

# **SPECIAL SERIES ON THE FEDERAL DIMENSIONS OF REFORMING THE SUPREME COURT OF CANADA**

**The Legitimacy of Constitutional Arbitration in a Multinational  
Federative System.**

**The Case of the Supreme Court of Canada**

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## Introduction

Legitimacy is inherent in any study of power because it lays the foundation of the authority impose volition, that is, to compel others to act in accordance with a directive.<sup>1</sup> Legitimacy may be defined as “the morally and socially acceptable and accepted attribute – beyond strictly legal considerations – of an institution, a decision or an object”<sup>2</sup>. It is never wholly acquired nor lost: its ever-changing existence constitutes its inescapable characteristic.<sup>3</sup> It is forever up for evaluation and can never be settled. In this regard, an institution (or power) will always be to a greater or lesser extent “legitimate.”<sup>4</sup> Hence, we may refer to a spectrum of legitimacy.

The issue of the democratic legitimacy of judicial power is far from being a novelty.<sup>5</sup> It is unceasingly questioned and debated for purposes of its own protection. To these incessant enquiries into the legitimacy of constitutional justice within a democratic regime, one may add the notion of federative legitimacy within federations. Within a federative setting, courts and judges are invested with the role of arbitrating jurisdictional disagreements which inevitably spring from the realms of federal and federated governments pertaining to the area of jurisdiction reserved to them under the Constitution.

Contrary to its democratic dimension, the federative dimension of the notion of legitimacy has seldom been a subject of interest since the entrenchment of the Charter in 1982.<sup>6</sup> As such, it is this issue upon which our analysis is focussed. In the first part, an analytical framework is drafted illustrating the federative legitimacy of constitutional courts<sup>7</sup> as it gravitates around three axes: institutional legitimacy, functional legitimacy and social legitimacy. In the second part, an evaluation is made of the greater or lesser federative legitimacy of the Supreme Court of Canada as measured from this triple point of view. This exercise will make it possible to illustrate certain problems pertaining to the legitimacy of the Supreme Court of Canada acting in its capacity as the ultimate arbitrator of federative disagreements.

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<sup>1</sup> FEVRIER, Jean-Marc, « Sur l'idée de légitimité », (2002) 92 *Revue de la recherche juridique* 367, p. 368 and 369.

<sup>2</sup> FRÉMONT, Jacques, « La légitimité du juge constitutionnel et la théorie de l'interprétation », in the *Rapports canadiens au Congrès international de droit comparé, Droit contemporain*, Cowansville, Éditions Yvon Blais, 1994, p. 644, p. 687.

<sup>3</sup> *Ibid.*, p. 687.

<sup>4</sup> VERDUSSEN, Marc, *Les douze juges. La légitimité de la Cour constitutionnelle*, Bruxelles, Éditions Labor, 2006, p. 49.

<sup>5</sup> Since the renown work by Édouard Lambert published at the beginning of the century dealing with “government by judges in the United States”, from time to time this runs through all democratic societies: LAMBERT, Édouard, *Le gouvernement des juges et la lutte contre la législation sociale aux États-Unis*, Paris, Dalloz, 2005.

<sup>6</sup> Also sharing this opinion: BEAUD, Olivier, « De quelques particularités de la justice constitutionnelle dans un système fédéral », in GREWE, Constance et al. (dir.), *La notion de « justice constitutionnelle »*, Paris, Dalloz, 2005, p. 50 : “More surprisingly, on the other hand, is the fact that jurists working within federative structures evade this aspect [the link between federalism and constitutional justice]”; for a Canadian viewpoint, see BAIER, Gerald, *Courts and Federalism :Judicial Doctrine in the United States, Australia, and Canada*, Vancouver, UBC Press, 2006, p. 1 : “Only the Charter is currently getting its due. Judicial review of the division of powers remains a topic of neglect despite its genuine importance to the study of Canadian government.”

<sup>7</sup> For the purposes of this paper, we shall use the expression “constitutional courts” to designate both the courts specialized in constitutional matters and the final courts of appeal in such cases (supreme courts).

## Section I – Guidelines underpinning a federative legitimacy theory within a multinational environment

Before discussing the three-dimensional character of federative legitimacy, we shall first focus upon the role of constitutional courts as arbitrators of federative disagreements.<sup>8</sup>

### A. The Constitutional Court as the arbitrator of federative disagreements

Federated states generally have a judicial authority that handles the resolution of federative disagreements and ensures that the rules governing the distribution powers are duly observed.<sup>9</sup> This is, of course, owing to the autonomy principle of the orders of government in their sphere of jurisdiction which means that none of them can amend the rules of the game to its own advantage.

In the exercise of its arbitration function, the constitutional court is called upon to interpret and apply the contract or the agreement concluded between the parties. In addition, it must adapt these rules based upon the evolution of societal conditions. It must strive to maintain equilibrium between the respective powers of each order of government (federal/federated equilibrium), and in a multinational context, between the national majority and national minorities.

The issue of the legitimacy of a constitutional court cannot be raised without first paying specific attention to the nature of the designated federative system, and more specifically one must closely scrutinize the contents of the original federative pact. Underlying the notion of pact, one finds the "constituent principle"<sup>10</sup> of any federative system. The fundamental *purpose* of the pact or federative *contract* has to do with a distribution of the legislative functions between two orders of government, either autonomous or unsubordinated amongst themselves within a given range of subjects reserved for each ones' exclusive legislative power. Once this agreement has been reached, it is then constitutionalized, which confers upon it a particularly strong compulsory power. Henceforth, it may only be amended following the consent of each order of government. If the constitutional court is the "pinnacle of the federal structure"<sup>11</sup>, then the constitutional pact forms the base or foundations thereof.

The interpretation, application and adaptation of the constitution by the constitutional court in its function as arbitrator in the settlement of a federative disagreement may be perceived by a majority or minority of citizens as having the effect of amending the original federative pact. Such a situation does, in fact, raise the problem of the federative legitimacy of such a Constitutional court.

In the exercise of its task of adapting the federative system to new societal conditions, the constitutional court must attempt to maintain a certain *equilibrium*<sup>12</sup> between the specific and

<sup>8</sup> When discussing "federative disagreements", we are referring to conflicts concerning the distribution of legislative powers, as well as such cases that call into question fundamental aspects of the federative structure of the State, for instance: the constitutional amendment procedures, the legal status of federal and federated entities, their territories, or their possible secession.

