

# The Judicial Power in Canada: The Mirror of a Pluralistic Society

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**Abstract: Il potere giudiziario in Canada come specchio di una società pluralistica** – The article deals with the issue of the reflective judiciary in Canada. It especially looks at the composition of the Supreme Court. The Supreme Court Act provides that three judges must be appointed among judges or lawyers coming from Quebec and the essay tries to survey if the francophone judges reflect the interests of the community they belong to. In order to evaluate this perspective, the article checks if the three judges are used to jointly deliver dissenting opinions validating the hypothesis that they defend the Quebec identity. The results show a different attitude and thus we can conclude that the presence of francophone judges does not constitute a “francophone party”; it rather contributes to increase the confidence of Quebec people in the federal judiciary and moreover it assures expertise in civil law.

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## 1. Biculturalism and Bijuralism: The Canadian “brand”

The study of the Canadian legal system has always awakened legal scholars' interests, both in the field of public and private law, for its significant peculiarities which appear at the institutional, political, social and economic level. Canada has a federal organisation and two legal systems coexist in its institutional framework: civil law, and common law; likewise, there are two official languages: French and English. Despite being an independent state with its own flag and its own constitutional system, the British monarch continues to be the Head of the State and the Queen is portrayed on Canadian dollars. From an economic perspective, there is a strong divergence between the Western Provinces, strongly exploiting natural resources, and the Eastern ones – specifically Ontario and Quebec – with a strong industrial vocation<sup>1</sup>. It is necessary to add some further remarks to the Canadian “duality”: first, Aboriginal communities, occupying the territory before the arrival of European colonists, were recognized the status of Founding Peoples; second, the population is conspicuously composed of people who migrated in Canada more recently.

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<sup>1</sup> P. Foucher, *La double dualité du Canada et ses conséquences juridiques*, in P. Thibault, B. Pelletier, L. Perret (eds.), *Les mélanges Gérard –A. Beaudoin. Les défis du constitutionalisme*, Cowansville, 2002, 163 ff.; G. Martinico, *La genesi “mista” dell’asimmetria canadese*, in G. Delledonne, G. Martinico, L. Pierdominici (eds.), *Il costituzionalismo canadese a 150 anni dalla Confederazione. Riflessioni comparatistiche*, Pisa, 2017, 15 ff.

The choice of a federal asset is linked to the idea of keeping the Provinces autonomous, in order to limit the trend of decentralization resulting in the problematic coexistence of former French colonies and the Anglophone Dominion. The former French colonies are characterized by a civil law system, French as a common language and catholic religion, often invoked for nationalist purposes<sup>2</sup>; whereas the Anglophone Dominion is characterized by a system of common law, English as a common language, and Protestant origins<sup>3</sup>. The attempt to anglicise those territories (i.e. The Provinces of Quebec and New Brunswick) immediately failed. Consequently, the British Crown accepted and recognised the civil law system through the Quebec Act of 1774. This Act provided that the former could regulate civil and property rights according to civil law, while they had to conform to, the common law system for criminal law and all other matters<sup>4</sup>. Keeping the former civil law system implies using the language related to that system. With the approval of 1774 Act, a process of biculturalism and bijuralism was triggered. Such dualism would strongly influence the Canadian legal asset. Accepting two Founding Peoples and being aware of the impossibility to reduce to a one-single-reality the dualistic legal nature Canadian political establishment to allow Provinces to regulate relationships between individual, as well as to let Quebec to

<sup>2</sup> In the territories occupied by the French Crown, the civil law system is adopted: *la Compagnie des cents associés* – founded in Quebec – officially imported Paris custom in 1627, and from 1667 onwards – when the *Compagnie* is dissolved – local right gets directly borrowed as French law main source. In 1710, the British conquered the French colony of Acadia and deported the French, starting a process of Anglicization of this area. In this situation, apart from the French *enclave*, common law got imposed in the rest of Canada. The two colonizing processes are very different: the French had settled with commercial interests, and for this reason they had climbed up Saint Lawrence river with fur smugglers and missionaries, looking for new routes of communication; the British, instead, wanted to occupy lands for agricultural purposes and this is the reason why they were in a continuous spread. The Seven Years War (1756-1763) – whose core events took place in Europe – sees France and United Kingdom at odds, fighting for their colonial possessions. The results of the conflict were not favorable for France, which, with the Treaty of Paris of 1763, was forced to surrender the territory that, nowadays, corresponds to New France. Firstly, the United Kingdom tried to start a process of Anglicization, through Royal Proclamation, in 1763. Although this act recognized the self-government of colonies, it imposed the British law to all former French territories. However, this project was not carried out and French or Natives parties were allowed, through an act, to apply French law. In cases of legal controversies, a mixed composition of juries was required, depending on the linguistic affiliation of the involved parties. L. Bruti Liberati, L. Codignola, *Storia del Canada. Dal primo contatto fra Europei e indiani alle nuove influenze nel pensiero politico mondiale*, Milan-Florence, 2018, *passim*; F. Toriello, *La circolazione del modello inglese in Canada e il rapporto con la tradizione di civil law. Un contributo alla ricostruzione*, in G. Rolla (ed.), *L'apporto della Corte suprema alla determinazione dei caratteri dell'ordinamento costituzionale canadese*, Milan, 2008, 81 ff., M. Morin, *Les débats concernant le droit français et le droit anglais antérieurement à l'adoption de l'Acte de Québec de 1774*, in 44 *R.S.U.S.*, 259 (2014).

<sup>3</sup> The causes of this coexistence depend on historical reasons: a part of the Canadian territory which was colonized by the French, has been surrendered to the British Crown with the Treaty of Paris in 1763.

<sup>4</sup> The same Act allowed the use of French language, the right to practice Catholicism and the equal right to get access to public charges both for Anglophone and Francophone. A. Tremblay, *Les compétences législatives au Canada et les pouvoirs provinciaux en matière de propriété et de droits civils*, Ottawa, 1967, 27 ff.

adopt civil law. This was officialised by the British North America Act (BNA) of 1867, which would give birth to the Dominion<sup>5</sup>.

However, this is not the end of frictions between Quebec and the Rest of Canada. Rather, they were even sharpened because the Provinces wanted to establish a federal system based on the equality among Provinces on one side, and on the other side, on the recognition of the status of distinct society to the French community. This dualism played a key role in shaping the history of Canada, as on the one hand the organization of public powers is justified by a *foedus*, which gathers all the territories for a question of efficiency of the system, and on the other hand such structure aims to maintain and guarantee the recognition of national identities<sup>6</sup>. Therefore, the Francophone nationalism is a recurring element in the political debate, and it cyclically reemerges in different occasions throughout Canadian history, fostering a division from an ethnic and linguistic (and no longer religious) point of view.

A crucial milestone, which turns the tension between the Francophone and Anglophone souls of Canada into a permanent feature of the system, is the so-called “Quiet Revolution”<sup>7</sup>.

In this context, the figure of Pierre Elliot Trudeau emerged on the political horizon. Trudeau promoted the political project to integrate all the identities which made up the country, which at this point were no longer limited to the traditional Francophone and Anglophone components.

To pursue the goal of integration, the Premier adopted the Multiculturalism Policy of Canada (1971) aimed at recognizing the cultural pluralism of the country; nonetheless the approval of the Charter of Rights and Freedoms in 1982 put a full stop to the “duopoly” held by the Francophone and Anglophone components. The political goal of the Charter of Rights and Freedoms was to foster the unity of Canada and build a national identity. Trudeau’s vision entailing a pan-Canadian federal nationalism was opposed to the

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<sup>5</sup> In 1841, the Act of Union came into effect: the two Provinces, the Lower Canada (Quebec) and the Upper Canada (Ontario) were merged to form a single Province; nonetheless, this Act did not achieve political stability and paved the way for the approval of British North America Act. Thereafter, in 1869, the Bay Hudson Company surrendered all the administrated territories (which would form, in the future, the Provinces of Manitoba, 1870, Alberta and Saskatchewan, 1905) to Dominion; in 1871, British Columbia joined Canada and in 1873, Prince Edward Island; in 1949, the Province of Newfoundland and Labrador joined the Federation. In 1975, Yukon and North-West Territories joined too; the third Territory, Nunavut, was founded in 1999.

<sup>6</sup> Ph. Resnick, *Towards a Multinational Federalism: Asymmetrical and Confederal Alternatives*, in F. Leslie Seidle (ed.), *Seeking a New Canadian Partnership: Asymmetrical and Confederal Options*, Montréal, 1994. About this topic, under a comparative point of view: E. Fossas, *National Plurality and Equality*, in F. Requejo (ed.), *Democracy and National Pluralism*, London-New York, 2001, 63; G. La Forest, *What Canadian Federalism Means in Québec*, in 15 *Rev. const. st.*, 1 (2010).

