

ARTICLE

THE CODIFICATION OF HUMAN RIGHTS IN CANADA

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with the collaboration of Marie-Lou Laprise**

This article is an updated and slightly revised version of the national report submitted by the author to the International Academy of Comparative Law's Second Thematic Congress. The theme of the Congress, held from May 24th to 26th 2012 at the National Taiwan University, was "Codification". The paper offers a systematic but brief account of the adjudicative protection of human rights, both collective and individual, in domestic law. Such an overview also provides the opportunity to identify a few trends in the development of the Canadian constitutional case law regarding human rights. Even if human rights had received quasi-constitutional protection several decades earlier, their codification as part of the supreme law of Canada in 1982 proved to be a significant step forward. This is particularly true for the fundamental freedoms of expression and religion, and for "legal rights." The picture is more mixed, however, regarding democratic rights. Part II of the Constitution Act, 1982, relating to special rights of Aboriginal peoples, has had huge systemic repercussions. A notable source of concern is the Supreme Court's continued hesitance on how to conceive of the relation between the Charter's individual rights and freedoms and the special rights of Aboriginal peoples recognized in Part II of the C.A. 1982.

L'article qui suit est une version corrigée, mise à jour et légèrement remaniée du rapport national canadien produit au deuxième congrès thématique de l'Académie internationale de droit comparé. Ce congrès, qui fut tenu à l'université nationale de Taiwan du 24 au 26 mai 2012, avait pour thème « La Codification ». Le texte qui suit offre donc une présentation à la fois systématique et brève de la protection juridictionnelle des droits fondamentaux, collectifs comme individuels, en droit interne. De dresser un tel panorama devait du reste permettre de dégager certaines tendances d'évolution de la jurisprudence constitutionnelle canadienne relative aux droits fondamentaux. Même si la protection « quasi constitutionnelle » de ceux-ci y était alors réalité depuis quelques décennies, la « codification » des droits de la personne au sein de la « loi suprême » du Canada en 1982 devait se révéler comme un progrès considérable. Cela concerne au premier chef les libertés fondamentales de religion et d'expression ainsi que les « garanties juridiques ». Le bilan est plus mitigé en ce qui concerne les droits démocratiques. La Partie II de la Loi constitutionnelle de 1982, relative aux droits spéciaux des peuples autochtones, a eu des répercussions systémiques énormes. Une source d'inquiétude est l'hésitation dont continue de faire montre la Cour suprême sur la question de la manière dont il convient de concevoir la relation entre les droits et libertés que la Charte garantit à la personne et les droits que la Partie II de la L.C. 1982 reconnaît en propre aux peuples autochtones.

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INTRODUCTION

Discussing the codification of human rights in Canada requires a few preliminary observations regarding Canada's constitutional law.

The Constitution of Canada encompasses a political component and a legal component.¹ The latter coincides with Canada's constitutional law, while the former corresponds to constitutional conventions. The courts may define the existence and content of constitutional conventions, but may not enforce them.²

Canada's legal constitution is made up of written and unwritten norms. Only the former pertain directly to the issue of codification. The legal constitution also comprises rigid or formal constitutional law on the one hand, and on the other, flexible or material constitutional law. As Maxime St-Hilaire and Laurence Bich-Carrière express it:

[TRANSLATION] Indeed, whether written or not, a norm may be constitutional in virtue of its status in the hierarchy of legal norms or in virtue of its content, if it addresses directly or indirectly the form of government of the state or the rights of individuals or groups with which the state may enter into relationships. In this sense, we can speak of rigid constitutional law in the former case, and of flexible constitutional law in the latter. Rigid constitutional law is referred to as such simply because, standing at a higher level of authority than the ordinary law of which it intends to state the conditions of validity, applicability and operability, it is logical that it cannot be modified by this ordinary law. If this rigid constitutional law is written, then the one or many texts that constitute it will

1. M. ST-HILAIRE & L. BICH-CARRIÈRE, "La constitution juridique et politique du Canada : notions, sources et principes" in *Droit constitutionnel*, loose-leaf ed., JurisClasseur Québec, coll. "Droit public", Montréal, LexisNexis, 2011.

2. See Re: Resolution to amend the Constitution, [1981] 1 S.C.R. 753 [Resolution to amend the Constitution]; Reference re: Amendment to the Canadian Constitution, [1982] 2 S.C.R. 791.

typically provide the procedure for its amendment. If it is unwritten, that is to say, jurisprudential, then it will generally need to be modified by the constitutional jurisdiction, which could be a constitutional court or a supreme court, for instance. Flexible constitutional law, for its part, can be amended by ordinary law, whether it is written and stems from ordinary statutes and decrees of implementation thereof, or whether it is unwritten and arises from any form of case law that is not constitutional, which means case law that can be modified by ordinary law. In this regard, one can just as well speak, as we will, of constitutional law in the formal and in the material sense. However, one must refrain from confusing this distinction with the distinction between formal and material sources of law, constitutional law included [...].³

Besides Canada's colonial past, when the first mechanism in place for reviewing constitutionality was the required compliance of colonial laws with imperial "constitutional" laws, the choice of federalism, made prior to Canada's accession to the status of a sovereign state under international law, rendered it necessary to include in the Constitution Act rules assigning respective spheres of jurisdiction to the federal government and the federate entities. The federation of British North American colonies also resulted in the protection of a limited range of rights in favor of certain religious and linguistic minorities. As a matter of fact, it is recognized that, in itself, the federal form of state organization protects cultural and linguistic diversity, as well as democracy at the local and regional levels. The Supreme Court held in the *Reference re Secession of Quebec* that "[t]he federal structure of our country also facilitates democratic participation by distributing power to the government thought to be most suited to achieving the particular societal objective having regard to this diversity".⁴ Later on, the transfer of the full constitution-making power from the United Kingdom to Canada prompted a revision of the Constitution, by the end of which individual rights and freedoms, certain

3. M. ST-HILAIRE & L. BICH-CARRIÈRE, *supra* note 1 at para. 8.

4. *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217 [*Secession of Quebec*] at para. 58.

linguistic rights of minorities (in this case French and English), and rights of Aboriginal peoples had attained the status of supreme law.

The *Constitution Act, 1867* (the “C.A. 1867”)⁵ and the *Constitution Act, 1982* (the “C.A. 1982”)⁶ collectively form the most significant part of Canadian formal constitutional law. As has been demonstrated by Maxime St-Hilaire and Laurence Bich-Carrière, the written part of this formal constitutional law, in reality, can be circumscribed only by means of a careful review of the C.A. 1982 provisions on which the constitution-making power is founded, namely, provisions in its Part V relating to the “Procedure for amending Constitution of Canada”.⁷ The unwritten part of the Constitution of Canada consists of case law that, beyond the interpretation of the Constitution’s written part, has set out a number of “unwritten principles”, including the rule of law, the independence of the judiciary, democracy, federalism, the protection of minorities, and the honour of the Crown in its relations with Aboriginal peoples. Finally, subsection 52(1), C.A. 1982 gave express form to formal legal constitutionalism and, by implication, to constitutional judicial review, otherwise already established for decades, in the following terms : “The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.” The Supreme Court has confirmed that “of no force or effect”, in this instance, means “invalid”.⁸

The *Canadian Charter of Rights and Freedoms* (the “Charter”) forms Part I of the C.A. 1982, while its Part II protects the specific rights of Aboriginal peoples. These two first parts of the C.A. 1982 provide the material for the first section of this report.

5. *British North America Act*, (1867) 30-31 Vict., c. 3 (U.K.), renamed *Constitution Act, 1867* by Section 53 of the *Constitution Act, 1982* (U.K.), being Schedule B of the *Canada Act, 1982* (U.K.), 1982, c. 11 [*Constitution Act, 1867*].

6. *Constitution Act, 1982* (U.K.), being Schedule B of the *Canada Act, 1982* (U.K.), 1982, c. 11.

7. See M. ST-HILAIRE & L. BICH-CARRIÈRE, *supra* note 1 at para. 20.

8. See *Re Manitoba Language Rights*, [1985] 1 S.C.R. 721 at para. 52.

The second section will be devoted to the codification of human rights in the flexible, merely material, written constitutional law that, here in Canada, we also call “quasi-constitutional” law. The third section will focus on the influence of supranational law concerning human rights on Canada’s unwritten formal constitutional law, an influence which, as we will see, is akin to the influence of a material source of law. The fourth and final section of this report will briefly consider the modalities of judicial enforcement of the various procedural and substantive constitutional protections that Canadian law grants to human rights.

1. FORMAL CONSTITUTIONAL PROTECTION: THE CANADIAN CHARTER OF RIGHTS AND FREEDOMS AND THE CONSTITUTIONAL RIGHTS OF ABORIGINAL PEOPLES (PARTS I AND II OF THE CONSTITUTION ACT, 1982)

1.1. Benefit of Rights

1.1.1. According to the Charter

It is necessary to situate the *Charter* properly with respect to the other charters and instruments protecting human rights and freedoms in Canada. Section 26 of the *Charter*, in this regard, preserves “any other rights or freedoms”, which are not to be taken away by the ones the *Charter* protects. What first and foremost distinguishes the *Charter* from other legislation of similar content is its full and formal constitutional status. Because of this status, it applies to both federal and provincial spheres of power in order to set the conditions of validity of various norms and actions. It only applies, however, to relations of the state with natural and legal persons. The constitutional *Charter* enforcement takes place in the same “decentralized” and “unspecialized” fashion as all other Canadian constitutional law in the formal sense,

and not, even concurrently or partially, by the intervention of bodies specifically created for this purpose.⁹

Most often, rights and freedoms protected by the *Charter* belong to “everyone”, that is to say, to every natural and legal persons, whether nationals or foreign citizens.¹⁰

Some rights are, however, expressly intended for Canadian citizens only. Such is the case for the right to vote and to be elected (the democratic rights), the right to enter, remain in or leave Canada (the mobility rights), and the right to have one’s children receive instruction in the official language of the minority (section 3, subsection 6(1) and section 23). The extent of the right to move and gain livelihood in any province (subsection 6(2)) is slightly broader as it is explicitly granted to Canadian citizens and permanent residents.

