachter v. Canada*,[10] a case involving parental leave benefits. The plaintiff, a biological father, challenged the limitation of such benefits to adoptive parents.[11] Although the dispute was moot by the time it reached the Supreme Court,[12] Chief Justice of Canada Lamer addressed the trial judge's remedial decision to simply extend the benefits to include natural parents. Chief Justice Lamer held that the correct route would have been to declare the inconsistency but suspend its effective date.

The Chief Justice extolled the benefits of suspension. A delay, he said, would give the legislature "an opportunity to fill the void" created by a declaration of invalidity.[13] That was especially important if striking down posed "a potential danger to the public" or "otherwise threaten[ed] the rule of law".[14] But it might also be in order if the legislation was not problematic *per se*, but merely underinclusive, and immediate invalidation "would deprive deserving persons of benefits without providing them to the applicant".[15]

In the ensuing years, suspended declarations have been used to address: the legal treatment of persons found not criminally responsible;[16] the failure to list of fathers on birth certificates;[17] the removal of criminal prohibitions increasing the danger

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[10] [1992] S.C.J. No. 68, [1992] 2 S.C.R. 679 (S.C.C.) (hereinafter "*Schachter*").

[11] The *Unemployment Insurance Act, 1971*, S.C. 1970 71 72, c. 48, s. 30.

[12] Parliament changed the parental leave law to include natural parents, but reduced the benefits from 15 to 10 weeks. A subsequent challenge by adoptive parents failed: *Schafer v. Canada (Attorney General)*, [1997] O.J. No. 3231, 35 O.R. (3d) 1 (Ont. C.A.).

[13] *Schafer v. Canada (Attorney General)*, [1997] O.J. No. 3231, 35 O.R. (3d) 1 (Ont. C.A.).

[14] *Schafer v. Canada (Attorney General)*, [1997] O.J. No. 3231, 35 O.R. (3d) 1 (Ont. C.A.).

[15] *Schafer v. Canada (Attorney General)*, [1997] O.J. No. 3231, 35 O.R. (3d) 1 (Ont. C.A.).

[16] *R. v. Swain*, [1991] S.C.J. No. 32, [1991] 1 S.C.R. 933 (S.C.C.).

[17] *Trociuk v. British Columbia (Attorney General)*, [2003] S.C.J. No. 32, [2003] 1 S.C.R. 835 (S.C.C.).

experienced by sex workers;[18] the eligibility under workers' compensation for chronic pain sufferers;[19] and the criminal prohibition of medical assistance in dying.[20] The cases give rise to numerous concerns, five of which are discussed below.

III. COURT'S APPROACHES

The first concern is that courts have proved quite willing to use suspensions in situations that do not, on a fair interpretation, implicate the rule of law. Indeed, in *Schachter* the Court separated threats to the rule of law from "underinclusiveness".[21] It recognized that pausing a benefits scheme, for example, while the state considers whether and how to repair a constitutional deficiency poses no risk to the rule of law. Even if the benefit is one that the state was obliged to provide, it is difficult to envision a scenario where such a pause would threaten the very legal order.

The second concern is the Court's expansion of the concept of the rule of law itself. In *Schachter*, Chief Justice Lamer suggested that "public danger" alone can implicate the rule of law. This has led to suspensions in numerous successful challenges to criminal laws.[22] To be sure, if it were the case that invalidation would risk the entire criminal justice system, that might indeed pose the kind of public danger requiring a suspension. But, that is never the case. Instead, suspensions are used to shield from immediate consequence discrete offences, or related rules of evidence, proof or procedure.

Striking down a criminal law probably does create a risk that nefarious persons might thereby avoid state sanctions. But that hardly rises to a rule of law problem. Indeed, many criminal law principles, faithfully observed, pose similar risks. Consider that the *Canadian Charter of Rights and Freedoms*[23] itself anticipates the release of a factually guilty person — perhaps because evidence against them was illegally obtained, or they were not tried within a reasonable time, or they were

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[18] *Canada (Attorney General) v. Bedford*, [2013] S.C.J. No. 72, [2013] 3 S.C.R. 110 (S.C.C.).

