

## *Is Canadian Constitutional Law Canadian?*

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### I. Introduction

In 2017, Anthea Roberts published an important book, *Is International Law International?*,<sup>1</sup> in which she asked whether there was actually a unified approach to international law across international jurisdictions or whether approaches to international law differed significantly within different cultural and educational systems. She went further than asking that question but went on to amass significant evidence on educational profiles of academics in different countries, international law textbooks within different national contexts, and ultimately different and competing national traditions of international law. While I will certainly not here amass the same quantity of material in response to the question, I raise here a question inspired by hers, asking “Is Canadian Constitutional Law Canadian?”

To be clear, I ask that not in the sense of whether Canadian constitutional law is distinctive relative to the traditions of other states, such as the United Kingdom or United States, but rather whether Canadian constitutional law is unified at a pan-Canadian level. Is there one patriated body of constitutional law across Canada, or are there sufficient indications as to raise questions about such a claim that would warrant further and more detailed investigation?

I am going to claim that there are significant disunities in the body of Canadian constitutional law. I will highlight troubling cleavages on linguistic lines, lines involving divergent models of constitutional sources, and lines associated with approaches to constitutional

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1 Anthea Roberts, *Is International Law International?* (Oxford: Oxford University Press, 2017).

interpretation. Overall, I will argue that there must be significant questions on whether there is indeed Canadian constitutional law that is pan-Canadian.

Consider first some of the linguistic cleavages present within the context of English-French bilingualism. These cleavages have more effects than often realized on constitutional text, on case law, and perhaps most significantly, on constitutional scholarship and its ongoing contributions to constitutional debates.

In respect of the constitutional text, obviously, the *Constitution Act, 1982* was adopted in an officially bilingual form. There are linguistic discrepancies between the two official versions that have given rise to case law on how to reconcile those, such as with the differing versions of the section 24 remedies clause in the *Charter*.<sup>2</sup> Or, where case law has not yet arisen that engages with those discrepancies, there has been scholarship noting potential future subjects of analysis, such as differences in the section 1 limitations clause of the *Charter*.<sup>3</sup> In one sense, though, everyone is wrestling in principle with the same bilingual text, even if at a practical level only one language version or the other receives attention in many cases in parts of the country not inclined to engage in extensive bilingual discussion.

However, the 1982 patriation, in addition to leaving Quebec out of the final constitutional deal, also failed to resolve the longstanding problem of the bulk of Canada's constitutional text being in English only. Longstanding commitments to translate at least the *Constitution Act, 1867*, including a constitutional commitment of an expeditious translation contained in section 55 of the *Constitution Act, 1982*, have come to naught, at least in official terms. The resultant and ongoing violation of section 55 is of significant concern, as François Larocque and Darius Bossé have powerfully highlighted, and must be addressed.<sup>4</sup> In the meantime, Justice Canada prints an unofficial translation of the *Constitution Act, 1867* that was created in 1990 alongside the English version, even while distinguishing them only subtly.<sup>5</sup> And the Government of Quebec has recently produced a *Codification Administrative de la Loi constitutionnelle de 1867 et du Canada Act 1982*.<sup>6</sup> In relation to the *Constitution Act, 1867*, the French-language translations set out in that document are related article-by-article to versions proposed within texts by constitutional scholars or, where available, translations within Supreme Court of Canada judgments then attributed to the justices whose judgments had been translated. The result

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2 See *R v Collins*, [1987] 1 SCR 265, 38 DLR (4th) 508 (discussing the different English and French versions of s 24(2), with the less stringent French-language version to be preferred).

3 See several of the discussions in Luc B Tremblay & Grégoire CN Webber, eds, *The Limitation of Charter Rights: Critical Essays on R v Oakes* (Montréal: Éditions Thémis, 2009).

4 See François Larocque & Darius Bossé, "Section 55 and the Obligation to Enact an Officially Bilingual Constitution" (paper presented to *Legacies of Patriation* Conference, University of Alberta, 21 April, 2022). Senator Pierre Dalphond led efforts to get the Senate to adopt a resolution to encourage fulfillment of this obligation as recently as March 2022. It is a serious constitutional violation and disrespect for Francophones that the present state of affairs is allowed to continue on this matter.

5 For a discussion of this version, which originated in efforts of the French Constitutional Drafting Committee and was presented by the Minister of Justice in 1990 but then never officially adopted, see generally Hugo Yvon Denis Choquette, *Translating the Constitution Act, 1867: A Legal-Historical Perspective* (LLM thesis, Queen's University Faculty of Law, 2009) [unpublished].

