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THE LEGITIMACY OF THE CONSTITUTIONAL ARBITRATION PROCESS IN A MULTINATIONAL FEDERATIVE REGIME: THE CASE OF THE SUPREME COURT OF CANADA

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The legitimacy of public institutions is not a subject that has received much attention in the field of legal doctrine, perhaps because of the uncertainty that appears to be wedded to the concept. Nevertheless, no study of power can ignore the question of legitimacy, which underlies the right to command and impose one's will; in this sense legitimacy is an inherent component of power.[1] As a result, "what appears clearly is the normative nature of legitimacy which, historically, has been used as a way to evaluate power and its legal actions."[2]

In concrete terms, to be legitimate is "to be recognized as justified, to be accepted for what one is and what one does".[3] In the words of Jacques Frémont, "legitimacy, beyond the strictly legal considerations, is the morally and socially acceptable and accepted character of an institution, decision or

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1 Jean-Marc Février, "Sur l'idée de légitimité" (2002) 92 RRJ 367 at 368–69.

2 *Ibid* at 371 [translated by author].

3 Barthelémy Mercadal, "La légitimité du juge" (2002) 2 RIDC 277 at 277 [translated by author].

thing".[4] The notion of legitimacy may thus be understood in a broader sense than the positivist meaning, which assimilates it with legality and validity.[5] It is never permanently acquired or lost; its ability to evolve is one of its key characteristics.[6] It must be assessed continually, and it cannot be settled once and for all. The legitimacy of an institution (or power) can vary,[7] making it possible to imagine a spectrum of legitimacy.

The democratic legitimacy of judicial power is not a new question. Since the famous work of Édouard Lambert on "government by judges" in the United States,[8] published in the early years of the twentieth century, it has cropped up sporadically in all democratic societies. The legitimacy of the courts and the judges responsible for the constitutional review of the rules adopted by the state's political organs requires a constant re-evaluation of ways to reconcile democracy and constitutionalism. The question is raised constantly and kept alive by ongoing debate. Canada is no exception to the rule, especially since the constitutional amendment of 1982 that added a charter of rights and freedoms[9] to the Constitution—a reform that led to a profusion of articles on the respective roles played by political and judicial powers in the area of constitutional review.[10]

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4 Jacques Frémont, "La légitimité du juge constitutionnel et la théorie de l'interprétation" in *Droit contemporain : rapports canadiens au Congrès international de droit comparé* (Cowansville: Yvon Blais, 1994) 644 at 687 [translated by author].

5 Hans Kelsen, *Théorie pure du droit*, 2d ed (Paris: Dalloz, 1962) at 367.

6 Frémont, *supra* note 4 at 687.

7 Marc Verdussen, *Les douze juges : la légitimité de la Cour constitutionnelle* (Brussels: Labor, 2004) at 49.

8 Édouard Lambert, *Le gouvernement des juges et la lutte contre la législation sociale aux États-Unis* (Paris: Dalloz, 2005).

9 *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982,* being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

10 See e.g. Jacques Gosselin, *La légitimité du contrôle judiciaire sous le régime de la Charte* (Cowansville: Yvon Blais, 1991); Patrick Monahan, *Politics and the Constitution: The* Charter, *Federalism and the Supreme Court of Canada* (Agincourt: Carswell, 1987); Barry L Strayer, *The Canadian Constitution and the Courts: The Function and Scope of Judicial Review*, 3d ed (Toronto: Butterworths, 1988); Kent Roach, *The Supreme Court on Trial: Judicial Activism or Democratic Dialogue* (Toronto: Irwin Law, 2001); Petter H Russel,

This ceaseless debate about the legitimacy of constitutional justice in a democratic regime is accompanied, in federations, by a second debate on federative legitimacy. In a federative context, the courts and judges are given the role of arbiter in the jurisdictional disputes that cannot fail to arise between the federal and federate levels of government in connection with their reserved areas of jurisdiction under the constitution. In exercising this arbitral function, judges play a fundamental role in maintaining a balance between the respective powers of each level of government. Within multinational federations, the balance between the national majority and the national minority or minorities accompanies the question of federal/federated balance. To establish its legitimacy, and the legitimacy of its decisions, the court of last appeal responsible for ruling on federative disputes[11] must be able to present a guarantee of neutrality with respect to each level of government.

The Judiciary in Canada: The Third Branch of Government (Toronto: McGraw-Hill Ryerson, 1987); Joel C Bakan, "Constitutional Arguments: Interpretation and Legitimacy in Canadian Constitutional Thought" (1989) 27 Osgoode Hall LJ 123; Stéphane Bernatchez, "Les traces du débat sur la légitimité de la justice constitutionnelle dans la jurisprudence de la Cour suprême du Canada" (2006) RDUS 165; Stéphane Bernatchez, "La controverse doctrinale sur la légitimité du juge constitutionnel canadien" (2000) 19 Politique et Sociétés 89; Karim Benyekhlef, "Démocratie et libertés : quelques propos sur le contrôle de constitutionnalité et l'hétéronomie du droit" (1993) 38 McGill LJ 91; Christopher P Manfredi, *Judicial Power and the* Charter*: Canada and the Paradox of Liberal Constitutionalism* (Don Mills: Oxford University Press, 2001); Michael Mandel, *La Charte des droits et libertés et la judiciarisation du politique au Canada* (Montreal: Boréal, 1996); Luc Tremblay, "The Legitimacy of Judicial Review: The Limits of Dialogue between Courts and Legislatures" (2005) 3 ICON 617; Yves-Marie Morissette, "Le juge canadien et le rapport entre la légalité, la constitutionnalité et la légitimité" in Mary Jane Mossman & Ghislain Otis, eds, *La montée en puissance des juges : ses manifestations, sa contestation* (Montreal: Thémis, 2000) 28; Frederick L Morton & Rainer Knopff, *Charter Politics* (Scarborough, Ont: Nelson, 1992).

[11] The term "federative disputes" is used here to refer to conflicts concerning the distribution of legislative powers, as well as cases that call into question fundamental aspects of the federative structure of the State, such as the constitutional amendment procedures and the legal status of federal and federated entities, their territories, or their possible secession.

The federative dimension of the notion of legitimacy has received far less attention than its democratic dimension,[12] and it is the former aspect that will be addressed in this article. Part I outlines a framework to analyze the federative legitimacy of constitutional courts, articulated around three ideas: institutional or organic legitimacy (legal status and composition of the court, method used to appoint its members); functional legitimacy (jurisdiction, type of constitutional review exercised, method of referral, approach to interpretation, and power of the "last word"); and social legitimacy (expectations of the target audience). Part II assesses the federative legitimacy of the Supreme Court of Canada from this tripartite viewpoint and highlights a number of problems connected with the court's legitimacy as the ultimate arbiter for federative disputes.

I. SETTING OUT MARKERS FOR A THEORY OF FEDERATIVE LEGITIMACY IN A MULTINATIONAL CONTEXT

Before examining the tridimensional nature of federative legitimacy (Section B), we will look at the role played by constitutional courts[13] as the arbitrators of federative disputes.

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12 Also sharing this opinion is Olivier Beaud, see "De quelques particularités de la justice constitutionnelle dans un système fédéral" in Constance Grewe et al, eds, *La notion de « justice constitutionnelle »* (Paris: Dalloz, 2005) 49 ("[e]ven more surprising on the other hand is the fact that jurists or jurisconsults who are present in federative structures elude this dimension [the link between federalism and constitutional justice]" at 50 [translated by author]); and with regard to Canada, see Gerald Baier, *Courts and Federalism: Judicial Doctrine in the United States, Australia, and Canada* (Vancouver: UBC Press, 2006) ("[o]nly 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" at 1).

13 For the purposes of this paper, we use the expression "constitutional court" to designate both courts specialized in constitutional matters and final courts of appeal in such cases (supreme courts).

A. THE ROLE OF THE CONSTITUTIONAL COURT AS THE ARBITER OF FEDERATIVE DISPUTES

Constitutional disputes are an inherent part of any federative regime—"conflict management is therefore an essential element in the institutional framework of federal societies"[14]—and constitute its Gordian knot. If no conflict-resolution mode is provided, "each party in the conflict will attempt to impose its own solution, and the result of any constitutional dispute will depend on changing political circumstances or material force".[15] The actual conflict-resolution mode applied, however, varies from one federal society to the next on the basis of its specific culture.[16]

Although four main conflict-management methods can be observed within federative regimes—formal settlement, informal settlement, prevention, and public consultation[17]—it appears that formal settlement (in other words, judicial review) is the favoured choice. Most federal states have a judicial body that takes responsibility for solving federative disputes and, in particular, for ensuring compliance with the rules governing the division of legislative powers.[18] It seems, then, that the federative principle can only be fully realized through the establishment of a constitutional jurisdiction.[19]

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14 Michael Crommelin, "Le règlement des différends dans les systèmes fédéraux" (2001) 167 Revue internationale des sciences sociales 149 at 149 [translated by author].

15 Beaud, *supra* note 12 at 65 [translated by author].

16 Crommelin, *supra* note 14 at 149.

17 *Ibid.*

18 Jean-François Aubert, *Traité de droit constitutionnel suisse* (Neuchâtel: Ides et Calendes, 1967) at 242.

19 Hans Kelsen, "La garantie juridictionnelle de la constitution" (1928) Rev DP & SP 197 at 253; Kenneth C Wheare, *Federal Government*, 3d ed, (Oxford: London University Press, 1953) ("[w]hat is essential for federal government is that some impartial body, independent of general and regional governments, should decide upon the meaning of the division of powers" at 66); Jack N Rakove, "Judicial Review Before and Beyond Madbury" in Élisabeth Zoller, ed, *Marbury v Madison: 1803–2003, Un dialogue franco-américain/A French-American Dialogue* (Paris: Dalloz, 2003) ("Whatever else might be said about its origins, there is no question that judicial review was clearly an essential element of the original understanding of American federalism" at 44) [translated by author]; Eugénie Brouillet, *La négation de la nation : l'identité culturelle québécoise et le*

This is, of course, because the principle that each level of government is autonomous within its own sphere of competence means that no level can change the rules of the game to its own advantage. The rules cannot be placed at the mercy of either the federal or the federate level of government, and they must be interpreted and applied by an independent arbiter that owes no allegiance to either level.[20] In short, the establishment of a judicial body with responsibility for settling federative disputes constitutes what could be described as the "pinnacle of the federal edifice".[21]

The figure of the arbiter as an "impartial and disinterested third party"[22] remains, in our opinion, the most suitable image for the function exercised by a judicial body in the area of federative disputes.[23] "Arbitral function" is used here to refer to the notion of arbitration *lato sensu*, namely, the conventional approach to dispute settlement by a third party, a public institution, to which the parties must submit even without their consent.[24] In

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fédéralisme canadien (Quebec: Éditions du Septentrion, 2005) at 84–85. For an overview of the classical argument levelled against the Kelsenian view, see Olivier Beaud, "Hans Kelsen, théoricien constitutionnel de la Fédération" in Carlos Miguel Herrera, ed, *Actualité de Kelsen en France* (Paris: LGDJ, 2001) at 81–82.

20 Henri Brun, Guy Tremblay, & Eugénie Brouillet, *Droit constitutionnel*, 5th ed (Cowansville: Yvon Blais, 2008) at 405.

21 Verdussen, *supra* note 7 at 27 [translated by author].

22 Alexandre Kojève, *Esquisse d'une phénoménologie du droit : exposé provisoire* (Paris: Gallimard, 2007) at 74–75 [translated by author].

23 This view is shared by, among others, Donna Greschner, "The Supreme Court, Federalism and Metaphors of Moderation" (2000) 79 Can Bar Rev 47; Edmond Orban, "Introduction théorique" in Edmond Orban, ed, *Fédéralisme et cours suprêmes* (Montreal: Presses de l'Université de Montréal, 1991) 11 at 17; André Bzdera, "Comparative Analysis of Federal High Courts: A Political Theory of Judicial Review" (1993) 26:1 Canadian Journal of Political Science 3 at 3; Marie-Laure Gély, *Le rôle de la Cour suprême dans la répartition des compétences au Canada* (DCL Thesis, Université Laval, 1998) [unpublished] at 40. The figure of the arbiter has nonetheless been challenged by certain other authors of academic legal writings. See A Wayne Mackay, "The Supreme Court of Canada and Federalism: Does/Should Anyone Care Anymore?" (2001) 80 Can Bar Rev 241, who states a preference for the term "player".

24 Beaud, *supra* note 12 at 54.

the presence of a federative dispute, typically a conflict between the federal and the federate entities with respect to their jurisdiction, the constitutional court has ultimate responsibility for imposing a final settlement.

In exercising its arbitral function, the constitutional court is required to (1) interpret and apply the rules laid down by the constitutional text, or in other words apply the original contract or pact between the parties, and (2) adapt the rules to reflect changes in the societal conditions. In the latter case, the court must seek to maintain a balance between the respective powers of each level of government (the federal/federate balance) and also, in a multinational context, between the majority and minority nation(s).