[19] *Nova Scotia (Workers' Compensation Board) v. Martin; Nova Scotia (Workers' Compensation Board) v. Laseur*, [2003] S.C.J. No. 54, [2003] 2 S.C.R. 504 (S.C.C.).

[20] *Carter v. Canada (Attorney General)*, [2015] S.C.J. No. 5, [2015] 1 S.C.R. 331.

[21] *Schachter v. Canada*, [1992] S.C.J. No. 68 at para. 79, [1992] 2 S.C.R. 679 (S.C.C.): "This approach is clearly appropriate where the striking down of a provision poses a potential danger to the public (*R. v. Swain*, *supra*) or otherwise threatens the rule of law (*Reference Re Manitoba Language Rights*, [1985] 1 S.C.R. 721 (S.C.C.)). It may also be appropriate in cases of underinclusiveness as opposed to overbreadth."

[22] *Canada (Attorney General) v. Bedford*, [2013] S.C.J. No. 72, [2013] 3 S.C.R. 110 (S.C.C.)

[23] Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 (hereinafter "Charter").

denied the aid of an interpreter. More broadly, society has determined such risks to public safety tolerable in the operation of *constitutional* statutes. It is puzzling how they could become intolerable after a particular law has been found *unconstitutional*.

The third concern is that courts are fond of citing the existence of "legislative voids" that do not bear scrutiny. A good example is *Carter v. Canada*.[24] *Carter* struck down the relatively narrow offence of assisting another person to commit suicide.[25] The Court delayed the declaration for 12 months. Presumably, it did so because it feared some negative impact on public safety, although this was not stated as such; most of the remedial discussion was focussed on whether to permit individuals to seek exemptions (something the Court rejected until the government sought a further extension).[26] I concede that a legislative gap in the state's ability to respond to wrongful killings could trigger a public safety concern. But the *Criminal Code* contains several forms of culpable homicide unaffected by *Carter*, including murder and criminally negligent manslaughter. While it might have been more difficult to convict someone of those offences where the facts involved assisted suicide, it was hardly impossible.

The fourth concern involves how the Court invokes deference to the legislature in justifying a decision to suspend. In this context, deference appears to mean that the Court has decided that Parliament must be "permitted an opportunity to respond".[27] But that move conceals a powerful judicial nudge to Parliament that it *should* respond. The stated concern is frequently paired with the above-noted spectre of legislative voids. But, to the extent that they exist, such voids are more a political than legal matter. Unless a legislative non-response would create its own constitutional breach, it is unclear why the Court should consider it.

Striking down laws is a serious judicial intervention in democratic governance. It creates numerous issues, which might include putting some persons at risk of harm. But so do delayed declarations. (Indeed, so do many legislative decisions.) And it should matter whether a "risk" derives directly from a continued deprivation of a proven constitutional right, as opposed to maintaining in place an unconstitutional law. Returning to *Carter*, it was inconsistent for the Court to at one and the same time recognize the "cruelty" inherent in the scheme that it struck down in *Carter* and countenance that such "intolerable suffering" would continue — unless it is more important that the Court not place Parliament in an uncomfortable position. Surely the Constitution indicates that the former concern is more important.

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[24] *Carter v. Canada (Attorney General)*, [2015] S.C.J. No. 5, [2015] 1 S.C.R. 331 (S.C.C.) (hereinafter "*Carter*").

[25] *Criminal Code*, R.S.C. 1985, c. C-46, ss. 14, 241(b).

[26] *Carter v. Canada (Attorney General)*, [2016] S.C.J. No. 4, [2016] 1 S.C.R. 13 (S.C.C.).

[27] *Carter v. Canada (Attorney General)*, [2015] S.C.J. No. 5 at para. 125, [2015] 1 S.C.R. 331 (S.C.C.).