<sup>9</sup> AUBERT, Jean-François, *Traité de droit constitutionnel suisse*, Neuchâtel, Éditions Ides and Calendes, 1967, p. 242.

<sup>10</sup> GREBER, Anton, *Die vorpositiven Grundlagen des Bundesstaates*, Bâle, Helbing & Lichtenhahn, 2000, p. 239, quoted in BEAUD, Olivier, « Du nouveau sur l'État fédéral », (2002) 42 *Droits* 229, p. 235.

<sup>11</sup> VERDUSSEN, Marc, *supra* note 4, p. 27.

<sup>12</sup> [Translator's Note :] French language dictionaries offer the following definition: [Translation] "an acceptable relationship, a satisfactory proportion between opposing elements or a fair settlement between the parts of a whole." *Le Robert*, Montréal, Dicorobert inc., 1995, p. 802. The American College Dictionary (Random House, 1960, p. 406) proposes a satisfactory equivalent: "a state of rest due to the action of forces that counteract each other; equal balance between any powers, influences, etc".

common interests of the groups involved. The manner in which the constitutional court will settle the various federative disagreements with regard to that which is being perceived as being adequate federal/federated equilibrium, will have considerable influence on the evaluation of its federative legitimacy.

In a federation where there is one or more national minority communities, respect for the federative nature of the constitutional structure is vital because this makes it possible to give meaning politically and legally to the minority communities' collective cultural aspirations. From this point onwards, wherever there may be found within one and the same federation both majority and minority nationalisms, the issue of federal/federated equilibrium comes to the fore with particular acuity. The arbitral function exercised by the constitutional court in a multinational context can never forego such responsibility without seeing its federative legitimacy put into question.

### **B. The three-dimensional character of federative legitimacy**

From our standpoint, the federative legitimacy of a constitutional court may be appreciated from its tripartite nature of institutional legitimacy, functional legitimacy and social legitimacy.<sup>13</sup> Such an appreciation may only be made by taking into account the dialogical relationship that exists between these three components which are considerably interdependent with one another. Indeed, the scope of guarantees serving as a basis for the institutional legitimacy of the court is dependent upon the importance of its functions in the evolution of the federative system. Furthermore, one must note that the notion of legitimacy always takes on a social dimension since in the end it rests “upon the consent of the governed.”<sup>14</sup>

#### **1. Institutional Legitimacy**

Institutional legitimacy requires that the constitutional court be perceived as being impartial and independent. In a federative context, it must offer sufficient guarantees of objectivity or neutrality so that it cannot be exclusively likened to the institutions of the federal entity or the federated entities.

##### *The legal status of the Court*

The constitutional court derives its first legitimacy from its legal status. Since it must appear as being independent of both orders of governments, its legitimacy will obviously be strengthened if the Court's existence and jurisdiction emanate from the federative Constitution. If its status and attributions are broadly dependent upon the will of one of the orders of government, it could more than likely be perceived as playing a dual role of “judge” and “litigant” in any proceedings questioning the rights or interests of that one specific order of government.

##### *The composition of the Court*

The issue of the composition of the Court may be analyzed from the angles of complementarity,

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<sup>13</sup> This classification was developed and applied by Guy Scoffoni to assess the scope of the powers of United States Supreme Courts Judges and their democratic legitimacy: SCOFFONI, Guy, “La légitimité du juge constitutionnel en droit comparé : les enseignements de l'expérience américaine”, (1999) 2 *Revue internationale de droit comparé* 243. We have taken our inspiration from him by adapting the issue of assessing the federative dimension of legitimacy. Also taken into account is the thinking of Professor Verdussen which, in his appreciation of the legitimacy of the Belgian Constitutional court, privileges an approach that is simultaneously organic, procedural and functional. VERDUSSEN, Marc, *supra* note 4, p. 65.

<sup>14</sup> FÉVRIER, Jean-Marc, *supra* note 1, p. 368-369.

pluralism and representativeness.<sup>15</sup> Complementarity issues from the quest for balance among the various professional experiences of the judges, a balance that contributes to establishing the court's credibility. As for pluralism, it requires "that a single line of thought or sensitivity not be exclusively represented, otherwise such judicial authority would have no real legitimacy."<sup>16</sup> This may involve political leanings in the partisan sense of the word, or social or economic tendencies, including various sensitivities regarding the judge's political and constitutional vision of the country. Representativeness, a co-runner close to pluralism, evokes the variety inherent in society, whether national, cultural, linguistic or otherwise, in the make up of the constitutional court. This final objective is even more essential in the context of a multinational federative system.

#### *How Court members are called to the bench*

Nonetheless, it remains that the court's institutional legitimacy ultimately rests upon the manner in which its members are designated.<sup>17</sup> In a federative system, both orders of government should participate in the nomination of judges. This is an essential condition for preserving the appearance of neutrality that a judicial arbitrator must display.

#### 2. Functional legitimacy

Functional legitimacy requires that the duties performed by the constitutional court are acceptable with regard to the guarantees of institutional legitimacy that it sets forth.

#### *The Court's jurisdiction*

The fact that the constitutional control is entrusted to the entire judicial system or specifically to a court instituted for such purpose may have an impact upon how legitimacy is to be considered. In the first case (the *judicial review* model), the general jurisdiction of the supreme court means that it may benefit from several potential seats of legitimacy. The deficit of legitimacy with which the court may be confronted in federative issues is compensated by solid legitimacy as an ordinary court of law of final resort and of ultimate jurisdiction for matters of rights and freedoms. Such is not the case of a specialized court (the *constitutional review* model) which may only count upon its legitimacy as a constitutional court.

#### *The type of constitutional control exercised and the mode of referral to a court*

To ground its legitimacy, the functions exercised by the constitutional court must be perceived as being essentially of jurisdictional and not of a political nature. Nonetheless, the line between these two situations is not always well defined, which means that the modalities of constitutional control may influence the perception of the jurisdictional nature of the proceeding that the court exercises, and in doing so may have repercussions for the appreciation of its legitimacy. Therefore, the more opportunities the court has to exercise constitutional control, for instance by means of auto-referral or *a priori* control following the exercise of a consultative function, the more opportunities there are to play an important role in the evolution of the federative system and to present forceful institutional guarantees of independence with regard to political powers.

