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ABSTRACT

In Canada, it is now established that the individual rights guaranteed in the Charter of Rights and Freedoms do not apply to common law litigation between private persons, unless there is some specific governmental action on which one of the private parties has relied. The *Dolphin Delivery* decision interpreted the concept of governmental action as limited to executive and legislative activity so that the judicial enforcement of common law rules alone is not deemed to bring Charter rights directly into play. In private litigation, where no executive or legislative action is relied on to support the action, the application of the common law rules have only to be more generally consistent with Charter values. The *Dolphin Delivery* decision thereby created a dichotomy between the Charter treatment of common law and enacted law that has special consequences for the province of Quebec, where, uniquely, the regulation of private relations is governed by a civilian legal culture. In this paper, these two different standards of judicial review are applied to demonstrate that both the legal analysis and the results change when applied to Quebec's law of defamation. The dissimilarity in the results underscores the importance of taking into account the differences between the legal cultures that coexist in Canada, and the necessity of designing mechanisms that give more space for the recognition and appreciation of diversity.

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"The Charter must leave room for recourse to a law, in the name of the right to be different, which, in the final analysis, is perhaps the only truly universal right."[1]

INTRODUCTION

In Canada, it is now established that the individual rights guarantees in the Charter of Rights and Freedoms do not apply to common law litigation between private persons, unless there is some specific governmental action on which one of the private parties has relied. In *RWDSU v. Dolphin Delivery*,[2] the Supreme Court of Canada interpreted the concept of governmental action as limited to executive and legislative activity only so that judicial enforcement of common law rules alone is not deemed to bring Charter rights directly into play.[3] In private litigation where no executive or legislative action is relied on to support the action, the application of common law rules have only to be more generally consistent with Charter values.[4] The *Dolphin Delivery* decision thereby created a dichotomy between the Charter's treatment of common law and enacted law that has special consequences to the province of Quebec, where, uniquely, the regulation of private relations is governed by a civilian legal culture.

In this article, these two different standards of judicial review are applied to demonstrate that both the legal analysis and the results change when applied to (a) the common law of defamation in the rest of Canada and (b) Quebec's enacted law of defamation. The dissimilarity in the results underscores the importance of taking into account the differences between the legal cultures that coexist in Canada and the necessity of designing mechanisms that give more space to the recognition and appreciation of diversity. I will argue that the historical circumstances of Canada, in particular its federal system, could allow the retention of different legal norms regulating the same type of conduct in the private sphere, especially when those norms come from two different legal systems in which the validity of the balances of rights respond to their entrenchment as cultural and national fronts.

The first section of this article reviews the adoption of the Canadian

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1. Henri Brun, *The Canadian Charter of Rights and Freedoms as an Instrument of Social Development*, in THE COURTS AND THE CHARTER 1, 10 (Clare F. Beckton & A. Wayne MacKay eds., University of Toronto Press 1985).

2. [1986] 2 S.C.R. 573 (Can.).

3. *See id.* at 598-99.

4. *See id.* at 602-03.

Charter of Rights and Freedoms, its peculiar characteristics, and the court decision in *Dolphin Delivery*. In the second section I compare the different approaches of judicial review, one under the direct application of the Charter and the other under the constitutional value test created in *Dolphin Delivery*. The rights to freedom of speech and reputation will be used to analyze the specific subject of defamation law. In the third section I recreate the possible legal consequences when the Charter is applied directly to the law of defamation in Quebec, which is governed by norms based on a civil law tradition. This tradition reflects a different balance between the rights in conflict in defamation cases when compared to the defamation norms of Canadian common law. In the last section, the federal system of Canada is examined to explore its possibilities for adapting to the repercussions of the entrenchment of fundamental rights in a multicultural nation.

I. THE CANADIAN CHARTER OF RIGHTS AND FREEDOMS

The adoption of the Charter of Rights and Freedoms in Canada has been described as a moment of transformation.[5] This process, however, did not evolve smoothly. The interactions between pro-charter groups and those against it generated dialogues exposing diverse conceptions about the importance of such constitutional reform, but most importantly alienated for some time *Québécois* who understood that the outcome of the process violated the fundamental principles that gave place to the Confederation in 1867.[6] The words of Paul Ricoeur best summarize these feelings: "'What brought glory to some, brought humiliation to others. While some celebrate, others curse. As a result, symbolic wounds that require healing are stored in the archives of memory.'"[7]

To better understand these feelings, the formulas proposed in the Charlottetown Accord[8] with regard to Quebec give us an idea of what was

5. Jean-François Gaudresault-DesBiens, *Memories*, in THE CANADIAN CHARTER OF RIGHTS AND FREEDOMS: REFLECTIONS ON THE CHARTER AFTER TWENTY YEARS 219, 223 (J.E. Magnet, et al. eds., LexisNexis Butterworths 2003).

6. This does not mean that Quebec's citizens do not rely on the *Charter* or that they necessarily disapprove its values, but the adoption of the *Charter* is still viewed as a "symbolic episode of violence" against Quebec. *Id.* at 256; *see also* Alain G. Gagnon & Gut LaForest, *The Future of Federalism: Lessons from Canada and Quebec,* 48 INT'L J. 470, 478 (1993).

7. Gaudresault-DesBiens, *supra* note 8, at 258 (quoting PAUL RICOEUR, MEMORY, HISTORY, FORGETTING 96 (2000)).

8. The Charlottetown Accord responded primarily to Quebec's and First Nations' concerns about the Charter's application to policies that "Quebec or First Nations governments designed to preserve and promote those societies' languages, cultures, and traditions." Joel Bakan & Michael Smith, *Rights, Nationalism, and Social Movements in Canadian Constitutional Politics,* in CHARTING THE CONSEQUENCES: THE IMPACT OF CHARTER RIGHTS ON CANADIAN LAW AND POLITICS 218, 219 (David Schneiderman & Kate Sutherland eds.,

deemed necessary for a Charter-reconciliation. The Canada Clause, in its final form, would have amended the Constitution Act to require that the Constitution and the Charter be interpreted in a manner consistently with eight fundamental characteristics of Canada as a society.[9] The clause specified that Quebec constitutes a distinct society, characterized by a French-speaking majority, a unique culture, and a civil law tradition. It also declared that one of the roles of Quebec's legislature and government is to preserve and promote that distinct society. The Accord ratification process provided for a national referendum, which was defeated on October 26, 1992.

Christopher Manfredi has stated that the nature of the vision of a Canadian identity embodied in the Charlottetown Accord was perhaps the reason for its defeat.[10] He maintains that issues such as national unity and national identity or identities cannot be resolved by constitutionalizing the problem.[11] Even if this observation is correct in principle, it is also true that the Charter project itself, engineered by Pierre Elliot Trudeau, was prompted to counterbalance Quebec's secessionist movements in the 1960s, and thus the Charter represents the promotion of a Pan-Canadian identity.[12]

A. Features of the Charter of Rights and Freedoms

An integral part of the process that ended in the adoption of the Constitutional Act of 1982 was the "repatriation" of the Canadian constitution from the United Kingdom, by which the latter gave up any future role in Canada's process of constitutional amendment.[13] Simultaneously with the repatriation, Canada's Parliament enacted the Charter of Rights and Freedoms.