Due to their material content, some *Charter* rights are only applicable to natural persons. First of all, as only a natural person may obtain the status of citizen or permanent resident, the rights and freedoms reserved to the holders of these statutes can only be bestowed upon natural persons.

A legal person can neither be granted freedom of conscience and religion (paragraph 2(a)),¹¹ nor the right to only be deprived of life, liberty and security of its person in accordance with the principles of fundamental justice (section 7).¹² The same applies for

9. See M. ST-HILAIRE & L. BICH-CARRIÈRE, *supra* note 1 at para. 23-30; H. JEAN & G. LAPORTE, “Contentieux constitutionnel”, loose-leaf ed., JurisClasseur Québec, coll. “Droit public”, *Droit constitutionnel*, Montréal, LexisNexis Canada, 2011.

10. See *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145 [Southam]; *Singh v. Canada (Minister of Employment and Immigration)*, [1985] 1 S.C.R. 177 [Singh].

11. See *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295 [Big M Drug Mart].

12. See *Singh*, *supra* note 10; *Suresh v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 3; *Irwin Toy Ltd. v. Quebec (A.G.)*, [1989] 1 S.C.R. 927 at 1004; *Dywidag Systems International, Canada Ltd. v. Zutphen Brothers Construction Ltd.*, [1990] 1 S.C.R. 705 [Dywidag] at 709; *Canadian Egg Marketing Agency v. Richardson*, [1998] 3 S.C.R. 157 [Richardson] at para. 36.

the protection against arbitrary detention and imprisonment (section 9) and the rights in the event of arrest or detention (paragraph 10(a) to (c)).

As for the rights conceded to “any person charged with an offence”, even if the expression in itself can embrace legal persons as well as natural ones, the very nature of some of these rights will exclude legal persons from their application. It will be so when they are related to imprisonment or testimonies, for legal persons can, physically, neither be imprisoned nor testify (this applies to paragraphs 11(c),¹³ (e) and (f),¹⁴ among others).

Likewise, the right of “a witness” not to have any evidence given in a proceeding used to incriminate that witness in another proceeding (section 13) and the right of “a party or witness” to the assistance of an interpreter (section 14) are reserved to natural persons.

In contrast, the nature of certain rights allows legal persons to invoke them. This is true for the freedom of expression and the freedom of the press, and presumably also for the freedom of “other media of communication” (paragraph 2(b)).¹⁵ Section 8 appears to apply to legal persons in order to protect them against unreasonable search or seizure.¹⁶

The issues pertaining to the protection against discrimination, or the right to equality, have yet to receive a definite remedy from the Supreme Court,¹⁷ although the transcripts of the debates

13. See *British Columbia Securities Commission v. Branch*, [1995] 2 S.C.R. 3; *R. v. Amway corp.*, [1989] 1 S.C.R. 21.

14. See *Richardson*, *supra* note 12 at para. 36 (Iacobucci and Bastarache JJ., majority reasons).

15. See *Edmonton Journal v. Alberta (A.G.)*, [1989] 2 S.C.R. 1326 [*Edmonton Journal*]; *Canadian Broadcasting Corp. v. Lessard*, [1991] 3 S.C.R. 421.

16. See *Southam*, *supra* note 10.

17. See *Edmonton journal*, *supra* note 15, in which the dissenting judges, alone to speak of this matter, held that section 15 does not apply to legal persons. See also *Rudolph Wolff & Co. v. Canada*, [1990] 1 S.C.R. 695 and *Dywidag*, *supra* note 12.

suggest that the framers of the Constitution did not intend for it to apply to legal persons. This debate has raised many concerns. For instance, a foreign legal person could attempt to allege a discriminatory differential treatment based on national origin, an enumerated ground of subsection 15(1). This could amount to trying to make Canadian constitutional law contribute to the implementation into domestic law of principles from international economic law, namely, those of the most-favoured-nation and of national treatment. Furthermore, the enumeration of grounds in subsection 15(1) is not exhaustive, which means a legal person could very well try to invoke this provision against a differential treatment based on provincial origin or residence.¹⁸

Notwithstanding the foregoing, legal persons have standing as of right to raise as a defence any right protected by the *Charter*, whether in criminal¹⁹ or in civil proceedings,²⁰ and whether that right is bestowed upon them or not. To do so, however, the proceedings must have been initiated by the state or by one of its bodies, pursuant to a regulatory regime. This will always be the case in criminal proceedings, but not in civil ones. Under these circumstances, legal persons have standing to act as of right, and do not need to be granted public interest standing. At first, this exception was recognized to apply to criminal proceedings, with *Big M Drug Mart* in 1985. In this case, the Supreme Court stated that “[a]ny accused, whether corporate or individual, may defend a criminal charge by arguing that the law under which the charge is brought is constitutionally invalid”.²¹ While the exception then seemed to be limited to criminal proceedings, its expansion to the broader context of penal proceedings was soon to be recognized by the case law.²² A new widening, this time in the context of a civil

18. The Supreme Court has yet to decide if provincial residence is an analogous ground to those enumerated in subsection 15(1). See *Richardson*, *supra* note 12 at para. 28, 60.

19. See *Big M Drug Mart*, *supra* note 11; *R. v. Wholesale Travel Group Inc.*, [1991] 3 S.C.R. 154 [*Wholesale Travel*].

20. See *Richardson*, *supra* note 12.

21. *Big M Drug Mart*, *supra* note 11 at para. 39.

22. See *Wholesale Travel*, *supra* note 19, which confirms it.

proceeding, happened in *Canadian Egg Marketing Agency v. Richardson*:

In our opinion, the logic of *Big M Drug Mart* extends to give standing as of right to the respondents. While they might seek public interest standing, we do not believe they need do so. They do not come before the court voluntarily. They have been put in jeopardy by a state organ bringing them before the court by an application for an injunction calling in aid a regulatory regime. Success of that application could result in enforcement by contempt proceedings. If the foundation for these remedies is an unconstitutional law, it appears extraordinary that a defendant cannot be heard to raise its unconstitutionality solely because the constitutional provision which renders it invalid does not apply to a corporation.
[...] Surely, just as no one should be convicted of an offence under an unconstitutional law, no one should be the subject of coercive proceedings and sanctions authorized by an unconstitutional law.²³

A legal person will thus be able to benefit from a finding of unconstitutionality even when such a finding results from the violation of human beings' rights or freedoms.

If the "*Big M Drug Mart* exception" does not apply, a person, whether legal or natural, can seek public interest standing. Such a standing will be granted if the person seeking it establishes that there is a serious issue raised as to the invalidity of legislation, that he is directly affected by the legislation or has a genuine interest in its validity, and that the means chosen is a reasonable and effective way to bring the issue before the court.²⁴ This doctrine has been developed by the case law to make sure a legal norm could never be immunized from judicial review.²⁵

23. *Richardson*, *supra* note 12 at para. 40, 44.

24. *Canada (Attorney General) v. Downtown Eastside Sex Workers United Against Violence Society*, 2012 SCC 45 [Downtown Eastside].

25. We can see it as a greater effectuation, in practical terms, of the maxim *ubi jus ibi remedium*. See *Hy and Zel's Inc. v. Ontario (A.G.)*; *Paul Magder Furs Ltd. v. Ontario (A.G.)*, [1993] 3 S.C.R. 675 at 689; *Canada (Minister of Justice) v.*

1.1.2. According to Part II of the C.A. 1982

Formal constitutionalisation of the special rights of Aboriginal peoples is laudable, but unfortunately it is extremely uncommon. A comprehensive discussion of its terms and merits in Canadian law is however beyond the scope of this report.²⁶

Part II of the C.A. 1982 provides for the following in its Section 35:

- (1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.
- (2) In this Act, “aboriginal peoples of Canada” includes the Indian, Inuit and Métis peoples of Canada.
- (3) For greater certainty, in subsection (1) “treaty rights” includes rights that now exist by way of land claims agreements or may be so acquired.
- (4) Notwithstanding any other provision of this Act, the aboriginal and treaty rights referred to in subsection (1) are guaranteed equally to male and female persons.

This recognition and affirmation pertains to two distinct sets of rights: aboriginal rights, including *inter alia* “activity rights” and aboriginal title, and treaty rights. The use of the term “existing” in subsection 35(1), C.A. 1982 means nothing more than the fact that “extinguished rights are not revived by the Constitution Act, 1982”.²⁷

Whereas the content of an “activity right” is the right to engage in an activity that may or may not be tied to a territory, abo-

Borowski, [1981] 2 S.C.R. 575 at 598; Nova Scotia Board of Censors v. McNeil, [1976] 2 S.C.R. 265 at 271; Thorson v. Canada (A.G.), [1975] 1 S.C.R. 138 at 161-163; Downtown Eastside, *supra* note 24.

26. See generally Jean LECLAIR & Michel MORIN, “Peuples autochtones et droit constitutionnel” in *Droit constitutionnel*, loose-leaf ed., JurisClasseur Québec, coll. “Droit public”, Montréal, LexisNexis, 2011; Sébastien GRAMMOND, *Aménager la coexistence : les peuples autochtones et le droit canadien*, Bruylant/Yvon Blais, 2003.