#### *The Interpretative Paradigm*

Any interpretative activity implies some form of creation. As such, judges have always had

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<sup>15</sup> FAVOREU, Louis, « La légitimité du juge constitutionnel », (1994) *R.I.D.C.* 557, p. 575-578.

<sup>16</sup> *Ibid.*, p. 575.

<sup>17</sup> *Ibid.*, p. 571.

discretionary margin for stating the meaning of the law. However, such discretion assumes considerable proportions when constitutional issues are at stake. The generality of the terms used in constitutional texts are an open door to a multitude of plausible meanings. In federative disagreements, the greater the margin in interpreting a constitutional text, the greater is the court's important role in the evolution of the federative system and the danger of it being perceived as usurping the constituent's role. The choice of the interpretive paradigm privileged by the court in determining the meaning of the constitutional provisions will affect its role and its legitimacy.

Essentially, two broad forms of interpretation in constitutional matters may be distinguished: the original intent approach and the progressive approach.<sup>18</sup> In the first approach, the court must grant great importance to the constituent's intent in determining the meaning of a provision within the constitutional text. As such, it must establish the provision's original meaning and take this into account when adapting the text to the evolving framework of society. Now in the second, progressive approach, if there is a disparity between the constitutional text and the societal conditions in which it is to be applied, the judge is empowered to assume the constituent's role and decide what may be the most desirable constitutional prescriptions in light of their political consequences.

It is quite obvious that the second interpretive paradigm offers the constitutional court a far greater margin for weighing pros and cons than does the original intent approach. The act of granting no weight or tenuous weight to the constituent's contentions in interpreting the distribution of powers may be perceived as effectively denaturing the original federative pact, thereby undermining its legitimacy.

### *The power of having the "last word "*

Under a democratic system, the legitimacy of the judiciary rests upon the premise that it shall not have the last word in constitutional issues. It is the ultimate possibility of resorting to the constituent process that legitimizes constitutional control.<sup>19</sup>

### 3. Social legitimacy

The social component remains the centrepiece underpinning the concept of legitimacy: public recognition is the key.<sup>20</sup> This situation leads judges to resort to legitimization and rhetorical means to justify their decisions. In this respect, the use of principles of constitutional interpretation will play an important role. The choice of principle depends entirely on the discretion of the judge resorting thereto for the purpose of convincing her or his audience that the decision is not only reasonable, but also justifiable in law.<sup>21</sup>

In a multinational federative context where one finds a dynamics majority / national minority (ies), the taking into consideration of public opinion can have the effect of favouring the majority opinion to the detriment of minority opinions. In such a context, the more a variety of viewpoints is taken into account in the interpretation and implementation of the federative constitution, the more the activity of the court will rouse popular support essential for its legitimacy.

<sup>18</sup> VERDUSSEN, Marc, *supra* note 4, p. 44; BRUN, Henri, TREMBLAY, Guy, BROUILLET, Eugénie, *Droit constitutionnel*, 5<sup>e</sup> éd., Cowansville, Éditions Yvon Blais, 2008, p. 199-204; CARIGNAN, Pierre, « De l'exégèse et de la création dans l'interprétation judiciaire des lois constitutionnelles », (1986) 20 *R.J.T.* 27, p. 32.

<sup>19</sup> See also SCOFFONI, Guy, *supra* note 13, p. 260: "...democratic theory presupposes the existence of possible constitutional revision to counter balance constitutional control".

<sup>20</sup> MERCADAL, Barthélémy, « La légitimité du juge », (2002) 2 *Revue internationale de droit comparé* 277, p. 277.

<sup>21</sup> PERELMAN, Chaïm, « La motivation des décisions de justice, essai de synthèse », in PERELMAN, Chaïm, FORIERS, Paul, *La motivation des décisions de justice*, Bruxelles, Bruylant, 1978, p. 412; CÔTÉ, Pierre-André, *Interprétation des lois*, 3<sup>e</sup> éd., Montréal, Éditions Thémis, 1999, p. 25-26; FRÉMONT, Jacques, *supra* note 2, p. 679.

An appreciation of the extent of social legitimacy benefiting a constitutional court can be made by analyzing – not directly the opinion or reactions of citizens or groups of citizens in this respect – but those of their elected representatives. As such, it would be difficult to find a high degree of legitimacy for the constitutional court whose legal status, functions and decisions are continuously the subject of dissent and contention within the orders of federal or federative government.

## **Section II - The legitimacy of the Supreme Court of Canada as the ultimate arbitrator of federative disagreements**

Since the 1960s, the issue of the reform of the Supreme Court of Canada periodically is on the politico-legal agenda. It takes its place at all major federal-provincial constitutional conferences and is the subject of many reports or White Papers.<sup>22</sup> The many efforts invested over past decades in brainstorming the status or role of the country's highest judicial body leads one to conclude that this institution is confronted by a legitimacy deficit in the Canadian constitutional order.

### **A. The Supreme Court of Canada and Arbitration**

It is fitting to begin with a review of the original federative pact and its evolution in light of Québec's identity as a nation. The Canadian state was born in 1867 following the resolve expressed by four North American British colonies<sup>23</sup> to join as one within a federative type of government<sup>24</sup>. One of the determining centrifugal factors in choosing the federative principle as the basis for the new constitution was the presence on the territory of Québec of a majority belonging to a different national group aspiring to keep its political autonomy with respect to all issues related to its cultural identity. For Québec, the possibility of having a twofold national allegiance (Quebecer and Canadian) was at the heart of the Canadian federative project. The birth of a Canadian nation was conceived so as to permit and foster the thriving of intrastate cultural identities. This state would not replace senses of identity or pluralism, but would be born and prosper side by side with them. Respect for the federative principle and for the autonomy of each order of government in exercising its powers was inextricably linked to the will to ensure the survival and flourishing of this unique cultural identity within the new Canadian national community.<sup>25</sup>

The prime difficulty experienced by the Canadian constituent in formally amending the constitution was to propel constitutional jurisprudence into position as the preferred means of guiding federative evolution. Hence, the complex burden of progressively adapting constitutional texts into the uncharted conditions of Canadian society fell to the courts and ultimately to the Supreme Court. This evolution, while less easily perceptible and less spectacular than a formal

<sup>22</sup> To name but a few : Special Joint Committee of the Senate and the House of Commons on the Constitution of Canada, *Report*, 1972 (referred to as the Molgat-MacGuigan Report); Rapport du Comité sur la Constitution, Association du Barreau canadien, *Vers un Canada nouveau*, Montréal, 1978; *Task Force on Canadian Unity, A Future Together*, Ministry of Supply and Services, Canada, Ottawa, 1979 (referred to as the Pepin-Robarts Report); Livre blanc du gouvernement du Québec, *La nouvelle entente Québec-Canada, Proposition du gouvernement du Québec pour une entente d'égal à égal – la souveraineté – association*, 1979; Rapport de la Commission constitutionnelle du Parti libéral du Québec, *Une nouvelle fédération canadienne*, Montréal, 1980.