The Constitutional Act, among other acts of legislation, purports to entrench the rights and freedoms declared in the Charter by instituting an amendment procedure that requires the consent of the Senate and the House of Commons, and an agreement by resolution of the legislatures of at least two-

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University of Toronto Press 1997).

9. *See* Christopher P. Manfredi, *On the Virtues of a Limited Constitution: Why Canadians were Right to Reject the Charlottetown Accord*, in RETHINKING THE CONSTITUTION: PERSPECTIVES ON CANADIAN CONSTITUTIONAL REFORM, INTERPRETATION, AND THEORY 40, 49-51 (Anthony A. Peacock ed., Oxford University Press 1996).

10. *Id.*

11. *Id.* at 56-57.

12. *See* H.D. Forbes, "Trudeau's Moral Vision," in Rethinking the Constitution, *supra* note 12, at 22-23; *see also* Canadian Charter of Rights and Freedoms, Constitution Act, 1982, c. 11, sched. B, pt. I (U.K). The cross relation between the construction of a pan-Canadian identity and federalism will be discussed later in this paper.

13. Until 1982 amendments to the British North America Act had to be enacted by the United Kingdom Parliament. *See* Peter W. Hogg, *Formal Amendment of the Constitution of Canada*, 55 WTR LAW & CONTEMP. PROBS. 253, 255 (1992).

thirds of the provinces that also have, in aggregate, at least fifty percent of the population of all provinces.[14] It also established a supremacy clause that declares the Constitution of Canada the supreme law of Canada and any law inconsistent with it would not have effect.[15]

The combination of section 52 and section 24(1), which establish that the infringement of the rights and freedoms guaranteed by the Charter gives rise to a remedy, have granted the courts the power to review the constitutionality of laws.[16] Regarding this matter, it is important to keep in mind that the concept of an "implied" bill of rights that influenced judicial decisions already existed in Canada prior to the adoption of the Charter. However, the conception of an implied bill of rights did not push the Supreme Court to abolish legislation that infringed fundamental rights.[17]

One of the most salient traits of the Charter is the notwithstanding clause, contained in section 33.[18] Its basic purpose was to create a mechanism that could limit the role of the judiciary. Section 33 vested in the national parliament and the provincial legislatures the power to override some of the freedoms and rights[19] declared by the Charter. The reasons for the adoption of such a clause have been traced to Canada's adherence to parliamentary supremacy[20] and the regionalized nature of the country.[21] According to Professor Michael Mandel, the provincial legislative override power "'was conceded by the federal government to the opposing provinces as the price for agreement to the constitutional package.'"[22]

Quebec was the first province to use section 33.[23] After the adoption of

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14. Canadian Charter of Rights and Freedoms, §§ 38-49.

15. Section 52 (1) reads: "The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect." *Id.* at § 52(1); s*ee also* Gérald-A. Beaudoin, *Dynamic Interpretation of the Charter*, in THE CANADIAN CHARTER OF RIGHTS AND FREEDOMS: REFLECTIONS ON THE CHARTER AFTER TWENTY YEARS 182-183 (J.E. Magnet, et al. eds., LexisNexis Butterworths 2003).

16. *See* Charter of Rights and Freedoms, §§ 24(1), 52.

17. Yoav Dotan, *The Spillover Effect of Bills of Rights: A Comparative Assessment of the Impact of Bills of Rights in Canada and Israel*, 53 AM J. COMP. L. 293, 301 (2005).

18. *See Charter of Rights and Freedoms*, § 33.

19. The following rights or freedoms are not subject to the override provision: democratic rights, mobility rights, language rights, sexual equality clause and the enforcement provision of the *Charter*. *See Charter of Rights and Freedoms*, § 33(1).

20. Stephen Gardbaum, *The New Commonwealth Model of Constitutionalism*, 49 AM J. COMP. L. 707, 724 (2001).

21. Calvin R. Massey, *The Locus of Sovereignty: Judicial Review, Legislative Supremacy, and Federalism in the Constitutional Traditions of Canada and the United States*, 1990 DUKE L.J. 1229, 1267 (1990).

22. *Id.* at 1267-68 (quoting Michael Mandel, THE CHARTER OF RIGHTS AND THE LEGALIZATION OF POLITICS IN CANADA 75 (1989).

23. *See id.* at 1268-70.

the Charter, Quebec's legislature repealed all Quebec legislation and immediately reenacted it with the addition of a notwithstanding declaration for each statute.[24] This action was challenged,[25] and the Supreme Court of Canada in *Ford v. Quebec*[26] concluded that the notwithstanding clause only contained formal requirements and the judicial review of its use could not entail a substantive review of the legislative policy.[27] Quebec did not renew the use of section 33 when the five year term expired, and from then on, has used the section only selectively.[28] It now seems clear that the political costs of using the notwithstanding clause are higher than those imagined when the clause was introduced in the Constitution Act.[29]

Another important aspect of the Charter is that the rights and freedoms declared by it are not conceived as absolutes. Section 1 of the Charter establishes: "The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."[30] This section has delineated the methodological approach of Canada's judicial review.[31]

Last but not least, the Charter specifies that it applies only to the national and provincial governments and parliaments.[32] In *RWDSU v. Dolphin Delivery*,[33] the Supreme Court of Canada had the opportunity to clarify whether the Charter was also applicable to private parties.[34] In *Dolphin Delivery*, a private company obtained an injunction against a trade union, which was granted under the common law prohibiting secondary picketing.[35] The union claimed that the picketing was protected by the freedom of expression

24. See Gérald-A. Beaudoin, *supra* note 15, at 195-98.

25. Alliance des Professeurs de Montréal v. Quebec, [1985] C.S. 1272 (Can.).

26. [1988] 2 SCR 712 (Can.).

27. *Id.* ¶ 33.

28. *See* Scott Reid, *Penumbras for the people: Placing judicial supremacy under popular control,* in RETHINKING THE CONSTITUTION 200-09 (giving a description and discussion of the various arguments for and against Section 33).

29. *See* CHRISTOPHER P. MANFREDI, JUDICIAL POWER AND THE CHARTER: CANADA AND THE PARADOX OF LIBERAL CONSTITUTIONALISM 181-88 (Oxford University Press 2001) (giving an analysis of the implication of the decline of the notwithstanding clause and its impact on Canada's legislative-judicial relationship).

30. *See* Charter of Rights and Freedoms, § 1.

31. *See* R. v. Oakes, [1986] 1 S.C.R. 103, ¶¶ 67-69; James Allan and Grant Huscroft, *Constitutional Rights coming home to Roost? Rights Internationalism in American Courts,* 43 SAN DIEGO L. REV. 1, 17 (2006).