27. See *R. v. Sparrow*, [1990] 1 S.C.R. 1075 [*Sparrow*].

original title, as the most complete territorial aboriginal right, is a title recognizing rights of exclusive use and occupation on a global land space:

[TRANSLATION] Aboriginal title rests in principle on a global land space, which means that it extends to mining rights and can encompass stream beds and water rights. Hence, aboriginal title differs, in Quebec at least, from private ownership of land, which is subject in a large number of cases to the principle that rights in or over mineral substances form part of the domain of the state. The possibility that the aboriginal title is also a burden on some maritime spaces cannot be ruled out [...].²⁸

Any aboriginal right is likely to encompass a collective dimension. In *Sappier/Gray*, the Supreme Court explained that because those rights were recognized and affirmed “in order to assist in ensuring the continued existence of these particular aboriginal societies” and in maintaining their distinctive character, their exercise must be tied to this purpose. These rights are not “to be exercised by any member of the aboriginal community independently of the aboriginal society it is meant to preserve”.²⁹

In this sense, both the aboriginal title and the ancestral “activity rights” are collective rights held by the community and they suppose the ability for that community to allocate the terms of individual exercise thereof.³⁰ The same is true for treaty rights. In fact, Sébastien Grammond describes a treaty as an “[TRANSLATION] agreement which pertains to the rights of an Aboriginal people as a people, that is to say, to its collective rights”.³¹

28. Ghislain OTIS, “Le titre aborigène : émergence d’une figure nouvelle et durable du foncier autochtone?”, (2005) 46 *Les Cahiers de Droit* 795 at 838.

29. *R. v. Sappier; R. v. Gray*, [2006] 2 S.C.R. 686 at para. 26.

30. See *Sparrow*, *supra* note 27 at 1112; *Paul v. British Columbia (Forest Appeals Commission)*, [2003] 2 S.C.R. 585 at para. 36; *R. v. Powley*, [2003] 2 S.C.R. 207 [*Powley*] at para. 24; *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010 [*Delgamuukw*] at para. 115.

31. S. GRAMMOND, *Aménager la coexistence*, *supra* note 26 at 251; S. GRAMMOND, *Les traités entre l’État canadien et les peuples autochtones*, Cowansville, Yvon Blais, 1996 at 85-86.

These “collective” rights, whether aboriginal or treaty rights, can however be enforced on a contentious basis by an individual, including (but not limited to) as a defence in criminal proceedings.³² In *Powley*, the Supreme Court confirmed that even if aboriginal rights are communal rights “grounded in the existence of a historic and present community”, they may be exercised provided that it is “by virtue of an individual’s ancestrally based membership in the present community”.³³ Recognition of the community by ordinary law is, therefore, in no way decisive.

1.2. Burden of Rights

1.2.1. According to the Charter

We have seen the conditions under which it is possible for a party (or an intervener) to benefit from a *Charter* right, but it is also necessary, at least in theory, that the author of the impugned measure be bound by the *Charter*. To that effect, subsection 32(1) states that the *Charter* applies:

- (a) to the Parliament and government of Canada in respect of all matters within the authority of Parliament including all matters relating to the Yukon Territory and Northwest Territories; and
- (b) to the legislature and government of each province in respect of all matters within the authority of the legislature of each province.

In short, the *Charter* applies to the federal and provincial legislators and governments *in their respective areas of jurisdiction*. Its application takes into account the federative form of state organization.

Case law relating to the burden of rights under the *Charter* is not without its ambiguities, to the point that credit can be given

32. See *Sparrow*, *supra* note 27.

33. *Powley*, *supra* note 30 at para. 24.

to the thesis of a discrepancy between the Supreme Court's "theory" and its actual practice. Since an exhaustive description of these inconsistencies goes beyond the scope of this report, the following is only a summary of the Supreme Court's dominant position as to the various aspects of the *Charter* application. Apart from exceptional cases, there would seem to be two main modes of application of the *Charter* to the actors identified in subsection 32(1): in accordance with the impugned measure's "legislative" nature, or in accordance with its "governmental" nature.

1.2.1.1. The Burden of the Legislator

The *Charter* applies, in theory, to the federal Parliament and the provincial legislatures taken as a whole, as well as to the elements of which they are composed (the House of Commons and the Senate, and the provincial legislative assemblies, *inter alia*).

Insofar as it applies to the legislator, the *Charter* applies, first, to any legislative or regulatory norm. It thus allows courts, by reading in or reading down, to add or to subtract from the language of an impugned statute in order to construe it as consistent with the rights protected by the *Charter*.³⁴ However, the *Charter* cannot be a basis to declare complete legislative silence on an issue unconstitutional.

A legislative norm is not to be held contrary to the *Charter* when this norm merely confers, in full equality, an ability, such as the ability to enter into a contract, if exercising this ability does not necessarily involve an infringement to a person's constitutional rights. This is the concept of neutral legislative standard. The core of this analysis is to determine if the alleged breach of the *Charter* stems from the standard itself or rather from its implementation. For instance, in *Young v. Young*³⁵ and *P. (D.) v. S. (C.)*,³⁶ rendered at the same time, a unanimous Supreme Court held that the legislative provisions making the "best interest of the

34. See *Vriend v. Alberta*, [1998] 1 S.C.R. 493 [*Vriend*] at para. 44.

35. *Young v. Young*, [1993] 4 S.C.R. 3.

36. *P.(D.) v. S.(C.)*, [1993] 4 S.C.R. 141.

child” the guiding criterion for the Court in its adjudication of disputes regarding custody do not, in themselves, infringe any right or freedom protected by the *Charter*.³⁷

When the alleged breach of the *Charter* is attributable to an act of implementation of a legislative norm, the *Charter* will only be applicable to it, insofar as it applies to the legislator, if the action is taken under statutory authority granted by the norm in question. Such authority is, by definition, a power that derogates from the rules of law of general application and that can only be bestowed by statutory or common law. The *Charter* will not apply, in this mode, to the exercise of a mere ability conferred by general law, for instance provided by the Civil code, or existing only through a statute incorporating an association. Hence, an arbitration process arising under a contractual stipulation will not be subject to the *Charter*, while an arbitration that is imposed by statute, such as grievance arbitration, will be.³⁸ To take another example, the exercise of its jurisdiction by the British Columbia Human Rights Commission was easily recognized as subject to the *Charter* in *Blencoe*:

One distinctive feature of actions taken under statutory authority is that they involve a power of compulsion not possessed by private individuals (P. W. Hogg, *Constitutional Law of Canada* (loose-leaf ed.), vol. 2, at p. 34-12). Clearly the Commission possesses more extensive powers than a natural person. The Commission’s authority is not derived from the consent of the parties. The Human Rights Code grants various powers to the Commission to both investigate complaints and decide how to deal with such complaints. Section 24 of the Code specifically allows the Commissioner to compel the production of documents.³⁹

37. See *contra Miron v. Trudel*, [1995] 2 S.C.R. 418. The Ontarian insurance act was infringing section 15 right to equality by limiting the notion of “spouse” to legally married spouses.

38. *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038 [Slaight].

39. *Blencoe v. British Columbia (Human Rights Commission)*, [2000] 2 S.C.R. 307 [Blencoe] at para. 36 (Bastarache J.).

As Peter Hogg points out, however, the Supreme Court sometimes departs from its own principle.⁴⁰ This issue has given rise to many controversies in the jurisprudence and among scholars. Suffice it to say that the Supreme Court has, at times, held the *Charter* to be binding upon a form of implementation that was in no way tantamount to the exercise of statutory authority.⁴¹ Thereby, it seemingly introduced a concept of “implementation of government policy” in the analysis, thereby confusing the two main modes of application of the *Charter*.

1.2.1.2. The Burden of the Government

Insofar as it applies to the government, the *Charter* applies to an action by virtue only of the “governmental” quality of its author, regardless of the nature of the action. It is of no importance whether the action was taken under prerogative powers⁴² or under common law powers; nor does it matter that it consists in exercising a mere general ability deriving from the Civil code, the common law or a statute. This can include entering into a contract or into any kind of bilateral act,⁴³ or the exercise of property rights.

The *Charter* will apply as long as the author of the action is deemed equivalent to the government in the strict meaning of the term, the meaning that refer to the holder of the executive power. Thus, in Canada, this includes the Queen or the Governor General in Council, or the Lieutenant Governor in Council, depending on whether the federal or a provincial government is at issue.⁴⁴ The

40. Peter W. HOGG, *Constitutional Law of Canada*, 5th ed. supp., loose-leaf ed., Toronto, Carswell, 2007 at 37-15 to 37-18.

41. See *Eldridge v. British Columbia*, [1997] 3 S.C.R. 624 at para. 43-51. The implementation by a hospital of a “determined policy” or “program” offering services that residents of the province were entitled to receive, and the hospitals obligated to offer, was subject to the *Charter*, even though pursuant to the law the hospital was not exercising any power over others in supplying hospital care and other medical services.

42. See *Operation Dismantle v. The Queen*, [1985] 1 S.C.R. 441.

43. See *Douglas/Kwantlen Faculty Association v. Douglas College*, [1990] 3 S.C.R. 570 [Douglas].

44. *Constitution Act, 1867*, *supra* note 5, s. 9-16, 58-68.

Charter will also apply in this way to any action taken by the “cabinet” (at law, it is in reality the Committee of the Queen’s Privy Council for Canada) or the Executive Council alone, depending on whether the federal or provincial power is at issue, and to any action taken by individual ministers or by public servants of the government in the strict sense.