<sup>7</sup> This term refers to a series of events that took place in the period between the ‘60s and ‘70s, which is also characterised by some political, institutional and social reforms promoted by the Liberal Party of Quebec; J. Woehrling, *La constitution canadienne et l’évolution des rapports entre le Québec et le Canada anglais de 1867 à nos jours*, in *Rev. fran. dr. const.*, 195 (1992); F. Rocher, *The Quebec-Canada Dynamic or the Negation of the Ideal of Federalism*, in A.-G. Gagnon (ed.), *Contemporary Canadian Federalism*, Toronto, 2006, 81 f.

Francophone's one, which in turn had been exacerbated after the Quiet Revolution. However, the Canadian Premier's politics did not meet the favour of Quebec, which showed its distance from the political project by calling the direct democracy in 1980. On 20th May 1980, during the last stages of the approval of the Constitution Act, a popular consultation was called in order to legitimize the francophone Province government to negotiate its full sovereignty with the possibility to maintain economic and commercial relations with the Federation<sup>8</sup>. Quebec voters (representing 59.6% of the votes) were able to reject this hypothesis but there was no chance to concretely stop the Prime Minister's project, since he wanted to proceed unilaterally to the enactment of the Constitution Act, without the consent of the Provinces. Three of these, Quebec, Manitoba and New Foundland, first referred the issue to their Courts of Appeal for an advisory opinion and then to the Supreme Court. The latter expressed the existence of a constitutional convention, implying the duty to negotiate and obtain a substantial degree of provincial consent without the obligation to reach a unanimous decision. After this opinion, Premier Trudeau started again the negotiation process for Patriation. The consensus on his project grew with the exception of Quebec, which asked once again an advisory opinion to the Supreme Court on whether a unanimity decision was needed for any law affecting the responsibilities of Provinces and the right to veto by the Francophone party. The reference was only delivered after the definitive approval of the Constitution Act and held that, according to constitutional conventions Quebec was not empowered to block the process amending the British North America Act<sup>9</sup>.

In 1982, the Patriation resulted in a significant political success for Premier Trudeau and represented one of the most relevant achievements for Canadian constitutional law. Unfortunately, the constitutional process was not able to incorporate the francophone community, whose attempts to be recognized as a distinct society were frustrated<sup>10</sup>. Then, two further proposals of constitutional reform were issued: the Meech Lake Accord of 1987 and the Charlottetown Accord of 1992. They were meant to introduce some clauses recognising the *québécoise* speciality, but they were not finalised<sup>11</sup>.

These further failures ended up reinforcing the nationalist ambitions of Quebec and in 1995, once again, the Provincial Government called a referendum for the secession of the Province. Votes in favour of keeping part of the Federation

<sup>8</sup> As known, the results was not favorable to the secessionist claims but the francophone political élite called an another referendum in 1995 with the same purpose.

<sup>9</sup> Renvoi: opposition à une resolution pour modifier la Constitution (1982) 2 RCS, 793. J. Robillard, *Constitutional Conventions: The Canadian Supreme Court's Views Reviewed*, in *Public Law*, 183 (1981); J.F. Gaudreault-Des Biens, *The "Principle of Federalism" and the Legacy of the Patriation and Quebec Veto References*, in *54 Supreme Court L. Rev.*, 77 (2011).

<sup>10</sup> F. Lanchester, *La «Patriation» della Costituzione canadese: verso un nuovo federalismo?*, in *Riv. trim. dir. pubbl.* 1983, 337 ff.; T. Groppi, *Federalismo e Costituzione*, Milan, 2001, 187; F. Astengo, *Il Quebec: storia di una specialità negata*, in G. Rolla (ed.), *Regimi giuridici speciali di autonomia delle comunità territoriali*, Milan, 2013, 143; J. Cameron, *Legality, Legitimacy and Constitutional Amendment in Canada*, in R. Albert, D. R. Cameron (eds.), *Canada in the World. Comparative Perspectives on the Canadian Constitution*, Cambridge, 2018, 98.

<sup>11</sup> M. Bastarache, *L'Accord constitutionnel de 1987 et la protection des minorités francophones hors Québec*, in *34 McGill L. J.* 1, 119 (1988-1989).

slightly prevailed (49.42% yes, 50.58% no); hence the central government asked the Supreme Court for an advisory opinion concerning the legitimacy of a possible unilateral secession of Quebec. The court answered that firstly, the territorial and political separation would only be legitimate through an agreement between the Federation and Province (in other words, a unilaterally decision was not admissible), and, secondly, supreme principles of the Canadian system had to be respected. Such principles consisted of the rule of law, constitutionalism, federalism, democracy and protection of minorities<sup>12</sup>.

The legislative follow-up to the advisory opinion was set forth in the Clarity Act, 2000: “An Act to give effect to the requirement for clarity as set out in the opinion of the Supreme Court of Canada in the Quebec Secession Reference”. The Federal Act requires that Parliament preliminary states if the requires that the Parliament preliminary states if the question that people are asked to answer through the referendum is clear enough. After the referendum, the Parliament also has to assess whether the popular consultation resulted in a clear manifestation of will and whether there is an evident majority.

In the same year, in response to the Federal Act, the National Assembly of Quebec passed another act named: “An Act respecting the exercise of the fundamental rights and prerogatives of the Québec people and the Québec State”. This law states that Quebec can exercise its right to choose its political regime, including sovereignty, and that in a referendum the option obtaining is whichever obtains 50% + 1 of the votes must prevail<sup>13</sup>.

However, the francophone speciality has never received any formal recognition, apart from a small exception, i.e. a Parliamentary resolution of 22 November 2006 on proposal of Harper government stating that: «(...) que cette Chambre reconnaisse que les Québécoises et les Québécois forment une nation au sein d'un Canada uni»<sup>14</sup>.

The brief analysis presented above shows how Canada is a system seeking the balance between two cultures: particularly, the one considered as a minority aims at having a specific identity recognition at constitutional level within the Federation, and this could undermine reciprocal ties. Indeed, two additional

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<sup>12</sup> G. Rolla, *Il referendum sulla sovranità del Quebec ed il futuro del Canada. Alcuni paradossi costituzionali*, in *Giur. cost.*, 1996, 3269; E. P. Mendes, *The Legacy of the Quebec Secession Reference Ruling in Canada and Internationally*, in G. Delledonne, G. Martinico (eds.), *The Canadian Contribution to a Comparative Law of Secession*, Cham, 2018, 9 ff.; J.-F. Gaudreault-DesBiens, *The Law and Politics of Secession: From the Political Contingency of Secession to a “Right to Decide”?* *Can Lessons Be Learned from the Quebec Case?*, in G. Delledonne, G. Martinico (eds.), *The Canadian Contribution*, cit., 33 ff.; R. Louvin, *The Relations between Canada and Quebec: An Appraisal* in this issue.

<sup>13</sup> R. Louvin, *Quo vadis, Québec? Les rebondissements constitutionnels récents d'une revendication historique*, in O. Palusci, M. Casagrande, E. Ceccherini (eds.), *Canada in the Making*, Cambridge, 2018 (forthcoming).

<sup>14</sup> Resolution of November 27th, 2017 2006 par 265 Debats de la Chambre des communes, 39<sup>o</sup> parl, 1 re sess, vol. 141, n<sup>o</sup> 84 on November 22<sup>nd</sup>, 2006 5197. About the relationship between the Premier Harper and Quebec, please see: G. Laforest, *Trust and Mistrust Between Harper and Québec*, in A. López-Basaguren, L. Escajedo San Epifanio (eds.), *The Ways of Federalism in Western Countries and the Horizons of Territorial Autonomy in Spain*, vol. II, Berlin-Heidelberg, 2013, 341.

cleavages emerge: the former depends on the presence of First Nations, the latter is related to the numerous communities of immigrants.

## 2. Provincial and Legal Cultures Representation in the Supreme Court

Despite being a Federal State, Canada did not choose a two-tier jurisdiction. The judiciary is national but it is organized at a provincial level. The unitary choice is the result of a precise orientation carried out at the moment of the adoption of the BNA, because the Founding Fathers explicitly refused the United States two-tier model, considering it detrimental to correct and impartial application of justice. At the highest Canadian jurisdiction there is the Supreme Court, which, besides being a court of last instance, in 1982 also became a body carrying out judicial review of legislation<sup>15</sup>.

The choice of the selection process of judges, whose appointment is up to the executive, is the consequence of the British motherland's will considering it as an eligible mechanism to remove the judicial function from the influences of social communities in which the judicial bodies were located. During the debate on the BNA, no criticisms related to this option emerged, in the word of Sir Hector-Louis Langevin, who said in 1865: «by leaving these appointments to the Central Government, we are satisfied that the selection will be made from men of the highest order of qualifications, that the external and local pressure will not be so great, and the Government will be in a position to act more freely»<sup>16</sup>.

A specific analysis must be carried out in relation to the Supreme Court, a judicial body that underwent considerable transformation during the years.

In fact, looking at the legislative history of the British North America Act (BNA), it is possible to notice that the Founding Fathers were inclined to assign to a judicial body the task to solve the conflicts of competence between Federation and Provinces. On the one side, the U.S. model of the Supreme Court was very influential, on the other side Canadian Provinces, and especially Quebec, were reluctant to establish the Supreme Court given the representatives assemblies' loss of influence in respect of the judicial branch<sup>17</sup>.