1. NATURE OF THE ORIGINAL FEDERATIVE PACT

Since "the federal state cannot be understood unless a relation is established between juridical norms . . . and socio-political realities",[25] the federative legitimacy of a constitutional court must be assessed on the basis of the specific features of each federation. For example, the question of the legitimacy of a court becomes more or less acute depending on whether the population is relatively homogeneous or, on the contrary, contains numerous national, cultural, linguistic, or religious divides. The question of legitimacy is even more crucial in a multinational context, particularly when a single state contains within itself a majority form and one or more minority forms of territorial nationalism. The legitimacy of a constitutional court cannot be addressed without, as a first step, focusing on the actual nature of the federative regime concerned or, in other words, examining the terms of the original federative pact.

> [The] broad meaning of the arbitration concept . . . sets itself apart from the narrow meaning, originating in private law, which designates the contractual institution of a disagreement settled by a third party who is a private judge, chosen contractually, and not by a state jurisdiction to which the parties may be subjected without their consent. The specificity of this broad meaning of arbitration is that the third party in question is a public institution, a representative of the Federation who in fact is not necessarily a body emanating specifically from the Federation [translated by author].

[25] Anton Greber, *Die vorpositiven Grundlagen des Bundesstaates* (Basel: Helbing & Lichtenhahn, 2000) at 69, cited in Olivier Beaud, "Du nouveau sur l'État federal" (2002) 42 Droits 229 at 232 [translated by author].

The notion of a pact is the "founding principle"[26] of any federative regime. According to Proudhon, all federations, despite their apparent diversity, have the same foundation in the form of a synallagmatic and commutative contract.[27] François Rocher also points out that:

> in the beginning, the Latin term *foedus* meant union, pact, voluntary agreement, or covenant. . . . Underlying the [federative] association we therefore find the principles of mutual consent, cooperation and partnership, applied to create a shared framework while preserving the integrity of each constituent party.[28]

The fundamental *object* of the federative pact or *contract* is the division of legislative powers between two levels of government that are autonomous, or not subordinated one to the other, with each level exercising exclusive legislative powers in defined areas. Once concluded, the pact is constitutionalized, making it unusually robust. It can only be amended with the consent of each level of government, since "the existence of a federative pact as a constitutional pact is justified, in the final analysis, by the existence of the peoples making up the member states".[29] If the constitutional court is the "pinnacle of the federal edifice", then the constitutional pact forms the foundation.

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[26] *Ibid* at 235 [translated by author].

[27] Pierre-Joseph Proudhon, *Du principe fédératif* (Paris: E Dentu, 1863) at 73–74, cited in Orban, *supra* note 23 at 11. The theory of contract in civil law defines the synallagmatic or bilateral contract as one whereby the parties obligate themselves reciprocally, so that the obligation of one party is correlative to the obligation of the other. A contract is commutative when at the time it is formed at least one of the parties is aware of the importance and extent of the obligations that it shall have to render (see *Civil Code of Québec*, LRQ, c C-1991, arts 1380, 1382).

[28] François Rocher, "La dynamique Québec-Canada ou le refus de l'idéal fédéral" in Alain-G Gagnon, ed, *Le fédéralisme canadien contemporain : fondements, traditions, institutions* (Montreal: Presses de l'Université de Montréal, 2006) 93 at 102 [translated by author].

[29] Olivier Beaud, "La notion de pacte fédératif. Contribution à une théorie constitutionnelle de la Fédération" in Jean-François Kervégan & Heinz Mohnhaupt, eds, *Liberté sociale et lien contractuel dans l'histoire du droit et la philosophie* (Frankfurt: Vittorio Klostermann, 1999) 197 at 270 [translated by author].

In construing the nature of the original pact, the constitutional court may rely initially on the express provisions of the federative constitution and in particular on the rules governing the division of powers between the federal and federate levels of government, which reflect the aggregative and segregative factors underlying the federative pact. It may also take into account some elements that are not in the constitutional text but that reveal the conditions in which the groups concerned established their federative links, such as the debates that led up to the signing of the pact.

The interpretation, application, and adaptation of the constitution by the constitutional court in its role as the arbiter of federative disputes may be considered by a majority or minority of citizens to modify the original federative pact, a situation that may create problems for the constitutional court's federative legitimacy.

2. ARBITRAL FUNCTION AND EVOLUTION OF THE FEDERATIVE REGIME

The judicial process of adapting the constitution to new societal conditions is part of the task of constitutional adjudication. It cannot have the effect of denaturing the original federative pact. This is especially true in connection with the rules relating to the division of legislative powers. As we mentioned above, these rules constitute a fundamental element in the founding regulatory contract of any federation.

(a) Federal/Federated Balance

Federalism is, first, an example of socio-political integration; a process of perpetual adaptation oscillating between the need for unity and the need for diversity, and between the centralization and decentralization of power. In the words of Bruno Théret:

> an "authentic" federal system can . . . be defined as a system which includes a self-preserving mechanism for the federal principle that permanently regulates the constitutive contradiction between unity and diversity: if unity

> triumphs over diversity, or if diversity triumphs over unity, the term federalism can hardly be seen to apply.[30]

In exercising its arbitral function, the constitutional court must, as a result, seek to maintain a degree of *balance*[31] between the particularist and universalist tendencies of the groups involved. Balance is the key concept in a federative context. Clearly, the perception of balance or lack of balance in a given situation will depend in part on how the person responsible for establishing or maintaining it views the concept of "balance", and from this standpoint it is subjective. It does not dictate a clear position, since federalism must be understood as a process—in other words, as an evolving and continually adapting model—rather than as a static system governed by immutable rules.[32] As a result, balance is an ideal to be achieved, rather than an absolute criterion.[33]

The essential nature of federalism also dictates the delicate task of establishing a *fair*[34] weighting of the opposing forces. The value of unity will

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30 Bruno Théret, "Du principe fédéral à une typologie des fédérations : quelques propositions" in Jean-François Gaudreault-Desbiens & Fabien Gélinas, eds, *Le fédéralisme dans tous ses états. Gouvernance, identité et méthodologie* (Cowansville: Yvon Blais, 2005) 99 at 128 [translated by author].

31 The *Oxford Dictionary Online* proposes the following definition: "a situation in which different elements are equal or in the correct proportions". *Oxford Dictionary Online*, online: Oxford University Press <http://oxforddictionaries.com> *sub verbo* "balance".

32 Carl J Friedrich, *Trends of Federalism in Theory and Practice* (New York: Praeger, 1968) at 173.

33 See Francis Delpérée & Marc Verdussen, "L'égalité, mesure du fédéralisme" in Gaudreault-Desbiens & Gélinas, eds, *supra* note 30, 193 at 199. The preceding authors referred to JE Trent, who stated that "the federal principle underlying all others is the concept of equilibrium [which] does not represent a set position, but rather a fundamental attitude": JE Trent, "Les origines du fédéralisme sont ses principes : le cas du Canada" in P Destatte, ed, *L'idée fédéraliste dans les États-Nations* (Brussels: Presses universitaires européennes, 1999) 131 at 136 [translated by author]. See also Olivier Beaud, *Théorie de la Fédération* (Paris: Presses Universitaires de France, 2007) ("[T]his point of equilibrium is rarely achieved, and the cursor moves in one direction, then in another" at 281 [translated by author]).

34 Agreement on a satisfactory federal/federate equilibrium may obviously vary within the population of one and the same federation. Significant variation may generate profound

be essentially preserved if the federal government is able to exercise its legislative powers without significant interference from the federated governments, and vice versa for the value of diversity. At this point, the way in which the constitutional court settles federative disputes on the basis of what is seen as a suitable federal/federated balance will have a significant impact on any assessment of its federative legitimacy.

(b) National Majority/Minority Balance

A federative regime may be established "essentially, and distinctively, to guarantee rights and internal autonomy to certain minorities, even against the interests of the majority—however real and absolute—of citizens of the federation as a whole",[35] based on the political control of a federated entity. While uniting with other collectivities on the basis of shared interests, a national collectivity acquires legislative powers enshrined in the constitutional text that it can then exercise autonomously in certain areas connected with its distinct cultural identity. In a federation that includes a minority national collectivity, respect for the federative nature of the constitutional structure is vital, since this is what allows the minority to pursue its collective cultural aspirations at the political and legal levels.

At this point, when a majority nationalism coexists within a federation with one or more minority nationalisms, the question of the federal/federated balance becomes especially important. The arbitral function of the constitutional court in a multinational context must cover this aspect, or else the court's federative legitimacy may be called into question.

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disagreements with respect to the progressive direction that a regime should engage in and thereby undermine federal solidarity and loyalty. As regards these latter principles, see Guy Laforest, "Se placer dans les souliers des autres partenaires dans l'union canadienne" in Guy Laforest & Roger Gibbins, eds, *Sortir de l'impasse : les voies de la réconciliation* (Montréal: Institut de recherche en politiques publiques, 1998) at 55.

35 Charles Durand, *Confédération d'États et État fédéral* (Paris: M Rivière, 1955) at 177 [translated by author].

B. THE TRIDIMENSIONAL NATURE OF FEDERATIVE LEGITIMACY

In our opinion, the federative legitimacy of a constitutional court can be assessed from the triple viewpoint of institutional legitimacy, functional legitimacy, and social legitimacy,[36] but the assessment will only be valid if the dialogical relation between the three largely interdependent components is taken into account. This is because the scope of the guarantees that underlie the institutional legitimacy of the constitutional court is dependent on the importance of its role in the evolution of the federative regime. In addition, it is important to note that the notion of legitimacy always has a social dimension, since it is clearly founded "on the consent of the subjects".[37] Lastly, it must be remembered that each federative regime must "adjust [constitutional justice] to the particularities of its own political culture, which is a minimum and elementary condition for the legitimacy of any constitutional court".[38]

1. INSTITUTIONAL LEGITIMACY

Institutional legitimacy derives from the perception that the constitutional court is impartial and independent. In a federative context, the court must offer a sufficient guarantee of objectivity or neutrality to ensure that it is not seen as belonging exclusively to either the federal entity or the federated entities. It must have all the characteristics of an impartial arbiter. An assessment of the institutional legitimacy of a constitutional court is based on its legal status, its composition, and the method used to appoint its members.

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[36] This classification was developed and applied by Guy Scoffoni to assess the scope of the powers of United States Supreme Court judges and their democratic legitimacy in Guy Scoffoni, "La légitimité du juge constitutionnel en droit comparé : les enseignements de l'expérience américaine" (1999) 2 RIDC 243. We have taken our inspiration from him in adapting the issue of assessing the federative dimension of legitimacy. Also taken into account is the thinking of Verdussen who, in his appreciation of the legitimacy of the Belgian constitutional court, promotes an approach that is simultaneously organic, procedural, and functional: Verdussen, *supra* note 7 at 65.

[37] Février, *supra* note 1 at 368–69 [translated by author].

[38] Verdussen, *supra* note 7 at 20 [translated by author].

(a) Legal Status of the Court

A constitutional court derives its basic legitimacy from its legal status. Since it must present itself as independent from both levels of government, its legitimacy will clearly be strengthened if its existence and powers are provided for in the federative Constitution. Charles Durand notes in this connection that:

> if the goal is to obtain an impartial court focused on ensuring that the legal point of view prevails in its actions, then the pact or constitution must expressly set all the essential rules—including the number of judges—to place its internal organization and its activities beyond the reach of the ordinary legislator.[39]

Since any federative pact requires the free and voluntary consent of the various entities that wish to join, it follows that these entities, by voluntarily supporting the federative constitution, also agree to the jurisdictional arrangements for the settlement of federative disputes by a constitutional court. It is accordingly more difficult to question the legitimacy of a court with constitutional status as compared to a court of merely statutory origin, since the first can be considered to enjoy the assent of the federated entities. On the other hand, if its status and attributes are largely dependent on the wishes of either level of government, the court will be more likely to be perceived as both judge and party in disputes involving the rights or interests of that level.

(b) Composition of the Court

The composition of the court is clearly a fundamental aspect in any examination of its institutional legitimacy. Since the composition of a constitutional court must be adapted to its mission,[40] which in a federative context specifically includes settling federative disputes, the ideal type of court would include parity-based membership with representation of both the federal and federated entities. Hans Kelsen, in his theory on federative parity, mentions that "it would be natural to require [the court] ... to offer a

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[39] Durand, *supra* note 35 at 125 [translated by author].

[40] Louis Favoreu, « La légitimité du juge constitutionnel » (1994) 46:2 RIDC 557.

guarantee of sufficient objectivity through parity-based composition".[41] Parity would help establish the legitimacy of the constitutional court.

However, the legitimacy of the constitutional court must also be based on three other objectives related to its composition: complementarity, pluralism, and representativeness.[42] Complementarity refers to the focus on balance in the professional experience of the judges, which helps reinforce the court's own credibility. Pluralism requires that "a particular trend or sensitivity cannot be the only one represented, otherwise the court will have no real legitimacy".[43] Representativeness, which lies close to pluralism, is reflected in the degree to which social diversity, whether national, cultural, linguistic, or other, is represented in the composition of the constitutional court. This last objective becomes even more important in the context of a multinational federative regime, and it becomes crucial when this regime includes a national majority/minority dynamic. The way with which the composition of the constitutional court is dealt depends on the specific context of each federative regime and on the nature of the original federative pact.