6 Québec, Secrétariat du Québec aux relations canadiennes, *Codification Administrative de la Loi constitutionnelle de 1867 et du Canada Act 1982* (Québec: Gouvernement du Québec, 2021) [perma.cc/XA3E-YJK8].

is that the consolidated text set out within this work differs from the French-language version distributed by Justice Canada, sometimes in ways that could be legally significant. This means that there are actually differing constitutional texts in use in francophone contexts such that there are actual cleavages within the constitutional text itself.

I will return later to a further, underlying dimension of the linguistically based cleavages. For the moment, though, it is worth noting that a different set of cleavages arise in relation to what sources count as constitutional sources in Canadian law, with some of these cleavages being more technical and some more interpretive. Section 52(2) contains an enumeration of the contents of the Constitution of Canada — albeit with wording suggesting that its enumeration may be non-exhaustive<sup>7</sup> — and that enumeration refers to the Schedule to the *Constitution Act, 1982*. Despite the views of some that the *Royal Proclamation of 1763* is an instrument of Canadian constitutional law, including case law referring to it as a sort of “Magna Carta” for Indigenous peoples,<sup>8</sup> the enumeration within the Schedule referenced by section 52(2) does not include the *Royal Proclamation of 1763* on the list. It is clear, then, that cleavages exist on what documents are and are not part of the Constitution of Canada and thus constitutional sources in the more technical sense of constitutional text.

Going beyond the text itself, the Supreme Court of Canada demonstrated as recently as fall 2021 a tremendously deep division on the matter of the constitutional status of so-called unwritten principles of constitutional law. In the *City of Toronto* case, the Court split five-to-four on whether unwritten constitutional principles could serve as an independent basis for striking down legislation,<sup>9</sup> exemplifying a fundamental division on the nature of specific sources of constitutional law.

Some larger, associated questions concern matters of in what ways Indigenous legal norms are or are not recognized by the Constitution as sources of law in specific contexts as well as ways in which Indigenous legal norms are or are not themselves constitutional in some form. In terms of the mainstream Canadian legal system, these questions are new questions more than a new cleavage on an older matter, but there are real divisions nonetheless. On these matters, the range of different analyses should not be underestimated by those who see some particular answer as itself clear, obvious, and morally necessary. Even while many academics routinely write of Indigenous rights of self-government as if these were constitutionally recognized — and the federal government negotiated modern treaties on this basis — the governing case law from the Supreme Court of Canada on self-government (*Pamajewon*) has over nearly three decades been much more constraining, to the point of suggesting the possibility of only

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7 See *Constitution Act, 1982*, s. 52(2), being Schedule B to the *Canada Act 1982* (UK), 1982, c 11. (“The Constitution of Canada includes...”).

8 See e.g. *R v Marshall*; *R v Bernard*, 2005 SCC 43 at para 86 (Chief Justice McLachlin stating that “the *Royal Proclamation* must be interpreted in light of its status as the ‘Magna Carta’ of Indian rights in North America and Indian ‘Bill of Rights’; *R. v. Secretary of State for Foreign and Commonwealth Affairs*, [1982] 1 Q.B. 892 (CA), at p. 912”); *Calder v British Columbia* (AG), [1973] SCR 313 at 395, 34 DLR (3d) 145 (Justice Hall indicating the *Royal Proclamation*’s “force as a statute is analogous to the status of *Magna Carta*”). See also *R v Kogogolak*, (1959) 28 WWR 376 at 378, 1959 CanLII 565 (NWT SC) (referring to the *Royal Proclamation* as “the *Magna Carta* of the [Inuit]” given their lack of treaties). The characterization is somewhat surprising insofar as the *Proclamation*’s provisions on Quebec were significantly altered in the 1774 *Quebec Act*, showing its legal malleability.

9 *Toronto (City of) v Ontario* (AG), 2021 SCC 34.

limited spheres of constitutionally recognized self-governing powers.<sup>10</sup> Interactions of Indigenous rights and parliamentary powers have seen academics state positions as being allegedly obvious that have subsequently been rejected by the Supreme Court of Canada,<sup>11</sup> showing a real disconnect between the academic and judicial approaches to the doctrine. Other academics have critiqued the Court for not treating the *United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP) as a central authority even in cases where it was barely argued before the Court,<sup>12</sup> suggesting further diverging views on to what degree the courts ought to be taking notice of their own motion of the UNDRIP. The question of in what ways Indigenous legal norms are or are not part of Canadian law involves many complex facets generally,<sup>13</sup> even before we would get to the matter of whether they infuse constitutional law in certain contexts, some of which concern the very characterization of what systems of law are or are not applicable in Canada. These matters would of course warrant a full discussion of their own, and I will be addressing them in several upcoming contexts.<sup>14</sup>