The fifth concern builds on the just-noted issue of judicial arrogation of what are clearly legislative decisions. That would be the case for suspended declarations in any system where the court is charged with upholding constitutional norms and striking down non-compliant laws. It is exacerbated in the context of the Charter which already provides an avenue of redress: section 33. That provision enables Parliament or a provincial legislature to sustain a law "notwithstanding" that it trenches on certain Charter rights. While section 33 does not cover all Charter rights, the ones that it does (fundamental freedoms, legal rights and equality) are frequently at issue in cases of suspended remedies. Without pronouncing on the wisdom of the notwithstanding clause *per se*, it is surely preferable for the legislature, as opposed to the court, to determine whether a particular situation is serious enough to maintain an unconstitutional law in place. For those rights not subject to the clause, it is arguable that society has already decided that their protection under section 52 is a norm that is not to be cast aside. If so, it matters little whether the institution departing from that norm is cloaked in judicial robes.

IV. CONCLUSION

There is little to commend the current state of suspended remedies. It is a hopeful sign that in some recent cases the Court has invoked remedies with immediate effect — even going so far as to explain why a suspension would not be appropriate.[28]

While it might be challenging to reverse their trajectory, it may be possible to re-introduce the notion that suspended remedies are extraordinary moments to be approached with care. It would be helpful for the court to articulate a more explicit burden on the state (or other supporting party) to justify a suspension. It should no longer be acceptable to devote scant paragraphs to the question in facta, and to gloss over it in hearings.[29] Ideally, there should be time explicitly devoted to the issue at oral arguments. Carving out such space is critical at lower levels, where the trial judge can make factual findings about the matrix of considerations in which a suspension would operate.

The title of this piece invokes the idea of the inconvenient constitution. It is difficult to escape the sense of a certain nonchalance about constitutional compliance, particularly in those moments when constitutional dictates demand hard choices. Seen in those terms, the notion that the constitution poses an inconvenience to political and judicial actors is entirely disreputable. But perhaps that is to peer into the kaleidoscope from the wrong end. Instead, one should understand the constitution's imposition on other actors, at moments and in ways that they find

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[28] *R. v. Boudreault*, [2018] S.C.J. No. 58, [2018] 3 S.C.R. 599 (S.C.C.).

[29] In *Carter v. Canada (Attorney General)*, [2015] S.C.J. No. 5, [2015] 1 S.C.R. 33 (S.C.C.), the Attorney General of Canada devoted less than a page of a 53-page factum to remedy; and virtually no time at all was spent on the issue at the hearing. See online: https://www.scc-csc.ca/WebDocuments-DocumentsWeb/35591/FM030_Respondent_Attorney-General-of-Canada.pdf.

inconvenient, as indispensable to its role: to safeguard against casual or calculated malfeasance against those commitments that are essential to our shared political project.

Chapter 11

HARD CASES IN A CULTURE OF JUSTIFICATION

Michelle Biddulph*

The Supreme Court's decision in *Canada (Minister of Citizenship and Immigration) v. Vavilov*[1] has been hailed — and criticized — for ushering in a new "culture of justification" in Canadian administrative law.[2] This culture of justification leaves space for administrative decision-makers to develop their own strands of jurisprudence within the policy-laden fields in which they operate, though subject to judicial review for substantive reasonableness.[3]

However, the Court's choice to leave space for administrative jurisprudential development also reveals a potential tension between the culture of justification and the rule of law. The *Domtar/Wilson*[4] problem is tolerated in a culture of justification: administrative decision-makers can legitimately disagree and reach opposite conclusions on a similar question of law so long as the reasons are appropriately justified. This leads to the potential for persistent discord on hard questions,[5] which

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1 [2019] S.C.J. No. 65, 2019 SCC 65 (S.C.C.) [hereinafter "*Vavilov*"].

2 See, *e.g.*, Paul Daly, "Vavilov and the Culture of Justification in Contemporary Administrative Law" (2020) S.C.L.R. (2d) (forthcoming); Katherine Hardie, "Deference after the Trilogy: What is the Impact of a 'Culture of Justification'?" (2020) 33 Can. J. Admin. L. & Prac. 145.

3 While there are limited situations in which correctness still applies, this article is focused on the *Vavilov* conception of reasonableness review and its impact on consistency of decision-making in an administrative decision-maker's jurisprudence. I will, therefore, refer only to the standard of review of reasonableness throughout this article.