<sup>23</sup> The Province of Canada (which at that time included present day Québec and Ontario), New Brunswick and Nova Scotia: the *Constitution Act, 1867*, R.S.C. 1985, app. II, No. 5.

<sup>24</sup> The preamble of the *Constitution Act, 1867*, *ibid.*, is in this respect unequivocal and states that “the Provinces (...) have expressed their Desire to be federally united (...)”. As for the signification of the regime, it clearly provides for the implementation of a federation in all legal meanings of the word, namely that essentially it creates a division of legislative powers between two autonomous orders of government within their respective fields of jurisdiction. See BROUILLET, Eugénie, *La négation de la nation. L'identité culturelle québécoise et le fédéralisme canadien*, Québec, Septentrion, 2005, p. 150-168.

<sup>25</sup> *Ibid.*, p. 140-145.

amendment to the constitution, became nonetheless the determining factor in constitutional change.

An analysis of Supreme Court jurisprudence since the court assumed the role of ultimate arbitrator of federative disagreements has charted a trend toward the centralization of powers<sup>26</sup> that may be seen both in constitutional doctrines<sup>27</sup> as well as in the scope of many heads of federal jurisdiction.<sup>28</sup> Since the 1970s, Supreme Court analyses regarding the distribution of powers have become increasingly driven by efficiency-oriented considerations to the detriment of diversity<sup>29</sup>. This functionalistic logic requires a decompartmentalization of the areas of legislative powers of each order of government and it evolves within a so-called modern concept of the distribution of powers<sup>30</sup>, which mainly works to the advantage of the central order of government<sup>31</sup>. It is obviously impossible especially in this time of multiplication and complexity of state actions to completely avoid "zones of contact"<sup>32</sup> between both orders of government. On the other hand, federalism cannot in the end survive if there is a total decompartmentalization of legislative powers.

The constitutional evolution of the Canadian system operated by the Supreme Court of Canada has thereby caused a federative imbalance between the orders of federal and provincial governments in favour of the former. For a minority nation such as Québec within Canada, the federal/federated imbalance has legal and political consequences regarding its capacity for self-determination in a number of indispensable issues considered vital to its collective development.

<sup>26</sup> For a more exhaustive study, see *ibid.*, p. 255-322.

<sup>27</sup> *Kirkbi v. Gestion Ritvik Inc.*, [2005] 3 S.C.R. 302 (pertaining to trenching power); *Rothmans, Benson & Hedges Inc. v. Saskatchewan*, [2005] 1 S.C.R. 188 (the federal paramouncy doctrine). For a summary of the metes and bounds of these constitutional doctrines, see: BROUILLET, Eugénie, « The Federal Principle and the 2005 Balance of Powers in Canada », (2006) 34 *Supreme Court Law Review* (2d) 307. The Supreme Court has, nonetheless, recently limited the application of the interjurisdictional immunity doctrine, on behalf of a modern conception of the distribution of legislative power. *Banque canadienne de l'Ouest v. Alberta*, [2007] 2 S.C.R. 3; *British Columbia (P.G.) v. Lafarge Canada Inc.*, [2007] 2 S.C.R. 86. However, this doctrine is still directed in practice only at provincial norms thereby still creating asymmetrical effects in favour of the federal government order.

<sup>28</sup> See in particular *R. v. Hydro-Québec*, [1997] 3 S.C.R. 213 and *Reference re Firearms Act (Can.)*, [2000] 1 S.C.R. 783 (pertaining to federal authority over criminal law); *General Motors of Canada Ltd. v. City National Leasing*, [1989] 1 S.C.R. 641 and *Kirkbi vs. Gestion Ritvik Inc.*, [2005] 3 S.C.R. 302 (pertaining to federal authority in matters of trade and commerce); *R. v. Crown Zellerbach Canada Ltd.*, [1988] 1 S.C.R. 401 and *Re. Anti-Inflation Act*, [1976] 2 S.C.R. 373 (pertaining to the federal power as to legislate in matters of national interest or by virtue of its emergency power). For an in-depth analysis, see BROUILLET, Eugénie, *supra* note 24.

<sup>29</sup> The jurisprudence of the Supreme Court is indeed increasingly driven by a functionalist-oriented reasoning with regard to the division of legislative powers, for instance in matters dealing with the doctrine of national interest, federal authority over trade in general and trenching power: LECLAIR, Jean, « The Supreme Court of Canada's Understanding of Federalism : Efficiency at the Expense of Diversity », (2003) 28 *Queen's Law Journal* 411; BROUILLET, Eugénie, *supra* note 24, p. 319-322; OTIS, Ghislain, « La justice constitutionnelle au Canada à l'approche de l'an 2000 : Uniformity or Pluralistic Legal Constructs », (1995-96) 27 *Ottawa Law Review* 261; BRUN, Henri, « L'évolution récente de quelques principes généraux régissant le partage des compétences entre le fédéral et les provinces », in the *Congrès annuel du Barreau du Québec (1992)*, Québec, Service de la formation du Barreau du Québec, 1992.