Therewith, any legal or natural person or entity designated by statute as a Crown agent⁴⁵ or deemed so after the analysis of a statute⁴⁶ will be bound by the *Charter* in the same way. This analysis may take two forms: a *structural* analysis, or a *functional* analysis. Both have given rise to a plentiful and sometimes conflicting jurisprudence.

In essence, structural analysis will lead to the conclusion that an entity is a Crown agent if a substantial degree of control held by the government (in the strict meaning) over the entity is revealed. Such an analysis will have to rest on the entity’s legislative regime in its entirety, in order to determine the method of appointment and dismissal of its directors and officers, and to verify the extent to which its regulations and rulings are subject to governmental or ministerial approval, among other things. Various other kinds of governmental interference in the entity’s operation could also be considered. Public funding should not, however, be decisive in itself.

While in some respects structural analysis reduces the notion of governmental function to a narrow conception of government, functional analysis, to the contrary, derives from a broader concept of public service. Functional analysis focuses on the nature of the entity’s main operations or activities, in order to deter-

45. See *Greater Vancouver Transportation Authority v. Canadian Federation of Students — British Columbia Component*, [2009] 2 S.C.R. 295 [Greater Vancouver] at para. 17 (Deschamps J.). For instance, section 3.1.1. of the Hydro-Québec Act, R.S.Q. c. H-5, provides that “[t]he Company, for the purposes of this Act, is, and has been ever since 14 April 1944, a mandatary of the State”.

46. See *Douglas*, *supra* note 43; *Lavigne v. Ontario Public Service Employees Union*, [1991] 2 S.C.R. 211 [OPSEU].

mine if they correspond to the performance of a governmental function.

Structural analysis is the prevailing view since the Supreme Court's decisions in *McKinney v. University of Guelph* and *Stoffman v. Vancouver General Hospital*, rendered by a majority per Justice LaForest.⁴⁷ Nonetheless, this approach, which can be qualified as exclusivist "structuralism", has faced many criticisms, even within the Supreme Court itself.⁴⁸ Despite the structural analysis' dominant position, we believe that the Supreme Court's actual practice attests to the implicit and unassumed influence of a broad conception of governmental function understood from the perspective of public service, and not solely of the quality of the actors. This more general conception extends not only to the actions of actors that are not *in essence* governmental, but also to the implementation of statutes, and even to the adoption of statutes. At this level of generality, it comprises the performance of a jurisdictional function as well.⁴⁹

In *Buhay*, Justice Arbour, on behalf of a unanimous court, stated in *obiter dictum* that "[i]t may be that if the state were to abandon in whole or in part an essential public function to the

47. *McKinney v. University of Guelph*, [1990] 3 S.C.R. 229 [*McKinney*] and *Stoffman v. Vancouver General Hospital*, [1990] 3 S.C.R. 483 [*Stoffman*]. This position was followed in *Douglas*, *supra* note 43 and *OPSEU*, *supra* note 46.

48. See *McKinney*, *supra* note 47 (j. Wilson, dissenting reasons; Lexum unpaginated electronic version).

49. This view has been confirmed by *Greater Vancouver*, *supra* note 45 at para. 16 (Deschamps J.). Unanimously, the Supreme Court distinguished and admitted, besides the structural analysis, two forms of functional analysis: the one of the nature of the entity, and the one of the nature of the entity's impugned activities. See also *Godbout v. Longueuil (City)*, [1997] 3 S.C.R. 844, in which the minority, per LaForest J., deemed the *Charter* applicable to the City of Longueuil because of the governmental nature of its activities, or at least, of the impugned activities. It seems that Justice LaForest thus tried to correct, without admitting it and by way of a rather forced interpretative reconstruction, the mistake made in the majority reasons of *McKinney*, *supra* note 47 and *Stoffman*, *supra* note 47. On the other hand, majority reasons suggested that, without a sufficient degree of governmental control, the application of the *Charter* insofar as it applies to the government should be strictly limited to the entity's performance of governmental functions.

private sector, even without an express delegation, the private activity could be assimilated to that of a state actor for *Charter* purposes”.⁵⁰ Consequently, even when an entity is neither designated as a Crown agent nor deemed to be so by virtue of the governments' s control over it, the *Charter* will apply (insofar as it applies to the government), though only to the exercise of the functions in question.

Our thesis can be contrasted with the reasoning based on the exclusive application of a structural method justifying a very restricted view of the concept of government, which seems to be founded on some blindness towards the reality of a state intervention that diversified its forms and underwent a general expansion during the course of the 20th century. This reasoning favours the application of the *Charter* to a government conceived restrictively, on the basis of the form it may have taken in a bygone era, whereas a constitutional charter effectiveness in protecting rights and freedoms precisely demands that a state's actions be reviewed in an evolutionary perspective, adaptable to the society in which it takes place. This is how Justice Wilson was justified in making the following observation, which concludes our remarks on this issue:

It seems to me that a historical review of the growth of the Canadian state makes clear that those who enacted the Charter were concerned to provide some protection for individual freedom and personal autonomy in the face of government's expanding role. [...] In my view, it follows from these propositions that we must take a broad view of the meaning of the term “government”, one that is sensitive both to the variety of roles that government has come to play in our society and to the need to ensure that in all of these roles it abides by the constitutional norms set out in the Charter. This means that one must not be quick to assume that a body is not part of government. Consideration of a wide range of factors may well be necessary before one can conclude definitively that a particular entity is not part of government. If this Court is to discharge its responsibility of ensuring that our constitution does pro-

50. *R. v. Buhay*, [2003] 1 S.C.R. 631 at para. 31.

vide “unremitting protection of individual rights and liberties” against government action, then it must not take a narrow view of what government action is. To do so is to limit the impact of the Charter and minimize the protection it was intended to provide.⁵¹

Regarding the application of the *Charter* to local government bodies, it is likely that, even if the Supreme Court has never held so in *ratio decidendi*, all cities, municipalities, regional municipalities, urban communities and districts’ actions are already in the purview of the *Charter*.⁵² As for schools, the Supreme Court has held that “schools constitute part of government” for the application of the *Charter*.⁵³ This governmental status (by function) was given to elementary and secondary schools, but colleges and universities were not mentioned.⁵⁴

There seems to be an exception to these principles that are supposed to guide the *Charter*’s application to the government: police officers. Their action is apparently always considered as governmental. In *Broyles*, police officers were unanimously considered to be bound by the *Charter*, and the Supreme Court merely referred to them generally as “agent[s] of the state”,⁵⁵ with-

51. *McKinney*, *supra* note 47 (Wilson J., dissenting reasons; Lexum unpaginated electronic version).

52. See *Greater Vancouver*, *supra* note 45 at para. 22 (Deschamps J.): “a government should not be able to shirk its *Charter* obligations by simply conferring its powers on another entity. The creation of TransLink by statute in 1998 and the partial vesting by the province of control over the region’s public transit system in the [Greater Vancouver Regional District] was not a move towards the privatization of transit services, but an administrative restructuring designed to place more power in the hands of local governments. The devolution of provincial responsibilities for public transit to the [Greater Vancouver Regional District] cannot therefore be viewed as having created a “*Charter*-free” zone for the public transit system in Greater Vancouver” (references omitted).

53. *R. v. M. (M.R.)*, [1998] 3 S.C.R. 393 [*M.R.M.*] at para. 25 (Cory J., majority reasons). This general conclusion of the majority was shared by the dissenting judge at para. 71 (Major J., dissenting reasons).

54. *Ibid.* at para. 64 (Cory J., majority reasons).

55. *R. v. Broyles*, [1991] 3 S.C.R. 595 (Iacobucci J.; Lexum unpaginated electronic version).

out ever mentioning subsection 32(1).⁵⁶ Similarly, in *Hape*, no judge opposed the general proposition that police officers, for the purpose of the *Charter*, must be considered as a “state actor” or “agent of the state”. This tends to confirm the presence of an implicit, albeit more effective, principle of application of the *Charter* to any performance of a governmental function, in the broad public service meaning of the term.

The application of the Charter to courts, for its part, has given rise to a heated and mostly unresolved debate among commentators and judges. Suffice it to say that although refuted at first by the Supreme Court, the theory of applicability seems increasingly recognized, whether as applying to the government or to the legislator (since the adjudicating power of the courts derives from or is continued by statute).⁵⁷ In addition, many legal rights recognized to any person charged with an offence require, by their very content, that the decisions of the courts be subject to *Charter* review.⁵⁸

1.2.2. According to Part II of the C.A. 1982

Discussing the burden of rights under Part II of the C.A. 1982 cannot be done without presenting a portrait of Canadian federalism.

At the time of the federation of British North American colonies in 1867, the legislative power over “Indians, and Lands reserved for the Indians” was attributed by the imperial legislator to the colonial central sphere of jurisdiction, by way of subsection 91(24) of the C.A. 1867. Before 1867, executive and legislative powers were allocated between the Empire and the colonies. The

56. See also *R. v. Cook*, [1998] 2 S.C.R. 597 at para. 124 (Bastarache J., concurring reasons), echoed by *R. v. Hape*, [2007] 2 S.C.R. 292 [*Hape*] at para. 103 (LeBel J., majority reasons) to support the more restrictive idea that, at least, police officers “are clearly government actors to whom, *prima facie*, the Charter would apply”.

57. For the thesis that it does not apply, see *RWDSU v. Dolphin Delivery Ltd.*, [1986] 2 S.C.R. 573 [*Dolphin Delivery*]. For the thesis that it applies, see *R. v. Rahey*, [1987] 1 S.C.R. 588 [*Rahey*].