A further set of cleavages arise in the context of constitutional interpretation. For a certain period, there were seemingly official versions of constitutional interpretation that Canada employed — namely, purposive and so-called “living tree” analysis — and many scholars simply assert the validity of these approaches on an ongoing basis.<sup>15</sup> Even at a descriptive level, though, the centrality of these approaches became subject to questioning in recent years, especially in the important work of Ben Oliphant and Léonid Sirota.<sup>16</sup> Beyond that, the legally con-

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10 *R v Pamajewon*, [1996] 2 SCR 821, 138 DLR (4th) 204. These comments are of course now subject to whatever might be said in the forthcoming Supreme Court of Canada opinion in the *Quebec Child Welfare Reference* case, *Québec (AG) v Canada (AG)*, SCC Docket No 40061 (heard 7 December 2022), as that case saw some reengagement with *Pamajewon* and suggestions that the Court should alter its past jurisprudence in light of broader legal and normative developments.

11 See e.g. Kent McNeil’s virtually incendiary piece in the middle of the Idle No More protests that indicated that it was clear in Canadian law that there was a duty to consult on legislative action (Kent McNeil, “Idle No More Deserves Our Thanks: Movement Has Exposed Harper Government’s Lack of Respect for Aboriginal and Treaty Rights”, *Toronto Star* (27 January 2013) [perma.cc/F5XB-LXUW]) when that point had been explicitly left two years before by the Supreme Court of Canada as an unresolved question “for another day” (*Rio Tinto Alcan Inc v Carrier Sekani Tribal Council*, 2010 SCC 43 at para 45) and the Court would ultimately decide that there was no duty to consult applicable to legislative action (*Mikisew Cree First Nation v Canada (Governor General in Council)*, 2018 SCC 40 [Mikisew]).

12 See e.g. Sarah Morales, “Supreme Court of Canada Should Have Recognized UNDRIP: *Mikisew Cree First Nation v Canada*”, *Canadian Lawyer* (29 October 2018), online: <[www.canadianlawyermag.com](http://www.canadianlawyermag.com)> [perma.cc/4MAE-JE4K]. While it had been raised more meaningfully at lower court phases, the UNDRIP was barely raised at the Supreme Court of Canada in the case in question (*Mikisew*, *supra* note 11).

13 In a significant statement in *Pastion v Dene Tha’ First Nation*, 2018 FC 648 at para 8, Justice Grammond states that “Indigenous legal traditions are among Canada’s legal traditions. They form part of the law of the land.” However, this statement hides more complexity than first apparent, insofar as it becomes necessary to determine in what circumstances a non-Indigenous Canadian court will end up interpreting the contents of Indigenous law and other related matters that I will discuss further elsewhere.

14 See e.g. Holly Lake, “The Power of Law: Recognition of Indigenous Law is Making Gains in Canada, but the Courts Remain Timid”, *CBA/ABC National* (21 June 2022), online: <[www.nationalmagazine.com](http://www.nationalmagazine.com)> [perma.cc/2VM4-ERU5].

15 For a partial cataloguing of the influence of that metaphor, and problems with that influence, see Honourable Marshall Rothstein, “Checks and Balances in Constitutional Interpretation” (2016) 79:1 Sask L Rev 1.

16 See Benjamin J Oliphant & Léonid Sirota, “Has the Supreme Court of Canada Rejected ‘Originalism?’” (2016) 42:1 Queen’s LJ 107; Léonid Sirota & Benjamin J Oliphant, “Originalist Reasoning in Canadian Constitutional Jurisprudence” (2017) 50:2 UBC L Rev 505.

fused invocation of the so-called “living tree” principle through much of the *Charter* jurisprudence came under questioning as well, including in important work by Professor Brad Miller (as he then was),<sup>17</sup> and it was revealed that many of those invoking particular precedents for that principle were doing so without having ever read those purported precedents.<sup>18</sup>

Saying that much might make the point only that there is a messiness present more than actual cleavages on matters of constitutional interpretation. However, there are actual real differences in what is stated on constitutional interpretation by those who continue to adhere to living tree analysis and those increasingly putting forward originalist and textualist methodologies of constitutional interpretation. The latter, I would suggest, are far more widespread than many realize, on which I would cite the important paper of Justice Colin Feasby from this same conference.<sup>19</sup> There are more cleavages here than many realize, whether on constitutional interpretation generally or whether on more specific issues.