<sup>30</sup> *SEFPO v. Ontario (P.G.)*, [1987] 2 S.C.R. 2, p. 17-18; *General Motors of Canada v. City National Leasing*, [1989] 1 S.C.R. 641. *Première Nation de Westbank v. B.C. Hydro*, [1999] 3 S.C.R. 134, p. 146-147. Quite recently the Court has restated its faith in the flexible approach to Canadian federalism in *Banque canadienne de l'Ouest v. Alberta*, *supra* note 27, paragraphs 35 et seq. For an in-depth study of modern and classical paradigms of legislative powers and their jurisprudential applications, see: RYDER, Bruce, « The Demise and Rise of the Classical Paradigm in Canadian Federalism: Promoting Autonomy for the Provinces and First Nations », (1991) 36 *McGill Law Journal* 308.

<sup>31</sup> With regard to the exclusiveness principle see BROUILLET, Eugénie, « Le fédéralisme et la Cour suprême du Canada. Quelques réflexions sur le principe d'exclusivité des pouvoirs », (2010) 3 *Revue québécoise de droit constitutionnel* (available soon at : [www.aqdc.org](http://www.aqdc.org)).

<sup>32</sup> BEETZ, Jean, « Les attitudes changeantes du Québec à l'endroit de la Constitution de 1867 », in P.-A. CRÉPEAU and C.B. MACPHERSON (dir.), *L'avenir du fédéralisme canadien*, Toronto, University of Toronto Press, 1966, p. 123.

## B. The federative legitimacy of the Supreme Court of Canada

We shall now attempt to situate the highest court of the country within the framework of federative legitimacy in light of the three-sided viewpoint developed earlier. We shall limit this paper to aspects falling within the theoretical considerations that cause difficulties in the case of the Supreme Court of Canada.

### 1. A Defective Institutional Legitimacy

#### *The legal status of the Court*

Section 101 of the *Constitutional Act of 1867*<sup>33</sup> confers upon the federal Parliament the exclusive power for the “Constitution, Maintenance, and Organization of a General Court of Appeal for Canada.” Under this provision the Supreme Court of Canada was established in 1875<sup>34</sup>. In 1949, the possibility of making appeals to the Judicial Committee of the Privy Council was abolished in the wake of which the Supreme Court then became the final appellate court in all matters<sup>35</sup> and, consequently, the ultimate arbitrator of federative disagreements.

This purely statutory origin of the highest court of the country comes as a total surprise within the context of a federative system. As the ultimate arbitrator of federative disagreements, the existence and essential characteristics of the constitutional court should be rooted within the constitution, thereby protecting it from the arbitrary one-sided actions of one or more parties to the federative agreement<sup>36</sup>. The statutory implementation of the Supreme Court does not create a general frame of reference allowing a “reasonable and right minded person”<sup>37</sup> to perceive it as an independent tribunal vis-à-vis the federal government.

Since the constitutional amendment of 1982, one may maintain that the existence and essential characteristics of the court have been implicitly constitutionalized.<sup>38</sup> Little does a debate on this subject matter since the Supreme Court is essentially a federal institution based upon its organization and modus operandi. The legal obscurity surrounding its status is hardly a sound footing for its federative legitimacy.

#### *The composition of the Court*

The composition of the country’s highest tribunal is provided under the *Supreme Court Act*.

<sup>33</sup> *The Constitution Act, 1867*, *supra* note 23.

<sup>34</sup> *Supreme Court Act*, R.S.C. 1985, ch. S-26.

<sup>35</sup> *An Act to Amend the Supreme Court Act*, S.C. 1949, ch. 37.

<sup>36</sup> As it would happen, they come under the authority of the *Supreme Court Act*, *supra* note 34, sections 3, 35 to 43, 52, 53 and 56 to 78 (with regard to its authority); articles 4(1), 6, 12 to 24 (with regard to its organization).

<sup>37</sup> This criterion was developed in the *Valente v. La Reine* case, [1985] 2 S.C.R. 673, p. 684.

<sup>38</sup> Certain academic commentators, of whom we are a part, maintain that sections 41(d) and 42(1)d) of the *Constitution Act*, 1982, S.C.R. 1985, app. II, no. 44 provide from now on complex amendment procedures to abolish or modify the current composition of the Court and its jurisdiction of final appeal. Among those who support this view are: BRUN, Henri, TREMBLAY, Guy, BROUILLET, Eugénie, *supra* note 18, p. 232-235 and 814; LEDERMAN, W.R., “Constitutional Procedure in the Reform of the Supreme Court of Canada”, (1985) 26 *C. de D.* 195, p. 196-197. As for other authors, sections 41 and 42 of the 1982 Act only serve to indicate constitutional amendment procedures to be followed in order to enshrine in the Constitution the current provisions of the *Supreme Court Act*. Those who hold this interpretation include: HOGG, Peter W, *Constitutional Law of Canada*, Looseleaf Edition, Toronto, Carswell, 2008, p. 4-21, 4-22 and 4-27 ; WOEHLING, José, MORIN, Jacques-Yvan, *Les constitutions du Canada et du Québec : du régime français à nos jours*, 2<sup>e</sup> éd., t. 1, « Études », Montréal, Éditions Thémis, 1994, p. 482-483 ; TREMBLAY, André, *Droit Constitutionnel : principes*, 2<sup>e</sup> éd., Montréal, Éditions Thémis, 2000, p. 43 and 46.

Under this Act, the Court “consists of a chief justice (...) and eight puisne judges.”<sup>39</sup> With respect to the judiciary’s *pluralism* considering the judges’ political and constitutional vision of the country, more specifically their concept of the federative system and the way in which it is called upon to evolve, the fact that they are all appointed by the federal government certainly partially explains the centralist evolutionary trend of the Court’s federative jurisprudence.

As to the question concerning the *representation* of the variety inherent in Canadian society (national, cultural, linguistic or otherwise), the *Supreme Court Act* obliges the federal government to appoint three judges from Québec out of a total of 9 appointees.<sup>40</sup> This legislative requirement which, since 1982, has likely acquired constitutional status,<sup>41</sup> aims at ensuring a Supreme Court bench with judges trained in Québec civil law. It is also possible to consider an underlying desire to ensure the adequate representation of Québec on the court owing to its distinctive culture.