(c) Appointment of Members

Although the composition of the constitutional court may be defined by various constitutional or legislative standards, its legitimacy still depends substantially on the method used to appoint its members.[44] However, "no recruitment method appears able to guarantee, in itself, an aptitude [for impartiality] in the person recruited as a judge".[45] The legitimacy of the constitutional court is thus linked to the search for "a recruitment process that minimizes the risk of choices being dominated by favouritism, partisan concerns or a desire to obtain a court with an *a priori* leaning toward one or other political or economic option".[46]

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41 Kelsen, *supra* note 19 at 255–56.

42 Favoreu, *supra* note 40 at 575–78.

43 *Ibid* at 575 [translated by author].

44 *Ibid* at 571.

45 Mercadal, *supra* note 3 at 279 [translated by author].

46 Durand, *supra* note 35 at 126 [translated by author].

Despite the range of approaches introduced by various societies, it appears that constitutional judges are always designated by the political authorities.[47] In a federative regime, since the ideal composition of the constitutional court is federal/federated parity, which provides a guarantee that the federative balance will be maintained, it follows that the federated entities should play a role in the designation of judges, alongside the federal entity. In a multinational context with a majority/minority dynamic, the same problem arises as noted in connection with the composition of the court. In short, the method used to appoint the members of the constitutional court is intrinsically linked to its legitimacy.

Despite the inherent imperfection of any one method for recruiting judges, there should:

> at least be some *hope* that [the constitutional court] will ensure respect for the legal foundations of the federation, and this is scarcely possible if an organ created and recruited to promote the political aspirations of a majority or party is given complete latitude, or if constitutional review is excluded, diminished or distorted. Distortion can result from the internal organization of the organ concerned.[48]

The institutional aspect of constitutional court legitimacy constitutes what can be described as the "basis of legitimacy",[49] to which a functional aspect must clearly be added. Just as the guarantees needed to found the institutional legitimacy of a constitutional court are closely linked to the importance of its functions with respect to the evolution of the federative regime, it is also possible to state that the manner in which those functions are exercised may depend to a large extent on the institutional characteristics of the constitutional court.

2. FUNCTIONAL LEGITIMACY

Functional legitimacy depends on the functions of the constitutional court being legitimately acceptable in terms of the guarantee of institutional

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47 Favoreu, *supra* note 40 at 572.

48 Durand, *supra* note 35 at 126–27 [translated by author; emphasis in original].

49 Scoffoni, *supra* note 36 at 258 [translated by author].

legitimacy it provides. Since a federative dispute is constitutional in nature, a dispute submitted to the court is situated at the highest level, "where law and politics converge".[50] The importance of the role played by the constitutional court in the evolution of the federative regime determines its legitimacy. An assessment of functional legitimacy must look at the jurisdiction of the court, the type of constitutional review it exercises, the manner in which cases are referred, the paradigm used to construe laws, and the power of the last word.

(a) Jurisdiction of the Court

To understand the framework in which the constitutional court exercises its functions, it is important to determine its jurisdiction—in other words, its given mandate. Whether constitutional review is given to the court system as a whole, along with all of its other traditional tasks, or to a court specifically created for that purpose may influence the assessment of its legitimacy. In the first case, the task of interpreting and applying the Constitution is entrusted, in the last instance, to a supreme court which, located at the summit of the judicial pyramid, can be considered a constitutional court. In the second case, constitutional review is assigned to a specific organ created for that purpose, namely a constitutional court in the literal sense. Given the importance of its functions, its composition should not be the same as that of the ordinary courts, or else its legitimacy may be contested.[51] This is especially true in a federative regime.

The need to make a distinction between the two approaches to constitutional review in connection with the question of legitimacy stems from the fact that a supreme court's legitimacy as a court of law can help make up any deficit in its legitimacy as a federative court. This is not the case for a constitutional court based on the European model. However, a constitutional court is also responsible for reviewing the constitutionality of legislation in connection with fundamental rights and freedoms, and any assessment of the legitimacy of its arbitral function in federative disputes may be influenced by its perceived legitimacy with regard to fundamental rights.

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[50] Favoreu, *supra* note 40 at 571 [translated by author].

[51] *Ibid.*

In short, the jurisdiction of the court of last instance in federative disputes is a factor that must be taken into account when assessing the functional component of its legitimacy.

(b) Type of Constitutional Review Exercised and Method for Referring Cases

To support the constitutional court's legitimacy, the functions it exercises must be perceived as essentially jurisdictional, rather than political, in nature. However, the dividing line between the two spheres is not always well defined, and the procedure for launching a constitutional review may influence the perception of the jurisdictional nature of the court's functions and, as a result, have repercussions for the assessment of its legitimacy. It is important to remember that "an institution's legitimacy depends just as much on what it does as on what it is".[52] This means that the more opportunities a court has to exercise constitutional review, either by review on its own initiative or by an *a priori* review of rules as part of its consultative functions, the more likely it is to play a role in the evolution of the federative regime. It will therefore have to present a strong institutional guarantee of independence from political powers to preserve its legitimacy.

Review on the court's own initiative is one of the constitutional adjudication methods used by a constitutional court that presents the most problems with respect to the necessary demarcation between law and politics. As mentioned by Léon Duguit, "[i]f the highest court can intervene on its own initiative to spontaneously strike down any law it considers unconstitutional, it becomes a political organ that may become an overly powerful force within the state".[53] The court should, as a result, intervene

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[52] Verdussen, *supra* note 7 at 65 [translated by author].

[53] Léon Duguit, *Manuel de Droit constitutionnel* (Paris: Fontemoing, 1911) at 101; Léon Duguit, *Traité de Droit constitutionnel*, t 3, 2d ed (Paris: Fontemoing, 1923) at 615, cited in Antoine Leca, "Les grandes étapes du contrôle de constitutionnalité des lois dans la pensée politique européenne d'Aristote à Kelsen" (1987) 30 RRJ 957 at 976 [translated by author].

only at the request of the parties to the dispute—in other words, when it is asked to do so.[54]

The possibility of exercising *a priori* constitutional review of the rules adopted by the political organs of the state—in other words, before they have been duly promulgated—may also be problematic in terms of the constitutional court's legitimacy. Since a dispute arises necessarily from the application of the law, constitutional review should, in principle, be exercised only *a posteriori*. In this area, the consultative function, generally based on a referral procedure, appears to be a form of *a priori* review, since it intervenes during the process for promulgating laws. This situation may expose the constitutional court to questions about the political nature of its role, which makes the issue of legitimacy even more central.

(c) Paradigm Used to Interpret Laws

The interpretation of laws involves a degree of creativity, and judges always have a discretionary margin in determining the meaning of legal rules. This margin is particularly evident in constitutional law. First, the general nature of the terms used in constitutional texts gives rise to a range of plausible meanings. Second, the constitutional texts seldom provide specific rules for solving particular problems, which leads judges to compensate for the absence or near-absence of guidance in the constitution itself. This is what Vilaysoun Loungnarath calls the indeterminacy and insufficiency of constitutional texts, both characteristics that "create a space in which the judicial decision is no longer objectively based on legal reasoning or the letter of the constitutional law. Inevitably, when a judge enters this space, some of the judge's own political values penetrate and influence the law".[55] The

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[54] The third characteristic of judicial power is that it can act only when called upon, or, to use the language of the law, when it is seised of a case, *Democracy in America*, translated by Arthur Goldhammer (New York: Library of America, 2004) at 112.

[55] Vilaysoun Loungnarath, "Le rôle du pouvoir judiciaire dans la structuration politico-juridique de la fédération canadienne" (1997) 57 R du B 1003 at 1006–07 [translated by author]. See also Brun, Tremblay & Brouillet, *supra* note 20 at 183; Andrée Lajoie, Pierrette Mulazzi & Michelle Gamache, "Les idées politiques au Québec et le droit constitutionnel canadien" in Yvan Bernier & Andrée Lajoie, eds, *La Cour suprême du*

political nature of constitutional jurisprudence is evident.[56] The degree of imprecision and the age of the constitutional text have a major influence on the discretionary margin available to the judges in determining its meaning.

In federative disputes, the greater the latitude available for interpreting the constitutional text, the more likely the court will be to play a key role in the evolution of the federative regime and the more it will lay itself open to the charge "of illicitly taking the place of the constituent by defining or updating the standards of reference".[57] As a result, to preserve its legitimacy, the constitutional court must create a framework in the form of principles of interpretation, an activity that takes place outside the democratic process. The choice of paradigm used by the court to construe laws when deciding the meaning of a controversial legislative provision will have a determining influence on the impact of its role, and incidentally, on the question of its legitimacy.

Two main approaches to interpretation can be distinguished in the constitutional field: the original intent approach and the progressive approach.[58] In the first approach, the court emphasizes the intent of the constituent in determining the meaning of a provision in the constitutional text; in other words, it seeks to establish the original meaning and to take this meaning into account when adapting the text to match changes in society. In the second approach, if there is a gap between the constitutional text and the societal conditions to which it is meant to apply, the judge is authorized to take the place of the constituent and to select the constitutional prescriptions that are most suitable with regard to their political consequences. It is clear that the second approach to interpretation gives the constitutional court a far greater interpretative margin than the first. In addition, although it goes

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Canada comme agent de changement politique (Ottawa: The Royal Commission on the Economic Union and Development Prospects for Canada, Minister of Supply and Services Canada, 1986) 1 at 1–110, in which the authors demonstrate how constitutional jurisprudence is influenced by current political ideas.

56 Mackay, *supra* note 23.

57 Favoreu, *supra* note 40 at 565.

58 Verdussen, *supra* note 7 at 44; Brun, Tremblay & Brouillet, *supra* note 20 at 199–204; Pierre Carignan, "De l'exégèse et de la création dans l'interprétation judiciaire des lois constitutionnelles" (1986) 20 RJT 27 at 32.

without saying that to give too much importance to the meaning of the terms of the constitution when it was passed, or to the context of the time, hinders the necessary adaptation of the text to current societal conditions, to ascribe little or no weight to constituent intent in construing the rules governing the division of legislative powers may be seen as denaturing the original federative pact and imperilling the court's legitimacy.

(d) Power of the Last Word

A range of theories have been advanced to designate the relations between a constitutional court and the political authorities in order to legitimize the exercise of constitutional review.[59] Whatever theory is applied, the theories' common factor is that "the legitimacy of the constitutional judge depends on that judge not having the last word".[60] In a democratic regime, the ultimate possibility of relaunching the constituent process legitimates the exercise of constitutional review.[61] However, one of the fundamental characteristics of a federative regime is the need for a complex amendment procedure[62] to guarantee the autonomy of the federal and federated levels of government and their spheres of jurisdiction. As a result, in a federative regime, the exercise of constitutional review may become an instrument for evolution over which the constituent powers have practically no influence. The only

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[59] In this respect, see the "législateur négatif": Kelsen, *supra* note 19 at 226; Hans Kelsen, "Le contrôle de constitutionnalité des lois : une étude comparative des constitutions autrichienne et américaine" (1990) Revue fr dr constl 17 at 20; or the "juge aiguilleur": Louis Favoreu, "Les décisions du Conseil constitutionnel dans l'affaire des nationalisations" (1982) 2 Rev DP & SP 377 at 419. For a presentation of these various theories, see Michel Troper, *La théorie du droit, le droit, L'État* (Paris: Presses Universitaires de France, 2001) at 186 ff. Nonetheless, it would appear that it is the theory of "dialogue" that seems to have imposed itself upon Canadian legal doctrine. For an overview, see the articles in the special issue published by Grant Huscroft & Ian Brodie, eds, *Constitutionalism in the* Charter *Era* (2004) 23 Sup Ct L Rev (2d).

[60] Favoreu, *supra* note 40 at 578 [translated by author].

[61] See also Scoffoni, *supra* note 36 at 260 ("the democratic theory presupposes the existence of a possible constitutional revision to counterbalance constitutional control").

[62] This amendment procedure must require the agreement of federal and federated levels of government.

possible conclusion is that, in certain matters, the constitutional court may well have the power of the last word.

This possibility highlights the importance of the guarantees relating to the institutional legitimacy of the constitutional court, *a fortiori* if the court also has broad discretionary powers for the interpretation of legislation and multiple opportunities for exercising constitutional review. In this respect, the method used to appoint judges is crucial.[63]

3. SOCIAL LEGITIMACY

The social component remains the central element in the concept of legitimacy, and public recognition is its key ingredient[64]—a virtue granted, or refused, by an outside observer. Institutions and individuals cannot proclaim themselves legitimate. Whatever the legal regime underlying the constitutional court or the importance of its functions, public assent is the determining factor: "True approval for the legitimacy of constitutional justice is given or granted by public opinion. Public opinion ultimately consecrates or rejects the institution on the basis of its jurisprudence and its actions within the state."[65] In short, belief in the court's legitimacy is the overriding influence.[66]

Two remarks must be made concerning the question of the social legitimacy of a constitutional court in a multinational federative context. First, because legitimacy relies ultimately on public recognition, judges are encouraged to use legitimizing and rhetorical processes to justify their

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[63] Larry Kramer underscored this fundamental link between the judicial power having the last word and the process of appointing judges in the case of the American federation: Larry Kramer, "Au nom du people : qui a le dernier mot en matière constitutionnelle?" (2005) 4 Rev DP & SP 1027 at 1039–40.

[64] Mercadal, *supra* note 3 at 277.

[65] Favoreu, *supra* note 40 at 581 [translated by author].