32. Charter of Rights and Freedoms, § 32(1).

33. [1986] 2 S.C.R. 573 (Can.).

34. *Id.* ¶¶ 33-48.

35. *Id.* ¶¶ 5-7.

guarantee of section 2(b) of the Charter[36] and that the common law principles that permit the injunction infringed on such a right.[37] The Court determined that although the picketing was protected by section 2(b), the Charter does not apply to a private action governed by the common law.[38]

B. Dolphin Delivery Rationale

The Court in *Dolphin Delivery* was presented with the following questions: (1) whether the Charter applies to the common law; and (2) whether the Charter is applicable to private litigation. The questions presented a dilemma: the court had to limit the application of the Charter to governmental action (section 32), but at the same time it needed to acknowledge that the Charter applies to all "law," including the common law (section 52).

The Court's answer to the first question was straightforward: the Charter applies to the common law.[39] The answer to the second question required more elaboration. The Court began by stating that the Charter "was set up to regulate the relationship between the individual and the government" and it does not regulate the relations between private persons.[40] The terms used in section 32(1)[41] were interpreted to mean the executive, administrative, and legislative branches of the governments.[42] Therefore, the Court concluded, the Charter "will apply to those branches of government whether or not their action is invoked in public or private litigation . . . [t]o the extent that [the action] relies on statutory authority which constitutes or results in an infringement of a guaranteed right or freedom[.]"[43]

The complete answer to the questions presented by the case is that the Charter applies to the common law, but only "insofar as the common law is the basis of some governmental action which . . . infringes a guaranteed right or freedom."[44] Thus, the judicial enforcement of common law rules does not

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36. "Everyone has the following fundamental freedoms: . . . (b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication[.]" Charter of Rights and Freedoms, § 2(b).

37. *Dolphin Delivery,* [1986] 2 S.C.R. 573, ¶ 18.

38. *Id.* ¶ 48.

39. *See id.* ¶ 32.

40. *Dolphin Delivery,* [1986] 2 S.C.R. 573, ¶ 33.

41. Application of Charter (1) "This Charter applies (a) to the Parliament and government of Canada in respect of all matters within the authority of Parliament including all matters relating to the Yukon Territory and Northwest Territories; and (b) to the legislature and government of each province in respect of all matters within the authority of the legislature of each province." Charter of Rights and Freedoms, §32(1).

42. *See id.* ¶¶ 37, 41.

43. *Dolphin Delivery,* [1986] 2 S.C.R. 573, ¶ 41. The Court also held that judicial enforcement of the common law does not constitute government action for the purpose of the Charter. *Id.* ¶ 43.

44. *See Dolphin Delivery,* [1986] 2 S.C.R. 573, ¶ 41.

constitute government action for the purpose of the Charter.[45] The Court, however, included a caveat in *Dolphin Delivery*: in private litigation "where no act of government is relied upon to support the action . . . the judiciary ought to apply and develop the principles of the common law in a manner consistent with the fundamental values enshrined in the Constitution."[46] The net result of the decision is a dichotomy between statutory norms and common law norms that is the key factor in deciding if the Charter will be directly applicable to private litigation.

The *Dolphin Delivery* decision has been criticized from various perspectives.[47] The repercussions of the decision, with regard to Quebec civil law, are the ones that are pertinent to this article, and will be addressed in the following sections.

II. DIRECT OR VALUE APPLICATION OF THE CHARTER IN PRIVATE LITIGATION

Private law[48] in Quebec is governed by a civil law system.[49] The rules regulating private law are codified in Quebec's Civil Code. Under the framework established in *Dolphin Delivery*, these private law norms would be directly reviewable under the Charter because they are acts of the legislative branch. This framework creates a two-tiered system by which the norms regulating private relationships, if codified, will be subject to the direct application of the Charter. However, if the norms are common law rules, instead of a direct application, a "constitutional values" test will be applicable.[50] Any doubts about the correctness of this reading were put to rest

45. *See id.* ¶ 43.

46. *Id.* ¶ 46.

47. *See* Eward P. Belobaba, *The Charter of Rights and Private Litigation: The Dilemma of Dolphin Delivery*, in CHARTER ISSUES IN CIVIL CASES 29 (Neil R. Finkelstein & Brian MacLeod Rogers, eds., Carswell 1988); June Ross, *The Common Law of Defamation Fails to Enter the Age of the Charter*, 35 ALTA L. REV. 117, 120, 125 (1996); Catherine Valcke, *Quebec Civil Law and Canadian Federalism,* 21 YALE J. INT'L. L. 67, 101-04 (1996); Franklin R. Liss, *A Mandate to Balance: Judicial Protection of Individual Rights under the Canadian Charter of Rights and Freedoms*, 41 EMORY L.J. 1281, 1290-93 (1992).

48. The term private law is used to identify the norms that regulate private relationships between individuals, such as family law, wills and estates, and contractual and delictual obligations.

49. The initial British inclination after the defeat of the French in North America was to Anglicize its newly acquired French colony. The Quebec Act of 1774, among other things, reinstated the French civil law. "When in 1791 the Constitutional Act divided the province of Quebec into Upper and Lower Canada, all of the pre-1791 laws of Quebec remained in force in both regions until repealed or amended by the legislature of the province." Thus, from 1792 forward Quebec maintained its French-derived law. Calvin R. Massey, *The Locus of Sovereignty: Judicial Review, Legislative Supremacy, and Federalism in the Constitutional Traditions of Canada and the United States*, 1990 DUKE L.J. 1229, 1257 (1990).

50. Slattery has stated that a similar problem would arise with regards to rules of common law that have been legislated. Brian Slattery, *The Charter's Relevance to Private Litigation: Does Dolphin Deliver*?,

by the expression of Justice Wilson:

> I agree with the commentators that one of the consequences of [*Dolphin Delivery's*] refusal to apply the [*Charter*] to the common law absent government action is that the [*Charter*] will have a broader application in Quebec than in the other provinces. However, it seems inescapable that all legislation including the Civil Code of Quebec is subject to [*Charter*] review under s. 32(1).[51]

The critics of this result reflect diverse points of view. For some, to have a dual standard of Charter review is, by itself, unfair treatment.[52] Others assert that the result undermines Quebec's legal culture.[53] For others, the consequences of *Dolphin Delivery* directly attack the basis for the creation of the Confederation.[54]

One important question then is: Does a direct application of the Charter compared with a "constitutional values" standard result in a disparate treatment of norms governing the same private relations? An analysis of the two types of test follows.

A. Proportionality Test: Direct Application of the Charter

In *R. v Oakes*,[55] the Supreme Court of Canada established a two-step analysis for the determination of a Charter infringement, known as the proportionality test.[56] The first step is used to evaluate if a Charter right has been violated.[57] The second step will be used to determine if there exists a legal justification for the violation.[58] The parameters for such analysis are established in section 1 of the Charter, which states: "The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."[59]

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32 MCGILL L.J. 905, 910 (1987).