Aside from this rule dealing with Québec’s representation, the federal government is in no way restrained in the exercise of its discretionary power of appointment. Although the Court has always assigned to the bench a given number of French-speaking and English-speaking judges, bilingualism nonetheless does not constitute a criterion of appointment. For the past year, there has been debate on this issue and a federal legislative bill is presently under discussion.<sup>42</sup> Bilingualism among the country’s highest ranking magistrates seems to us to be a foregone fundamental requirement in a federation that officially proclaimed itself to be a bilingual state in 1969<sup>43</sup>. Last but not least, may it be said that native peoples have never been represented on the court, nor for that matter has any visible cultural community been represented.

#### *How judges are appointed*

As we have seen, the judiciary is that branch of state government that least reflects the federative nature of the country. One single level of government, namely the federal government, has the discretionary power to appoint all superior court judges throughout the country, including those of the Supreme Court.<sup>44</sup>

In matters of individual independence and impartiality, this one-sided process for appointing judges is a source of significant problems with regard to the legitimacy of the federal judiciary as the arbitrator of federative disagreements. It does not allow judges to be perceived as being independent of the federal order of government. In federative disagreements, the latter may be perceived as the arbitrator of its own interests in any such proceedings, which at the very least creates an atmosphere of partiality. Canadian provinces’ absence from participation in the process of appointing Supreme Court judges constitutes a significant breach in the federative principle<sup>45</sup>. The appointment of Supreme Court judges by the federal government alone is thereby detrimental to its federative legitimacy.

<sup>39</sup> *Supra* note 34, sect. 4(1).

<sup>40</sup> *Ibid.*, sect. 6.

<sup>41</sup> The failed constitutional amendment projects of 1971 (Victoria Charter) and 1987 (Meech Lake Accord) would have effectively and formally constitutionalized this requirement.

<sup>42</sup> This involved the federal private bill C-232. If it were to be adopted, it would require the government to choose future Supreme Court judges from amongst those “able to understand the French and English languages without the assistance of an interpreter.” This bill has passed its second reading in the House of Commons and is currently being examined in Parliamentary Committee. It has the benefit of support from the Commissioner of Official Languages, Graham Fraser.

<sup>43</sup> *Official Languages Act*, S.R.C. 1970, ch. O-2.

<sup>44</sup> *The Constitution Act, 1867*, *supra* note 23, sections 96 and 101; *Supreme Court Act*, S.C.R. 1985, c. S-26, sect. 4(2).

<sup>45</sup> See in particular: WHEARE, Kenneth, *Federal Government*, 3<sup>rd</sup> ed., London, Oxford University Press, 1947, p. 55, 56 and 71 ; BROSSARD, Jacques, *La Cour suprême et la Constitution*, Montréal, Les Presses de l’Université de Montréal, 1968, p. 123 ; MORIN, Jacques-Yvan, WOEHLING, José, *Les constitutions du Canada et du Québec du régime français à nos jours*, Volume I, Montréal, Éditions Thémis, 1994, p. 546-547; BRUN, Henri, TREMBLAY, Guy, BROUILLET, Eugénie, *supra* note 18, p. 411-412.

Since the federal government also retains exclusive power to appoint all judges of provincial superior and appellate courts<sup>46</sup> and since in a very great majority of all cases, Supreme Court judges are chosen from among such courts, a real reform of the process for appointing judges to the Supreme Court should also include appointment of judges to provincial superior courts. A joint appointment procedure by federal and provincial governments seems to us to be the only viable way for eradicating this federative legitimacy deficit.

In addition to this problem of legitimacy linked to the one-sided process of appointing Supreme Court judges, many observers have emphasized its essentially political nature. One thing is certain, the opacity of the process does not enable the court to be reasonably perceived as independent of the federal government,<sup>47</sup> nor does it instil in citizens' minds the conviction that judges are in possession of all requisite neutrality for the performance of their duties, especially in federative disagreements.<sup>48</sup>

Under the heading of institutional federative legitimacy, the Supreme Court presents its share of problems. Yet it obviously exercises highly important functions in the evolution of the federative system, as examined hereafter.

### 1. A fragile functional legitimacy

#### *Reference Proceedings*

The *Supreme Court Act* provides the possibility for the federal government to seek consultative opinions from the Supreme Court within the framework of reference proceedings.<sup>49</sup> In such instances, the court is then bound to reply unless questions are essentially political in nature,<sup>50</sup> in which case it will then have to justify its refusal. Although in principle, this is deemed only to be a court opinion; it is considered to have the same legal bearing as a decision handed down in a case of specific litigation.

Reference proceedings raise questions with regard to the functional dimension of federative legitimacy, because in a sense they lead to an *a priori* jurisdictional control of norms,<sup>51</sup> namely before they have been duly promulgated by state political bodies. The line between judicial and political functions in such a context becomes very thin, far more difficult to identify. Such proceedings draw the court into a kind of exercise that it would not allow itself to embark upon in ordinary litigation. Reference proceedings allow the government, for instance, to seek the court's opinion on the constitutionality of proposed legislation, or answers to questions, even on highly political issues. Such was the case notably in the *Reference concerning the secession of Québec* rendered in 1998.<sup>52</sup>

<sup>46</sup> *Constitution Act, 1867*, *supra* note 23, section 96.

<sup>47</sup> This concerns criterion adopted by the Supreme Court with regard to judiciary independence: *Valente v. La Reine*, [1985] 2 S.C.R. 673, p. 689.

<sup>48</sup> Especially see in the article written by nine colleagues published in the Montréal daily: *Le Devoir* on May 17, 2005 entitled "*Mode de nomination des juges – Un tabou dans la communauté juridique.*"

<sup>49</sup> *Supreme Court Act*, *supra* note 34, sect. 53. Some provincial governments may also address such a procedure to the highest provincial tribunal. Such is the case in Québec, see: *Court of Appeal Reference Act*, R.S.Q. c. R-23., sect. 1. The Québec Statute, as in the case of other provincial statutes, provides for the possibility of appealing such advisory opinions to the Supreme Court (sect. 5.1).

<sup>50</sup> *Reference: Resolution to amend the Constitution*, [1981] 1 S.C.R. 753, p. 768 and 884; *Reference re Objection by Quebec to a Resolution to amend the Constitution*, [1982] 2 S.C.R. 793, p. 805; *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, p. 235 et seq.

<sup>51</sup> GÉLINAS, Fabien, « La primauté du droit et les effets d'une loi inconstitutionnelle », (1988) 57 *R. du B. Can.* 455, p. 459.