58. On this matter, see Hogg, *supra* note 40 at 37-20 to 37-22.

Empire retained full control over this allocation, so that it was not federalism, but “decentralization” towards the colonies. Legislative power over the Aboriginals, from 1750, was tied to what we nowadays call the Defence. It then became a jurisdiction of its own. In 1860, as soon as the Imperial Parliament approved the colonial law entitled *An Act respecting the Management of the Indian Lands and Property*, the United Province of Canada (which would later be divided into two federated provinces, Ontario and Quebec, pursuant to section 6 of the C.A. 1867) was granted competence over Aboriginal Affairs.⁵⁹ Seven years later, the legislative powers, until then delegated by the Empire to the colonies, had to be allocated as a result of the federation of some of the British North American colonies. This allocation was taking place between, on the one hand, the colonies that were becoming federate entities, and on the other hand, a new sphere of power, the federal power. At the level of the legal relationship between London and British North America, however, little had changed. The Empire was still the grand master behind colonial constitutions, and the competent power with respect to commerce and intercolonial, imperial and international relationships.

The provision bestowing exclusive jurisdiction over Aboriginal peoples upon the central power, subsection 91(24) of the C.A. 1867, uses the word “Indians” only. In 1939, in the reference relating to “Eskimos”,⁶⁰ the Supreme Court unanimously held that the word “Indians”, in the context of this formal constitutional provision, includes the Inuits. In 1867, there were no Inuits in Canada, as they were living in Rupert’s Land and in Labrador, two territories that Canada acquired in 1870 and 1949, respectively. The transfer of Rupert’s Land from the Hudson’s Bay Company to the colony was meant to allow the expansion of some provinces’ frontiers, including Quebec, in 1898, and again in 1912. Since the expansion of Manitoba, Ontario and Quebec (in the last case, to encompass a territory inhabited by Inuits), the central power was refusing to recognize its jurisdiction (and responsibility) over

59. An Act respecting the Management of the Indian Lands and Property, S.P.C. 1860, 23 Vict., c. 151.

60. Reference whether “Indians” includes “Eskimo”, [1939] S.C.R. 104.

Inuits. It was alleging that according to subsection 91(24), its competence extended only to “Indians”, but the evidence was overwhelming: colonial authorities had always considered the Inuits as a category of “Indians”. It is thus established, since that 1939 reference, that the federal power has constitutional jurisdiction over Amerindians and Inuits.

Meanwhile, the central power still refuses to recognize its jurisdiction over the Métis, even though some passages of the Eskimo reference clearly suggest that the central power has jurisdiction over all Aboriginal peoples, and Part II of the C.A. 1982 recognizes them as Aboriginal people. The Supreme Court has yet to pronounce on this issue. The Royal Commission on Aboriginal Peoples recommended an affirmative answer.⁶¹ Section 31 of the *Manitoba Act, 1870*, a statute which is part of the Constitution of Canada according to paragraph 52(2)*b*) of the C.A. 1982, recognizes an “Indian title” to the “half-breed residents”.⁶² Nevertheless, in *Blais* in 2003, the Supreme Court held that the Métis were not “Indians” within the meaning of paragraph 13 of the *Natural Resources Transfer Agreement* of Manitoba, incorporated as schedule 1 to the *Constitution Act, 1930*, but, at the same time, emphasized that it “leave[s] open for another day the question of whether the term “Indians” in s. 91(24) of the Constitution Act, 1867 includes the Métis”.⁶³

It is critical, in this instance, to distinguish between constitutional law and ordinary law. According to constitutional law, the central power has jurisdiction over the Inuits and Amerindians at least, while its jurisdiction over the Métis is uncertain. Still according to the Constitution, “Lands reserved for the Indians” are not limited to reserves within the meaning of the *Indian Act* (the “I.A.”), but rather, encompass any land subject to an aboriginal

61. Canada, Royal Commission on Aboriginal Peoples, *Royal Commission Report on Aboriginal Peoples*, Ottawa / Royal Commission on Aboriginal Peoples, 1996, vol. 5.

62. *Manitoba Act, 1870*, 33 Vict., c. 3 (Canada), s. 31. See also *Manitoba Métis Federation Inc. v. Canada (A.G.)*, 2010 MBCA 71 (CanLII).

63. *R. v. Blais*, [2003] 2 S.C.R. 236 at para. 36.

title.⁶⁴ As regards ordinary law, the federal legislator made the *I.A.* applicable only to “Indians” as defined in the *I.A.* itself, not in the constitutional sense of the term. The *I.A.* only applies to persons who are registered under it or entitled to be so registered, while provisions pertaining to registration only allow Amerindians to do so, to the exclusion of Inuits and Métis. The central power’s limited exercise of its jurisdiction over “Indians”, however, may not be taken as a basis to delimit its extent. Pending a satisfactory answer, in Alberta, the Métis are regulated by a provincial statute, the *Metis Settlements Act*.⁶⁵ Its constitutionality has recently been reviewed by the Supreme Court on *Charter* grounds (equality rights and fundamental freedoms), but not on division of powers grounds.⁶⁶

Federal legislative power over Aboriginals is rather broad. As long as a federal statute is aimed specifically at the Aboriginals, it will, in all likelihood, be upheld as valid. Conversely, any provincial statute that addresses, on a non ancillary basis, Aboriginals *qua* Aboriginals, should normally be found to be invalid. Yet, numerous provincial provisions pertaining to Aboriginals have been recognized as having a valid incidental effect on a matter within federal jurisdiction. Furthermore, in practice, courts tend to uphold provincial statutes relating specifically to Aboriginals, provided that they do not intend to define Aboriginals’ status or distinctiveness, or mainly purport to curtail their rights or to inflict special obligations on them.⁶⁷ It thus seems even more likely that a provincial statute incidentally aiming toward the protection of aboriginal or treaty rights would be deemed valid. That is how,

64. *Indian Act*, R.S.C. 1985, c. I-5. See *Delgamuukw*, *supra* note 30 at para. 174-176; *St. Catherine’s Milling and Lumber Co. v. the Queen*, (1888) 14 A.C. 49 at 59.

65. *Metis Settlements Act*, R.S.A. 2000 c. M-14.

66. *Alberta (Aboriginal Affairs and Northern Development) v. Cunningham*, [2011] 2 S.C.R. 670.

67. *R. v. Sutherland*, [1980] 2 S.C.R. 451; *Moosehunter v. R.*, [1981] 1 S.C.R. 282; *Dick v. R.*, [1985] 2 S.C.R. 309; *Lovelace v. Ontario*, [2000] 1 S.C.R. 950; *Kitkatla Band v. British Columbia (Minister of Small Business, Tourism and Culture)*, [2002] 2 S.C.R. 146; *Paul v. British Columbia (Forest Appeals Commission)*, [2003] 2 S.C.R. 585 [Paul].

in *Paul*, the Supreme Court held that “[t]he province of British Columbia has legislative competence to endow an administrative tribunal with the capacity to consider a question of aboriginal rights in the course of carrying out its valid provincial mandate”.⁶⁸ All of which goes to say that the issue of the burden of rights correlate to the special rights of Aboriginal peoples cannot merely be reduced to the issue of legislative jurisdiction over “Indians”.

Inasmuch as Aboriginal treaties are defined by their obligational content regarding the fundamental rights of an Aboriginal community *as such*, division of powers principles should lead us to the conclusion that only the federal government can be party to a treaty defining the status and rights of Aboriginals. In *Howard*, however, the Supreme Court oddly suggested that provinces could be competent to enter into aboriginal treaties addressing more than a cession of territory.⁶⁹ This seems hard to reconcile with the *Simon* and *Morris* cases, in which treaty rights were held to fall under the federal jurisdiction over “Indians and Lands reserved for the Indians”.⁷⁰ The aforementioned cases never anticipated the possibility of a treaty with the Métis, over whom the federal jurisdiction is uncertain.

Treaty-making is a royal prerogative at common law; hence, to the question of which federal body or authority is competent to conclude treaties with Aboriginal communities, the answer is that it comes within the purview of the executive power, exercised through the minister. The treaty-making process is subject to very relaxed requirements, and even seems to do without conditions of form.⁷¹ The Supreme Court developed a doctrine on this matter that is analogous to the one pertaining to ostensible authority.⁷² The minister may therefore engage the constitutional (and thus

68. See *Paul*, *supra* note 67 at para. 46.

69. *R. v. Howard*, [1994] 2 S.C.R. 299 at 308.

70. *Simon v. R.*, [1985] 2 S.C.R. 387 [*Simon*] at 411; *R. v. Morris*, [2006] 2 S.C.R. 915 at para. 43 (majority reasons) and at para. 91 (dissenting reasons).

71. See *Simon*, *supra* note 70 at 400-401.

72. *R. v. Sioui*, [1990] 1 S.C.R. 1025 at 1040.

supra-legislative) responsibility of the state by entering into a treaty with an Aboriginal people.

The duty to respect aboriginal and treaty rights of the Aboriginal peoples is incumbent upon the “Crown” (both provincial and federal), equivalent to what continental science of law calls the “state”. Indeed, in *Van der Peet*, the Supreme Court held that section 35 of the C.A. 1982’s purpose is “the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown”.⁷³ In *Haida Nation*, the Supreme Court specified that “[t]his [normative] process of reconciliation flows from the Crown’s duty of honourable dealing toward Aboriginal peoples, which arises in turn from the Crown’s assertion of sovereignty over an Aboriginal people and *de facto* control of land and resources that were formerly in the control of that people”.⁷⁴

As for the duty to consult prior to the undertaking of actions that might adversely affect an Aboriginal right or title seriously claimed, albeit not yet formally recognized and delimited, the Supreme Court confirmed in *Haida Nation* that the burden lies solely upon the Crown.⁷⁵ It thereby contradicted its previous statement in *Delgamuukw*, in which it suggested that this duty was also born by individuals.