As one specific example, I would point to radically different views on what one might call the classical tradition of Canadian federalism, as seen in various clashes over federal assertions of power in recent years. These divisions reach deeper than disagreements about the law within shared premises but relate instead to matters like whether constitutionally settled positions are determinative relative to alleged new needs,<sup>20</sup> whether arguments about the consequences of particular division of powers determinations do or do not count as arguments on the constitutional issue at stake,<sup>21</sup> whether arguments derived from the constitutional text about particular powers do or do not count as arguments,<sup>22</sup> and so on. There are not just dis-

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17 Bradley W Miller, “Origin Myth: The Persons Case, the Living Tree, and the New Originalism” in Grant Huscroft & Bradley Miller, eds., *The Challenge of Originalism* (Cambridge: Cambridge University Press, 2011) 1. An important challenge has been put to Miller’s account by Peter C Oliver, “Enduring Metaphors: The Persons Case and the Living Tree” (2022) 48 *Queen’s LJ* 44, although Oliver’s challenge relates more to how the case was understood from 1929 to 1982 and, in my respectful view, leaves relatively undisturbed many of Miller’s claims about what the reasoning in the case itself entailed. There is, of course, more to be said on these issues, but any suggestion that the case straightforwardly supports the progressive causes for which it has been used has to be subject to very serious interrogation.

18 See Rothstein, *supra* note 15.

19 Colin Feasby, “Implications of the Supreme Court of Canada’s New Approach to Charter Interpretation” (lecture delivered at the *Legacies of Patriation* Conference, University of Alberta, 21 April 2022).

20 An important case that does not receive enough discussions of its divisions would be *Consolidated Fastfrate Inc v Western Canadian Council of Teamsters*, 2009 SCC 53, in which there was an explicit argument over allegations of originalism in one position.

21 See e.g. this observation of Justice Huscroft in the context of debates about climate change and federalism: “I appreciate that federalism concerns seem arid when the country is faced with a major challenge like climate change. As long as something gets done, it may seem unimportant which level of government does it. But federalism is no constitutional nicety; it is a defining feature of the Canadian constitutional order that governs the way in which even the most serious problems must be addressed, and it is the court’s obligation to keep the balance of power between the levels of government in check.” This quote is from the *Reference re Greenhouse Gas Pollution Pricing Act*, 2019 ONCA 544 at para 198, with the Supreme Court of Canada decision in the case (*References re Greenhouse Gas Pollution Pricing Act*, 2021 SCC 11 [*Greenhouse Gas*, 2021]) similarly displaying disagreements over to what degree the practical problem faced should affect the interpretation of division of powers issues.

22 Consider the example of Justice Rowe’s significant emphasis on constitutional text in the *Greenhouse Gas*, 2021, *supra* note 21 at paras 477ff, whereas this text does not seem to matter in the same way to the other justices who treat it as overridden by doctrine and practical concerns.

agreements but real and fundamental cleavages about what even count as appropriate forms of constitutional argumentation and constitutional interpretation.

In a short comment on this topic, I cannot purport to fully explain these linguistic, source-related, and interpretation-related cleavages or their origins. But it is not difficult to suggest that there are self-reinforcing phenomena at play. One can amass evidence in various ways that Anglophone constitutional scholars have largely ignored Francophone constitutional scholarship, something that will then tend to be perpetuated over time. One can point to evidence of different canons of central constitutional cases divided across parts of the country, as between Quebec and outside Quebec and as between parts of the country where Indigenous issues play a more central role and those where they receive less attention.<sup>23</sup> One can even point to some signs of areas of constitutional law developing entirely differently in different provinces. One can speak anecdotally of constitutional pedagogy being substantially different in different schools, and here I might say that the amount of time spent in a first-year constitutional law course on division of powers ranges from a full semester to two weeks or, in one instance of which I heard recently, only two hours. One can speak of constitutional law courses at some schools that teach non-majority opinions in certain leading cases as if these were the definitive law, probably a sincere belief within particular theoretical approaches to constitutionalism and one that comes to be perpetuated in the context of the kinds of cleavages I have been discussing. In this respect, part of the Canadian constitutional legacy even four decades after patriation includes some fracturing across the very face of Canadian constitutionalism.

I should not end on that pessimistic note. There are ways forward. They involve more reading across our differences, more intense scholarship, and more investment in serious study of Canadian constitutional law. We should be dialoguing about curricula and pedagogy and substance, and there are no easy ways forward but much more work ahead. Patriation was one way station but there are many miles ahead.

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23 While I will not name names throughout this paragraph, an important past study on what cases are treated as canonical by scholars from different parts of the country appeared as Hugo Cyr & Monica Popescu, "The Supreme Court of Canada" in András Jakab, Arthur Dyevre & Giulio Itzcovich, eds, *Comparative Constitutional Reasoning* (Cambridge: Cambridge University Press, 2017) 154. The pedagogical substratum of these canons will be perpetuated within later work of scholars and practitioners.