51. McKinney v. University of Guelph, [1990] 3 S.C.R. 229, 320, 327 (Can.) (dissident opinion).

52. *See* Ghislain Otis, *The Charter, Private Action and the Supreme Court*, 19 OTTAWA L. REV. 71, 87 (1987); Slattery, *supra* note 50, at 910.

53. Yves De Montigny, *The Impact (Real or Apprehended) of the Canadian Charter of Rights and Freedoms on the Legislative Authority of Quebec,* in CHARTING THE CONSEQUENCES, *supra* note 8 at 3, 16.

54. *See* Valcke, *supra* note 47, at 103

55. [1986] 1 S.C.R. 103, ¶ 74 (Can.).

56. *Id.*

57. The two-step process allows the courts to "define rights generously." *See* James Allan and Grant Huscroft, *Constitutional Rights Coming Home to Roost? Rights Internationalism in American Courts*, 43 SAN DIEGO L. REV. 1, 18 (2006).

58. *See id.*

59. Charter of Rights and Freedoms, § 1.

To meet the test set out in this section, the court will analyze whether the impugned law is of sufficient importance to warrant overriding a right, and if it is related to concerns that are pressing and substantial in a free and democratic society.[60] Also, the law or measure has to satisfy a proportionality test by which the court will determine if there exists a rational connection between the law and its objectives.[61] However, the existence of a rational connection, by itself, will not be sufficient to declare its constitutionality. The norm also should impair as little as possible the right or freedom at issue.[62] Finally, there also must be proportionality between the effects of the law and its objectives.[63]

B. "Constitutional Values" Test

In *Dolphin Delivery*, the Court established that in cases where the Charter does not apply directly, the courts "ought to apply and develop the principles of the common law in a manner consistent with the fundamental values enshrined in the Constitution."[64] However, the Court did not elaborate on what the "constitutional values" test consists of. Nine years later, the Court answered the question in *Hill v. Church of Scientology*.[65]

In *Hill*, defendants in a defamation action alleged that the common law of defamation unreasonably restricted their right to free expression.[66] The court was sharp in rejecting this argument:

> *Private parties owe each other no constitutional duties and cannot found their cause of action upon a Charter right. The party challenging the common law cannot allege that the common law violates a Charter right because, quite simply, Charter rights do not exist in the absence of State action.* The most that the private litigant can do is argue that the common law is inconsistent with Charter values. It is very important to draw this distinction between Charter rights and Charter values. Care must be taken not to expand the application of the Charter beyond that established by s. 32(1), either by creating new causes of action or by subjecting all court orders to Charter scrutiny.[67]

The "constitutional values" test, thus, has to be different from the

60. *Oakes*, [1986] 1 S.C.R. 103, ¶¶ 73, 74.
61. *Id.* ¶ 74.
62. *Id.*
63. *Id.*
64. *Id.* ¶ 46.
65. [1995] 2 S.C.R. 1130, ¶¶ 94-102 (Can.).
66. *Id.* ¶ 65.
67. *Id.* ¶ 98 (emphasis added).

proportionality test established in *Oakes*. In *Hill*, the court delineated the differences as follows. First, the framework established by section 1 of the Charter is not an appropriate tool to use in this kind of case.[68] The rationale for the statement is that a Charter "'challenge' in a case involving private litigants does not allege the violation of a Charter right."[69] Accordingly, to determine if there is a conflict between the Charter values and the common law rule, "Charter values, framed in general terms, should be weighed against the principles which underlie the common law. The Charter values will then provide the guidelines for any modification to the common law which the court feels is necessary."[70]

In *Hill*, the defendants argued that the common law of defamation unjustifiably infringed the right to freedom of expression and asked the Court to adopt the actual malice standard set in *New York Times v. Sullivan*.[71] The Supreme Court of Canada rejected the petition and concluded that the common law of defamation "complies with the underlying values of the Charter and there is no need to amend or alter it."[72] To arrive at this conclusion, the Court determined that defamatory statements were tenuously related to the core values embedded in the right to freedom of expression.[73] This conclusion is the result of the application of the "constitutional values" test.

In order to better understand how the "constitutional values" test differs from the direct application standard, I will review *Hill's* reasoning related to the constitutional protection of false statements and compare it with the treatment that false statements received in *R. v. Zundel*.[74] In *Zundel*, the court analyzed the constitutionality of a criminal statute which prohibited the publication of news or statements "known to be false" and likely to cause injury or mischief to a public interest.[75] We will see that the analysis in *Hill* departs abruptly from previous analyses regarding the constitutional protection of false communications.

In *Zundel*, the court used the "direct application" standard to determine the constitutionality of a criminal statute. The analysis relevant for this discussion

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68. *See id*. ¶ 91.

69. *Id.* ¶ 100.

70. *Hill*, [1995] 2 S.C.R. 1130, ¶ 100. The court also made clear that the party challenging the common law rule "bears the onus of proving both that the common law fails to comply with *Charter* values and that, when these values are balanced, the common law should be modified." *Id.* ¶ 101. This differs from the Oakes test, in which once the challenger establishes that there is a Charter right or freedom involved, the onus moves to the party defending the statute. *See id.*

71. *Id.* ¶ 65 (discussing generally New York Times v. Sullivan, 376 U.S. 254 (1964)).

72. *Hill*, [1995] 2 S.C.R. 1130, ¶ 144.

73. *See id*. ¶ 109.

74. [1992] 2 S.C.R. 731 (Can.).

75. *See generally id.*

concerns the first part of the *Oakes* test: whether the communication is protected by the Charter. [76]

In *Zundel,* the court stated that freedom of expression must be given a broad, purposive interpretation.[77] The court concluded that one of the purposes protected by the freedom of expression is the protection of minority beliefs, beliefs which a majority regards as wrong or false; thus, the publication fell under Charter protection.[78] As a rule of thumb, the court reiterated its position that all communications, which convey or attempt to convey meaning, are protected.[79] The exception to this rule is those cases in which the physical form of the communication is made excludes protection, such as, violent acts.[80] The most notable difference between the rationale of *Zundel* and the rationale of *Hill* is that in *Zundel* as well as other cases, the court was firm in its belief that when determining whether a communication warrants protection by the Charter, courts *cannot take into account the content of the communication.*[81]

The arguments advanced by the State in *Zundel* in order to defend the legality of the statute, were based on the irrelevance of false statements.[82] For example, the State argued that a deliberate lie is an illegitimate form of expression that should not be protected, and that a deliberate lie "does not promote truth, political or social participation, or self-fulfillment[,]" the typical values ascribed to the freedom of expression.[83] The court rejected both arguments. The court concluded:

> Applying the broad, purposive interpretation of the freedom of expression guaranteed by s. 2(b) . . . I cannot accede to the argument that those who deliberately publish falsehoods are for that reason alone precluded from claiming the benefit of the constitutional guarantees of free speech. I would rather hold that such speech is protected by s. 2(b), leaving arguments relating to its value in relation to its prejudicial effect to be dealt with under s. 1.[84]

In *Hill,* after the court determined that no governmental action was involved in the case, the court formulated the following test: "Charter values, framed in general terms, should be weighed against the principles which

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76. The publication in *Zundel* was a booklet which asserted that the Holocaust is a myth perpetrated by a Jewish conspiracy. Zundel, [1992] 2 S.C.R. 731, ¶ 3.