That being said, notwithstanding the constitutional rules of federalism, the obligation to respect Aboriginal peoples’ constitutional rights, including the duty to consult, is binding *mutatis mutandis* upon the provincial Crowns.⁷⁶ Thereby, as long as they come to terms with the “*Sparrow* test”, provinces may curtail the exercise of such rights.⁷⁷

73. See *R. v. Van der Peet*, [1996] 2 S.C.R. 507 at para. 31.

74. *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511 [*Haida Nation*] at para. 32. See also *Mitchell v. M.N.R.*, [2001] 1 S.C.R. 911 at para. 9.

75. *Haida Nation*, *supra* note 74 at para. 35.

76. *Haida Nation*, *supra* note 74 at para. 35; *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, [2010] 2 S.C.R. 650.

77. See *R. v. Côté*, [1996] 3 S.C.R. 139 at para. 87; *Delgamuukw*, *supra* note 30 at para. 160.

It should be noted in passing that the content of the Crown's duty to consult in Canadian constitutional law regarding Aboriginal peoples does not coincide perfectly with the international law principle of the duty to obtain the free and informed consent of indigenous peoples as set out in article 32 of the *United Nations Declaration on the Rights of Indigenous Peoples*.⁷⁸

1.3. Categories of Rights

First, the *Charter* protects certain fundamental freedoms under its section 2: (a) "freedom of conscience and religion"; (b) "freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication"; (c) "freedom of peaceful assembly"; and (d) "freedom of association". Compared to the freedoms guaranteed by articles 9 to 11 of the *European Convention on Human Rights* (the "ECHR")⁷⁹ or by articles 18 to 22 of the *International Covenant on Civil and Political Rights* (the "ICCPR"),⁸⁰ they have the same *object*, but not always the same *content*, according to the jurisprudence. Canadian case law on the freedoms of religion and of expression is plentiful. That relating to the freedom of association pertains mainly to collective labour relations, and is dauntingly unstable,⁸¹ while that relating to the freedom of peaceful assembly is, for all intents and purposes, nonexistent.

78. United Nations Declaration on the Rights of Indigenous Peoples, 2 October 2007, U.N. Doc. A/RES/61/295.

79. Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950, 213 U.N.T.S. 221 at 223, Eur. T.S. 5.

80. *International Covenant on Civil and Political Rights*, 19 December 1966, 999 U.N.T.S. 171, Can. T.S. 1976 No 47, 6 I.L.M. 289 (entered into force 23 March 1976, accession by Canada 19 May 1976).

81. Reference Re Public Service Employee Relations Act (Alta.), [1987] 1 S.C.R. 313; *Dunmore v. Ontario (A.G.)*, [2001] 3 S.C.R. 1016; *Health Services and Support — Facilities Subsector Bargaining Association v. British Columbia*, [2007] 2 S.C.R. 391 [Health Services]; *Ontario (A.G.) v. Fraser*, [2011] 2 S.C.R. 3 [Fraser].

Then there are the “democratic rights” provided for by sections 3 to 5: the right for every citizen to vote and to be qualified to be elected in federal and provincial legislative elections (section 3), the setting of the maximum duration of federal and provincial legislative bodies to five years, except under special circumstances (section 4), and the obligation for federal and provincial legislative bodies to hold a sitting at least once every twelve months (section 5). Section 3 of the *Charter* has the same object than article 3 of the first Protocol to the ECHR and article 25 of the ICCPR.

Section 6 of the *Charter* sets out the “mobility rights” of citizens, who may enter, remain in and leave Canada, on the one hand (subsection 6(1)), and on the other hand, allows any citizen or permanent resident to move and gain livelihood anywhere in Canada (subsection 6(2)). Subsection 6(1) thus has the same object as articles 2 and 3 of the Protocol n° 4 to the ECHR and articles 12 and 13 of the ICCPR.

It is followed by sections 7 to 14, bestowing legal rights which correspond in part to those of article 2 to 8 of the ECHR, of article 1 of its Protocol n° 4, of its Protocol n° 6, of article 4 of its Protocol n° 7 and of its Protocol n° 13. They also overlap the rights set out in articles 6 to 11, 14, 15 and 17 of the ICCPR. Section 7 of the *Charter*, a general protection of everyone’s right not to be deprived of life, liberty and security of the person, has been constructed by the Supreme Court in a broad and generous manner that extended its scope in such a way that it encompasses the freedom to make certain fundamental life choices.⁸²

Section 15 protects every individual’s right to equality by way of a general protection against negative discrimination (subsection 15(1)), while expressly allowing positive discrimination (subsection 15(2)), which is not required to be temporary.⁸³ This

82. *New Brunswick (Minister of Health and Community Services) v. G. (J.)*, [1999] 3 S.C.R. 46 at para. 61; *Blencoe*, supra note 39; *R. v. Malmö-Levine / R. v. Caine*, [2003] 3 S.C.R. 571; *R. v. Clay*, [2003] 3 S.C.R. 735; *Canada (A.G.) v. PHS Community Services Society*, [2011] 3 S.C.R. 134.

83. *R. v. Kapp*, [2008] 2 S.C.R. 483 [*Kapp*].

section thus has the same object as article 14 of the ECHR, its Protocol n° 12 and articles 26 and 27 of the ICCPR.

At last, sections 16 to 23 set out a set of linguistic rights relating to Canada's two official languages: English and French.

It should be noted that, by virtue of section 33, federal and provincial legislators may derogate from the rights and freedoms provided for by sections 2 and 7 to 15 of the *Charter*. No material condition of urgency is required: in so doing, legislators only have to conform to purely formal conditions. In contrast, article 15 of the ECHR only allows derogation from rights that are not deemed "absolute" because of their utmost importance, such as the right to life (article 2, except for death resulting from lawful acts of war), the prohibition of torture and inhumane or degrading treatment (article 3), the prohibition of slavery and forced labour (article 4), and the protection against any punishment that is not provided for by law. Furthermore, derogatory measures may only be taken "in time of war or other public emergency threatening the life of the nation", "to the extent strictly required by the exigencies of the situation", and "provided that such measures are not inconsistent with [the state's] other obligations under international law". While article 4 of the ICCPR follows the same logic than the ECHR, the Constitution of Canada easily permits derogation not only from the fundamental freedoms and the equality rights, but also from legal rights, while it does not allow it for rights that are unquestionably more "relative", such as the right to have one's children educated in the official language of the minority (section 23). The foregoing tends to illustrate how the Constitution of Canada is at odds with international standards on this regard.⁸⁴

84. European Commission for Democracy Through Law (Venice Commission), *Opinion on the protection of human rights in emergency situations*, Opinion no. 359 / 2005, adopted at its 66th Plen. Sess., reported in press release CDL-AD(2006)015, Strasbourg, 4 April 2006, online: <[http://www.venice.coe.int/docs/2006/CDL-AD\(2006\)015-e.pdf](http://www.venice.coe.int/docs/2006/CDL-AD(2006)015-e.pdf)>.

Another specificity of the *Charter* is the presence, in section one, of a general restriction of rights clause, rather than particular provisions relating to the restriction of each specific right.⁸⁵

As for Part II of the C.A. 1982, we already explained how subsection 35(1) recognizes two main categories of rights for Aboriginal peoples: aboriginal rights, and treaty rights. The first category encompasses “activity rights” and aboriginal title. According to subsection 35(3), the second category includes rights arising from the “modern treaties”, which are land claims agreements.

1.4. The *De Jure* Absence of a Hierarchy of Rights

It is a basic and uncontested principle of Canadian constitutional law that, except for provisions laying out the constitution-making power, “one [valid] part of the Constitution cannot be abrogated or diminished by another part of the Constitution”.⁸⁶ This principle, however unwritten on the whole, has been recognized by the courts, and partial written expressions of it can be found in the supreme law. For instance, the right to equality granted by section 15 of the *Charter* may not be invoked against the fact that the law may vary from a province to another, since this is a normal consequence of federalism as laid out by the C.A. 1982.⁸⁷ Neither can the right to equality be invoked against the limited scope of the right to have one’s children educated in the language of the minority conferred by section 23 of the C.A. 1867.⁸⁸ From the fore-

85. Marie DESCHAMPS, Maxime ST-HILAIRE & Pierre GEMSON, “The Cross-Fertilisation of Jurisprudence and the Principle of Proportionality: Process and Result from a Canadian Perspective”, to be published.

86. See *New Brunswick Broadcasting Co. v. Nova Scotia (Speaker of the House of Assembly)*, [1993] 1 S.C.R. 319 [N.B. Broadcasting] (McLachlin J., majority reasons, Lexum unpaginated electronic version); Reference re Bill 30, An Act to Amend the Education Act (Ont.), [1987] 1 S.C.R. 1148; *Adler v. Ontario*, [1996] 3 S.C.R. 609.

87. *Gosselin (Tutor of) v. Quebec (A.G.)*, [2005] 1 S.C.R. 238 [Gosselin].

88. The jurisprudence goes so far as to provide that “in a federal system, province-based distinctions do not automatically give rise to a presumption of discrimination”, and that “differential application of federal law in different provinces can be a legitimate means of promoting and advancing the values of a federal system”: *Haig v. Canada; Haig v. Canada (Chief Electoral Officer)*, [1993] 2

going principle derives the principle of the absence of a hierarchy of constitutional rights and freedoms.