4 *Domtar Inc. v Quebec (Commission d'appel en matière de lésions professionnelles)*, [1993] S.C.J. No.75, [1993] 2 S.C.R. 756 (S.C.C.); *Wilson v. Atomic Energy of Canada Ltd.*, [2016] S.C.J. No. 29, 2016 SCC 29 (S.C.C.).

5 I use "hard questions" in the Dworkin sense, being cases where no settled rule dictates a clear decision either way: see Ronald Dworkin, "Hard Cases" (1975) 88 Harvard Law Review 1057 at 1060. However, while I borrow Dworkin's terminology as an apt descriptor

can undermine the rule of law. *Vavilov* rejects calls for correctness review where there is persistent discord on a question of law, reasoning that persistent discord is vague and difficult to identify, and that internal and horizontal constraints between decision-makers will make the persistent discord problem rare, if not eliminate it entirely.[6]

This reasoning rests on the Court's acceptance that, though horizontal *stare decisis* does not apply to administrative decision-makers, internal institutional constraints and external judicial constraints are sufficient to prevent or remedy the problem of persistent discord on questions of law. These propositions, however, are questionable from a rule of law perspective. This article suggests that the internal and external constraints suffer from fairness problems, vagueness problems, and end up inviting disguised correctness review anyway. The *Vavilov* solution to the persistent discord problem may not be much of a solution at all.

I. THE PERSISTENT DISCORD PROBLEM

The "persistent discord" problem, or the problem of conflicting jurisprudence from an administrative tribunal, was first addressed by the Supreme Court in *Domtar Inc. v. Quebec (Commission d'appel en matière de lésions professionnelles)*.[7] In *Domtar*, the respondent tribunal had consistently interpreted an income replacement provision in a workers' compensation statute as providing for income replacement payment for each day that a worker would have worked but for the injury, regardless of whether extrinsic forces would have affected the worker's ability to carry out his employment.[8] In finding this interpretation to be patently unreasonable, the Quebec Court of Appeal relied on a single decision of the Labour Court, issued in a penal context, which had interpreted the same provision and reached a different result.[9] The Supreme Court held that the Quebec Court of Appeal had erred in overturning the CALP decision, which was based on a long line of consistent CALP jurisprudence, by relying on a decision issued by a different tribunal in a different context.[10] However, even if there was a persistent discord in the interpretation of the provision, Justice L'Heureux-Dubé rejected the proposition that a reviewing court

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of the types of cases where the persistent discord problem is likely to arise in the administrative law context, I do not profess to apply Dworkin's concept of rights-oriented judgment to the resolution of hard cases in the administrative context.

[6] *Canada (Minister of Citizenship and Immigration) v. Vavilov*, [2019] S.C.J. No. 65 at paras. 129-132, 2019 SCC 65 (S.C.C.).

[7] [1993] S.C.J. No. 75, [1993] 2 S.C.R. 756 (S.C.C.) [hereinafter "*Domtar*"].

[8] *Domtar Inc. v. Quebec (Commission d'appel en matière de lésions professionnelles)*, [1993] S.C.J. No. 75, [1993] 2 S.C.R. 756 at 776 (S.C.C.).

[9] *Domtar Inc. v. Quebec (Commission d'appel en matière de lésions professionnelles)*, [1993] S.C.J. No. 75, [1993] 2 S.C.R. 756 at 778 (S.C.C.).

[10] *Domtar Inc. v. Quebec (Commission d'appel en matière de lésions professionnelles)*, [1993] S.C.J. No. 75, [1993] 2 S.C.R. 756 at 783 (S.C.C.).

ought to intervene on the correctness standard and divine the correct interpretation. She reasoned that, though consistency in administrative decision-making is desirable, courts are not the entities that ought to be tasked with imposing that consistency given the institutional relationship that underpins judicial review.[11]

The Supreme Court considered the matter again in 2016 in *Wilson v. Atomic Energy of Canada Ltd*.[12] *Wilson* addressed a longstanding issue in labour arbitrator jurisprudence: whether the *Canada Labour Code*[13] permitted federally-regulated employers to dismiss an employee without cause. The majority of labour arbitrators said no.[14] A significant minority, however, held that the employer could dismiss employees without cause but appropriate notice or pay in lieu of notice.[15] The majority of the Supreme Court dismissed the argument that this longstanding and persistent discord justified correctness review to settle the question of whether a federally-regulated employee could be dismissed without cause,[16] though it went on to conclude that there was only one reasonable interpretation — that an employee could not be dismissed without cause.[17]