[66] Olivier Corten, "La persistance de l'argument légaliste : éléments pour une typologie contemporaine des registres de légitimité dans une société libérale" (2002) 50 Dr et Soc 185 at 189. The author quotes the ideas of Max Weber. See Max Weber, *Économie et société*, vol 1 : *les catégories de la sociologie*, translated by Julien Freund et al (Paris: Librairie Plon, 1971) at 219 ff.

decisions: "The legitimization strategy is based on both an assessment of existing public opinion and an anticipation of public reactions to [their] decisions".[67] From this point of view, the use of the principles of constitutional interpretation will play an important role. The selection of one principle rather than another is left to the discretion of the judge, whose objective will be to persuade an audience that the decision is not only reasonable, but also justifiable in law.[68]

In a multinational federative context, and in the presence of a national majority/minority dynamic, taking public opinion into consideration means choosing the opinion of the majority over the opinion of the minority or minorities. As pointed out by Guy Scoffoni, "[t]he essential nature of constitutional oversight and, in particular, the protection of minorities, requires [instead] that the judge sometimes resist the majority opinion. The permanent challenge facing judges is to reconcile public opinion and constitutional principles . . .".[69] The more the court takes into account a diversity of viewpoints in construing and implementing the federative constitution, the more its activities will attract the popular support essential to its legitimacy. Federalism and the consubstantial notion of balance feature among the "constitutional principles" it must consider.[70]

Second, with regard to federative disputes, the degree of social legitimacy of a constitutional court can be assessed by analyzing the opinions and reactions not of citizens or citizen groups, but of their elected representatives. It is hard to conclude that a constitutional court enjoys a high degree of legitimacy when its legal status, functions, and decisions are a source of ongoing discord and contestation by the federal or federated levels of government.

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67 Scoffoni, *supra* note 36 at 269 [translated by author].

68 Chaïm Perelman, "La motivation des décisions de justice, essai de synthèse" in Chaïm Perelman & Paul Foriers, eds, *La motivation des décisions de justice* (Brussels: Bruylant, 1978) 415 at 421; Pierre-André Côté, *Interprétation des lois*, 3d ed (Montreal: Thémis, 1999) at 25–26; Frémont, *supra* note 4 at 679.

69 Scoffoni, *supra* note 36 at 278 [translated by author].

70 See Section A-2,"Arbitral function and evolution of the federative regime", under Part I, above.

II. LEGITIMACY OF THE SUPREME COURT OF CANADA AS THE ULTIMATE ARBITER OF FEDERATIVE DISPUTES

Since the 1960s, reform of the Supreme Court of Canada has been a recurring topic in the legal and political world. It has appeared on the agenda of major federal-provincial constitutional conferences, and it has been the focus of numerous reports and white papers.[71] Behind all the proposals for institutional reform to change the Supreme Court's legal status or composition, or the method for appointing its judges, lies a central issue: its legitimacy as Canada's highest general court of appeal. The effort expended over several decades to consider the status and role of the country's highest court tends to indicate that it faces a legitimacy deficit as a component of the Canadian legal system.

In Part II, we will attempt to gauge the degree of legitimacy granted the Supreme Court of Canada as the ultimate arbiter of federative disputes in light of the three dimensions outlined, above, in Section B. First, however, it is important to look briefly at the Court's arbitral function in light of the federative pact of 1867 and its subsequent evolution (Section A).

A. ARBITRAL FUNCTION OF THE SUPREME COURT OF CANADA

Section 101 of the *Constitution Act, 1867*,[72] gives the Parliament of Canada the power to create a general court of appeal for Canada, and in accordance with this provision the Supreme Court of Canada was established in 1875.[73]

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[71] To name but a few: *Final Report of the Special Joint Committee of the Senate and the House of Commons on the Constitution of Canada,* (Ottawa: Information Canada, 1972) (referred to as the Molgat-McGuigan Report); Canadian Bar Association Committee on the Constitution, *Towards a New Canada* (Montreal: Canadian Bar Foundation,1978); Task Force on Canadian Unity, *A Future Together*, (Hull: Supply and Services Canada, 1979) (Pepin-Robarts Report); Government of Quebec, *Québec-Canada: A New Deal, The Québec Government Proposal for a New Partnership Between Equals: Sovereignty-Association*, (Quebec: Official Editor, 1979); Constitutional Committee of the Quebec Liberal Party, *A New Canadian Federation,* (Montréal: Quebec Liberal Party, 1980).

[72] *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, App II, No 5 [*Constitution Act, 1867*].

[73] *Supreme Court Act*, RSC 1985, c S-26.

In 1949, the possibility of appealing its decisions to the Judicial Committee of the Privy Council was abolished, making the Supreme Court the final court of appeal in all matters[74] and, as a result, the ultimate arbiter in federative disputes.

1. ORIGINAL FEDERATIVE PACT AND EXISTENCE OF A QUEBEC NATION

The Canadian state came into being in 1867 after four British colonies in North America[75] expressed the wish to unite under a federative form of government.[76] One of the determining centrifugal factors in the choice of the federative principle as the foundation for the new constitution was the presence, in Quebec, of a strong national group that aspired to retain its political autonomy in all matters relating to its cultural identity, within a structure that would lead to the emergence of a shared political nationality.[77]

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[74] *An Act to amend the Supreme Court Act*, SC 1949 (2nd Sess), c 37.

[75] The Province of Canada (which at that time included present-day Quebec and Ontario), New Brunswick, and Nova Scotia: *Constitution Act, 1867*, *supra* note 72.

[76] The preamble of the *Constitution Act, 1867*, *supra* note 72, 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, it essentially creates a division of legislative powers between two autonomous orders of government within their respective fields of jurisdiction. See Brouillet, *supra* note 19 at 150–68.

[77] Brouillet, *supra* note 19 at 140–45. In the *Reference re Secession of Quebec*, [1998] 2 SCR 217 at para 59, 161 DLR (4th) 385 [*Re: Quebec*], the Supreme Court recognized the importance of Quebec's distinct culture to the conclusion of the 1867 federative agreement:

> The principle of federalism facilitates the pursuit of collective goals by cultural and linguistic minorities which form the majority within a particular province. This is the case in Quebec, where the majority of the population is French-speaking, and which possesses a distinct culture. This is not merely the result of chance. The social and demographic reality of Quebec explains the existence of the province of Quebec as a political unit and indeed, was one of the essential reasons for establishing a federal structure for the Canadian union in 1867.... The federal structure adopted at Confederation enabled French-speaking Canadians to form a numerical majority in the province of Quebec, and so exercise the considerable provincial powers conferred by the Constitution Act, 1867 in such a way as to promote their language and culture. It also made provision for certain guaranteed representation within the federal Parliament itself [emphasis added].

For Quebec, the opportunity for a dual national allegiance (to Quebec and to Canada) was at the heart of the Canadian federative project. The birth of the Canadian nation was perceived in Quebec as a way to ensure and promote not only the survival, but also the growth of intra-state cultural identities. The new nation would not take the place of particularity and pluralism, but rather would emerge and develop at their side. Respect for the federative principle and the autonomy of each level of government in the exercise of its legislative powers was indissolubly linked to Quebec's desire to ensure the survival and growth of its distinct cultural identity within the new Canadian national collectivity.

What was the nature of the pact? Who were the parties to the contract? What were the conditions? An in-depth examination of all aspects of the theory of the federative pact falls outside the scope of this paper, but it has been undertaken several times by various authors. Suffice it to say that beyond the pact between four British colonies can be found a binational pact, the requirements of which dictated the content of the political pact[78] later ratified by an act of the British Parliament. In the Province of Canada (which comprised today's Quebec and Ontario), long before the pre-Confederation conferences, the national groups were identified with the territories each occupied as a majority: Quebec, for the French Canadians, and Ontario, for the English Canadians, with each geopolitical entity being considered home to a distinct culture.[79] The addition of the two maritime provinces to the planned federation did not alter this cultural bipolarity.

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[78] Richard Arès, *Dossier sur le Pacte fédératif de 1867. La Confédération : pacte ou loi?* (Montreal: Bellarmin, 1967) at 235.

[79] George F Stanley, "Act or Pact? Another Look at Confederation" (1956) 35:1 *Report of the Annual Meeting of the Canadian Historical Association* 1 at 24. It is in fact interesting to note that during the debates on the federation project that took place at the Legislative Assembly of the Province of Canada, on several occasions John A Macdonald used the term "Lower Canadians" or the expression "people of Lower-Canada" to designate the French-Canadian people, thereby emphasizing their territorial (hence political) appurtenance. See Province of Canada, Parliament, *Parliamentary Debates on the Subject of the Confederation of the British North American Provinces, 8th Parl, 3rd Sess* (Quebec: Hunter, Rose & Co, 1865) at 29–30 [*Debates on Confederation*].

The two nations party to the federative pact are, first, the English-Canadian nation concentrated in three of the original provinces (Ontario, New Brunswick, and Nova Scotia) and, second, the French-Canadian nation strongly concentrated in the Province of Quebec. The tendency to believe that a federative compromise was reached between all French Canadians and all English Canadians, wherever they were established, is unfounded. All the pre-Confederation negotiations were conducted between territorial entities populated by a majority of individuals from a specific culture, rather than between two groups uniting all French speakers on the one hand and all English speakers on the other. The question of protection for the rights of the cultural minorities in each colony, in other words the rights of English speakers in Quebec and of French speakers in the other provinces, only arose once the federative form of the Constitution had been defined. In this respect, protection for the intra-provincial French- or English-speaking minorities was not an essential condition for the compromise that led to the adoption of a federative regime.

The main concern of Quebecers and their political leaders in connection with the proposed scheme was the adoption of the federative principle as the foundation for a new system of government.[80] This was the condition *sine qua non* for their support for the new constitution and the constitutional guarantee of their survival and growth as a distinct people. The goal they sought, through federation, was to strengthen their nation by recovering the powers they had lost through legislative union, since Quebec was the only geopolitical entity in which they had a clear majority. In the words of A.I. Silver, "Everything . . . seemed to indicate that Quebec alone was to be the arena of French-Canadian national life, that within the federal alliance, Quebec was to be the French-Canadian country".[81]

The 1867 federative regime emerged from a confrontation of various ideologies and various visions for the new planned country.[82] A series of

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[80] GP Browne, *Documents on the Confederation of British North America* (Toronto: McClelland and Stewart, 1969) at 128.

[81] AI Silver, *The French-Canadian Idea of Confederation, 1864–1900*, 2d ed (Toronto: University of Toronto Press, 1997) at 51.

[82] Brouillet, *supra* note 19 at 122–31.

compromises ensured the support of the colonies and led to the birth of a new nation. From this point of view, the 1867 federative regime appears to have been an agreement or pact joined by all the colonies concerned.

The main conditions of the federative pact were as follows: the adoption of a federative principle was the key condition set by Quebec, which in exchange was willing to concede to the demands of Ontario and the maritime provinces for proportional representation in the lower house of the federal Parliament. For the maritime provinces, equal representation in the Senate and the construction of an intercolonial railway were the most pressing concerns.

2. THE SUPREME COURT AND THE EVOLUTION OF THE FEDERATIVE REGIME

The difficulty that any formal amendment to the Constitution (discussed below) presents for the Canadian constituent has made constitutional jurisprudence the means of choice for making changes to the regime. As a result the courts, and the Supreme Court in the last instance, are responsible for the complex task of gradually adapting the constitutional texts to the new conditions of Canadian society. This evolution, less perceptible and less spectacular than a formal constitutional amendment, nevertheless has a determining impact.

An analysis of the jurisprudence of the Supreme Court since it has acted as the final arbiter of federative disputes shows a tendency to favour the centralization of power.[83] Since the 1970s, the reasons given by the Supreme Court in its decisions concerning the federative division of legislative powers have been increasingly driven by considerations of efficiency, to the detriment of diversity.[84] This functional logic requires a

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[83] For an in-depth study, see Brouillet, *supra* note 19 at 255–322.

[84] This type of reasoning may be seen 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: Jean Leclair, "The Supreme Court of Canada's Understanding of Federalism: Efficiency at the Expense of Diversity" (2003) 28 Queen's LJ 411; Brouillet, *supra* note 19 at 319–22; Ghislain Otis, "La justice constitutionnelle au Canada à l'approche de l'an 2000 : uniformisation ou construction plurielle du droit?" (1995–96) 27:2 Ottawa L Rev 261; Henri Brun, "L'évolution récente de quelques

decompartmentalization of the legislative spheres of each level of government and forms part of the so-called modern conception of the sharing of legislative powers,[85] under which the principle of exclusiveness is not "a particularly compelling doctrine".[86] In several decisions, the Supreme Court has used the expressions "flexible federalism" or "cooperative federalism"[87] to emphasize the idea that the principle of exclusiveness is not absolute. The adoption of this paradigm in the area of federative disputes may act to the detriment of the provinces since it creates many overlapping areas where valid federal and provincial laws both apply, leading to the application of the doctrine of federal paramountcy when the laws prove incompatible and rendering the provincial standards inoperative.[88]

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principes généraux régissant le partage des compétences entre le fédéral et les provinces" in *Congrès annuel du Barreau du Québec (1992)* [Quebec: Service de la formation du Barreau du Québec, 1992] 23.