This latter principle, which is also recognized in international law pursuant to the *Vienna Declaration* of 1993⁸⁹ as a corollary to the principle of the indivisibility of human rights, was first articulated in Canadian law by the Supreme Court in *Dagenais v. Canadian Broadcasting Corp.* in 1994:

The pre-Charter common law rule governing publication bans emphasized the right to a fair trial over the free expression interests of those affected by the ban. In my view, the balance this rule strikes is inconsistent with the principles of the Charter, and in particular, the equal status given by the Charter to ss. 2(b) and 11(d). It would be inappropriate for the courts to continue to apply a common law rule that automatically favoured the rights protected by s. 11(d) over those protected by s. 2(b). A hierarchical approach to rights, which places some over others, must be avoided, both when interpreting the Charter and when developing the common law. When the protected rights of two individuals come into conflict, as can occur in the case of publication bans, Charter principles require a balance to be achieved that fully respects the importance of both sets of rights.⁹⁰

Courts have repeatedly confirmed the principle since.⁹¹ If two *Charter* rights seem to be at odds, a judge may not declare a general precedence of one over the other. He or she must strive to reconcile them in a way that will resolve the conflict, and if neces-

S.C.R. 995 (L'Heureux-Dubé J., Lexum unpaginated electronic version), referring to *R. v. S.(S)*, [1990] 2 S.C.R. 254.

89. *Vienna Declaration and Programme of Action*, U.N.G.A.O.R., 48th Sess., U.N. Doc. A/CONF.157 (1993) 23.

90. *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835 at 877 (emphasis added).

91. See *inter alia Reference re Same-Sex Marriage*, [2004] 3 S.C.R. 698 at para. 50; *Gosselin*, *supra* note 88; as cited by Louis-Philippe LAMPRON & Eugénie BROUILLET, "Le principe de non-hiérarchie entre droits et libertés fondamentaux : l'inaccessible étoile?", (2011) 41 *Revue générale de droit* 93 at para. 2.

sary, will firmly anchor the decision to the facts of the case, or will take the latter right in consideration in the process of verifying if an infringement to the former right is justified in a free and democratic society, according to section one of the *Charter*.⁹²

It would however be illusory to believe that this principle could possibly be implemented in all its theoretical purity, and *de facto* hierarchies have established themselves within national legal regimes, despite the prohibition in principle under international law.⁹³

By looking at the overarching structure of the *Charter*, one can observe at first that section 33 suggests an odd hierarchy by allowing, as mentioned in section 1.3 of this report, a derogation from rights that are recognized by international standards and common sense as being of the utmost importance, but not from other rights of a manifest lesser importance. To our knowledge, this aberration stems from an unfortunate political and historical contingency, rather than strictly legal considerations.⁹⁴

Section 28 and subsection 35(4) of the C.A. 1982 turn gender equality into an inviolable principle, a principle that adds to the general equality right of section 15 in order to assure equality in the protection of rights and freedoms offered by the *Charter* and in the protection of the special rights of Aboriginal peoples offered by Part II of the C.A. 1982, independently from the other provisions of these instruments. Gender equality seems all the more to benefit from a special emphasis since section 33 of the *Charter*

92. Ross v. New Brunswick School District No. 15, [1996] 1 S.C.R. 825 at para. 73; Trinity Western University v. British Columbia College of Teachers, [2001] 1 S.C.R. 772 at para. 29-35; Multani v. Commission scolaire Marguerite-Bourgeoys, [2006] 1 S.C.R. 256 at para. 30; L.-P. LAMPRON & E. BROUILLET, *supra* note 91.

93. See Virginie SAINT-JAMES, "Hiérarchie et conciliation des droits de l'Homme" in Joël Andriantsimbazovina *et al.* eds., *Dictionnaire des droits de l'Homme*, Paris, P.U.F., 2008 at 477-478.

94. See Roy J. ROMANOW, John D. WHYTE & Howard A. LEESON, *Canada... Notwithstanding: the making of the Constitution, 1976-1982*, Toronto, Carswell / Methuen, 1984.

does not permit any derogation from section 28, and even less, if that is possible, from subsection 35(4), which is not part of the *Charter*.

A delicate matter also arises regarding the interactions between the predominantly individual rights protected by the *Charter* and the “collective” rights of Aboriginal peoples recognized and affirmed by Part II of the C.A. 1982. Section 25 of the *Charter* provides as follows:

The guarantee in this Charter of certain rights and freedoms shall not be construed so as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada including

- (a) any rights or freedoms that have been recognized by the Royal Proclamation of October 7, 1763; and
- (b) any rights or freedoms that now exist by way of land claims agreements or may be so acquired.

To some extent, the principle according to which one part of the Constitution cannot abrogate or diminish another seems to manifest itself in this section. Up to now, the Supreme Court's decisions on the matter have only comprised conflicting *obiter dicta*. In his partially concurring reasons in *Kapp*, Justice Bastarache suggested not only that *Charter* individual rights and freedoms could not render invalid the special constitutional rights of Aboriginal peoples, but also that, according to the theory of the protective shield, the latter should systematically override the former.⁹⁵ This runs directly counter to international law principles on these matters, which is why our preference is for Justice Deschamps partially concurring reasons in the recent *Beckman* case:

In *Reference re Secession of Quebec*, 1998 CanLII 793 (SCC), [1998] 2 S.C.R. 217, at paras. 48-82, this Court identified four principles that underlie the whole of our constitution and of its evolution: (1) constitutionalism

95. *Kapp*, *supra* note 83 at para. 93-96 (Bastarache J., concurring reasons).

and the rule of law; (2) democracy; (3) respect for minority rights; and (4) federalism. These four organizing principles are interwoven in three basic compacts: (1) one between the Crown and individuals with respect to the individual's fundamental rights and freedoms; (2) one between the non-Aboriginal population and Aboriginal peoples with respect to Aboriginal rights and treaties with Aboriginal peoples; and (3) a "federal compact" between the provinces. [...]

The Aboriginal and treaty rights of the Aboriginal peoples of Canada are recognized and affirmed in s. 35(1) of the *Constitution Act, 1982*. The framers of the Constitution also considered it advisable to specify in s. 25 of that same Act that the guarantee of fundamental rights and freedoms to persons and citizens must not be considered to be inherently incompatible with the recognition of special rights for Aboriginal peoples. In other words, the first and second compacts should be interpreted not in a way that brings them into conflict with one another, but rather as being complementary. [...]⁹⁶

1.5. The Exhaustivity Issue in Formal Constitutional Codification

We will now turn to the relations between unwritten constitutional principles and constitutional provisions protecting human rights. Some unwritten principles were recognized by the jurisprudence as implied elements of the Constitution of Canada within the meaning of the C.A. 1982.

The Constitution of Canada, like the constitutions of many other countries,⁹⁷ is not only founded on, but also actually com-

96. *Beckman v. Little Salmon/Carmacks First Nation*, [2010] 3 S.C.R. 103 [Beckman] at para. 97-98 (Deschamps J., concurring reasons) (emphasis added).

97. Ronald M. DWORKIN, *Law's Empire*, Cambridge (MA), Harvard University Press, 1986; Jeremy KIRK, "Constitutional Implications (I): Nature, Legitimacy, Classification, Examples", (2000) 24 *Melbourne University Law Review* 645; "Constitutional Implications (II): Doctrines of Equality and Democracy", (2001) 25 *Melbourne University Law Review* 24; Véronique CHAMPEIL-DESPLATS, *Les principes fondamentaux reconnus par les lois de la République : Principes constitutionnels et justification dans les discours juridiques*, Paris, Economica, 2001; Dieter GRIMM,

prises, underlying and unwritten principles that nonetheless constitute rigid constitutional law. The *Reference re Secession of Quebec*, as aforementioned, rephrased some of the most important of these fundamental principles: constitutionalism and the rule of law; democracy; federalism; and respect for minority rights.⁹⁸ The *Reference re Remuneration of Judges of the Provincial Court* had previously affirmed the existence of an unwritten, general and fundamental version of judicial independence.⁹⁹

Parliamentary privilege is a body of power and immunities (including to preserve the order of debates and to summon witnesses) that common law and English law (in this instance, the *Bill of Rights* of 1689) traditionally bestowed upon parliamentarians both individually and gathered in Chambers. It has also, in our opinion in a way as odd as it is perilous, been recognized as an underlying principle of the Constitution.¹⁰⁰

Finally, we must observe, as Justice Deschamps did in *Beckman*, that the honour of the Crown also holds a key position among these unwritten principles.¹⁰¹

Care must be taken not to confuse these unwritten principles with constitutional conventions. The latter are part of the political Constitution's structure, while the former are part of the legal constitution, formal and rigid. In the *Reference re Secession of Quebec* in 1998, the Supreme Court unanimously insisted on the following:

Underlying constitutional principles may in certain circumstances give rise to substantive legal obligations (have

« The Basic Law at 60 – Identity and Change » 11 *German Law Journal* 33-46 (2010), available at <http://www.germanlawjournal.com/index.php?pageID=11artID=1230>.

98. *Secession of Quebec*, *supra* note 4 at para. 48-82.

99. *Reference re Remuneration of Judges of the Provincial Court of P.E.I.*; *Reference re Independence and Impartiality of Judges of the Provincial Court of P.E.I.*, [1997] 3 S.C.R. 3 [Remuneration of Judges] (Lamer C.J., majority reasons).

100. See *N.B. Broadcasting*, *supra* note 86.

101. *Beckman*, *supra* note 96 (Deschamps J., concurring reasons).