77. *Id.* ¶ 21.

78. *Id.* ¶ 22.

79. *Id.* ¶ 23.

80. *Id.*

81. *Zundel*, [1992] 2 S.C.R. 731, ¶ 23; *see Hill*, [1995] 2 S.C.R. 1130.

82. *Zundel*, [1992] 2 S.C.R. 731, ¶ 140.

83. *Id.* ¶ 26.

84. *Id.* ¶ 36.

underlie the common law."[85] However, in the court's list of values protected by the freedom of expression, the protection of minority beliefs regarded as false by the majority, as discussed in *Zundel*, was not included.[86]

Contrary to *Zundel*, the court went on to discuss the content of the communication in *Hill* to determine if it was protected by the Charter.[87] The court stated that defamatory statements were "tenuously related to the core values" protected by freedom of speech, because: (1) they "are inimical to the search of truth[;]"(2) "[f]alse and injurious statements cannot enhance self-development[;]" (3) defamatory statements do not "lead to healthy participation in the affairs of the community[;]" and (4) defamatory statements "are detrimental to the advancement of these values and harmful to the interests of a free and democratic society."[88]

The analyses in the two cases have little resemblance. However, it is important to note that the differences *do not* lie in the inapplicability of section 1 of the Charter to cases where the standard to be used is "constitutional values," as stated in *Hill*. The difference lies in the determination of whether a false statement falls under the concept of freedom of expression.[89] In *Zundel*, the content of the expression was not taken into account to determine if the communication fell within section 2(b).[90] But, in *Hill*, the court took into account the content of the expression to determine if the "values" embedded in the guarantee of freedom of expression were promoted by this type of expression.[91]

The difference in the method of analysis resulted in a variation in the protection of the expression itself. Under the first part of the *Oakes* proportionality test, false statements are deemed protected, but under the "constitutional values" standard they are deemed to have little significance to the protection of freedom of expression.[92]

The second part of the analysis, made by the court in *Hill*, was to balance the "tenuous value" of defamatory expressions with the principles that underlie the protection of reputation.[93] In explaining the concept of reputation, the court

85. *Hill*, [1995] 2 S.C.R. 1130, ¶ 100.

86. *See Hill*, [1995] 2 S.C.R. 1130.

87. *Id.* ¶ 152.

88. *Id.* ¶ 109.

89. *See Zundel*, [1992] 2 S.C.R. 731, ¶¶ 22, 27; *Hill*, [1995] 2 S.C.R. 1130, ¶ 109.

90. *See Zundel*, [1992] 2 S.C.R. 731 ¶ 23.

91. *See Hill*, [1995] 2 S.C.R. 1130, ¶ 124.

92. *See generally Oakes*, [1986] 1 S.C.R. 103. In a later decision, R. v. Lucas, [1998] 1 S.C.R. 439, ¶ 27, where a criminal defamation statute was challenged, the court also concluded that deliberate lies and falsehoods are protected by section 2(b) of the Charter. *Id.*

93. *Hill*, [1995] 2 S.C.R. 1130, ¶¶ 109-10.

described at length the historical foundations of the protection.[94] It concluded that, even when the Charter did not specifically recognize reputation as a right, reputation "represents and reflects the innate dignity of the individual, a concept which underlies all the Charter rights. It follows that the protection of the good reputation . . . is of fundamental importance to our democratic society."[95] In the balance, the court awarded more value to reputation than to defamatory statements.[96]

Although the court said in *Hill* that the Charter values had to be weighed against the principles that underlie the common law rules, the court did not engage in that discussion.[97] Instead, after reviewing critiques that had been made to the actual malice standard adopted in *New York Times v. Sullivan*, the court framed the following question: "Should the [l]aw of [d]efamation be [m]odified by [i]ncorporating the Sullivan [p]rinciple?"[98] The formulation of this question is in itself problematic because the court had already stated that neither public officials nor public figures were part of the case.[99] Therefore, even if the court decided to adopt the actual malice standard, it would have had no direct effect on the case at hand.

The common law rules of defamation that govern the Canadian provinces, except Quebec and the three northern territories, provide that the falsity of defamatory statements is presumed and the plaintiff does not have to establish that the defendant has perpetrated any wrongdoing.[100] A statement that would have the effect of lowering the esteem or respect of a person in the minds of reasonable or ordinary members of the public is considered defamatory.[101] Once it is established that the statement is defamatory, the plaintiff will have at her disposal the following powerful presumptions: that the statement is false, malicious (published without lawful excuse), and has caused injury to the plaintiff's reputation.[102]

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94. *Id.* ¶¶ 110-25.

95. *Id.* ¶ 123.

96. *See id.* ¶¶ 140, 159.

97. *See Hill*, [1995] 2 S.C.R. 1130, ¶ 210.

98. *Id.* ¶¶ 130-36, 140.

99. *See id.* ¶¶ 72-81.

100. Cusson v. Quan, [2007] 286 D.L.R. 4th 196, ¶ 35 (Can.); Gaskin v. Retail Credit Co., [1965] S.C.R. 297, ¶ 3 (Can.).

101. Cherneskey v. Armadale Publishers Ltd., [1979] 1 S.C.R. 1067 ¶ 16; *see also* ROGER D. MCCONCHIE & DAVID A. POTTS, CANADIAN LIBEL AND SLANDER ACTIONS 3 (2004).

102. MCCONCHIE & POTTS, *supra* note 101, at 3. The defenses available are few and they include the defense of truth, absolute privilege or qualified privilege, and fair comment on matters of public interest. In the case of the truth as a defense the burden of proving the truth rests on the defendant. The defense of absolute privilege provides complete immunity for defamatory statements, even it is was published with actual malice. The defense covers judicial and parliamentary proceedings, and, communications between officers of state about state affairs. In contrast, the defense of qualified privilege does not protect statements made with

These common law rules of defamation should have been weighed against the constitutional values embedded in the Charter. However, the court in *Hill* did not follow the test it had just created.[103] Nonetheless, by stating that "it is not requiring too much of individuals that they ascertain the truth of the allegations they publish," the court created a reputational right much more robust than the right to freedom of expression.[104] The court made its real balancing exercise favoring the right to reputation when it ruled:

> The law of defamation is essentially aimed at the prohibition of the publication of injurious false statements. It is the means by which the individual may protect his or her reputation, which may well be the most distinguishing feature of his or her character, personality, and, perhaps, identity. I simply cannot see that the law of defamation is unduly restrictive or inhibiting. Surely it is not requiring too much of individuals that they ascertain the truth of the allegations they publish.[105]

The following section compares Quebec's civil law rules for defamation cases with the common law rules described.