85 *Ontario (Attorney General) v OPSEU,* [1987] 2 SCR 2 at 17–18, 41 DLR (4th) 1, [*OPSEU*]; *General Motors of Canada v City National Leasing,* [1989] 1 SCR 641, 58 DLR (4th) 255 [*General Motors*]; *Westbank First Nation v British Columbia Hydro and Power Authority,* [1999] 3 SCR 134 at 146–47, 176 DLR (4th) 276. Quite recently the Court reaffirmed its belief in this flexible conception of Canadian federalism in *Canadian Western Bank v Alberta,* 2007 SCC 22, [2007] 2 SCR 3 at paras 35ff [*Canadian Western Bank*]. For an in-depth study of modern and classical paradigms of legislative powers and their jurisprudential applications, see Bruce Ryder, "The Demise and Rise of the Classical Paradigm in Canadian Federalism: Promoting Autonomy for the Provinces and First Nations" (1991) 36 McGill LJ 308.

86 *OPSEU, ibid* at 17.

87 See especially *Canadian Western Bank, supra* note 85; *British Columbia (Attorney General) v Lafarge Canada,* 2007 SCC 23, [2007] 2 SCR 86 [*Lafarge*]; *Fédération des producteurs de volailles v Pelland,* 2005 SCC 20, [2005] 1 SCR 292; *Husky Oil Operations Ltd v Minister of National Revenue,* [1995] 3 SCR 453, 128 DLR (4th) 1; *R v Wetmore,* [1983] 2 SCR 284, 2 DLR (4th) 577; *Multiple Access Ltd v McCutcheon,* [1982] 2 SCR 161, 138 DLR (3d) 1; *Re: Anti-Inflation Act,* [1976] 2 SCR 373, 68 DLR (3d) 452.

88 This means that the norm is deprived of its effects insofar as there is inconsistency and for as long as it lasts. See generally *Rothmans, Benson & Hedges v Saskatchewan,* 2005 SCC 13, [2005] 1 SCR 188 [*Rothmans*].

Exclusiveness is fundamentally connected with the principle of autonomy for each level of government in the exercise of its legislative powers.[89] However, it is clearly impossible, especially with the present-day trend toward increasingly numerous and complex government actions, to completely avoid all "zones of contact"[90] between the two levels of government. On the other hand, federalism will not survive for long if all legislative powers are completely decompartmentalized. On this point, we share the opinion of professors Francis Delpérée and Marc Verdussen that "as soon as [the] derogations [from the principle of exclusiveness] become too numerous and too significant, to the point where they take the lead over the principle, the federal nature of the State is challenged".[91]

This major dilution[92] of exclusiveness in the decisions of the highest Canadian court operates mainly to centralize powers and is reflected in the main doctrines governing the implementation of power-sharing

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89 With regard to the exclusiveness principle, see Eugénie Brouillet, "Le fédéralisme et la Cour suprême du Canada. Quelques réflexions sur le principe d'exclusivité des pouvoirs" (2010) 3 Revue québécoise de droit constitutionnel, online: l'Association québécoise de droit constitutionnel <http://www.aqdc.org>.

90 Jean Beetz, "Les attitudes changeantes du Québec à l'endroit de la Constitution de 1867" in Paul-André Crépeau & Crawford B Macpherson, eds, *L'avenir du fédéralisme canadien* (Toronto: University of Toronto Press, 1966) 113 at 123 [translated by author].

91 Francis Delpérée & Marc Verdussen, "L'égalité, mesure du fédéralisme" in Gaudreault-Desbiens & Gélinas, eds, *supra* note 30 at 202 [translated by author].

92 Eugénie Brouillet, "La dilution du principe fédératif et la jurisprudence de la Cour suprême du Canada" (2004) 45:1 C de D 7.

arrangements[93] and also in the extension of the area of application of several federal competencies.[94]

The evolution of the Canadian constitutional regime driven by the Supreme Court of Canada has led to federative imbalance between the federal and provincial levels of government, to the advantage of the federal level. For a minority nation such as Quebec within Canada, this federal/federated imbalance has legal and political consequences for its ability to achieve self-determination in a number of areas considered vital to its collective growth.

B. THE FEDERATIVE LEGITIMACY OF THE SUPREME COURT OF CANADA

In the following pages we will attempt to place Canada's highest court on the spectrum of federative legitimacy using the triple viewpoint described above. This exercise will highlight certain problems, from the institutional point of view, connected with the process for appointing members of the Supreme Court, given the key functions exercised by the Supreme Court as the arbiter of federative disputes.

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93 *Kirkbi AG v Ritvik Holdings*, 2005 SCC 65, [2005] 3 SCR 302 [*Kirkbi*] (pertaining to trenching power); *Rothmans*, *supra* note 88 (pertaining to the paramountcy doctrine). For an overview of what characterizes the constitutional doctrines, see Eugénie Brouillet, "The Federal Principle and the 2005 Balance of Powers in Canada" (2006) 34 Sup Ct L Rev (2d) 307. The Supreme Court has, nonetheless, recently limited the application of the interjurisdictional immunity doctrine, in favour of a modern conception of the division of legislative power: see *Canadian Western Bank*, *supra* note 85; *Lafarge*, *supra* note 87. However, this doctrine is still directed in practice only at provincial norms, thereby still creating asymmetrical effects in favour of the federal government order.

94 See *R v Hydro-Québec*, [1997] 3 SCR 213, 151 DLR (4th) 32, and *Reference re Firearms Act (Can)*, 2000 SCC 31, [2000] 1 SCR 783 (pertaining to federal authority over criminal law); *General Motors*, *supra* note 83; *Kirkbi*, *supra* note 93 (pertaining to federal authority in matters of trade and commerce); *R v Crown Zellerbach Canada Ltd*, [1988] 1 SCR 401, 151 DLR (4th) 32; *Re: Anti-Inflation Act*, *supra* note 87 (pertaining to the federal power to legislate in matters of national interest or by virtue of its emergency power). For an in-depth analysis, see Brouillet, *supra* note 19.

1. A DEFICIT IN INSTITUTIONAL LEGITIMACY

In a federative regime, the constitutional court responsible for settling federative disputes in the last instance must be able to present an institutional guarantee of neutrality in order to establish its legitimacy. The Supreme Court of Canada has certain problems in this respect, especially concerning its legal status and the process used to appoint its members.

(a) Legal Status of the Supreme Court

The Supreme Court was established by the federal Parliament in 1875[95] under section 101 of the *Constitution Act, 1867*, which gave the Parliament of Canada exclusive power to "provide for the Constitution, Maintenance, and Organization of a General Court of Appeal for Canada".[96] This purely statutory origin for the country's highest court is surprising in a federative regime. As the ultimate arbiter of federative disputes, the existence and essential features of the constitutional court should be set out in the Constitution itself, protecting it from the unilateral interventions of a single party to the federative pact.[97]

During the pre-federative period, some parliamentarians in Canada East[98] had expressed concerns and voiced their opposition to the creation of a general court of appeal with broad powers whose members could be appointed under a process determined at the pleasure of the federal Parliament.[99] The creation of the court was widely opposed in the early years of the federation and finally occurred only in 1875.[100] Today, the institutional

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95 *Supreme Court Act*, *supra* note 73.

96 *Constitution Act, 1867*, s 101, *supra* note 72.

97 These fall rather under the *Supreme Court Act*, *supra* note 73, ss 3, 35–43, 52, 53, 56–78 (regarding its powers), ss 4(1), 6, 12–24 (regarding its organization).

98 This was the name of the Province of Quebec under the Union Regime (1840–1867).

99 *Debates on Confederation*, *supra* note 79 at 693, 861 (Antoine-Aimé Dorion, Lower Canada Liberal Leader); 896, 897 (Henri E Taschereau).

100 Roger Chaput, "La Cour suprême et le partage des pouvoirs : rétrospective et inventaires" (1981) 12 RGD 35 at 35. See also Alexandre A Regimbal, *De sa création à sa consécration en tant que tribunal de dernière instance : la Cour suprême du Canada telle qu'imaginée, instaurée et modifiée par les parlementaires de la Chambre des communes 1867–1949* (Essay

independence of the Supreme Court from the central power is a topic that continues to attract widespread criticism.[101]

The statutory origin of the Supreme Court which, since 1949, has been the ultimate guardian of the Canadian Constitution as a whole and, more specifically, of the federative balance between the two levels of government, does not provide a general framework allowing a "reasonable and well informed person"[102] to perceive as sufficient the independence of the Supreme Court from the federal level of government. As Barry L. Strayer wrote in 1968, "one of the fundamental complaints is that the Court is a purely federal emanation, a creation of Parliament, which is subject to restriction or even abolition by that body".[103] Radical changes could be made to the court without consent from the provinces, undermining its federative legitimacy.

Since the constitutional amendments of 1982, it has been possible to make the case that the existence and essential characteristics of the Supreme Court have been implicitly constitutionalized. Some writers on doctrine, including one of the present authors, argue that sections 41(d) and 42(1)(d) of the *Constitution Act, 1982*,[104] now impose a complex amendment

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presented under the auspices of the Jean-Charles-Bonenfant Foundation) (Quebec: National Assembly, 2008), online: l'Assemblée nationale de Québec <http://www.bibliotheque.assnat.qc.ca>.

[101] The jurisprudential development of the content of independence and impartiality principles during the 1980s is an ordinary part of the interest shown for the issue of the Supreme Court's independence and impartiality: *Valente v The Queen*, [1985] 2 SCR 673, 24 DLR (4th) 161 [*Valente*]; *The Queen v Beauregard*, [1986] 2 SCR 56, 30 DLR (4th) 481 [*Beauregard*]. Subsequent cases appeared specifying and recalling the essential elements of judicial independence. See *Reference re Remuneration of Judges of the Provincial Court (PEI)*, [1997] 3 SCR 3, 150 DLR (4th) 577, [*Provincial Judges Reference*]; *Canada (Minister of Citizenship and Immigration) v Tobiass*, [1997] 3 SCR 391, 151 DLR (4th) 119; *Québec v Barreau de Montréal*, (2001) RJQ 2058, 48 Admin LR (3d) 82 (Qc AC).

[102] This criterion was developed in *Valente*, *ibid* at 684.

[103] Barry L Strayer, *Judicial Review of Legislation in Canada* (Toronto: University of Toronto Press, 1968) at 209.

[104] *Constitution Act, 1982*, *supra* note 9.

procedure for abolishing or modifying the current composition of the Supreme Court and its jurisdiction as the court of final appeal.[105] This question has yet to be settled by the Supreme Court.[106] Whatever the outcome of the debate, the fact remains the Supreme Court is an essentially federal institution in terms of its organization and operation. The legal grey area surrounding its status clearly has an impact on its federative legitimacy.

(b) Composition of the Supreme Court

The composition of the country's highest court is set out in the *Supreme Court Act*, which specifies that the court is composed of eight puisne judges and one chief justice.[107] Turning first to the question of parity in the representation of the federal and federated entities, it is clear that there is a major problem. All the members of the Supreme Court are appointed by the federal government, with no regard to the place where they acquired their legal training (with the exception of Quebec, a topic discussed below). The only condition set by the federal legislator is that only persons who are or have been a judge of a superior court of a province or a barrister or advocate of at least ten years' standing at the bar of a province may be appointed as judge of the Supreme Court. In practice, however, candidates are generally drawn from the same region as the outgoing judge, ensuring a degree of

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[105] The following authors are indeed of this same opinion: Brun, Tremblay & Brouillet, *supra* note 20 at 232–35, 814; WR Lederman, "Constitutional Procedure in the Reform of the Supreme Court of Canada" (1985) 26 R de D 195 at 196–97. For other authors, sections 41 and 42 of the *Constitution Act, 1982,* only indicate constitutional amendment procedures to be followed in order to insert the current provisions of the *Supreme Court Act* into the Constitution. The following share this opinion: Peter W Hogg, *Constitutional Law of Canada*, loose leaf (consulted on 1 April 2011), (Toronto: Carswell, 2008) at 4-21, 4-22, 4-27; Jacques-Yvan Morin & José Woehrling, *Les constitutions du Canada et du Québec : du régime français à nos jours*, vol 1 "Études", 2d ed (Montreal: Thémis, 1994) at 482–83; André Tremblay, *Droit constitutionnel : principes*, 2d ed (Montreal: Thémis, 2000) at 43, 46.

[106] If one day this question is raised before the Supreme Court, it will be up to the Court as court of last resort to make a ruling on its own status, which in itself raises a problem regarding its legitimacy.

[107] *Supreme Court Act*, *supra* note 73, s 4(1).

parity in terms of regional representation. It does not seem unreasonable to think that this practice has acquired the status of a constitutional convention.[108]

The complementarity of the technical skills and expertise of the members of Canada's highest court does not appear to be a problem. The Supreme Court has been, and still is, made up of legal experts of undeniable legal competency whose areas of specialization tend to complement each other.

It is important to remember that pluralism in the composition of a constitutional court requires that no single tendency or sensitivity be represented to the exclusion of others, in order to bolster legitimacy.[109] The tendency may be political (in the partisan sense), social, or economic, and the sensitivity may be with regard to a political and constitutional vision of the country. Canada's parliamentary system, of British origin, generally promotes an alternation between majority governments and is therefore likely to generate a degree of pluralism in the political tendencies (in the partisan sense) of the members of the Supreme Court. Since judges are appointed in Canada by the federal government, a power exercised in practice by the prime minister, it seems reasonable to assume that over time the membership will become composed of legal experts having affinities with the main Canadian parties. With respect to the judges' political and constitutional vision for the country, and more specifically their conception of the federative regime and the direction in which it should evolve, it also seems likely that because they are appointed by the federal government, they will lean toward a jurisprudence that favours the centralizing trend within the federation. We will explain this link below.