<sup>52</sup> *Reference re Secession of Quebec*, *supra* note 50, par. 25: "In the context of a reference, the Court, rather than acting in its traditional adjudicative function, is acting in an advisory capacity. The very fact that the Court may be asked hypothetical questions in a reference, such as the constitutionality of proposed legislation, engages the Court in an exercise that it would never entertain in the context of litigation. No matter how closely the procedure on a reference

The Supreme Court of Canada may be called upon not only to exercise an *a posteriori* constitutional control of norms within the framework of a specific dispute submitted to its consideration, but also *an a priori* control, by means of reference proceedings. This plurality of means of redress by jurisdictional control increases its role in the constitutional evolution of the Canadian federation. In such a context, the necessity of institutional guarantees of independence and neutrality with regard to political powers is thereby only increased for purposes of maintaining its legitimacy.

*The hegemony of the progressive approach*

When exercising its task of adapting constitutional texts to new societal conditions, the court must elaborate guidelines<sup>53</sup> without which those wielding judicial power would be perceived as usurping constituent power, thereby potentially endangering their legitimacy.

The progressive interpretation principle has over recent decades been the one preferred by the Supreme Court of Canada in constitutional issues.<sup>54</sup> The principles of interpretation – as we have seen – play an unmistakable rhetorical role in the art of adjudicating. These are the tools that judges use to justify and legitimize their decisions. The problem then is that of the audience.

The weakening of the federative principle as a normative principle generally reflects the expectations and dominant values in Canadian society, at least amongst its elite, which favours the centralization of powers. This centralist yearning is intimately linked to a strong feeling of belonging that English Canadians generally feel towards the central government<sup>55</sup>. As such, they believe that this order of government is the one that should enjoy the greatest concentration of powers to achieve Canada's national destiny. Professor François Rocher emphasizes the point: "The legitimization of the Canadian political system no longer rests upon a greater or lesser conformity with federal principles, but rather on the equivalence between public policy and the needs expressed by citizens as a whole. In other words, federal legitimacy is no longer essential

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may mirror the litigation process, a reference does not engage the Court in a disposition of rights. For the same reason, the Court may deal on a reference with issues that might otherwise be considered not yet "ripe" for decision."

<sup>53</sup> Inherent discretion in the interpretation process was exercised by the Judicial Committee of the Privy Council mainly in following three guidelines: statutory rules of interpretation, the rule of *stare decisis* and the federative principle. The Supreme Court of Canada, for one, has largely freed itself from the statutory rules of interpretation and has considerably diluted the application of the rule of *stare decisis* and the federative principle: BROUILLET, Eugénie, *supra* note 24, p. 201 to 218 and 255 to 266; and BROUILLET, Eugénie, « La dilution du principe fédératif et la jurisprudence de la Cour suprême du Canada », (2004) 45 *C. de D.* 7-67.

<sup>54</sup> In the case of the *Re: Anti-Inflation Act*, [1976] 2 S.C.R. 373, p. 412, the Supreme Court stated that one must consider: "[...] that a Constitution designed to serve this country in years ahead ought to be regarded as a resilient instrument capable of adaptation to changing circumstances." Several years later, in the *Law Society of Upper Canada v. Skapinker*, [1984] 1 S.C.R. 357, p. 365 and 366, it is explicitly stated that the interpretation of the Canadian Charter must be dynamic and progressive, in reference to the living tree metaphor of the Judicial Committee. See also, *Québec (Commission des droits de la personne et des droits de la jeunesse) v. Maksteel Québec Inc.*, [2003] 3 S.C.R. 228, par. 11. That same year, in the decision *Hunter v. Southam*, [1984] 2 S.C.R. 145, p. 155, the Court reiterates its preference for the progressive interpretation of the Constitution, this time in its entirety. In this instance, the Court once again refers to the analogy between the Canadian Constitution and the "living tree" conceived of by Lord Sankey in the case of *Edwards v. A.-G. for Canada*, [1930] A.C. 124, p. 134. See, with the same effect, *R. v. Beauguard*, [1986] 2 S.C.R. 56, p. 81.

<sup>55</sup> With regard to this English Canadian sense of identity, Professor Philip Resnick had this to say: In a more general sense, [...] the English Canadian sense of nation has itself been very much a by-product of the creation of the central government in 1867, the year of Canada's Confederation. The sense of identity and citizenship for most English-speaking Canadians has been caught up with that level of government. Though regionalist sentiment has not been lacking, especially in the Atlantic provinces or in western Canada, the vast majority of English-speaking Canadians define themselves as Canadians first. » RESNICK, Philip, « The Crisis of Multi-National Federations: Post-Charlottetown Reflections », (1994) 2 *Rev. Const. Stud.* 189, p. 191.

for the stability of the Canadian political system, at least from the viewpoint of the dominant approach in Canada ».<sup>56</sup>

The margin of judicial discretion inherent in the process of constitutional interpretation seems to have significantly expanded in the wake of the Supreme Court's decision to privilege a broad and progressive interpretation of constitutional provisions. Yet in a federative system which is home to a national minority community, respect for the federative nature of the constitutional structure is vital.

*Its power to have the last word "*

As we have seen, the legitimacy of the judiciary in a democratic system rests upon the fact that it does not have the last word in constitutional matters. Yet, in federative disagreements, the Supreme Court has this power *de facto*. In such cases, the only way to by-pass the interpretation given by the Supreme Court to a constitutional provision consists in either convincing it to reverse its position in a later decision or to amend the constitution so as to neutralize the effects of its jurisprudence.

Currently in Canada, constituent authority is so to speak paralyzed. This *de facto* situation is due, on the one hand, to the rigidity of the main amendment procedures themselves<sup>57</sup> and, on the other, to the development of competing visions of the future of the Canadian federation amongst Quebecers and other Canadians. Generally, Canadians outside Québec tend to be in favour of a centralist evolution of the Canadian federation and symmetry with regard to provincial legislative powers, whereas Quebecers generally favour greater decentralization of powers and the institution of an asymmetric federalism.<sup>58</sup> This profound disagreement notably explains the failure of the last two attempts at constitutional amendments<sup>59</sup> and the absence of new propositions made by the current federal political parties. The maintenance of the federative balance and the protection of provincial autonomy are, within the Canadian federative system, especially dependent on the constitutional interpretation of the courts, namely the Supreme Court. We can thus assert that the Supreme Court benefits as such from a power of the "last word", if not *de jure*, then *de facto*.