III. QUEBEC DEFAMATION LAW

A defamation civil suit in Quebec is a tort governed by the Quebec Civil Code.[106] Civil tort liability requires that the plaintiff prove the existence of an injury, a wrongful act, and a causal connection between the two.[107] The first element, the existence of an injury, relates to the defamatory character of the statements.[108] It has been held that defamation "consists in the communication

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actual malice. *Id.* at 3-4. The defense applies when the defendant has an interest or a legal, social or moral duty, to communicate the defamatory statement and the recipients have a corresponding interest or duty to receive it. *See* JEREMY S. WILLIAMS, THE LAW OF LIBEL AND SLANDER IN CANADA, 73-75 (2d ed. Butterworths 1988). The fair comment defense is available when the defamatory statement is a comment or opinion made honestly and fairly, without actual malice, based on facts on a matter of public interest. *See id.* at 73-75, 92.

103. *Hill*, [1995] 2 S.C.R. 1130, ¶ 140.

104. *Id.*

105. *Id.*

106. Quebec civil law does not provide for a specific form of action for interference with reputation. The basis for an action in defamation in Quebec is found in Article 1457 which reads: Every person has a duty to abide by the rules of conduct which lie upon him, according to the circumstances, usage or law, so as not to cause injury to another. Where he is endowed with reason and fails in his duty, he is responsible for any injury he causes to another person . . . and is liable to reparation for the injury, whether it be bodily, moral or material in nature. He is also liable, in certain cases, to reparation for injury caused to another by the act or fault of another person or by the act of things in his custody. Quebec Statutes of Quebec, 2009 S.Q., ch. 64.

107. *See generally Prud'homme*, [2002] 4 S.C.R. 663.

108. *Id.* ¶ 33.

of spoken or written remarks that cause someone to lose in estimation or consideration, or that prompt unfavourable or unpleasant feelings toward him or her."[109] To determine whether the statement is defamatory, the court must establish whether an ordinary person would believe that the remarks, when viewed as a whole, brought discredit to the reputation of another person.[110] However, the fact that a defendant made a defamatory statement will not, on its own, establish liability.[111] The plaintiff must also prove that the defendant committed a wrongful act.[112]

"[T]he wrongful act may derive from two types of conduct, one malicious and the other merely negligent[.]"[113] A malicious act entails a behavior that denotes intent to cause harm, such as attacking another person's reputation aiming to ridicule or humiliate the person.[114] In the case of a negligent act, the intention to cause harm is absent but the acts or omissions of the defendant are deemed negligent.[115] Because fault is the key element in the determination of liability, truth is not in and of itself an absolute defense, and a defamatory falsehood does not necessarily entail liability.[116] This is an important difference between the Quebec civil law and the common law, in which the falsity of the expression is an element of the tort of defamation.[117]

In addition to these elements, an action in defamation always involves two fundamental values: freedom of expression and the right to reputation.[118] Because the values can come into conflict, Quebec's courts balance the two rights to determine fault.[119] There will be wrongful interference with the right to reputation of a person if the defendant did not act as a reasonable person

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109. *Id.* (quoting *Radio-Sept-Iles*, [1994] R.J.Q. 1811).

110. *Id.*

111. *Id.* at ¶ 35.

112. *Prud'homme*, [2002] 4 S.C.R. 663, ¶ 35.

113. *Id.*

114. *Id.*

115. *Id.* Based on the description of these two types of behavior, the Court has identified three situations in which a person could be liable: 1) when the defendant knew that the statements were false; 2) when the defendant "spreads unpleasant things about someone else, when he or she should have known them to be false[;]" and 3) when the defendant expresses "unfavorable but true things about another person without any valid reason for doing so." *Id*. ¶ 36.

116. Néron Communication v. Chambre des Notaires du Quebec, [2004] 3 S.C.R. 95, ¶ 60 (Can.).

117. *See* MLRC 50-STATE SURVEY 2003-2004: CURRENT DEVELOPMENTS IN MEDIA LIBEL LAW, 1068 (Media Law Resource Center ed., 2003).

118. *Lucas*, [1998] 1 S.C.R. 439, ¶ 16; *Prud'homme*, [2002] 4 S.C.R. 663, ¶ 38.

119. *See Néron*, [2004] 3 S.C.R. 95, ¶ 54 (quoting *Radio-Sept-Îles*, [1994] R.J.Q. 1811, 1818). The Quebec Court of Appeals in *Radio-Sept-Îles* expressed:

> This area of the law of civil liability also requires a particular sensitivity to values that at times conflict with each other, such as the public's right to information and the freedom of the media to disseminate it, on the one hand, and, on the other, the right to respect for one's private life and the protection of some of its core components, namely anonymity and privacy.

would have under the same circumstances.[120] However, in the case of journalists, Quebec has adopted a professional standard of care as opposed to the general standard of care. In *Société Radio-Canada v. Radio-Sept-Îles*,[121] the court of appeals established that the assessment of whether the conduct was wrongful will be conducted in light of the professional standards governing the activities of the media.[122] In this endeavor, the court must take into consideration both the realities and the difficulties of the journalist's trade, (particularly space and time constraints).[123] The truth of the statements and the public interest are other factors that must be taken into account in the assessment of fault.[124] In *Néron Communication*, the Supreme Court of Canada applied the media/journalist standard established in *Radio Sept-Îles*:

> [T]he existence of a fault is the general and fundamental requirement in the law of defamation and fault is measured against professional journalistic standards. A journalist is not held to a standard of absolute perfection; he or she has an obligation of means. On the one hand, if a journalist disseminates erroneous information, this will not be determinative of fault. On the other hand, a journalist will not necessarily be exonerated simply because the information he or she disseminated is true and in the public interest. If, for other reasons, the journalist has fallen below the standard of the reasonable journalist, it is still open to the courts to find fault. Viewed this way, civil liability for defamation continues to fit nicely within the general framework of art. 1457 C.C.Q. [125]

The Canadian common law and the Quebec civil law rules of defamation for civil claims each show a different balance for the protection of the freedom of expression and the right to one's reputation. The Canadian common law of defamation favors the protection of reputation, giving the plaintiff powerful presumptions converting the cause of action into one of strict liability.[126] A

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120. *See id.* ¶¶ 51-62.

121. *Radio-Sept-Iles*, [1994] R.J.Q. 1811, 1818.