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[108] *Ibid*, s 5. A constitutional convention is a rule established by agreement between governing forces or politicians that is not sanctioned by the courts but applied and complied with by all parties by reason of political necessity: Brun, Tremblay & Brouillet, *supra* note 20 at 43ff. In the first reference on patriation, the Supreme Court laid down three conditions for establishing a convention: the existence of one or more precedents; the fact that the actors in the precedents believed that they were bound by a rule; and the existence of a reason for the rule: *Re: Resolution to Amend the Constitution*, [1981] 1 SCR 753, 125 DLR (3d) 1 [*Re: Resolution*].

[109] Favoreu, *supra* note 40 at 575.

Finally, concerning representation of the diversity inherent in Canadian society (whether national, cultural, linguistic, or other) in the composition of the Supreme Court, the *Supreme Court Act* requires the federal government to appoint three judges from Quebec, out of a total of nine.[110] This legislative requirement, which since 1982 has probably acquired constitutional status (see above for more discussion),[111] is intended to ensure the presence on the bench of judges trained in Quebec civil law. It is also possible to see in this an underlying aim to ensure suitable representation for Quebec's distinctive culture. The six other seats are generally allocated to Ontario (3), the western provinces (2), and the Atlantic provinces (1). It is important to note that this is what happens in practice, but that the Canadian government could easily decide to do otherwise.

Apart from the rule concerning representation for Quebec, no limits are placed on the federal government's discretion in appointing judges. Although the Supreme Court has always been composed, in actual practice, of French-speaking and English-speaking members, bilingualism is not a criterion for an appointment. The subject has been a focus of debate for the past year and a federal bill on the subject died with the general elections of 2011.[112] Bilingualism for the country's senior judges seems to us to be a fundamental requirement in a federation that has officially proclaimed itself bilingual since 1969.[113] Last, we should mention that no Aboriginal nation or visible cultural community has ever been represented at the Supreme Court.

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[110] *Supreme Court Act*, *supra* note 73, s 6.

[111] The failed constitutional amendment projects of 1971 (Victoria Charter) and 1987 (Meech Lake Accord) and the 1992 Charlottetown Accord would have formally constitutionalized this requirement.

[112] This involved the federal private Bill C-232. If the bill had been 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. The Quebec Bar Association also adopted a resolution confirming the preceding in June 2008 (cf: Letter from Gérald R. Tremblay to Prime Minister Stephen Harper (21 July 2008), online: Barreau du Québec <http://www.barreau.qc.ca>).

[113] *Official Languages Act*, RSC 1970, c O-2.

(c) Method Used to Appoint Judges

As we have seen, judicial power is the state function that least reflects the country's federate nature. One level of government, the federal level, has the discretionary power to appoint all the judges sitting in the country's higher courts, including the Supreme Court.[114]

In terms of individual independence and impartiality, the unilateral appointment process creates major problems for the Supreme Court's legitimacy as the arbiter of federative disputes, since it prevents the judges from being perceived as independent from the federal level of government. In a federative regime, in general, the federated entities play a role in the process used to appoint the members of the court responsible for settling federative disputes in the last instance. This is, in fact, an essential condition for the appearance of neutrality required of the judicial arbiter. However, here the federal government may find itself in a situation akin to being the judge in its own case,[115] creating at least an appearance of partiality. Several authors have concluded that the absence of the provinces from the appointment process for the Supreme Court constitutes a major breach of the federative principle.[116] The appointment of Supreme Court judges by the federal government alone detracts from its federative legitimacy.

The issue was addressed by proposed constitutional amendments in the Meech Lake and Charlottetown Accords, which provided for the appointment of Supreme Court judges by the federal government on a proposal by the provincial governments. The two accords would also have enshrined in the Constitution the *Supreme Court Act* provision that specifies that at least three of the nine judges must be from Quebec. At this point, we should note that the practice introduced in 2006 by the federal government that allows a parliamentary committee to question the government's

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[114] *Constitution Act, 1867*, *supra* note 72, ss 96–101; *Supreme Court Act*, *supra* note 73, s 4(2).

[115] Chaput, *supra* note 100 at 35.

[116] See Wheare, *supra* note 19 at 55, 56, 71; Jacques Brossard, *La Cour suprême et la Constitution* (Montreal: Presses de l'Université de Montréal, 1968) at 123; Morin & Woehrling, *supra* note 105 at 546; Brun, Tremblay & Brouillet, *supra* note 20 at 411–12.

candidates before their formal appointment as a judge has no impact on the Supreme Court's federative legitimacy, since the provincial governments are still excluded from the formal appointment process. The same applies to the establishment of advisory committees to draw up a three-candidate shortlist from the list of pre-selected candidates provided by the federal Minister of Justice after consulting with the attorneys general of the provinces and territories, chief justices, and eminent members of the legal community.[117] There can be no doubt that the federal government still holds the decision-making power.

It is also important to emphasize that the proposals for constitutional reform in the Meech Lake and Charlottetown Accords would not have solved all the problems relating to the institutional legitimacy of the Supreme Court. Given that the federal government also has the exclusive power to appoint all the judges of the provincial superior and appeal courts[118] and that a large majority of Supreme Court judges are chosen from this pool, a true reform of the process for appointing judges to the Supreme Court would also have to cover the appointment of judges to the higher provincial courts. An appointment procedure for all these courts involving both the federal and provincial governments appears to us to be the only possible way to correct the Supreme Court's federative legitimacy deficit.

Besides the legitimacy problem created by the unilateral process for appointing the members of the Supreme Court, several observers have noted its noted its lack of separation from the political sphere political nature. In 1978, Bora Laskin, a former chief justice of the Supreme Court, wrote that a candidate's political opinions, without being a preponderant factor in the selection process, were not without consequence.[119] Various recent

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[117] Canada, Minister of Justice, *Proposal to Reform the Supreme Court of Canada Appointments Process*, online: Department of Justice <http://www.justice.gc.ca>.

[118] *Constitution Act, 1867*, s 96, *supra* note 72.

[119] "The political opinions of the judiciary do not really have any importance, at best one may surmise that between two legal authorities of equal value, the political party in office will likely choose the one whose opinions are most in line with those of the party's philosophy": Bora Laskin, "La Cour suprême du Canada" (1978) Revue internationale de droit comparé 139 at 141, cited in Gély, *supra* note 23 at 170. Jacques Frémont also shares this opinion. "In reality, the 'political' component still remains an important factor in the

statements, including one by the chief justice of the Quebec Court of Appeal, have fuelled existing doubts about the weight of partisan political considerations in the federal appointment process.[120] One thing is clear: the opaque nature of the process prevents the Supreme Court from being reasonably perceived as independent[121] and prevents citizens from having the firm conviction that its judges exhibit all the neutrality they need to perform their duties, particularly in the area of federative disputes.[122]

In short, from the institutional standpoint, the Supreme Court's essentially statutory legislative foundation, the relative lack of diversity in its composition, and—above all—the unilateral method of judicial appointment by the central government all undermine its federative legitimacy. This problem is made all the more glaring by the fact that, in Canada, it performs duties of the greatest importance for the evolution of the federative regime, as we will see below. It is also possible to suggest that the Supreme Court's centralizing approach in the jurisprudence dealing with the division of legislative powers is related to the unilateral and political nature[123]

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making of appointments as well as recent or former affinities that also weigh in the balance": Frémont, *supra* note 4 at 656.

120 On April 26, 2005, Justice Robert stated during a Radio-Canada broadcast that "[i]n order to be appointed as a judicial candidate to sit on the bench of a federal court, I believe that it is a kind of 'prerequisite' that such candidate not be a sovereigntist. As such, I believe this to be an opinion widely shared amongst judges in Canada." « Pas de réprimande pour le juge Robert » *Le Devoir* (4 August 2005), online: Le Devoir <http://www.ledevoir.com>. Michel Robert was chairman of the Liberal Party of Canada from 1986 to 1990. This remark followed allegations from a former general director of the Quebec wing of the Liberal Party of Canada, Benoît Corbeil, who had maintained that attorneys had been appointed to the bench on the basis of their political allegiance. Chief Justice Robert's declaration was reprimanded in a motion in the House of Commons that judged it akin to discrimination "on the basis of political opinion" House of Commons, *Journals*, 38th Parl, 1st Sess, No 110 (7 June 2005).

121 This was the criterion adopted by the Supreme Court on an issue of judicial independence: *Valente*, *supra* note 101 at 689.

122 See Michelle Cumyn, "Mode de nomination des juges—Un tabou dans la communauté juridique", *Le Devoir* (17 May 2005) online: Le Devoir <http://www.ledevoir.com>.

123 Jacques Brossard affirmed what follows with regard to this issue: "[T]here often seems to be a coincidence between the process of appointing members of the highest level of

of the appointment process. This is why these institutional aspects of the Supreme Court as the ultimate arbiter of federative disputes must be reformed.

2. A FRAGILE LEVEL OF FUNCTIONAL LEGITIMACY

The importance of the duties performed by the Supreme Court of Canada in the federative field comes from its general jurisdiction for appeals, its ability to exercise *a priori* constitutional review via the referral procedure, the paradigm used to interpret legislation, and its power of the last word in federative disputes.

(a) A general court of appeal

In Canada, the constitutional review of legislation is a task entrusted to the court system as a whole (based on the judicial review system). The Supreme Court, placed at the top of the court hierarchy, can be called on to settle all disputes in the last instance, including federative disputes.

Since section 101 of the *Constitution Act, 1867,* gives the federal Parliament the power to constitute a "General Court of Appeal for Canada", we consider the court's general jurisdiction constitutionalized; the federal Parliament could not, for example, unilaterally restrict its jurisdiction to make it a specialized constitutional court. The term "general" refers to the fact that the Supreme Court of Canada has jurisdiction to settle all Canadian disputes, whether in the field of constitutional, criminal, civil, or administrative law—and most importantly, in the federative arena, both provincial and federal cases. As a result, "integration is the chief feature of the Canadian judicial system. The relative division of judicial functions does not match the division of legislative and executive functions within the federation".[124]

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control and the greater or lesser centralizing tendency of its decisions": Brossard, *supra* note 116 at 242.

[124] Brun, Tremblay & Brouillet, *supra* note 20 at 795 [translated by author]. See *Ontario (PG) v Pembina Exploration Canada Ltd*, [1989] 1 SCR 206, 57 DLR (4th) 710.

The Supreme Court's general jurisdiction offers it several potential sources of legitimacy, and any deficit in terms of federative legitimacy may be compensated for by its strong legitimacy as the court of final resort in general law and as the final appeal court in the area of fundamental rights and freedoms. The court's multiple sources of legitimacy may explain, in part, the lack of interest shown by the legal-doctrine community in the federative dimension.

(b) Referral Procedure

In Canada, judges do not review constitutional questions on their own initiative. The matter must be raised by one of the parties to a dispute at first instance.[125] Review on the court's own initiative does not exist in Canadian constitutional law and, as a result, creates no problem for the functional dimension of the Supreme Court's federative legitimacy.

The *Supreme Court Act*, however, allows the federal government to refer a question to the Supreme Court to receive its opinion.[126] The Supreme Court is required to answer the question unless it is essentially political,[127] in which case the court must justify its refusal. Although in principle the court simply gives its opinion, that opinion is considered to have the same legal weight as a decision rendered following litigation.

The referral procedure raises questions concerning the functional dimension of federative legitimacy, since it leads to a form of *a priori* review[128]—in other words, review before the rule concerned is duly

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[125] *R v Blais*, 2003 SCC 44, [2003] 2 SCR 236 at 241; *Provincial Judges Reference, supra* note 101 at 147.

[126] *Supreme Court Act, supra* note 73, s 53. Some provincial governments may also address such a procedure to the highest provincial tribunal. Such is the case in Quebec; see *Court of Appeal Reference Act*, RSQ c R-23, s 1. The Quebec Statute, as in the case of other provincial statutes, provides for the possibility of appealing such advisory opinions to the Supreme Court (s 5.1).

[127] *Re: Resolution, supra* note 108 at 768, 884; *Re:Objection by Quebec to a Resolution to Amend the Constitution*, [1982] 2 SCR 793 at 805, 140 DLR (3d) 385; *Re: Quebec, supra* note 77 at 235ff.

[128] Fabien Gélinas, "La primauté du droit et les effets d'une loi inconstitutionnelle" (1988) 67 Can Bar Rev 455 at 459.

promulgated by the state's political organs. The dividing line between judicial and political functions becomes more tenuous and more difficult to discern. The procedure leads the Supreme Court into a type of action that it would not consider itself authorized to perform in the context of specific litigation. The referral procedure, for example, allows the government to ask for the Supreme Court's opinion on the constitutionality of legislative bills and to pose theoretical questions or questions with a strong political component.[129]

One example is *Reference re Secession of Quebec*, in which the federal government asked the Supreme Court to rule on the ability of Quebec, under the Constitution of Canada, to unilaterally affect its secession from Canada. Responding to the submission of the *amicus curiae* that the court should refuse to answer questions posed in the reference because to do so would be to usurp a democratic decision that the people of Quebec might be called upon to make, the court considered that the questions, despite their major political implications, had a sufficient legal component to warrant the intervention of the judicial branch.[130]

The Supreme Court of Canada may be asked to exercise constitutional oversight *a posteriori*, when a specific dispute is brought before it, or *a priori*, via the referral procedure. This plurality of possibilities for court oversight expands the role it plays in the constitutional evolution of the Canadian federation. As a result, the need for institutional guarantees of independence and neutrality with respect to the political authorities grows even greater if the Supreme Court is to preserve its legitimacy.