This issue of persistent discord appeared one more time in *Vavilov*, this time through the argument of *amicus curiae*. The majority in *Vavilov* rejected the suggestion that correctness review ought to apply where there is persistent discord in administrative jurisprudence on a question of law, reasoning that the new robust form of reasonableness review was sufficient to address the threat that the persistent

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[11] *Domtar Inc. v. Quebec (Commission d'appel en matière de lésions professionnelles)*, [1993] S.C.J. No. 75, [1993] 2 S.C.R. 756 at 795-796 (S.C.C.).

[12] [2016] S.C.J. No. 29, 2016 SCC 29 (S.C.C.).

[13] R.S.C. 1985, c. L-2.

[14] *Wilson v. Atomic Energy of Canada Ltd.*, [2015] F.C.J. No. 44 at para. 47, [2015] 4 F.C.R. 467, 2015 FCA 17 (F.C.A.). The Supreme Court's decision is rather obscure as to the extent to which arbitral jurisprudence supported either interpretation, as the majority suggested that 1,740 decisions supported the "with cause" interpretation while only 28 supported the "without cause" interpretation: *Wilson v. Atomic Energy of Canada Ltd.*, [2016] S.C.J. No. 29 at para. 60, 2016 SCC 29 (S.C.C.). However, as the dissent pointed out, the majority's purported number of decisions favouring the without cause interpretation actually included *every* decision rendered by an arbitrator under the *Canada Labour Code* regardless of whether that decision considered the issue of whether an employee could be dismissed without cause: *Wilson v. Atomic Energy of Canada Ltd.*, [2016] S.C.J. No. 29 at para. 110, 2016 SCC 29 (S.C.C.). The Federal Court of Appeal's description of the conflict therefore appears to be more accurate.

[15] *Wilson v. Atomic Energy of Canada Ltd.*, [2015] F.C.J. No. 44 at para. 48, [2015] 4 F.C.R. 467, 2015 FCA 17 (F.C.A.).

[16] *Wilson v. Atomic Energy of Canada Ltd.*, [2016] S.C.J. No. 29 at paras. 16, 17, 2016 SCC 29 (S.C.C.).

[17] *Wilson v. Atomic Energy of Canada Ltd.*, [2016] S.C.J. No. 29 at para. 39, 2016 SCC 29 (S.C.C.).

discord problem poses to the rule of law.[18] The majority posited two suggestions to prevent the persistent discord problem or remedy it when it arises: internal constraints within an administrative entity that foster a "harmonized decision-making culture";[19] and the external burden imposed by reasonableness review to justify any decision that departs from "longstanding practices or established internal decisions".[20]

II. THE INTERNAL CONSTRAINT: A HARMONIZED DECISION-MAKING CULTURE

The first solution to the persistent discord problem suggested by the *Vavilov* majority is the development of a harmonized administrative decision-making culture, fostered by internal constraints on decision-making such as internal legal opinions, standards, policy directives, plenary meetings, training manuals, checklists and templates.[21] However, while such harmonized decision-making may quell dissent, it does so at the expense of transparency: a party that appears before a particular administrative decision-maker should have access to the documents and guidelines that may be used to shape the ultimate decision. Where an internal legal opinion is commissioned that favours a particular interpretation of a statutory provision, for example, a party's ability to advocate for a different interpretation is hampered. This is because the party will likely not even be aware of the existence or content of the legal opinion, as the opinion would be protected by privilege.[22] The same is true of things such as internal standards, policy directives or the outcomes of plenary meetings.[23] The rule of law suffers when the rules and principles guiding a decision are not revealed to the person affected by that decision.

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[18] *Canada (Minister of Citizenship and Immigration) v. Vavilov*, [2019] S.C.J. No. 65 at paras. 71, 72, 2019 SCC 65 (S.C.C.).