This observation serves to emphasize the need in this context of reforming the institutional guarantees of neutrality of Canada's highest and last court of appeal, especially with regard to how its judges are appointed.

## 2. Social legitimacy called into question in Québec

In the end as we have seen, legitimacy rests upon public recognition. It would have been interesting and relevant to survey by using empirical methods the support enjoyed by the Supreme Court in Canadian civil society and in the Canadian legal community. Recourse to such methods goes beyond the scope of this study. This being as it is, we shall treat the issue of the social dimension of the Court's legitimacy from a narrower more restrictive, hence imperfect, spectrum, namely the positions taken by the Québec government over the past decades.

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<sup>56</sup> ROCHER, François, « La dynamique Québec-Canada ou le refus de l'idéal fédéral », in GAGNON, Alain-G. (dir.), *Le fédéralisme canadien contemporain : fondements, traditions, institutions*, Montréal, Les Presses de l'Université de Montréal, 2006, p. 136.

<sup>57</sup> The vast majority of constitutional amendments require either the unanimous consent of federal and provincial assemblies, or the consent of the federal parliament and the legislative assemblies of seven provinces whose population represents fifty percent (50%) of Canada's population: *The Constitution Act, 1982*, *supra* note 38, part V, sect. 38, 41 and 42.

<sup>58</sup> BROUILLET, Eugénie, *supra* note 24, p. 376-378.

<sup>59</sup> *Meech Lake Accord*, 1987; *Charlottetown Accord*, 1992.

Since the end of 1940, all Québec governments regardless of the political party in power have proposed constitutional amendments regarding Canada's highest court of appeal.<sup>60</sup> These proposals have addressed both institutional and functional issues. They have raised questions concerning how bench members are appointed, the Court's composition and its general appellate jurisdiction. All of them have conveyed a desire to protect the cultural specificity of the Québec nation within the Canadian federative system.

With regard to the process of appointing the judges, the Québec government since 1947 has persistently requested appointment by the federal government *and* the provincial governments, but regarding the previous second part, by the Québec government for the three Quebec judges.

As for the Court's composition, in addition to this joint appointment procedure the Québec government also advanced the principle of alternating the language (French/English) of successive Chief Justices.<sup>61</sup> All governments have spoken out for formally enshrining the presence of three Quebec judges in the constitution.<sup>62</sup>

As for the functional dimension of federative legitimacy, a proposition submitted by the government of René Lévesque following the Sovereignty-Association Referendum in 1980 is in our view well worth being mentioned here owing to its inherent merits illustrating a viewpoint of federative balance and respect for the dual-national nature of the original federative agreement. It involved the creation within the Supreme Court of a specific bench of judges made up equally of judges from Quebec and the other Canadian provinces for purposes of settling federative disagreements.<sup>63</sup> From an institutional point of view, this proposition has the advantage of ensuring a composition truly reflecting Canada's national duality. From a functional point of view, this could perhaps act as a counterbalance to the evolutionary trend towards centralization of the Canadian federation, which is unwanted by a large segment of the people of Québec. This being stated, the likelihood of such a proposition being accepted is virtually nil within a federation whose overwhelming majority of English-language proponents are against the recognition of Québec as a distinct society in the form of a mere interpretative clause in the constitution.

## Conclusion

The fundamental role that the court performs in the evolution of the Canadian federative structure and, as such, in maintaining equilibrium between the powers of the federal and provincial government orders, explains the steadfast attention that this has always aroused in Québec. The federative principle and its essential corollary of the autonomy of government orders in the exercise of their legislative powers constitute for Québec far more than some mere technique of governance, but rather the guarantee of its thriving as a national community within the Canadian federation. It thus becomes vital that the institution upon which its fate largely depends be endowed with essential guarantees of independence and therefore federative neutrality.

We are, however, of the opinion that a purely institutional reform of the Supreme Court – essentially involving the appointment process of judges – would not in itself put an end to the deficit of federative legitimacy which it faces at least in Québec. Indeed, as has been emphasized

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<sup>60</sup> QUÉBEC, *Québec's Positions on Constitutional and Intergovernmental Issues, from 1936 to March 2001*, Ministère du Conseil exécutif, Secrétariat aux affaires intergouvernementales canadiennes, en ligne : [http://www.saic.gouv.qc.ca/institutionnelles\\_constitutionnelles/positions\\_1936-2001.htm](http://www.saic.gouv.qc.ca/institutionnelles_constitutionnelles/positions_1936-2001.htm).

<sup>61</sup> Government of René Lévesque (1980-1985); Government of Pierre-Marc Johnson (1985), in *ibid.*, p. 63 and 68 (respectively).

<sup>62</sup> *Ibid.*

<sup>63</sup> *Ibid.*, p. 63.

by professors Morin and Woehrling, such a reform "...would provide the Court with a federative legitimacy that it currently lacks and which could paradoxically shield it from criticism without in any way undermining the centralizing orientation of its interventions."<sup>64</sup>

If federalism still means something to Canada, we hold that an institutional reform of the Court must be accompanied by an enhanced theorization of the federative principle within its jurisprudence<sup>65</sup>, which would tend towards an improved equilibrium of powers within the federation and, henceforth, greater protection of Québec's sphere of autonomy. Only in this manner shall the court finally acquire its letters of nobility in Québec as the ultimate arbitrator of federative disagreements.

Reference : BROUILLET, Eugénie, TANGUAY, Yves, « La légitimité de l'arbitrage constitutionnel en régime fédératif multinational. Le cas de la Cour suprême du Canada », dans Michel SEYMOUR (dir), *Le fédéralisme multinational en perspective : un modèle viable?*, Actes de colloque international, Montréal, 25-27septembre 2009 (à paraître). Paru à titre de "Working Paper" par l'Institute of Intergovernmental Relations, Queen's University, [en ligne: <http://www.queensu.ca/iigr/working/SCC/SCCpapers.html>].

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<sup>64</sup> MORIN, Jacques-Yvan, WOEHLING, José, *supra* note 38, p. 546-547.

<sup>65</sup> BROUILLET, Eugénie, *supra* note 52.