At the beginning, the BNA stated that conflict between Federation and Provinces would have been solved through the power of disallowance. However this choice made the central government the real hub of the system. For this reason Provinces pushed in order to pass an act introducing a court of appeal pursuant to sec. 101 BNA<sup>18</sup>. The Parliament was favourable to this solution, otherwise only the provincial judicial branch would have been the arbiter of the

<sup>15</sup> P.H. Russell, *The Judiciary in Canada: The Third Branch of Government*, Toronto, 1987.

<sup>16</sup> Sir Hector-Louis Langevin, in *Parliamentary Debates on the Subject of the Confederation of the British North American Provinces*, 8<sup>th</sup> Prov. Parl. Of Canada, 3<sup>d</sup> Sess. (16 February 1865) 387, quoted by C. Forcese, A. Freeman, *The Laws of Government. The Legal Foundation of Canadian Democracy*, Toronto, 2011, 249.

<sup>17</sup> J. Smith, *The Origins of Judicial Review in Canada*, in T. Morton (ed.), *Law, Politics, and the Judicial Process*, cit., 433 ff.

<sup>18</sup> Sec. 101 BNA: «The Parliament of Canada may, notwithstanding in this Act, from Time to Time provide for the Constitution, Maintenance, and Organization of a General Court of Appeal for Canada (...).».

allocation of competences between Federation and Provinces. In this way the introduction of the court was interpreted like a pro-federation choice.

Therefore, the Supreme and Exchequer Act, 1875 was passed. It gave birth to the court of last resort in Canada<sup>19</sup>. The Bill was the result of a political bargain oriented to maintain the unity of the country and at the same time to recognize the differences between the two prevailing cultures. The body was made up of six judges, (five puisne judges and one chief justice) of whom two judges coming from Quebec. According to a custom two of them must come from Ontario and two from Maritimes Provinces. Thanks to the Act to Amend the Supreme Court Act, 1949, the court became the judge of last instance for Canada and acquired the current configuration. Its members are nine judges, including the chief justice, three of whom are entitled to Quebec; whilst a customary source provides that three of them have to come from Ontario, the other two judges from Western Provinces and eventually one from Atlantic Provinces. The appointments are made by the Governor General on behalf of the Minister of Justice, while the Chief Justice is appointed by the Prime Minister and according to the same custom he or she must be alternatively Anglophone or Francophone.

Differently from the appointment of members of other judicial bodies, the system of appointment to the Supreme Court still raises some criticism in relation to its effective capacity to help the government to select the most suitable candidates to this remarkable function. In fact, this method was criticized by legal scholars and politicians who claimed that also other state authorities should be vested with the power to appoint the Supreme Court judges<sup>20</sup>.

The ongoing practice did not give birth to a common custom. Indeed, several solutions were followed. There have been not only unilateral appointments, but also designations that involved *ad hoc* parliamentary committees which included members of opposition parties who heard the candidate selected by the Government or who enlisted proper candidates presented to the Minister of Justice after consultation of judicial branch and of advocates of the interested Province<sup>21</sup>.

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<sup>19</sup> I. Bushnell, *Captive Court*, Montréal, 1992, 4 ff. Until 1949, Privy Council will be the last judicial instance for the Canadian Dominion; P.W. Hogg, *Canada: From Privy Council to Supreme Court*, in J. Goldsworthy (ed.), *Interpreting Constitutions: A Comparative Study*, New York, 2006, 55 ff.

<sup>20</sup> A. M. Dodeck, *Reforming the Supreme Court Appointment Process, 2004-2014: A Ten Year Democratic Audit*, in *Supreme Court L. Rev.*, 112 (2014).

<sup>21</sup> M.A. Simonelli, Does judicial appointment process matter? *Il caso della Corte suprema canadese*, in *federalismi.it*, 5 (2016); R. Cairns Way, *Deliberate Disregard: Judicial Appointments under the Harper Government*, in 67 *Supreme Court L. Rev.*, 43 (2014); N. Vizioli, *Le nomine dei giudici della Corte suprema del Canada*, in M. Calamo Specchia (ed.), *Le Corti costituzionali: composizione, indipendenza, legittimazione*, Turin, 2011, 155 ff.; J. Ziegel, *Sélection au mérite et démocratisation des nominations à la Cour Suprême du Canada*, in 5 *Choix* 2, 6 (1999); D. Songer, *The Transformation of the Supreme Court of Canada*, Toronto, 2008, 14 f.; D. White, *Political Accountability in Appointments to the Supreme Court of Canada*, in 25 *Constitutional Forum Const.* 3, 109 (2016); G. Delledonne, *La designazione dei giudici della Corte suprema: osservazioni comparatistiche*, in G. Delledonne, G. Martinico, L. Pierdominici (eds.), *Il costituzionalismo canadese a 150 anni dalla Confederazione*, cit., 125 ff. The Premier Trudeau - in order to substitute the puisne justice Thomas Cromwel and the Chief Justice Beverly MacLachlin, - announced the constitution of an independent and non-partisan Advisory Board, which had

According to several pressure groups it would be advantageous to pass a bill which provides the popular election rather than governmental appointment<sup>22</sup>. For this purpose, a Standing Committee on Justice to Study the Process by which the Judges are appointed to courts of appeal and the Supreme Court of Canada was established in 2003. In the Committee's report, the majoritarian Liberal Party excluded the hypothesis of parliamentary hearings like in the U.S.A. or public interviews like in South Africa or parliamentary elections. It showed a certain favour for the obligation of the Minister of Justice to present himself to the Houses in order to justify and to defend his appointments and for the creation of a committee with the task to select a list made up of three to five candidates among whom the Minister would have had to choose one. After the selection, the Minister and the committee must be heard in the House of Commons. The committee had to represent as many interests as possible and to include federal and provincial government ministers, members of the judicial branch, advocates and people from civil society.

In contrast, the Bloc Québécois aspired to the provincial appointment. On the contrary, the Conservative Party opted for a parliamentary election whilst the New Democrats were favourable to parliamentary hearing of the Minister of Justice but before the final appointment.

The aim was to reduce the overwhelming power of government in the appointment process in order to avoid the danger of appointments made on the basis of political affinity with the government in charge rather than due to professional skills, thus impinging on autonomy and impartiality of judges<sup>23</sup>.

In order to reduce the relationship between governmental majority and judicial branch – as noted above – proposals are oriented to a greater involvement of the elective bodies. However, it is clear that a counter-majoritarian role can be assured only if the vote regarding the individual designation, either *ante* or *post*, is assumed through qualified majority so as to involve the opposition parties. Otherwise an absolute or relative majority could propose again the political orientation of the majority, without increasing the legitimacy of the Supreme Court.

Shifting the appointment process within the parliamentary context could be a reply to the critiques about the lack of legitimization, which sometimes are raised against the Supreme Court. Moreover, such a choice could better safeguard the principle of sovereignty of Parliament which constitutes a fundamental principle of the Canadian legal system. This issue became very relevant after the

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the task of identifying suitable candidates, submitting a short list of five individuals for consideration by the Prime Minister. This special system of appointment is based on openness, transparency and accountability. On October 28, 2016, Justin Trudeau announced the appointment of the Honourable Malcom Rowe and on December 18, 2017, the Prime Minister appointed the Honourable Sheilah Martin to the Supreme Court of Canada, while on December 12, 2017 he had elevated Justice Wagner as Chief justice.

<sup>22</sup> In 2002, Environics pool reported two-thirds of Canadians favour the popular election of the Supreme Court Justices: F. L. Morton, *Judicial Appointments in Post-Charter Canada: A System in Transition*, in K. Malleon, P.H. Russell (eds.), *Appointing Judges in an Age of Judicial Power*, Toronto- Buffalo-London, 2006, 56.

<sup>23</sup> The prejudice was fired by the fact that before 1949, more than 50% of judges had served as member of legislative assemblies.

enactment of sec. 52 of the Constitution Act, 1982 that poses the Act at the top of the system of sources of law, while converting the Supreme Court into a constitutional judge. As noted above, legal scholars and politicians were sceptical about the prospect of creating an authority deprived of democratic legitimization which could strike down act of Parliaments, so to give rise to an era of judicial activism rather far from traditional Canadian history<sup>24</sup>.

That is a very debated topic among Canadian legal scholars who believe that the judicial function can limit the autonomy of elected bodies. At the time of the enactment of the Charter of Rights and Freedoms, especially the Provinces argued that the codification of rights in a constitutional document and consequently its configuration as a parameter of constitutional review were inconsistent with the parliamentary system<sup>25</sup>. The proceedings of the Joint Parliamentary Committee, which have taken place before the final enactment of the Charter of Rights and Freedoms, shed light on the risk that the function of Parliament and so of the supremacy of its acts, that is to say of statutory law, could be eroded by the judicial power.