[19] *Canada (Minister of Citizenship and Immigration) v. Vavilov*, [2019] S.C.J. No. 65 at para. 129, 2019 SCC 65 (S.C.C.).

[20] *Canada (Minister of Citizenship and Immigration) v. Vavilov*, [2019] S.C.J. No. 65, 2019 SCC 65 (S.C.C.).

[21] *Canada (Minister of Citizenship and Immigration) v. Vavilov*, [2019] S.C.J. No. 65 at para. 130, 2019 SCC 65 (S.C.C.).

[22] *Pritchard v. Ontario (Human Rights Commission)*, [2004] S.C.J. No. 16 at paras. 28-31, 2004 SCC 31 (S.C.C.).

[23] And, in many cases, access to reasons for past decisions: for example, the Parole Board of Canada does not publicly release its reasons for decision. If a party before the Parole Board wishes to have access to a past decision of the Parole Board, even a decision on a general issue of law, the party must (a) know the name of the decision; and (b) submit a specific request to the Parole Board of Canada's decision registry with detailed description of the identity of the requesting party and the reason for the request. See Parole Board of Canada, "What is the Decision Registry?" (December 5, 2018), online: <https://www.canada.ca/en/parole-board/services/decision-registry/what-is-the-decision-registry.html> (last accessed August 10, 2020).

While a harmonious decision-making culture is desirable from a rule of law perspective in that it helps minimize the risk of arbitrary conflicting decisions on similar issues,[24] a culture that is developed in private and shielded from the eyes and submissions of the parties that are affected by the decisions, as well as from the courts tasked with reviewing those decisions, is a culture that is inconsistent with the rule of law. Where a party seeks judicial review of the substance of an administrative decision, the judicial review is ordinarily focused only on the decision itself with no extraneous evidence admissible.[25] If the reasons for decision do not disclose the impact of the internal harmonized decision-making culture on the outcome of the decision, and if the affected party has no knowledge of the internal constraints that may have impacted the decision,[26] a reviewing court has no means by which it can ensure the decision-maker did not fetter its discretion or otherwise act improperly in reaching the particular decision. The culture of justification requires a decision-maker's reasons to "meaningfully account for the issues and concerns raised by the parties",[27] while simultaneously encouraging decision-makers to implicitly base their decisions on factors and considerations which may be shielded from the affected party. So long as a decision-maker refrains from referring to those considerations in its reasons, these internal constraints will escape judicial review.

III. THE EXTERNAL CONSTRAINT: REASONABLENESS REVIEW

The Court held in *Vavilov* that reasonableness review serves as an external constraint on the persistent discord problem because an administrative decision-maker bears a justificatory burden to explain a departure "from longstanding practices or established internal authority". As a result, reviewing courts will be able to minimize the "risk of arbitrariness" in administrative decision-making by ensuring that the decision-maker adequately justifies any departure from precedent.[28] If the persistent discord remains, and if parties submit evidence of that discord to the courts, the court may "telegraph the existence of an issue in its reasons and encourage the use of internal administrative structures to resolve the disagree-

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[24] See *IWA v. Consolidated-Bathurst Packaging Ltd.*, [1990] S.C.J. No. 20, [1990] 1 S.C.R. 282 at 327 (S.C.C.).

[25] *Association of Universities and Colleges of Canada v. Canadian Copyright Licensing Agency (Access Copyright)*, [2012] F.C.J. No. 93 at para. 19, 2012 FCA 22 (F.C.A.).

[26] And is therefore unable to compel the tribunal to produce that evidence, whether pursuant to r. 317 of the *Federal Court Rules*, SOR/98-106 or similar provincial rules of court.

[27] *Canada (Minister of Citizenship and Immigration) v. Vavilov*, [2019] S.C.J. No. 65 at para. 127, 2019 SCC 65 (S.C.C.).