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[129] *Re: Quebec, supra* note 77at para 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 it would never entertain in the context of litigation. No matter how closely the procedure on a reference may mirror the litigation process, a reference does not engage the Court in a disposition of rights. For the same reason, in the case of a reference the Court may deal with issues that might otherwise be considered not yet 'ripe' for being the subject of judicial recourse.

[130] *Ibid* at paras 26–28.

(c) The Hegemony of the Progressive Approach

The Judicial Committee of the Privy Council, as the court of final appeal until 1949, interpreted the *Constitution Act, 1867*, as an ordinary statute, applying the rules of statutory interpretation. Among these rules one first finds the literal rule, which presumes that the author of the law expresses himself clearly so that his intent should be deduced from the words used.[131] The search for the intent of the legislator or constituent must therefore be based primarily on the letter of the law. If the words used are not clear—that is, where there may be doubt as to the meaning of a provision—the words must be interpreted in a manner consistent with the statute as a whole. In other words, the provisions must be read together in order to give effect to each. Although the Judicial Committee began to show more openness, beginning in the 1930s, to a progressive or flexible interpretation of the *Constitution Act, 1867*,[132] in general it did not question the application of the rules of statutory interpretation to the Constitution. In this way, the Judicial Committee allowed the Constitution to evolve and adapt to the changing conditions of Canadian society in a manner consistent with the overall spirit of the original federative agreement.

The application of the rules of statutory interpretation to the provisions of the *Constitution Act, 1867*, by the Judicial Committee led, particularly in the 1930s, to a wave of criticism from English-Canadian authors who argued that this prevented the adaptation of the constitutional text to the new economic and social conditions of Canadian society.[133] It appears that it was

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131 Brun, Tremblay & Brouillet, *supra* note 20 at 777-79.

132 We may recall that it is in fact the Judicial Committee to whom we are indebted for the 1930 analogy between the Constitution and a living tree. See *Edwards v A-G for Canada*, [1930] AC 124 at 136, [1930] 1 DLR 98 ("[t]he British North America Act planted in Canada a living tree capable of growth and expansion within its natural limits") [*Edwards*].

133 WPM Kennedy, *Some Aspects of the Theories and Working of Constitutional Law* (London, UK: Oxford University Press, 1932) at 92–93; Vincent C Macdonald, "Judicial Interpretation of the Canadian Constitution" (1935–36) 1:2 UTLJ 260 ("[P]revailing political theories which indicate the propriety or necessity of a greater degree of national control over, and governmental intervention in matters of social welfare and business

not the inability of the Judicial Committee to allow the constitutional text to evolve that inflamed their passions, but rather the direction the Committee gave to that evolution. For the authors concerned, new societal conditions required the centralization of powers in the hands of the federal authorities[134]—something that the federative jurisprudence of the Judicial Committee did not support.

Beginning in the 1970s, the Supreme Court gradually moved away from the literal interpretation method, introducing the so-called progressive or dynamic interpretation method, which allowed it to correct any mismatch between the constitutional text and the societal conditions it was intended to govern. As a result, judges were expected to choose the most suitable constitutional prescriptions in light of their political consequences. Furthermore, the enshrinement of a charter of rights and freedoms in the Canadian Constitution in 1982 was instrumental in opening up constitutional jurisprudence to the winds of change.[135]

Our goal here is not to deny the inherent need to adapt a constitutional text, but rather to highlight the necessity of guidelines[136] for the task, without which the holders of judicial power may be seen as usurpers of the constituents' power and will potentially harm their own legitimacy. One of the guidelines for adapting the rules governing legislative power-sharing to the new conditions was the intent of the constitutents of 1867 to create a federation in Canada, with all that that involves in legal terms, including

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activity" at 282). See also Bora Laskin, "Peace, Order and Good Government—Re-examined" (1947) 25 Can Bar Rev 1054 at 1085.

134 Alan C Cairns, "The Judicial Committee and Its Critics" (1971) 4 CJPS 301 at 339.

135 Brun, Tremblay & Brouillet, *supra* note 20 at 788–95; Jacques Frémont, "La face cachée de l'évolution contemporaine du fédéralisme canadien" in Gérald A Beaudoin, Joseph E Magnet et al, eds, *Le fédéralisme de demain : réformes essentielles* (Montreal: Wilson & Lafleur, 1998) at 56.

136 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. See Brouillet, *supra* note 19 at 201–18, 255–66; Brouillet, *supra* note 89.

respect for the autonomy of both levels of government in the exercise of their exclusive legislative powers.

The principle of progressive interpretation has been the preferred choice of the Supreme Court of Canada for several decades in constitutional matters in general.[137] The principles of interpretation play an undeniable rhetorical role in the art of adjudication. They constitute guides and tools for use by judges in justifying and legitimizing their decisions. The choice of one principle rather than another is left entirely to the discretion of the judges, whose objective is to persuade the target audience that the decision is not only reasonable, but also founded in law.[138] The problem is with the target audience. Since broad, progressive interpretation is based on consideration of the expectations and values of society, the dominant expectations and values taken into account will, of course, be those of the majority—and a weakening of the federative principle as a normative force is generally in line with the expectations and dominant values of Canadian society, or a least of its elite, which favours the centralization of power. This desire for centralization is closely linked to the strong attachment felt, in general, by English-Canadians for central government.[139] For them, this is the level of government that

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[137] In the case of *Re: Anti-Inflation Act*, *supra* note 87 at 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 SCR 357 at 365–66, 9 DLR (4th) 161, 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 of the Privy Council. See also *Québec (Commission des droits de la personne et des droits de la jeunesse) v Maksteel Québec Inc*, 2003 SCC 68, [2003] 3 SCR 228 at para 11. That same year, in the decision *Hunter v Southam,* [1984] 2 SCR 145 at 155, 11 DLR (4th) 641, the Court reiterated its preference for the progressive interpretation of the Constitution, this time in its entirety. In this instance, the Court once again referred to the analogy of the Canadian Constitution as a "living tree" conceived of by Lord Sankey in the case of *Edwards*, *supra* note132. See, with the same effect, *Beauregard*, *supra* note 101 at 81.

[138] Chaïm Perelman, "La motivation des décisions de justice, essai de synthèse" in Perelman & Foriers, *supra* note 68 at 412; Côté, *supra* note 68 at 25–26.

[139] With regard to this English-Canadian sense of identity, Philip Resnick had this to say:

should have the most power, in order to implement national goals. As pointed out by François Rocher:

> The legitimization of the Canadian political regime is no longer based on the degree of compliance with the federal principles, but on the match between public policy and the needs expressed by the citizenry. In other words, federal legitimacy is no longer essential to the stability of the Canadian political system, at least from the standpoint of the dominant approach in Canada.[140]

The margin of judicial discretion inherent in the constitutional interpretation process appears, at least from the seventies onward, to have become significantly larger since the decision by the Supreme Court to apply a broad, progressive approach to the constitutional texts. In a federative regime that includes a minority national group, respect for the federative nature of the constitutional structure is vital. In their work to adapt the constitutional texts, the courts must promote a form of interpretation that is compatible with the essential legal characteristics of the federative principle.

For example, in 2005 the Supreme Court had an opportunity to reiterate its preference for the progressive approach in a case involving the division of legislative powers. In *Reference re* Employment Insurance Act *(Can.), ss 22 and 23,*[141] the Supreme Court was asked to examine the constitutional validity of the new federal legislative provisions governing parental leave. It had to determine whether the provisions[142] encroached upon provincial legislative competence over property and civil rights and matters of a merely

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> 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.

Philip Resnick, "The Crisis of Multi-National Federations: Post-Charlottetown Reflections" (1994) 2 Rev Const Stud 189 at 191.

[140] Rocher, *supra* note 28 at 136 [translated by author].

[141] *Reference re* Employment Insurance Act *(Can.), ss 22 and 23,* 2005 SCC 56, [2005] 2 SCR 669.

[142] *Employment Insurance Act*, SC 1996, c 23, ss 22–23.

local or private nature[143] or whether they came under federal legislative competence over employment insurance.[144] The Court used the principle of progressive interpretation to identify the extent of federal competence over employment insurance without looking at the original intention of the constituents. The Quebec Court of Appeal, which had used an approach based on original intent, had concluded that the evidence showed that the constitutional amendment of 1940, which transferred provincial jurisdiction over unemployment insurance to the federal government, was not intended to extend jurisdiction over social security and assistance measures, which remained with the provinces. If this had been the case, the provinces would have refused to agree to the constitutional amendment.[145] According to the Court of Appeal, the principle of progressive interpretation could not be applied if it involved ignoring the intent of the constituents in 1940.[146]

This hierarchy in the principles of interpretation, in other words, the primacy given by the Supreme Court to a progressive rather than an original-intent approach, tends to extend the discretionary margin already available to the Court in the constitutional field and to increase the importance of its role in federative disputes.

(d) Power of the "Last Word"

In a democratic regime, the legitimacy of judicial power is based on the fact that it does not have the last word in constitutional matters. However, in federative disputes, the Supreme Court possesses this power de facto.

The metaphor of dialogue has been used increasingly in recent years in Canadian jurisprudence and doctrine to characterize relations between the judicial and political powers.[147] It is presented as a middle ground between

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[143] *Constitution Act, 1867*, *supra* note 72 at ss 92(13), 92(16).

[144] *Ibid* at para 91(2A).

[145] *Québec (Attorney General) v Canada (Attorney General)*, [2004] RJQ 399, 245 DLR (4th) 515 at para 71,73 (Qc CA).

[146] *Ibid* at para 92.

[147] Credit for the preceding goes to Peter W Hogg & Allison A Bushell, "The *Charter* Dialogue Between Courts and Legislatures (or Perhaps the *Charter of Rights* Isn't Such a Bad Thing After All)" (1997) 35 Osgoode Hall LJ 75. The Supreme Court thereafter had

judicial supremacy and legislative supremacy and is based on the key idea that parliaments hold the ultimate power to review or overturn a court decision.[148]

The dialogue theory was developed and applied in the field of constitutional review based on the rights and freedoms enshrined in the *Canadian Charter of Rights and Freedoms*[149], and it is essentially based on two features of this constitutional text: (1) the ability of Parliament and legislatures to subject the rights and freedoms guaranteed by the *Charter* to reasonable limits prescribed by law that can be demonstrably justified in a free and democratic society, and (2) the power of Parliament and legislatures to protect a statute from judicial constitutional oversight with regard to rights and freedoms, if this is expressly declared in the statute concerned.[150] These limitation and derogation clauses have no equivalent when it comes to constitutional oversight of the division of legislative powers.

Some authors who have looked at the dialogue metaphor in more detail also identify the possibility of suspending the effects of invalidity and the referral procedure as two other tools that establish a dialogue-based relationship between the judicial and political powers.[151] Both can apply in the area of federative disputes. In some of its decisions, the Supreme Court has suspended the effects of declaring a rule invalid to give the legislator time to remedy the situation. The referral procedure is another dialogue-based

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recourse to the preceding in several decisions, the first of which was *Vriend v Alberta*, [1998] 1 SCR 493 at 138, 156 DLR (4th) 385. For an insight into the academic and jurisprudential history of this metaphor, see Christopher P Manfredi, "The Life of a Metaphor: Dialogue in the Supreme Court, 1998–2003" (2004) 23 Sup Ct L Rev (2d) 105.

148 See Kent Roach, "Dialogic Judicial Review and its Critics" (2004) 23 Sup Ct L Rev (2d) 49 at 55–56; Eugénie Brouillet & Félix-Antoine Michaud, "Les rapports entre les pouvoirs politique et judiciaire en droit constitutionnel canadien : dialogue ou monologue?" in *Actes de la XIXe Conférence des juristes de l'État (2011)* (Cowansville: Yvon Blais, 2011) at 3–35, online: Conférence des juristes <http://www.conferencedesjuristes.gouv.qc.ca>.

149 *Canadian Charter of Rights and Freedoms*, *supra* note 9.

150 *Ibid*, ss 1, 33 (respectively).

151 See Roach, *supra* note 148.

tool, in the sense that it allows parliaments to "test" the constitutionality of their legislative bills before they are passed. In our view, although all of these examples can be seen as tools for interaction between the courts and parliaments, the fact remains that the parliaments must ultimately comply with a court decision.