The words of Sterling Lyon – Manitoba Prime Minister are a very good and striking example in this sense. He underlined that the guarantee of rights could be achieved more successfully through the elected assemblies rather than by «men albeit learned in the law, who are not necessary aware of everyday concerns of Canadians»<sup>26</sup>. In sum, the introduction of judicial review was perceived as undemocratic<sup>27</sup>, apart from the fact that the adoption of the Charter of Rights and Freedoms was an advancement in the protection of minorities, that wouldn't have reached easily the majority in the elected assemblies<sup>28</sup>.

A scholar underlined that «all of these victories for underprivileged individuals and groups enhance, rather than undermine, the democratic character

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<sup>24</sup> F.L. Morton, R. Knopff, *Charter Politics*, Scarborough, 1992; F.L. Morton, R. Knopff., *The Charter Revolution and the Court Party*, Peterborough, 2000, 149; C.P. Manfredi, *Judicial Power and the Charter: Canada and the Paradox of Liberal Constitutionalism*, Toronto, 2001; N. Olivetti Rason, *La giurisprudenza della Corte suprema del Canada*, in *Giur. cost.*, 3238 (2003); J.B. Kelly, *Governing with the Charter: Legislative and Judicial Activism and Framers'*, Vancouver, 2005; B.L. Strayer, *The Canadian Constitution and the Courts*, Toronto, 1983, 35 ff.

<sup>25</sup> I. Cotler, *Can the Center Hold? Federalism and Rights in Canada*, in E. Katz, G.A. Tarr (eds.), *Federalism and Rights*, Lanham, 1996, 174; F.L. Morton, R. Knopff, *The Charter Revolution*, cit., 149.

<sup>26</sup> Several Provincial Premiers showed their hostility towards the proposal of change of the Supreme Court in a judicial review court: A. Blakeney, the Premier of Saskatchewan and member of the New Democratic Party was worried about the possibility that social laws enacted could be quashed by the Supreme Court. E. McWhinney, *Dilemmas of Judicial Law-Making*, in P. Thibault, B. Pelletier, L. Perret (eds.), *Essays in Honour of Gérald A. Beaudoin*, cit., 326, ft. 47.

<sup>27</sup> F. L. Morton, R. Knopff, *The Charter Revolution*, cit., 150; F. L. Morton, R. Knopff (ed.), *Law, Politics and the Judicial Process*, cit., 571 f.; S. Gambino, *Federalismo, diritti, corti. Riflessioni introduttive a partire dall'esperienza canadese*, in S. Gambino, C. Amirante (eds.), *Il Canada. Un laboratorio costituzionale*, Padua, 2000, 33 ff.; R. Sharpe, *Judicial Activism: The Debate in Canada*, in C. Casonato (ed.), *The Protection of Fundamental Rights in Europe: Lessons from Canada*, Trento, 2004, 11 ff.; C. Casonato, *Judges and Rights: Activism, Restraints, and Legitimacy*, in C. Casonato (ed.), *The Protection of Fundamental rights*, cit., 27 ff.

<sup>28</sup> P.W. Hogg, *The Charter Revolution: Is It Undemocratic?*, in 12 *Constitutional Forum*, 2 (2001-2002).

of our society. The fact that they were won in the courts rather than in the legislative arena does not make them less democratic»<sup>29</sup>.

Concerns seem to be diminished – albeit not disappeared – for several reasons. Firstly, prominent authors have introduced the idea of a dialogue between courts and legislature<sup>30</sup>, by building a collaborative relationship rather than a conflicting one. Secondly the Supreme Court have showed deference to the Legislative power, acting with self-restraint and modulating the retroactivity of decision invalidating laws concerning very delicate matters<sup>31</sup>. Lastly the judicial body has acquired legitimization from the public opinion<sup>32</sup>.

### 3. The judicial power in Canada: a reflective but even impartial and fair judiciary

Therefore, we can conclude that there is an increasing trend towards the incorporation, in the judicial power of members identified on the basis of socio-cultural and ethnic origins. This is a trend that is confirmed at the comparative level<sup>33</sup>. Nevertheless, it is necessary to give the right weight to the specific groups in the Canadian mosaic. Furthermore, it seems important to understand whether *ad hoc* judges carry out their function of legitimacy of the judicial body or if they influence the body.

Starting from the first point, it is undisputable that the Canadian legal system relies upon a historic diarchy composed of Anglophone and Francophone communities. We have already explained the underlying reason of this union, given that, from the one side the Quebeckers claimed the recognition of the status of distinct society and, from the other side, the Anglophones made efforts to incorporate them into the institutional structure. The position of French origin citizens cannot be assimilated to the condition of an ordinary linguistic minority, because Canadian history and law recognize to Quebeckers the *status* of Founding People to the same extent as the Anglophone community. Quebec constitutes the core of the Canadian Federation. This is an undeniable element from the ancient

<sup>29</sup> R. Sigurdson, *Left- and Right-Wing Charterphobia in Canada: A Critique of the Critics*, in C. Leuprecht, P.H. Russell (eds.), *Essential Readings in Canadian Constitutional Politics*, Toronto, 2011, 402.

<sup>30</sup> The reference is to: P.W. Hogg, A.A. Bushell, *The Charter Dialogue between Court and Legislatures (or Perhaps the Charter of Rights Isn't Such a Bad Thing After All)*, in 35 *Osgoode Hall L. J.*, 75 (1997); P.W. Hogg, A.A. Bushell, W.K. Wright, *Charter Dialogue Revisited – or “Much Ado About Metaphors”*, in 45 *Osgoode Hall L. J.*, 1 (2007).

<sup>31</sup> A case in point can be the decision *Carter v. Canada (Attorney General)*, [2015] 1 S.C.R. 331, 2015 SCC 5 about the prohibition against physician-assisted dying, where the Court suspended its ruling for 12 months. See S. Rodriguez, *Tecniche di bilanciamento tra diritto alla vita e libertà personale: l'attivismo della Corte canadese e il dialogo con i giudici di Strasburgo*, in E. Ceccherini (ed.), *I diritti al tempo delle crisi. Nuove tecniche di ponderazione*, Naples, 2018, 205 ff.

<sup>32</sup> The data of Angus Reid Institute show that 74% of Canadians declares their satisfaction for the decisions of the Supreme Court and that 61% of Canadians trust in the Supreme Court in parallel only 28% of the citizens trusts in the Parliament, see [www.angusreid.org](http://www.angusreid.org) (15 August 2015).

<sup>33</sup> K. Nobbs, *International Benchmarks a Review of Minority Participation in the Judiciary*, in M. Weller (ed.), *Political Participation of Minorities*, Oxford, 2010, 589 ff.

time of its foundation. The debate for the approval of the British North America Act showed this point clearly.

We could mention the words of Hector Langevin who stated in Parliament that French Canadians were “separate people” and was afraid of the withdraw of French customs, uses and law. He was not the only deputy who even if favourable to the federation project expressed his concern about the possible assimilation of French Canadians to the predominant Anglophone culture.

The strong integrational compact explains the reasons for the creation of a unique and united Federation, which characterizes the institutional architecture of Canada, and has been reiterated throughout times by the Supreme Court. Very often the latter behaves as a guarantor of the francophone peculiarity in the Federation both in Quebec and outside of its borders.

In an important leading case which dates back to the ‘30s, the Court ruled: «Inasmuch as the Act embodies a compromise under which the original Provinces agreed to federate, it is important to keep in mind that the preservation of the rights of minorities was a condition on which such minorities entered into the federation, and the foundation upon which the whole structure was subsequently erected. The process of interpretation as the years go on ought not to be allowed to dim or to whittle down the provisions of the original contract upon which the federation was founded, nor is it legitimate that any judicial construction of the provisions of ss. 91 and 92 should impose a new and different contract upon the federating bodies»<sup>34</sup>.

The guarantee of francophone culture in Canada has been recently restated in the reference for the Senate<sup>35</sup> where about the question concerning the removal of the real property requirement according to which Senators should own land worth at least \$ 4000 in the Province for which they are appointed. This requirement would violate sec. 23(3) Constitution Act, 1987 which allows Quebec

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<sup>34</sup> *re The Regulation and Control of Aeronautics* (1932) A. C. 54 at 70. On this point, M. D. Behiels, *Canada's Francophone Minority Communities. Constitutional Renewal and the Winning of School Governance*, Montréal, 2004, X.