[28] *Canada (Minister of Citizenship and Immigration) v. Vavilov*, [2019] S.C.J. No. 65 at para. 131, 2019 SCC 65 (S.C.C.).

ment".[29] Where this occurs, "it may become increasingly difficult for the administrative body to justify decisions that serve only to preserve the discord".[30]

There are several things missing from this optimistic articulation of reasonableness review. First, the Court offers no explanation as to how reasonableness review ought to be conducted where a decision-maker is beginning to grapple with a hard question and no "longstanding" authority has yet been developed. Does a decision-maker bear a justificatory burden to explain a departure from a single precedent on the issue? Or is each decision subject to reasonableness review *de novo* for an unspecified period of time until one particular interpretation begins to accrue enough support to become "longstanding"? Does the justificatory burden kick in once a particular interpretation is affirmed to be reasonable on judicial review? The matter is left unresolved.

Given the Court's rejection of the *amicus*' call for correctness review on conflicting decisions and given the Court's acknowledgment that horizontal *stare decisis* does not apply between administrative decision-makers, one must presume that the Court intended to leave space for decision-makers to, in the words of Paul Daly, "work inconsistencies pure".[31] The problem with *Vavilov* is that it does little to provide guidance to courts on how to identify the dividing line between a decision that is part of a legitimate process of "working inconsistencies pure" and one that departs from "established internal decisions".[32] In the former, the decision is reviewed purely for its reasonableness.[33] In the latter, the decision is unreasonable unless the decision-maker can adequately explain why it chose not to follow the established precedent.[34] Reviewing courts are left with little guidance as to the circumstances in which they must impose a justificatory burden on the administra-

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[29] *Canada (Minister of Citizenship and Immigration) v. Vavilov*, [2019] S.C.J. No. 65 at para. 132, 2019 SCC 65 (S.C.C.).

[30] *Canada (Minister of Citizenship and Immigration) v. Vavilov*, [2019] S.C.J. No. 65 at para. 132, 2019 SCC 65 (S.C.C.).

[31] Paul Daly, "The Principle of *Stare Decisis* in Canadian Administrative Law" (2015) 49 Revue Juridique Themis 757 at 775.

[32] *Canada (Minister of Citizenship and Immigration) v. Vavilov*, [2019] S.C.J. No. 65 at para. 132, 2019 SCC 65 (S.C.C.).

[33] Of course, if the parties before the decision-maker each advance different interpretations and each can provide internal precedent to support the argument, the decision-maker is required to address each precedent in its reasons as part of the obligation to be responsive to the submissions of the parties: *Canada (Minister of Citizenship and Immigration) v. Vavilov*, [2019] S.C.J. No. 65 at paras. 127, 128, 2019 SCC 65 (S.C.C.). However, the requirement to consider and address competing submissions seems to be less stringent than the burden to justify a departure from past precedent.

[34] *Canada (Minister of Citizenship and Immigration) v. Vavilov*, [2019] S.C.J. No. 65 at para. 131, 2019 SCC 65 (S.C.C.): "Where a decision maker *does* depart from longstanding practices or established internal authority, it bears the justificatory burden of explaining that

tive decision-maker to explain why it did not follow a particular decision. In essence, *Vavilov*'s proposed solution to the issue of persistent discord suffers from the very vagueness problems that the Court identified in rejecting the correctness standard of review. Simply sheltering the vagueness problem under the reasonableness umbrella does little to actually solve the issue.

Second, the Court's proposed resolution to persistent discord on a question of law — the "telegraphing" of the existence of an issue, where evidence of that issue has already been put before the court — stands in tension with the reasonableness framework that the Court insists must apply regardless of the existence of persistent discord. The suggestion that, once such judicial "telegraphing" puts a decision-maker on notice as to the existence of the issue,[35] the decision-maker will find it increasingly difficult to justify decisions that "serve only to preserve the discord" opens the door for the revival of disguised correctness review. Administrative decision-makers, one must presume, are rational actors that make decisions for legitimate reasons. They do not reach particular conclusions on points of law for the fun of it — there will be a legitimate reason why one decision-maker resolves a hard case one way, and another resolves that same hard case a different way. To suggest that, at some point, one strand of administrative reasoning on a hard case becomes unjustifiable because it exists solely to preserve the discord seems to cast doubt on the legitimate intentions of a particular decision-maker, which is at odds with the ostensibly respectful premises of reasonableness review.