In the area of federative disputes, the metaphor of dialogue is consequently unsound.[152] The only way to get around the Supreme Court's interpretation of a constitutional provision is either to persuade it to change its mind in a later decision or to amend the Constitution to neutralize the effects of the jurisprudence. However, in Canada, the constituents' power is practically paralyzed: first because of the rigidity of the main amendment procedures[153] and second because of the emergence of competing visions for the future of the Canadian federation among Quebecers and other Canadians. In general, Canadians outside Quebec are in favour of a centralizing evolution of the Canadian federation and symmetry in provincial legislative powers, while Quebecers support greater decentralization of powers and the establishment of asymmetrical federalism.[154] This deep divide explains, in particular, the failure of the last two attempts at constitutional amendment[155] and the lack of any new proposals put forward by the current federal parties. The maintenance of a federative balance and protection for the autonomy of the provinces are,

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[152] In many decisions, the Supreme Court itself uses "arbiter" as a figure of speech to describe its role in federative issues. See *Canadian Western Bank*, *supra* note 85 at para 24; *Beauregard*, *supra* note 101 at paras 27, 30 ("umpire", "resolver", "interpreter"); *Therrien (Re)*, 2001 SCC 35, [2001] 2 SCR 3 at para 108:

> The judicial function is absolutely unique. Our society assigns important powers and responsibilities to the members of its judiciary. Apart from the traditional role of an arbiter which settles disputes and adjudicates between the rights of the parties, judges are also responsible for preserving the balance of constitutional powers between the two levels of government in our federal state.

[153] 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 per cent (50%) of Canada's population: *Constitution Act, 1982*, part V, ss 38, 41, 42, *supra* note 9.

[154] Brouillet, *supra* note 19 at 376–78.

[155] Meech Lake Accord, 1987; Charlottetown Accord, 1992.

within the Canadian federative regime, especially dependent on the constitutional interpretation of the courts, and of the Supreme Court in particular. It is therefore reasonable to state that the Supreme Court enjoys the power of the last word, if not de jure, at least de facto.

It can be concluded, with respect to the functional dimension of the its federative legitimacy, that the Supreme Court plays a role of the utmost importance within the Canadian federative regime for three reasons: (1) because it offers Parliament a way to solicit its opinion by referring questions that would otherwise be considered outside the scope of the judicial system; (2) because it applies a progressive approach to interpretation that frees it of many of the limits on the exercise of its judicial discretion; and (3) because of the power of the last word that it holds de facto in the area of federative disputes. This observation highlights the need, given the context, to reform the institutional guarantee of neutrality of Canada's highest court, in particular with respect to the process for appointing its members.

3. SOCIAL LEGITIMACY QUESTIONED IN QUEBEC

In the final analysis, as we have seen, legitimacy is based on public recognition. It would be interesting and useful to conduct an empirical survey of support for the Supreme Court in civil society and the legal community in Canada, but such a survey falls outside the scope of this paper. However, we can still examine the social dimension of the Supreme Court's legitimacy from the restricted, and therefore imperfect, viewpoint of the various positions taken publicly by the Quebec government in recent decades concerning the question of legitimacy.

Since the late 1940s, almost all Quebec governments, of whatever shade, have made demands for constitutional amendments concerning Canada's highest court,[156] affecting both its institutional and functional dimensions. The demands cover the process for appointing members, the composition of the Supreme Court, and its general appeal jurisdiction. They are all based on

[156] Quebec, Ministère du Conseil exécutif, Secrétariat aux affaires intergouvernementales canadiennes, *Québec's Positions on Constitutional and Intergovernmental Issues, 1936 to March 2001*, online: Secrétariat aux affaires intergouvernementales canadiennes <http://www.saic.gouv.qc.ca> [*Québec's Positions*].

the goal of protecting the cultural particularity of the Quebec nation within the Canadian federative regime.

With respect to the process for appointing judges, the Quebec government demanded as early as 1947 that they be appointed jointly by the provincial and federal authorities. At the time, the federal campaign to abolish appeals to the Judicial Committee of the Privy Council in London was at its height, and although a large majority of federal parliamentarians were generally in favour of the idea, several were concerned about the effects it would have on the neutrality of the process for arbitrating federative disputes. The federal Progressive Conservative party, which formed the official opposition at the time, demanded that the provinces be consulted on the topic, a move opposed by the Liberal government.[157] Against this background, Maurice Duplessis, Quebec's premier from 1944 to 1959, set the bar for Quebec's constitutional demands with regard to the institution that would be given responsibility for arbitrating federative disputes in the final resort:

> The members of the Canadian court that would be created to replace the Privy Council should be appointed by the federal and provincial governments. It is not reasonable and in conformity with a true comprehension of national unity that the federal authority appropriate for itself the right to unilaterally choose the arbitrators called upon to decide on the respective rights of each party. Québec considers that the Supreme Court of Canada should meet all the conditions required of a third arbitrator for constitutional matters and Canadian intergovernmental relations.[158]

The need for a joint appointment procedure has been reiterated in Quebec's constitutional demands since that time. Daniel Johnson, Quebec's premier from 1966 to 1968, called for the creation of a constitutional court with two-thirds of the judges appointed by the provincial governments: "The composition of this court should reflect the federal character of common institutions and the Canadian cultural duality."[159] The proportion of two-thirds of the judges appointed by the provinces featured in later calls

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[157] Regimbal, *supra* note 100 at 29–33.

[158] Cited in *Québec's Positions*, *supra* note 156 at 22 [citations omitted].

[159] *Ibid* at 34.

by other Quebec premiers.[160] Over the decades, this demand has been replaced by the suggestion that the Quebec government should appoint the three judges from Quebec, or that they should be appointed by the federal government with a "significant contribution"[161] or "direct involvement"[162] by Quebec.

With regard to the Supreme Court's composition, besides the joint appointment procedure, the Quebec government has also proposed that the Chief Justice should be alternately French speaking and English speaking.[163] More recently, in 2008, the National Assembly unanimously adopted a resolution "affirming that French language proficiency is a prerequisite and essential condition for the appointment of Supreme Court of Canada judges".[164] Finally, Quebec governments have called ceaselessly for the presence of three Quebec judges to be formally entrenched in the Constitution.[165]

In connection with the functional dimension of the Supreme Court's federative legitimacy, the creation of a specialized constitutional court was for many years a feature of Quebec's demands,[166] although it seems to have been dropped more recently. The Supreme Court has perhaps, in this regard, benefitted from the plurality of sources of legitimacy created by its general

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[160] Government of Jean-Jacques Bertrand (1968–1970); Government of René Lévesque (1976–1980), *ibid* at 38, 52 (respectively).

[161] Government of Pierre-Marc Johnson (1985); Government of Robert Bourassa (1985–1990), *ibid* at 63, 68.

[162] Benoît Pelletier, Minister responsible for Canadian Intergovernmental Affairs and Aboriginal Affairs for the Quebec government, "L'avenir du Québec au sein de la fédération canadienne" (Speech given at the Canada Research Chairs Symposium on Quebec and Canadian Studies, « Dynamiques et enjeux politiques du fédéralisme canadien », 1 October 2004), online: Secrétariat aux affaires intergouvernementales canadiennes <http://www.saic.gouv.qc.ca> [translated by author].

[163] Government of René Lévesque (1980–1985); Government of Pierre-Marc Johnson (1985), *Québec's Positions*, *supra* note 156 at 59, 63.

[164] Adopted on 21 May 2008, online: Secrétariat aux affaires intergouvernementales canadiennes <http://www.saic.gouv.qc.ca>.

[165] *Québec's Positions*, *supra* note 156.

[166] From 1966 to 1980, see *ibid.*

jurisdiction for appeals (in the areas of general law, fundamental rights and freedoms, and federative disputes), making it an institution that is generally accepted and respected, even though criticized in multiple areas in Quebec. Beginning in the 1980s, then, Quebec's demands have focused more on ways to reform the Supreme Court than on ways to relieve it of its constitutional jurisdiction.

A proposal submitted by the government of René Lévesque in the period following the referendum on sovereignty-association in 1980 deserves mention here, since it had several qualities from the point of view of federative balance and respect for the binational nature of the original federative pact. The proposal was to create, within the Supreme Court, a special bench of judges with equal representation from Quebec and the other Canadian provinces to settle federative disputes.[167] The advantage of this proposal, from an institutional point of view, was that it would ensure a composition that reflected Canadian national duality. From a functional point of view, it would also have counterbalanced the centralizing tendency within the Canadian federation, which appears to go against the wishes of a large part of the Quebec population. However, the feasibility of such a proposal was practically nil, since a majority of the federation's components, in themselves composed of an English-speaking majority, were against the idea of recognizing Quebec's distinct culture as a fact in the Constitution, even in the form of a clause to help interpret its provisions.

Once again with respect to jurisdiction, Quebec governments have demanded that civil disputes from Quebec no longer come under the jurisdiction of the Supreme Court in the last resort, but under the jurisdiction of the province's court of appeal, with judges appointed by the Quebec government.[168] This proposal was replaced by another proposal, concerning the creation of a special bench composed solely, or in the majority, of the Quebec judges sitting in the Supreme Court.[169]

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[167] *Ibid* at 59.

[168] Government of Maurice Duplessis (1944–1959) and government of René Lévesque (1976–1980), *ibid* at 22,52 (respectively).

[169] Government of René Lévesque (1980–1985) and Government of Pierre-Marc Johnson (1985), *ibid* at 59, 63 (respectively).

Last, it is important to mention that the concerns expressed by Quebec governments with regard to the role played by the Supreme Court in federative disputes also arose during discussions to constitutionalize a charter of human rights and freedoms, specifically because of the potentially integrative and standardizing effects of the reform on the federative balance. As stated by Daniel Johnson, premier of Quebec from 1966 to 1968:

> In a unitary country with a homogeneous society, declarations of rights can be seen as summations of the moral philosophy accepted by the entire population, and the rights of citizens can be derived therefrom. The result is to entrench in the Constitution a certain homogeneity of ethical concepts whose application is the responsibility of the courts. We feel that in a federal system and particularly in the case of Canada, it would be a serious political mistake to proceed in that way. Quebec's civil law tradition and the way in which it recognizes and protects fundamental rights are in fact significantly different from the procedure in common law courts. If therefore we contemplate a declaration of rights that is so basic that the highest constitutional court in Canada must make these rights explicit, we are obliged to demand that the formation of a constitutional court be examined first.[170]

Although our review of the issues is by no means exhaustive, we can suggest without fear that, at least via the statements of their elected political representatives, Quebecers appear to have questioned the federative legitimacy of the Supreme Court since it became the ultimate arbiter of federative disputes in 1949. The fundamental role played by the Supreme Court in the evolution of the Canadian federative regime, and therefore in the balance between the powers of the federal and provincial levels of government, explains why it has received such sustained attention in Quebec. The federative principle and its essential corollary, autonomy for each level of government in the exercise of its legislative powers, are seen in Quebec as not just a technique for governance, but the guarantee that Quebec will be able to take its rightful place as a national group within the Canadian federation. It also appears vital, for Quebec, for the institution that governs its destiny in

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[170] *Ibid* at 34.

large part to present a guarantee of federative independence, and therefore of neutrality.

III. CONCLUSION

Legitimacy is a virtue that is granted or refused by an outside observer, and one that reflects fidelity to a pre-established principle. We have chosen to articulate our analysis of the legitimacy of constitutional arbitration around the federative principle and its essential legal characteristics, as "[f]ederalism lends a peculiar dimension to constitutional justice".[171] The evolution of the federative Constitution, the founding social pact, is in many states dependent to a large degree on the interpretational work of a constitutional court, which must present a sufficient guarantee of objectivity if its decisions in the area of constitutional justice are to be perceived as legitimate.

However, in many respects the Supreme Court of Canada stands as an exception in the world of federative regimes: its existence and essential characteristics are not formally enshrined in the Constitution, and all its members, like all the judges of the higher provincial courts, are appointed unilaterally by the federal government. In addition, it exercises functions of the highest importance, in particular because of the difficulty for the Canadian constituent of making formal amendments to the Constitution. The delicate task of maintaining a balance between the powers of the two levels of government is placed firmly on the shoulders of the Supreme Court.

Given the coexistence within the Canadian federation of both Canadian and Quebec nationalism, the question of federal/federated balance becomes of prime importance. The arbitral function of the Supreme Court in such a multinational context must cover this aspect, at the risk of seeing the court's federative legitimacy questioned. For Quebec, the preservation of the federative structure of the Canadian state is vital, since it reflects its collective cultural aspirations in political and legal terms.

However, the fact remains that a purely institutional reform of the Supreme Court, and more specifically of the process used to appoint its judges, would not alone suffice to eliminate the federative legitimacy deficit

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[171] Beaud, *supra* note 12 at 51.

with which it is afflicted, at least in Quebec. As aptly pointed out by Morin and Woehrling, such a reform:

> would give the Court the federative legitimacy it is currently lacking, and could therefore have the paradoxical result of protecting it from criticism while making no real change to the centralizing thrust of its actions, which result from economic, social, and political factors that go far deeper than the method used to appoint judges. As a result, it is not impossible to claim that the higher the degree of its federal legitimacy, the better a federal Supreme Court is able to exercise its centralizing role.[172]

If federalism still means something in Canadian constitutional law, we believe that an institutional reform must be accompanied by a stronger theoretical elaboration of the federative principle in the jurisprudence of the country's highest court, helping to establish a better balance of powers within the federation and, consequently, stronger protection for Quebec's sphere of autonomy. It is only in this way that the Supreme Court will acquire credibility in Quebec as the ultimate arbiter of federative disputes.

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[172] Morin & Woehrling, *supra* note 105 at 546–47 [translated by author].