<sup>35</sup> Reference re Senate Reform, 2014 SCC 32, [2014] 1 S.C.R. 704. On this reference see: P.E. Mendes, *Constitutional Options after the Supreme Court's Decision in Reference Re Senate Reform: Restoring Trust and Credibility through Senate Reform*, in 35 *NJCL* 1, 85 (2015); J. I. Colón-Ríos, A. C. Hutchinson, *Constitutionalizing the Senate: A Modest Democratic Proposal*, in 60 *McGill L. J.* 4, 599 (2014); A. Dodeck, *The Politics of the Senate Reform Reference: Fidelity, Frustration, and Federal Unilateralism*, in 60 *McGill L. J.* 4, 623 (2014) ff.; R. Albert, *Constitutional Amendment by Stealth*, *ibidem*, in 60 *McGill L. J.* 4, 673 (2014) ff.; Y. Danwood, *The Senate Reference. Constitutional Change and Democracy*, in 60 *McGill L. J.* 4, 737 (2014); C. Mathieu, P. Taillon, *Le fédéralisme comme principe matriciel dans l'interprétation de la procédure de modification constitutionnelle*, in 60 *McGill L. J.* 4, 763 (2014); N. Karazivan, *De la structure constitutionnelle dans le Renvoi relative au Sénat: vers une gestalt constitutionnelle?*, in 60 *McGill L. J.* 4, 793, (2014); K. Glover, *The Supreme Court in a Pluralistic World: Four Readings of a Reference*, in 60 *McGill L. J.* 4, 839 (2014); E. Macfarlane, *Unsteady Architecture: Ambiguity, the Senate Reference, and the Future of Constitutional Amendment in Canada*, in 60 *McGill L. J.* 4, 883 (2014); C. Cornell, *Reference re Senate Reform and the Supreme Court of Canada's Clarification of the Constitutional Procedure for Reforming the Canadian Parliament's Upper House*, in 20 *Law & Bus. Rev. Am.*, 451 (2014); E. Arban, *Current trends in Canadian federalism. Centripetal and Centrifugal Forces in Canadian Division of Powers*, in [www.amministrazioneincammino.luiff.it/app/uploads/2010/08/Current-trends-in-Canadian-federalism1.pdf](http://www.amministrazioneincammino.luiff.it/app/uploads/2010/08/Current-trends-in-Canadian-federalism1.pdf)

senators not to reside in the electoral divisions for which they have been appointed. This provision constitutes an exception to the general rule applied to Quebec senators exclusively, who must have property in Quebec, albeit without being compelled to have their residence in the Province. On this issue, the Court pointed out the special arrangement reserved to Quebecers and ruled that the full repeal of the property requirement embodied in sec. 23(3) requires the consent of legislative assembly of Quebec, under the special arrangements procedure. This amending formula recognizes Quebec's veto power of and the privileged position of the Province in the constitutional framework.

The relevance of the Quebec position in the constitutional compact which gave the birth to the Federation was addressed in another reference of 2014 concerning the eligibility requirements for Quebec appointments<sup>36</sup>. The reference is subdivided into two questions: the first one affects the fact whether a person who was at any time an advocate of at least ten years standing at the Barreau du Quebec was qualified for appointment under sec. 6 of the Supreme Court Act, 1985 given that the selection should be made «from among the advocates of that Province»; the second one refers to the possibility for the Parliament to enact ordinary statutes in order to interpret the requirement of sec. 6 of the Supreme Court Act, 1875.

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The Court's majority opinion excluded that the general requirements encompassed in sec. 5 – which reserved the appointment to current judges of a superior court of a province, including the court of appeal, to former judges of such a court, to current barristers or advocates standing at the bar of the Province for at least 10 years – and to former barristers or advocates standing at least 10 years can be extended to the judges coming from Quebec.

The reason is included in sec. 6 of the same Act, which in its English version provided that at least three of the judges must be appointed among the judges of the Court of Appeal or of the Superior Court of the Province of Quebec or among the advocates of that Province. Sec. 6 narrows the array from four kinds of people who are eligible under sec. 5 to two groups who are eligible under sec. 6. The explanation of this differentiation is based on the need to assure to the Court the presence of civil law experts and to represent legal tradition and social values from Quebec to maintain Quebec's confidence in the supreme judicial body.

A distinct regulation is the result of the historic bargain which gave birth to the Act regulating the institution of the Supreme Court<sup>37</sup>. It enshrines a symbolic significance and not only a technical one; it assures the permanent linkage between the judges and the French-Canadian society.

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<sup>36</sup> Reference re Supreme Court Act, ff. 5 and 6, 2014 SCC 21, [2014] 1 S.C.R. 433. The reference was motivated by the appointment of Justice Nadon, a supernumerary judge of the Federal Court of Appeal and formerly, but not at the time of this appointment, a member of the Quebec bar of more ten years standings. His appointment was challenged before the Federal Court of Canada.

<sup>37</sup> P.H. Russell, *The Supreme Court of Canada as a Bilingual and Bicultural Institution*, Ottawa, 1969.

In the reference, the legislative history of the Act demonstrates that the provision of *ad hoc* seats for judges coming from Quebec was aimed at implementing the trust in the new judicial body by Quebeckers.

The analysis of the Act helps understand that Quebec representation is not only linked to the necessity to have civil law skills but also constitutes a fundamental milestone of the constituent compromise that has led to the adoption of the British North America Act, which reshaped the Canadian dominion, so to turning it into a federal state.

The conclusions of the majority opinion were reached by adopting a literal and purposive analysis. The literal meaning was taken into account because the text of sec. 6 expressly requires the current membership of the Barreau du Québec or of the Court of Appeal or of the Superior Court of Québec while derogating from sec. 5 of the Act. The purpose of the provision was considered as well, because this piece of legislation represents the historic compromise that brought to Federation. It provides a French-Canadian quota of justices so as the court could have civil law training and could be trusted from by Québec citizens, while recognizing the special status of their Province. The enactment of an *ad hoc* provision for Quebeckers permitted to overcome all the criticism coming from provincial representatives and to increase the confidence in the new body.

In respect of the second question affecting the possibility for an ordinary statute to extend the general requirements embodied in sec. 5 and in sec. 6 of the Act, the court deemed that issues related to the Supreme Court, after the Patriation, have been attracted in the domain of constitutional sources of law specifically in Part V of the Constitution Act, 1982. Therefore any law amending the Supreme Court Act, 1875 must have constitutional rank although the Act regulating the composition and function of the Supreme Court was an ordinary statute. At the moment the judicial authority is a constitutional body and it said that its regulation was upgraded to constitutional level.

Even in this case, the genesis and context of the Act explains the characteristic of the accommodation between the two founding peoples who want to maintain the bijuralism of the Federation. This goal was present also in previous agreements reached before the enactment of the Constitution Act, 1982. For instance, in the April Accord, 1981, in which there is a confirmation of the intention to limit Parliament's unilateral authority to reform the Supreme Court so as to make it more difficult to modify the court's composition. Indeed, the amending formula for this part requires the unanimity and so the Québec's representation was given special constitutional protection.

The reference of the court *de facto* renders unalterable the constituent covenant that has institutionalized the diarchy between Anglophones and Francophones. Such agreement implies the duty to allocate *ad hoc* seats for Québec in order to strengthen the link between *societas* of the Province and the federal institution.

In fact, the primary goal does not seem to be the need to defend the interests of Québec through the Francophone representation but rather to legitimate the judgments of the court from Québec, due to its specific representation. In other

words, the outcomes of decisions less characterized by a pro-provincial approach (*rectius* pro-Quebec) would be legitimated because the judicial body incorporates a francophone representation and for this reason these decisions can be more easily endorsed<sup>38</sup>.

Moreover, indicating the current professional activity – as a requirement for the appointment to the Supreme Court – guarantees the presence of skills in civil law, which is a fundamental feature of the Quebec identity. In this regard, the Honourable Justice Piere-Basile Mignault said: «for the people of Quebec, our civil law is our most precious asset after our religion and language. It is a legacy we have received from our fathers, to be maintained and passed on to future generations. It is our duty and responsibility to honour and preserve our civil law, to ensure the purity of its doctrine and keep it safe from any influence that would prevent it from being what it should be»<sup>39</sup>.

This framework downscales the strength of the view according to which the francophone representation carries out its function of adjudication in a partial way and uncritically pro-Quebec. This conclusion could affect all of the other components of the court who, in any case, represent other provinces. In other terms, a francophone “faction” is not present in the Supreme Court and few dissenting opinions were delivered by the three French Canadian Justices in juxtaposition with the Anglophone majority.

Three exceptions to this general statement can be mentioned concerning cases that involve relevant matters: *Public Service Board v. Dionne*<sup>40</sup> and *Capital Cities Communications Inc. v. Canadian Radio Television Commission*<sup>41</sup> relating culture and communication and *Quebec A.G. v. Canada*<sup>42</sup>. The first two decisions were delivered by the Supreme Court in 1978 and reaffirmed the full federal competence in the matter of television broadcasting either cable or wireless, leaving apart the legislative intervention of Provincial Legislatures, while the third one was recently issued after the enactment of Constitution Act, 1982.

The first two cases are meaningful since the opinions of all of the three French Canadians justices were strongly contrary to the majority opinion, stating that the cable tv matter was reserved to the Provinces. The dissenting judges did not agree with the idea according to which since wireless broadcasting is a

<sup>38</sup> R. Schertzer, *Quebec Justices as Quebec Representatives: National Minority Representation and the Supreme Court*, in 46 *Publius* 4, 539 (2016); P. Patenaude, *Le Québec et la Cour suprême*, in 14 *Alta L. Rev.*, 138 (1976).