122. The Court stated:

> The criteria is that of the reasonable person, working in the field of information. In the case of a news report, we have to determine if the background investigation was conducted with the usual precautions, by using the tools of investigation that are available or that are usually used. In the end, we will determine is reasonable care was used in preparing the notice or the report. We should take into account the practical realities and differences of being a journalist.

Id. *See Prud'homme*, [2002] 4 S.C.R. 663, ¶ 34 (for the standard applied to an elected municipal official).

123. *See Neron*, [2004] 3 S.C.R. 95, ¶¶ 60-61.

124. *See id.*

125. *Id.* ¶ 61.

126. *See* MCCONCHIE & POTTS, *supra* note 101, at 3.

prima facie case can be established by simply showing that the statement could be deemed as one that lowers the plaintiff's esteem or reputation.[127] After that, Canadian common law does not require proof of fault, proof of falsity, or even proof of injury.[128] Although it could be argued that the defenses available to the defendant in the common law even out the balance between the right to reputation and the freedom of expression, the burden of proof resides with the defendant.[129] When compared with how little is required from the plaintiff, that balancing reveals the superior position in which the plaintiff stands.

In Quebec, the balance between reputational rights and freedom of speech tends to favor the latter. As discussed above, Quebec laws of defamation are governed by principles of negligence that have to be proved by the plaintiff. Although in Quebec the truthfulness of a statement will not always be a defense, it could be argued that this is a consequence of blending a privacy action with a defamation action. Nonetheless, the falsity of the statement is only one of the factors considered to determine if the conduct is wrongful.[130] Quebec law does not have a strict liability regime; therefore, the plaintiff must prove both the injury and the wrongfulness of the action.[131] Additionally, the adoption of a standard of care as the measure to evaluate the conduct of the defendant also benefits the defendant, because the particular conditions, such as her role as a journalist, are taken into account when determining whether the act or omission was wrongful.

The two systems reflect different standards that place opposing emphases on the right to reputation and the freedom of expression.[132] This brings us to the question posited by the *Hill* decision: Would the balance of freedom of expression and reputation result in the same protection warranted to reputation by *Hill* when Quebec's civil law is confronted with the Charter's rights and freedoms?[133]

IV. QUEBEC'S DEFAMATION REGIME AND THE CHARTER

I am going to construct a challenge to Quebec's law using the concept of reputation as the right infringed upon by the law. Quebec's defamation law

127. *Id.*

128. *See Cusson*, [2007] 286 D.L.R. 4th 196, ¶ 35; *Gaskin*, [1965] S.C.R. 297, ¶ 3.

129. *See Prud'homme*, [2002] 4 S.C.R. 663, ¶ 56.

130. *Néron Communication*, [2004] 3 S.C.R. 95, ¶ 60.

131. *See Prud'homme*, [2002] 4 S.C.R. 663, ¶ 56.

132. As one author has expressed: "Quebec courts have made a major change favouring freedom of expression that the common law courts in Canada have so far refused to make." Joseph Kary, *The Constitutionalization of Quebec Libel Law*, *1848-2004*, 42 OSGOODE HALL L.J. 229, 268 (2004); *see also* Eugénie Brouillet, *Free speech, Reputation, and the Canadian Balance,* 50 N.Y.L. SCH. L. REV. 33, 54-55 (2005).

133. The Supreme Court of Canada has not had the opportunity to confront the question.

puts the onus of proving defamation on the plaintiff.[134] This framework does not give the person claiming that her reputation has been injured a remedy comparable with that upheld in *Hill*.

In *Hill*, the court strongly defended the need to protect a person's reputation, signaling that the value of reputation is directly linked to the dignity of the human being and serves to advance societal goals.[135] After the decision in *Hill*, it would not be disputed that, using the *Oakes* test, a court would find that a right to reputation is part of the rights guaranteed by the Charter. Canadian courts have been flexible in the determination of what claims are understood to be covered by the Charter.

The second step of the proportionality test is more complicated. Once determined that Quebec's defamation framework restricts the right to reputation, the next step will consist of determining if the restriction can be justified under section 1 of the Charter. In order to accomplish this task, the court has to ascertain if the aim or objective of the law is sufficiently pressing and important to restrict a Charter right.[136] Assuming that the court understands that the objectives of the framework of the civil law of defamation are sufficiently important, because it is designed to protect the right to free expression, the court will ask if there is proportionality between the effects of the framework upon the rights and the objective of protecting the freedom of speech.[137] This part of the test is designed to look for a rational connection between the restricting effects *vis-à-vis* the objective.[138] I will assume that the court will find a rational connection between the objective of protecting speech and requiring a plaintiff to prove a wrongful act.

The minimal impairment test requires a determination of whether the civil law of defamation places minimal restriction on the right to reputation.[139] Because the court will be balancing two fundamental rights, reputation and expression, and to date the only case where the court has analyzed them is *Hill*, the court can go either way. It could determine that Quebec's framework asks too much of the plaintiff by requiring that she prove either intention to cause harm or negligence. Or, the court could determine that the right to freedom of expression is well balanced against reputational rights, because requiring a plaintiff in a civil suit to prove fault does not eliminate protection of reputation since the plaintiff still has a cause of action.[140]

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134. *See Prud'homme*, [2002] 4 S.C.R. 663, ¶ 56.

135. *See Hill*, [1995] 2 S.C.R. 1130, ¶ 110.

136. See *Oakes*, [1986] 1 S.C.R. 103, ¶ 16.

137. *See id*. ¶ 74.

138. *See id.*

139. *See Zundel*, [1992] 2 S.C.R. 731, ¶ 221; *Lucas*, [1998] 1 S.C.R. 439, ¶ 69.

140. Although the wording of the minimal impairment test suggests that the court will evaluate other alternative measures, the court has used this part of the test to evaluate the reasonability of the measure and

Under both possible conclusions, the results are inconsistent with, on one hand, the idea of an entrenched Charter of Rights and Freedoms designed to guarantee the rights of the citizens of Canada or, on the other, with the idea of equality. If the court determines that Quebec's law of defamation is constitutional, the net result is to have two different systems of liability. One governed by the common law, which gives more protection to reputation, and one governed by civil law, which gives more protection to freedom of expression. However, if the Court determines that Quebec's law is unconstitutional, objection to the decision will be based on the different constitutional treatment that laws dealing with the same private relations are receiving. The common law rules of defamation are analyzed under the constitutional values test, whereas the civil law system of Quebec is submitted to a higher standard by the use of the proportionality test.[141]

V. CHARTER, FEDERALISM AND QUEBEC

A historical approach to Canada's formation into a federal system can provide an opportunity to reconcile the results that the *Dolphin Delivery* decision poses. Nonetheless, the adoption of the Charter into Canada's federal system introduced a distinctive feature that makes that reconciliation more difficult.