Vavilov implicitly invites courts to engage in disguised correctness review to resolve a true issue of persistent discord, since at some point a court must make a determination that a particular decision on a point of law only "preserves the discord". Once a court deems one particular interpretation to be legitimate and the other as unnecessarily preserving the discord, the court has, effectively, pronounced its opinion on the interpretation it believes to be correct. This is correctness review by any other name. To the extent that the majority in *Vavilov* queried when, if ever, a persistent discord could be accurately identified in order to justify the application of correctness review, the majority's description of reasonableness review seemed to answer that question. If a court on reasonableness review is capable of identifying a persistent discord and deeming a particular interpretation on an issue as serving only to preserve the discord, the court is equally capable of identifying a discord and applying correctness review to resolve it.

Third, given the majority's rather unfortunate characterization of a particular strand of interpretation serving to "preserve a discord", the *Vavilov* framework appears self-contradictory. Once a particular interpretation receives judicial favour

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departure in its reasons. If the decision maker does not meet that burden, the decision will be unreasonable".

[35] Which is a rather unhelpful outcome given that the parties would have already compiled evidence of the persistent discord issue to put before the court in the first place. They presumably need no reminder of the existence of the problem.

and another is deemed only to preserve a discord, it would appear difficult, if not impossible, for an administrative decision-maker to later justify a decision adopting the rejected interpretation. While this may be viewed as a laudable result from a rule of law perspective, it stands in tension with the culture of justification created by *Vavilov*. In essence, it tells a decision-maker that, once a court has stepped in on disguised correctness review to resolve a persistent discord issue that the decision-maker was incapable of resolving internally, any decision that seeks to depart from the accepted interpretation seeks only to renew the discord. It is difficult to imagine how a decision-maker could adequately meet its justificatory burden in this scenario.[36] The culture of justification appears to end where disguised correctness review begins.

IV. CONCLUSION

The Supreme Court's rejection of the correctness standard of review where persistent discord threatens the rule of law was based on the Court's optimistic view that such discord is capable of resolution internally, that reasonableness review will effectively constrain any emerging discord, and, in any event, that persistent discord is too vague and difficult to identify to justify correctness review. While the Court's proposed solutions seem facially unobjectionable, once probed a little deeper, significant issues begin to emerge.

The administrative decision-maker bears the bulk of responsibility to solve emerging discord issues. However, encouraging the administrative decision-maker to find internal solutions to emerging discord on hard cases risks hampering transparency in the decision-making process. It is all too easy for such internal constraints to escape judicial review, as they are generally undisclosed and therefore unknowable to the parties. Further, where a party seeks judicial review of a decision on the basis that it conflicts with another interpretation issued by that decision-maker, courts are placed in an impossibly vague position. It is difficult, if not impossible, to determine whether the conflict arises from the internal process of working inconsistencies pure or whether it arises from a departure from an established internal precedent in hard cases that have no easy answer.

Vavilov, like *Dunsmuir* before it, represents a significant and good faith attempt to simplify and strengthen the framework for judicial review. Like *Dunsmuir*, however, the *Vavilov* framework has its own weaknesses. The potential for reduced

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[36] Imagine, for example, the facts of *Wilson v. Atomic Energy of Canada Ltd.*, [2016] S.C.J. No. 29, 2016 SCC 29 (S.C.C.). If a court ruled, as the Supreme Court effectively did in *Wilson*, that any decision of a labour adjudicator holding that the *Canada Labour Code* permits employees to be dismissed without cause is a decision that only serves to preserve the discord, it is impossible to imagine a situation where a labour adjudicator could later rule that the *Canada Labour Code* does permit employees to be dismissed without cause. Regardless of how impeccable the adjudicator's reasoning may be, it is very difficult to see how a court could be willing to find that the decision is reasonable and thereby renew the discord that had been quashed.

transparency in administrative decision-making and for disguised correctness review on lingering hard questions is one significant potential weakness of the *Vavilov* framework. The problem of how courts ought to review administrative decisions on hard cases is one that has lingered since *Domtar*, as the conflict between the consistency interest of the rule of law and the democratic interest in respect for decision-making autonomy is at its highest with these types of cases. While *Vavilov* claimed to have solved the problem, in reality, it seems to have only become more entrenched.