<sup>39</sup> P.-B. Mignault, *L'avenir de notre droit civil*, in 56 *Revue de droit*, 116 (1922), the quotation comes from S. Morin, *Quebec: First Impressions Can Be Misleading*, in S. Farranm, E. Örüçü, S.P. Donlan (eds.), *A Study of Mixed Legal Systems: Endangered, Entrenched or Blended*, Dorchester, 2014, 169 always concerning the same topic: S. Normand, *Un thème dominant de la pensée juridique traditionnelle au Québec: la sauvegarde de l'intégrité du droit civil*, in 32 *McGill L. J.*, 559 (1987); S. Normand, *Le code civil et l'identité*, in S. Lorie, N. Kasirer, J.-G. Belley (eds.), *Du Code civil du Québec: contribution à l'histoire immédiate d'une recodification réussie*, Montréal, 2005, 619 ff.; W. Tettley, *Mixed Jurisdictions. Common Law vs. Civil Law (codified and Uncodified)*, in 60 *Louisiana Law Review*, 677 (2000).

<sup>40</sup> *Public Service Board et al. v. Dionne et al.*, [1978] 2 S.C.R. 191.

<sup>41</sup> *Capital Cities Communications Inc. v. Canadian Radio Television Commission* [1978] 2 S.C.R. 141.

<sup>42</sup> *Quebec A.G. v. Canada*, [2015] 1 S.C.R. 693, 2015 SCC 14.

competence of the Federation, then, due to some attractive *vis* even the cable communication should be regulated by federal level. In the dissenting opinions, this interpretation was deemed to be in contrast with the sec. 92 of BNA<sup>43</sup>, which would cover this kind of communication because it involves the landline telephone communication. The access of the Province to this competence beyond the economic interest – would have a strategic importance to build and maintain the distinctive values of francophone culture in a perspective of cultural protectionism<sup>44</sup>. In consideration of the relevance of the issue, harsh comments were addressed against the opinion of the court, which was blamed of ignoring claims and requests made by Provinces.

This event compelled Chief Justice Bora Laskin to say that: «Judges are completely independent of any influences in their decisions (...) the source of our appointment in no way qualifies our independence. We have no duty to governments, no duty to litigants, except to apply the law according to our ability. I do not represent the federal government nor do I represent Ontario which is my home province I represent no one but myself. (...) I know of no better way to subvert our judicial system, no better way to destroy it than to give currency to the view that the Judiciary must be a representative agency»<sup>45</sup>.

Nevertheless, friction factors relying upon provincial claims have decreased within the Supreme Court especially after the enactment of the Charter of Rights and Freedoms in 1982. Many commentators agree that the shift of function of the Supreme Court has changed its approach to legal reasoning too, in the sense that it aims at enhancing a cooperative federalism, rather than a conflicting one<sup>46</sup>. In addition, data show that a centripetal movement of Canadian federalism is taking

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<sup>43</sup> Sec. 92 (10) Local Works and Undertakings other than such as are of the following Classes: (a) Lines of Steam or other Ships, Railways, Roads, Telegraphs, and other Works and Undertakings connecting the Province with any other or others of the Provinces, or extending beyond the Limits of the Province.

<sup>44</sup> On the topic of building a national identity through medias, see P.K. Kresl, *Come formare una cultura nazionale in un mondo senza confini*, in G. Rolla (ed.), *Lo sviluppo dei diritti fondamentali in Canada*, Milan, 2000, 277 ff.; K. Ross, P. Playdon (eds.), *Black Marks: Ethnic Minority and Media*, London, 2001, 33 ff.; B. Larsen, T. Tufte, *Is There a Ritual Going On? Exploring the Social Uses of the Media*, in I. Bandebjerg, H.K. Hastrup (eds.), *Sekvens, Yearbook 1999: Intertextuality and Visual Media*, Copenhagen, 1999, 181 f.

<sup>45</sup> The Ottawa Journal 23 1978 in [https://www.newspapers.com/title\\_1188/the\\_ottawa\\_journal/](https://www.newspapers.com/title_1188/the_ottawa_journal/) But see before: B. Laskin, *The Supreme Court of Canada: A Final Court of and for Canadians*, in 29 *Can. Bar Rev.*, 1038 (1951).

<sup>46</sup> E. Brouillet, *The Supreme Court of Canada: The Concept of Cooperative Federalism and its Effects on the Balance of Power*, in N. Ayrones, J. Kincaid (eds.), *Courts in Federal Countries: Federalists or Unitarists*, Toronto, 2017; C. Mathieu, P. Taillon, *Le fédéralisme comme principe matriciel*, cit., 763 ff.; J. Leclair, *The Supreme Court of Canada's Understanding of Federalism: Efficiency at the Expense of Diversity*, in J.-F. Gaudreault-Des Biens, F. Gélinas (eds.), *Le fédéralisme dans tous les États. Gouvernance, identité et méthodologie*, Bruxelles-Cowansville, 2005, 383 f.; G.-A. Beaudoin, *La Cour suprême et le fédéralisme canadien*, in E. Orban (ed.), *Fédéralisme et cours suprêmes*, Bruxelles-Montréal, 1991, 81 ff.. The web site of the Supreme Court regarding 2006-2016 data proves this statement.

<sup>46</sup> J.B. Kelly, *Judging the Judges; The Decline of Dissent in the Supreme Court's Charter Decisions*, in F.L. Morton (ed.), *Law, Politics*, cit., 560 ff.; D. Songer, *The Transformation of the Supreme Court*, cit., 203 f.; C. L'Heureux-Dubé, *The Dissenting Opinion: Voice of the Future*, in 38 *Osgoode Hall L. J.* 3, 495 (2000).

place<sup>47</sup> and that there is a reinforcement of collegial decision held at the unanimity<sup>48</sup>. This statement is supported by an element: in cases in which matters that are very relevant to Quebec are debated, French Canadians justices did not adopt francophone sectarianism or embrace positions very close to separatist attitudes. On the contrary, opinions were delivered at unanimity and they witnessed that the judicial body generally showed unitary opinions lacking of nationalistic or partisan shades. Given this, bijuralism and territorial cleavages of the court do not hinder the creation of the κοινή which has been sometimes challenged by political institutions and civil society.

In recent years, it has not been possible to single out a francophone block which counterposes against the rest of Canada representatives with the exception of the case abovementioned: *Quebec A. G. v. Canada*. In fact, some reflections arise from a recent case where three justices from Quebec delivered a dissenting opinion, jointly with Justice Abella. The Province of Quebec challenged the constitutionality of sec. 29 of the *Ending Long Gun Register*, which imposed the destruction of all records hosted in a data base, which contained all the certificates for every arm acquired, transferred or possessed in Canada. Such database had been created by all Provinces effort. The Federal Act had been enacted by relying on the Federation's competence on criminal jurisdiction but Quebec objected it had the right to obtain the data regarding the territory of Quebec. The Attorney General of Quebec pointed out that the evolution of Canadian federalism is favorable to a flexible approach on the division of competences and the case should be solved through the principle of cooperative federalism. In addition, the federal act can affect a specific provincial matter, which is property and civil rights. Therefore a joint decision about this matter would be preferable<sup>49</sup>.

It is not easy to determine if this case will be able to open a new phase in the relationship between Quebec and the rest of Canada, but, anyway, this judgment alone cannot frustrate the initial hypothesis about the impartiality and autonomy of the bench in a context of reflective judiciary at least in Canada. This statement

<sup>47</sup> F.L. Morton, *The Political Impact of the Canadian Charter of Rights and Freedoms*, in 20 *Can. J. Pol. Sc.*, 44 (1987); M. Mandel, *The Charter of Rights and the Legalization of Politics in Canada*, Toronto, 1989, 36; E. Richez, *Losing Relevance: Quebec and the Constitutional Politics of Language*, in 52 *Osgoode Hall L. J.*, 1, 2014, 191; E. Brouillet, *The Supreme Court of Canada*, cit., 142; J. Woehrling, *The Canadian Charter of Rights and Freedoms and Its Consequences for Political and Democratic Life and the Federal System*, in A.-G. Gagnon (ed.), *Contemporary Federalism*, cit., 235; A. Lajoie, *Garantir l'intégration des valeurs minoritaires dans le droit: une entreprise irréalisable par la voie structurelle*, in J.-F. Gaudreault-Des Biens, F. Gélinas (eds.), *Le fédéralisme dans tous les États*, cit., 377 f.

<sup>48</sup> E. Mac Farlane, *Consensus and Unanimity at the Supreme Court of Canada*, in 52 *Supreme Court L. Rev.*, 379 (2010); D. Songer, J. Siripurapu, *The Unanimous Cases of the Supreme Court of Canada as Test of Attitudinal Model*, in 42 *Can. J. Pol. Sc.* 1, 2009, 87; P. McCormick, *Bias, Swarms, and Outliers: Conceptualizing Disagreement on the Modern Supreme Court of Canada*, in 42 *Osgoode Hall L. J.*, 107 (2004); P. McCormick, *The Choral Court: Separate Concurrence and the McLachlin Court 2000-2004*, in 37 *Ottawa L. Rev.* 1, 37 (2005); P. McCormick, "By the Court": *The Untold Story of a Canadian Judicial Innovation*, in 53 *Osgoode Hall L. Journ.* 3, 1048 (2016); C. L'Heureux-Dubé, *The Length and Plurality of Supreme Court of Canada Decisions*, in 28 *Alta L. Rev.* 3, 586 (1990).