The British North America Act ("B.N.A.")[142] "united on a federal basis the separate colonies that had up to until that time constituted British North America."[143] This type of governmental organization was a pre-requirement for the union because the provinces, especially Quebec, were not willing to hand over all political autonomy and self-government.[144]

The adoption of a federal system permitted the preservation of diversity among the provinces. This was a crucial element that allowed the inclusion of Quebec in the confederation.[145] The distribution of powers established in the

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has been deferential to the assessment of the legislatures. However, *see* RJR-MacDonald Inc, v. Canada, [1995] 3 S.C.R. 199, ¶ 17 (Can.) (the Canadian Parliament's failure to produce evidence that an absolute prohibition against cigarette advertising was the least-intrusive means of reducing tobacco consumption prevented them from arguing that it satisfied the minimal impairment requirement).

141. *See Oakes*, [1986] 1 S.C.R. 103 ¶ 74; *Hill*, [1995] 2 S.C.R. 1130, ¶ 98-124; *Dolphin Delivery*, [1986] 2 S.C.R. 573, ¶ 46.

142. British North America Act, R.S.C., App. II, No. 5 (1867).

143. LAW, POLITICS AND THE JUDICIAL SYSTEM IN CANADA 219 (F.L. Morton ed., 1984).

144. *Id.*

145. *See* British North America Act, R.S.C. App. II, No. 5, (1867). The specific accommodations created for Quebec can be pinpointed in the following sections: Section 93 guaranteed the continuation of Catholic schools; Section 94 excluded Quebec from potential uniform national legislation on property and civil rights; Section 129 preserved the local laws of the provinces; and Section 133 guaranteed the continued use of French as an official language.

B.N.A. had the following effect:

> [It] detached the governance of the new province of Quebec from the old province of Canada and put it in the hands of a new provincial government elected by a majority of French-speaking Roman Catholics. Given the wide scope of provincial powers, including education and 'property and civil rights,' this was thought to put in the hands of Quebeckers the power to preserve and shape their own culture.[146]

In matters related to private law, section 8 of the Quebec Act of 1774[147] provided the space for Quebec to continue the development of a distinct body of private law derived from the civil law system. The successor of this section was established in section 92 of the B.N.A., which enumerates the areas where the provinces have legislative authority.[148] Until this day, section 92(13), which deals with property and civil rights in private law, and section 129 have afforded to Quebec the continuation of its legal culture based on the civil law system.[149] This has been one characteristic that *Québécois* use to define themselves as a distinct society within Canada.

Before the enactment of the Canadian Charter, the Supreme Court of Canada, when evaluating the law of the provinces, dealt only with the appropriate exercise of legislative power, meaning the division of power between the federal and the provincial governments. With the adoption of the Charter, the Supreme Court has a new role in determining the validity of governmental action, either national or provincial, when it infringes on the rights and freedoms guaranteed by the Charter. With this new role, the Supreme Court, as part of the central government, has the opportunity to start acting as a homogenizing force. It is not a secret that one of the underlying objectives of the constitutional protection of individual rights was the strengthening of the national community.[150]

The *Dolphin Delivery* decision exemplifies a conception of Canada as a

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146. Barry L. Strayer, *The Canadian Constitution and Diversity*, *in* FORGING UNITY OUT OF DIVERSITY: THE APPROACHES OF EIGHT NATIONS 157, 165 (R. A. Goldwin et al. eds., 1989).

147. "[R]elative to Property and Civil Rights, Resort shall be had to the Laws of Canada . . . ." Quebec Act, 1774, 14 George III, C. 83 (U.K.). The "laws of Canada" meant in this section the French derived civil law. *See* Massey, *supra* note 31, at 1257.

148. British North America Act, 1867, R.S.C., App. II, No. 5, § 92.

149. *Id*. §§ 92(13), 129. "Except as otherwise provided by this Act, all Laws in force … shall continue in … respectively, as if the Union had not been made . . . ." The Constitution Act, 1867, R.S.C., App. II, No. 5, § 129 (1985).

150. Katherine Swinton, *Competing Visions of Constitutionalism: of Federalism and Rights, in* COMPETING CONSTITUTIONAL VISIONS: THE MEECH LAKE ACCORD 279, 281 (K. Swinton & C. Rogerson, eds., 1988).

unitary, non-diverse, legal culture. The Court created a rule by which Quebec's private law can be scrutinized under a higher standard without even mentioning it.[151] The differences between the two systems of law were not taken into account. The Court did not even acknowledge the existence of this other legal culture as part of the Canadian system when making the rule.[152] One of the risks of establishing equal rules for diverse societies is that the majoritarian, or mainstream aspects of such societies are assumed as the standard.

VI. CONCLUSION

The historical and contemporary characteristics of Canada could be used to create a space for acknowledgement of and respect for diversity. The entrenchment of fundamental rights and freedoms brings to any society the dilemma of upholding rights deemed to be universal and at the same time making accommodations for groups or individuals based in their distinctiveness. This dilemma, which exists in any given society, is most notable in the cases of societies where there is a political recognition of the sociological differences of its components and where a visible majority exists.

In the case of Canada and its relation to Quebec, the fear of assimilation has been present throughout time. The words of J. A. Corry better explain the interrelation of those sentiments:

> Quebec's objections about them [federal priorities and patterns built into shared programmes] have not been primarily the distribution of powers under section 91 and 92 but rather the stamp of English-Canadian preferences and outlook on most of what the federal government does. That is why English Canadians have to think more sympathetically about what it would be like to stand in Quebeckers' shoes, and try to modify their preferences and outlook to take account of the preferences and outlook of Quebeckers in a wide range of matters. Here indeed we do need a new and more scrupulous constitutional morality.[153]

The adoption of the Charter permits individuals to claim respect for their rights and to use them to oppose governmental action. But, it can also signify the standardization of the meaning and consequences of rights understood as universal, where the conception of equality is a formal one, with no space for the concept of substantive equality.

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151. *See Dolphin Delivery*, [1986] 2 S.C.R. 573.

152. *See id.*

153. J. A. Corry, *The Uses of a Constitution*, *in* THE CONSTITUTION AND THE FUTURE OF CANADA 1, 9-10 (1978).

Subjecting Quebec's Civil Code to the Charter would undermine the special character of Quebec's legal culture "by encouraging courts to measure systematically the legal system that expresses this culture against the yardstick of common law."[154] The defeat of the "distinct society" formula proposed in the Charlottetown Accord for Quebec, and the strengthening of the equality value in the Charter, makes more difficult the accommodation of Quebec's legal culture. However, as others have explained,[155] the concept of federalism is not only malleable, but it is in the end a concept that entrenches the ideas of government and compromises. In the case of Quebec, a commitment to pluralism and the recognition of diversity could be designed within the Charter to re-adapt and re-configure the "watertight compartments."

154. Yves De Montigny, *The Impact (Real or Apprehended) of the Canadian Charter of Rights and Freedoms on the Legislative Authority of Quebec, in* CHARTING THE CONSEQUENCES, *supra* note 8, at 16.

155. Gagnon and LaForest, *supra* note 6, at 478.