<sup>49</sup> P. Daly, *Dismantling Regulatory Structures: Canada's Long-Gun Registry as Case Study*, in 33 *NJCL* 2, 169 (2014).

is based on the analysis of the dissenting opinions. When they were delivered by three Québécois justices, they would reveal a strong disagreement with the rest of the Anglophone-oriented judicial body, giving credit to the hypothesis of the existence of a “Francophone Justice party”; by contrast, the inexistence of a shared vision among the three French-Canadian Justices can be detected. It does not emerge, in fact, any “functional” and cultural bond of the Francophone Justices to the referring Province, rather a professional contribution to the *ius dicere* duty of the court. Therefore, their territorial provenience has the prevailing purpose to legitimize the jurisdictional activity of the whole court. In this context, pluralism of the Supreme Court reflects the heterogeneity of the Canadian society, but does not foster conflicts. The court is a neutral body that promotes a cooperative federalism. In fact, inspired by several cases related to meaningful topics such as the cultural and linguistic ones, the court did not hesitate to deliver solutions that were “not Quebec-oriented”. An interesting case that may be mentioned is *Ford v. Quebec*<sup>50</sup>, which is relevant not only for issues related to language but also for the applicability of the notwithstanding clause of sec. 33 of Charter of Rights and Freedoms, that is the means by which Premier Pierre Elliot Trudeau achieved the consent to the Patriation process<sup>51</sup>.

Firstly, the decision in the Ford case was delivered at unanimity and so no ethnic-linguistic rift was arisen, although the matter was crucial for Quebec people. Secondly, the judgment is very important with respect to the applicability of sec. 33. The application of the clause to the Bill 101, which avoids the judicial review of legislation, is consistent with the purpose of the Charter. However, the court struck down sec. 58 and 69 of the Charter of French Language, which banned commercial signs written in language other than French, because these provisions were not consistent with the limitation clause of sec. 1 of the Charter of Rights and Freedoms. The evidences produced in the court about material facts

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<sup>50</sup> *Ford v. Quebec* [1988] 2 S.C.R. 712. On this topic, see also the case *The King v. Dubois* [1935] S.C.R. 378.

<sup>51</sup> Section 33: (1) Parliament or the legislature of a province may expressly declare in an Act of Parliament or of the legislature, as the case may be, that the Act or a provision thereof shall operate notwithstanding a provision included in section 2 or sections 7 to 15. (2) An Act or a provision of an Act in respect of which a declaration made under this section is in effect shall have such operation as it would have but for the provision of this Charter referred to in the declaration. (3) A declaration made under subsection (1) shall cease to have effect five years after it comes into force or on such earlier date as may be specified in the declaration. (4) Parliament or the legislature of a province may re-enact a declaration made under subsection (1). (5) Subsection (3) applies in respect of a re-enactment made under subsection (4). D. Newman, *Refractive and Prismatic Analysis in Implicit Comparative Constitutional Law* in this issue; P. Kaye, *The Notwithstanding Clause (Sec. 33 of the Charter of Rights and Freedoms)*, Toronto, 1992, 31 f.; P.H. Russell, *Standing Up for Notwithstanding*, in 29 *Alta L. Rev.* 2, 293 (1991); T. Kahana, *What Makes for a Good Use of the Notwithstanding Mechanism*, in 23 *Supreme Court L. Rev.*, 191 (2004); L. Weinrib, *Learning to live with the override*, in 35 *McGill L. J.*, 542 (1990); K. Roach, *Dialogue or Defiance: Legislative Reversals of Supreme Court Decisions in Canada and the United States*, in 4 *Int'l J. Const. L.* 2, 347 (2006); J. Cameron, *The Charter's Legislative Override: Feat or Figment of the Constitutional Imagination?*, in 23 *Supreme Court L. Rev.*, 135 (2004); J. L. Hiebert, *Is it Too Late to Rehabilitate Canada's Notwithstanding Clause?*, in 23 *Supreme Court L. Rev.*, 169 (2004); S. Gardbaum *The New Commonwealth Model of Constitutionalism*, Cambridge, 2013, 97; R. Albert, *The Desuetude of the Notwithstanding Clause - and How to Revive It*, in *Boston College Law School Research paper* 425, 2016.

did not justify the limitation to freedom of expression imposed by ss. 58 and 69 of the Charter of the French Language. Despite the fact that the Quebec Government had the purpose to enhance the status of French language, the legislative intervention was neither necessary nor proportional. Yet the motivation of Quebec Government of Bill 101 made reference to the need of protecting the “*visage linguistique*”. Therefore, the override clause represented the tool aimed at recognizing Quebec speciality.

The idea that francophone justices in the court do not “represent” Quebec claims has emerged also in other significant cases. The 1998 Secession Reference was a case of high political relevance and the outcomes could be very detrimental for the federal pattern. The court unanimously that the secession of a portion of territory is legal, in theory, but must not be carried out unilaterally; a secession can happen only at the end of a negotiated path with the Federation and the other Provinces and after a popular consultation with a strong majority in favour of the project. Unilateral secession can be justified only in case of infringement of citizens’ rights and if democratic rules are violated. The court took a firm stance on this point, behaving again as a federal institution oriented towards the unity of the state. Judges stated that the federation is the most suitable institution to safeguard the cultural and ethnic minorities which form the majority within a specific province. In this way, the Supreme Court enhanced the protection of cultural diversity in a federal form of state<sup>52</sup>.

In the examined cases, the Supreme Court acts as the protector of Federation and of the competence of the Provinces, including Quebec, whose historic and cultural diversity is considered but not overexposed. The francophone justices deliver opinions in which the *Quebecois* peculiarity is highlighted and stressed but it is not used instrumentally against the Federation. In other words, Quebec is not recognised a special position. The Province does not have a veto power as argued in the Quebec veto Reference, where the all members of the court stated that Quebec can not enjoy a special treatment because the Federation is based on the equality of all its components. The Supreme Court reveals a neutral, or pan-canadian approach and data show the same attitude: looking at the judgments from 1982 to 2002 concerning the conflict between Federation and Provinces, 58.6% of its decisions have been in favour of Government of Ottawa and among these 75% involved Quebec.

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<sup>52</sup> D. Haljan, *Constitutionalising Secession*, Portland (Or), 2014, 325; S. Alvstad, *The Québec Secession Issue, with an Emphasis on the “Cultural” Side of Equation*, in 18 *Temple ICLJ*, 89 (2004); M. Dawson, *Reflections on the Opinion of the Supreme Court of Canada in the Québec Secession Reference*, in 11 *NJCL*, 5 (1999); P. Monahan, *The Public Policy Role of the Supreme Court of Canada in Secession Reference*, 11 *NJCL*, 65 (1999); C. L. Ford, *In Search of the Qualitative Clear Majority: Democratic Experimentalism and the Québec Secession Reference*, in 39 *Alta L. Rev.* 2., 511 (2001); J. Leclair, *The Secession Reference. A Ruling in Search of a Nation*, in 34 *RJT*, 885 (2000); A. Bayefsky (ed.), *Self-determination in International Law: Québec and Lessons Learned*, Deventer, 2000; P. Dumberry, *The Secession Question in Quebec*, in *DPCE*, 2015, 357 ff.; K. Basta, *The State between Minority and Majority Nationalism: Decentralization, Symbolic Recognition and Secessionist Crises in Spain and in Canada*, in 48 *Publius* 1, 51 (2017); J.-F. Gaudreault-Des Biens, *Secession Blues: Some Legal and Political Challenges Facing the Independence Movement in Quebec*, in *Percorsi costituzionali*, 2014, 765.

Summing up the representation of Quebec in the court does not perform in favour of the Province. Its attitude seems to be aimed at building a connection between Federation and Quebec. They do not feel constrained by a constituent community and do not represent a particular part in the judicial decision-making process. They seem to have inclusive, and not adversarial, purposes.

This approach is not exempt from critics, especially by legal scholars who would be more favourable to a judicial activism pro-Quebec, promoting a more decentralized system of government<sup>53</sup>. Not only, several critique have risen regarding interpretation issue of French legal texts, whose exegesis convey the common law influence<sup>54</sup>.

#### 4. Conclusion

In this chapter, we discussed the attempt of the Canadian constitutional system to incorporate the cultural and linguistic diversities in the judiciary. One more relevant point seems to be that there is an increasing interest in promoting the diversity in the judicial recruitment. This aspiration to manifest the diversity in judicial bodies is spreading. We can notice that sec. 2.13 of the Universal Declaration on the independence of Justice of Montréal in 1983 provides that: «the process and standards of judicial selection shall give due consideration to ensuring a fair reflection of the judiciary of the society in all its aspects»<sup>55</sup>. In the same wake, the International Bar Association Code on Minimum Standards of Judicial Independence states that «The process and standards of judicial selection must insure fair representation of all social classes, ethnic and religious groups, ideological inclinations and where appropriate, geographical regions. The representation should be fit and not numerically or accurately proportional<sup>56</sup>».

In the framework of the OCSE either the Declaration of Copenhagen (1990) or of Lund (1992) put the attention to the issue of participation of minorities in the administration of justice. Sec. 30 of the first one rules that: «The participating States recognize that the questions relating to national minorities can only be satisfactorily resolved in a democratic political framework based on the rule of law, with a functioning independent judiciary». At the same time the latter points out, in the chapter related to the participation in decision-making (point six), that:

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<sup>53</sup> S. Ishiyama Smithey, *The Effect of the Canadian Supreme Court's Charter Interpretation on Regional and Intergovernmental Tensions in Canada*, in 26 *Publius* 2, 83 (1996); J.B. Kelly, M. Murphy, *Shaping the Constitutional Dialogue on Federalism: Canada's Supreme Court as Meta-Political Actor*, in 35 *Publius* 2, 217 (2005).

<sup>54</sup> On this issue see, F. Coté, *Human Rights and the Judicial Subjugation of a Nation's Legal Language: A Case Study on the Impact of the Canadian Charter of Rights and Freedoms on the Dynamics of Québec Private Law*, in Y. Ning, J.-G. Turi, C. Le (eds.), *Law, Language and Justice*, Marietta (Ge), 2017, 141 ff.

<sup>55</sup> S. Shetreet, *The Doctrinal Reasoning for More Women Judges: The Principle of Reflective Judiciary*, in S. Shetreet (ed.), *Women in Law*, London-Cambridge, 1998, 190; S. Shetreet, *The Emerging Transnational Jurisprudence on Judicial Independence: The IBA Standards and Montreal Declaration*, in S. Shetreet, J. Deschênes (eds.), *Judicial Independence: The Contemporary Debate*, Dordrecht, 1985, 393 ff. The statement was strongly supported by African delegation where the topic of ethnic and tribal belonging is very relevant.

<sup>56</sup> S. Shetreet, *The Doctrinal Reasoning*, cit., 189.

«States should ensure that opportunities exist for minorities to have an effective voice at the level of the central government, including through special arrangements as necessary. These may include, depending upon the circumstances: special representation of national minorities, for example, (...) formal or informal understandings for allocating to members of national minorities (...) seats on the supreme or constitutional court or lower courts».

From this perspective, Canada has been a forerunner legal system. In fact, from the entry into force of the Supreme Court Act, 1875 onwards a legal quota for francophone judges has been reserved, leaving to the customary law the indication of the other seats which are reserved to the Provinces.

However, a greater attention towards the diversity in the judicial branch has moved to the lower courts, becoming a meaningful issue at political level. In 2016, the Minister of Justice declared that: «We know that our country is stronger, and our judicial system more effective, when our judges reflect Canada's diversity. As promised, we have filled the urgent judicial vacancies by drawing on a list of recommended candidates who are of the highest calibre and who are as diverse as Canada»<sup>57</sup>.

The attention to this debate has increased in the last years and from a chronological point of view has involved the gender matter. It is worth to remember that only a strong pressure held by the National Action Committee on the Status of Women brought to the result of the appointment of Bertha Wilson, in 1982, as the first woman in the Supreme Court, after having been appointed as the first woman of the Court of Appeal of Ontario in 1975. In relation to the gender issue, an increase of female appointments in the federal courts can be seen as well: in the '80s, only 3% of judges were women, in 1990 the percentage increased to 10% and became 25% in 2002, currently 36% women belong to the federal bench<sup>58</sup>. The Premier Brian Mulroney, in his first mandate between 1984 and 1988, appointed 17% of women. Among all, the appointments in the Supreme Court of Claire L'Heureux Dubé in 1987 and Beverly McLachlin in 1988 (who were appointed Chief Justice by Jean Chretien in 2000) must be included. At the Provincial level, the Ontario Judicial Appointments Advisory Committee, which was established in 1989, has promoted the appointments of women in its first six years of function, thus increasing the amount from 3% to 22% and selecting three justices belonging to First Nations, ten to visible minorities and even eight to French Canadians; Ontario was the first Province to appoint the first aboriginal, the first Eastern Asian and the first black woman judge<sup>59</sup>.

At the Supreme Court level, it seems that a customary norm exists, providing that there have to be three women among its members, while on the contrary the representation of the other social components is weaker. However, several signals show a shift. Jean Chretien has appointed the first justice in the Supreme Court of Ukrainian origins, John Sopinka and the first of Italian

<sup>57</sup> The Honourable Jody Wilson-Raybould Minister of Justice and Attorney General of Canada [news.gc.ca/web/article-en.do?nid=1086309](https://news.gc.ca/web/article-en.do?nid=1086309) 22th of July 2016.

<sup>58</sup> B. McLachlin, *Canada's Legal System at 150: Democracy and the Judiciary*, in <https://www.scc-csc.ca/judges-juges/spe-dis/bm-2016-06-03-eng.aspx> 21st of June 2016.

<sup>59</sup> L. Morton, *Judicial Appointments in Post-Charter Canada*, cit., 70.

descendent, Frank Iacobucci too<sup>60</sup>. Indeed, Justice Larry La Forme was appointed as the first aboriginal person to the Court of Appeal of Ontario in 2004. Justice Maurice Charbonneau has been the first black judge called to the Provincial Court of Ontario in 1969 and Justice Michael Tulloch was appointed to the Court of Appeal of Ontario in 2012.

It's obvious that the purpose of creating the judiciary as a mirror of the socio-cultural diversity is one of the most relevant aims of the Government, since pluralism existing in the society has been considered as a *quid pluris* to be enhanced, even in a field in which the function is exercised in the general interest of the community and not in accordance with a specific group interest. The extension of the mirror representation to all levels of judiciary is encompassed also in the guidelines of the Provincial Judicial Advisory Committees for the proposals of the judicial appointments<sup>61</sup>.

Diversity can increase judicial legitimization and reduce criticism about the lack of non-democratic origin of the judges. Cases involving delicate issues can be met with more public approval, and divisiveness can reach more easily an accommodation.

The survey showed that there is a perception of the existence of a *quid pluris* in the multifaceted composition of the judiciary. Firstly, there is a strengthening of the social cohesion and indirectly of democracy, which is distinguished rather by a project of inclusion than for one of alienation. By the way, how could the different groups trust in a judicial system which is not able to include the diversity of the population?<sup>62</sup> The admission to the judicial career of members of communities who have been excluded in the past may only make the function of judging more plausible, which might enshrine distinct perspectives, and not solely those of the prevalent class.

After all, if it is true that we are living in a “judgeocracy” era, a realistic counterweight can be the full and active participation of minorities in the judicial function.

However, we cannot deny that the issue of reflective judiciary is controversial because it may collide with a milestone of the democratic system which connects itself to the constitutional traditions of judicial impartiality and independence. These outlines seem to be barriers to the implementation of diversities in the judiciary, but they can not be an excuse for a failure to implement

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<sup>60</sup> L. Morton, *Judicial Appointments in Post-Charter Canada*, cit., 59 f.

<sup>61</sup> «Along with this assessment of professional competence and overall merit, Committees must strive to create a pool of candidates that is gender-balanced and reflective of the diversity of each jurisdiction, including Indigenous peoples, persons with disabilities, and members of linguistic, ethnic and other minority communities, including those whose members' gender identity or sexual orientation differs from that of the majority. In doing so, Committees should give due consideration to all legal experience, including that outside of mainstream legal practice. Broad consultations by the Committees, and community involvement through these consultations are essential elements of the process». [www.fja-cmf.gc.ca/appointments-nominations/committees-comites/guidelines-lignes-eng.html](http://www.fja-cmf.gc.ca/appointments-nominations/committees-comites/guidelines-lignes-eng.html)

<sup>62</sup> J. Rawls, *A Theory of Justice*, Cambridge, 1971.

measures to enhance diversity, or at least, to prevent practises that reduce representativeness<sup>63</sup>.

For instance, the entrenchment of Justices coming from the Provinces in the Supreme Court has not hindered the capacity of the judicial body to deliver impartial and reasonable decisions. As a consequence, the trust and the credibility in the Supreme Court have increased, producing an undeniable benefit for the whole legal system.

After exploring the jurisprudence of the court, we can affirm that the Francophone Justices perform their task with commitment and loyalty to the *ius dicere* rather than to their cultural and linguistic belonging. Nevertheless, their presence in the body has doubtless contributed to the nation-building process which sometimes is put to the test by political challenges

For this reason, both the 1987 Meech Lake Accord and the 1992 Charlottetown Accord advocated a reform in respect to appointments to the Supreme Court in the direction of reinforcing the Provincial and aboriginal representation within the body.

Specifically, Meech Lake Accord proposed amendments which entrenched Quebec's right to three judges on the Court and let every Province select a list of candidates to be appointed to the Court. Likewise, Charlottetown Accord established the so called "Canada clause" which entailed the recognition of Quebec as distinct society within Canada.

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<sup>63</sup> F. Gélinas, *Judicial Independence in Canada. A Critical Overview*, in A. Seibr-Fohr (ed.), *Judicial Independence in Transition*, Heidelberg, 2012, 575.