“full legal force”, as we described it in the *Patriation Reference*, supra, at p. 845^[102]), which constitute substantive limitations upon government action. These principles may give rise to very abstract and general obligations, or they may be more specific and precise in nature. The principles are not merely descriptive, but are also invested with a powerful normative force, and are binding upon both courts and governments.¹⁰³

It remains to be determined how exactly an unwritten principle can intervene in the judicial and, more generally, legal debate, in order to produce such influential effects. These principles cannot do violence to the language of the supreme law they are meant to underlie and organize. The Supreme Court gave out this warning in the same 1998 case:

Given the existence of these underlying constitutional principles, what use may the Court make of them? In the *Provincial Judges Reference* [...], we cautioned that the recognition of these constitutional principles [...] could not be taken as an invitation to dispense with the written text of the Constitution. On the contrary, we confirmed that there are compelling reasons to insist upon the primacy of our written constitution. A written constitution promotes legal certainty and predictability, and it provides a foundation and a touchstone for the exercise of constitutional judicial review.¹⁰⁴

Rather, an unwritten principle may serve to inform the choice of a provision’s construction or to bridge the gaps in its language, as was the case in the reasons of the majority of the Supreme Court in the *Reference re Remuneration of Judges* in 1997, wherein the intervention of the principle of independence of the judiciary was subsidiary.¹⁰⁵

102. Resolution to amend the Constitution, supra note 2.

103. *Secession of Quebec*, supra note 4 at para. 54.

104. *Ibid.* at para. 53.

105. See *Remuneration of Judges*, supra note 99 (Lamer C.J., majority reasons).

Yet, as described in Dicey's classic work,¹⁰⁶ the rule of law shall at first be construed as referring to formal principles such as the publicity of the law and the submission of all, from the humble citizen to the head of the government, to a single legal regime enforced by a unified system of ordinary courts. It shall also, however, be interpreted as including a corpus of material subjective rights commonly called the "English liberties". Insofar as this conception is accurate, it was inevitable that whether the rule of law, as an unwritten constitutional principle, could come into play to fill potential gaps in the *Charter's* provisions was a question that would arise before the Supreme Court. It so happened in 2005 with the *Imperial Tobacco* case. The Supreme Court then unanimously reduced the formal (or rigid) constitutional version of the rule of law to only a few elements of its classic doctrinal purview. As a result, the Court concluded that it would do violence to the language of the *Charter* to see in it gaps that could be filled by the "English liberties" constituting the material aspect of the rule of law in its doctrinal conception.¹⁰⁷

The thesis that the *Charter's* constitutional codification of human rights is exhaustive can only stand for the field of formal or rigid constitutional law. No one questions the validity of federal and provincial quasi-constitutional statutes on human rights. Indeed, their validity is most likely confirmed by section 26 of the *Charter*, which provides that "[t]he guarantee in this Charter of certain rights and freedoms shall not be construed as denying the existence of any other rights or freedoms that exist in Canada". Even when circumscribed to rigid constitutional law, however, this thesis must be balanced with that, prior to the *Charter*, of the implied bill of rights. The idea that Canada's rigid legal constitution includes an unwritten charter of fundamental rights goes back to a series of *obiter dicta* rendered over a period extending from 1938

106. Albert Venn DICEY, *Introduction to the Study of the Law of the Constitution* (1885), 10th ed., London, Macmillan, 1959.

107. *British Columbia v. Imperial Tobacco Canada Ltd.*, [2005] 2 S.C.R. 473 at para. 58, 60, 65.

to 1997.¹⁰⁸ Ironically enough, the last of these *dicta* is found in the *Reference re Remuneration of Judges*, the case on which the Supreme Court, one year after, relied upon to declare (in the *Reference re Secession of Quebec*) that an unwritten principle may not do violence to the written language of the Constitution. The irony is that it is this 1998 decision, hence indirectly the 1997 one, that would be the foundation of the Supreme Court when holding in *Imperial Tobacco* that the corpus of rights protected by the *Charter* was exhaustive of the rigid constitutional law on the matter. This divergence might be explained by the fact that the theory of the implied bill of rights only concerns the political freedom of expression, which it ties to the democratic structure of our parliamentary institutions, that is to say, to the principle of democracy, and not to the principle of the rule of law.

2. MATERIAL CONSTITUTIONAL PROTECTION: THE QUASI-CONSTITUTIONAL HUMAN RIGHTS STATUTES

Though “constitutional” in the material sense, the statutes that will be described in this section are ordinary statutes on the formal level. Their adoption is not an exercise of the constitution-making power. Consequently, they cannot set out the conditions of validity of statutes. They usually benefit, however, from specific rules of precedence that depart from the general principles of construction of statutes. In recognition of the importance of these statutes and their precedential status, the Supreme Court has

108. *Reference Re Alberta Statutes - The Bank Taxation Act; The Credit of Alberta Regulation Act; and the Accurate News and Information Act*, [1938] S.C.R. 100 at 133-134 (Duff C.J.); *Saumur v. Quebec (City)*, [1953] 2 S.C.R. 299 at 331 (Rand J.), 353-354 (Kellock J.) and 363-374 (Locke J.); *Switzman v. Elbing and Quebec (A.G.)*, [1957] S.C.R. 285 at 307 (Rand J.) and 328 (Abbott J.); *Oil, Chemical and Atomic Workers, International Union, Local 16-601 v. Imperial Oil Ltd.*, [1963] S.C.R. 584 at 600 (Abbott J.); *Fraser v. P.S.S.R.B.*, [1985] 2 S.C.R. 455 at 462-463 (Dickson C.J.); *OPSEU*, supra note 46 at para. 39-44 (Dickson C.J., concurring reasons) and 143-152 (Beetz J., majority reasons); *Dolphin Delivery*, supra note 57 at 584 (McIntyre J.); *Remuneration of Judges*, supra note 99 at para. 102-103 (Lamer C.J.). On this matter, see HOGG, supra note 40 at 34-10 to 34-13.

dubbed them “quasi-constitutional”. According to the jurisprudence, this special status is gained by virtue of both their rules of precedence and their material content.¹⁰⁹ Contrary to the *Charter*, these statutes apply to both private law and public law interactions. Since they are ordinary statutes adopted in a federal system, they can only protect rights and freedoms relating to the sphere of power of the legislator who enacted them. Most of these statutes are accompanied by a specialized and often optional implementation mechanism.

2.1. In Federal Law

2.1.1. Laws of the Central Power

There are two federal quasi-constitutional statutes protecting human rights: the *Canadian Bill of Rights* of 1960¹¹⁰ (the “*Canadian Bill*”), and the *Canadian Human Rights Act* of 1977¹¹¹ (the “*Canadian Act*”).

The *Canadian Bill* protects rights and freedoms similar to those of the *Charter*. The former, however, in its paragraph 1(a), purports to protect the rights of individuals to enjoyment of property, whereas the latter, on this regard, is limited to section 8 protection against unreasonable search or seizure.

Section 2 of the *Canadian Bill* provides for construction directives and a precedence rule:

Every law of Canada shall, unless it is expressly declared by an Act of the Parliament of Canada that it shall operate notwithstanding the *Canadian Bill of Rights*, be so construed and applied as not to abrogate, abridge or infringe or to authorize the abrogation, abridgment or infringement

109. *Insurance Corporation of British Columbia v. Heerspink*, [1982] 2 S.C.R. 145; *Ontario Human Rights Commission and O'Malley v. Simpsons-Sears Ltd.*, [1985] 2 S.C.R. 536; *Robichaud v. Canada (Treasury Board)*, [1987] 2 S.C.R. 84.

110. *Canadian Bill of Rights*, S.C. 1960, c. 44.

111. *Canadian Human Rights Act*, R.S.C. 1985, c. H-6.

of any of the rights or freedoms herein recognized and declared, and in particular, no law of Canada shall be construed or applied so as to [do something prohibited by paragraph (a) to (g)].

As for the *Canadian Act*, its purpose is to ensure equal opportunities and to eliminate discrimination with respect to employers and service providers operating in the federal jurisdiction. It applies to both private relationships and relationships between the state and legal or natural persons, insofar as these relationships pertain to the federal Parliament. Its subsection 66(1) provides that this act “is binding on Her Majesty in right of Canada, except in matters respecting the Yukon Government or the Government of the Northwest Territories or Nunavut”.

It deals particularly with the right to protection against discrimination. Its section 2 provides that its purpose is to give effect “to the principle that all individuals should have an opportunity equal with other individuals to make for themselves the lives that they are able and wish to have and to have their needs accommodated, consistent with their duties and obligations as members of society, without being hindered in or prevented from doing so by discriminatory practices” based on a list of unlawful grounds. The *Canadian Act* does not attempt to reach this objective by mean of a precedence rule, but rather by the implementation of a system of investigation, conciliation, settlement and sanction, composed of the Canadian Human Rights Commission established by its Part II, and of the Canadian Human Rights Tribunal established by its sections 48.1 to 48.9. This system will be further described in section 4.2.1 of this report.

Given their simultaneous application, partial inconsistencies may exist between these two statutes and the *Charter*. For instance, sections 12 (“publication of discriminatory notices”) and 13 (“hate messages”) of the *Canadian Act* prohibit certain discriminatory actions in a way that is incompatible with the case

law relating to the protection of the freedom of expression under the constitutional *Charter*.¹¹²

2.1.2. Territorial Laws

The three Canadian territories, whose jurisdiction derives, contrary to that of provinces, from the federal law and not from the supreme law, have each adopted a human rights statute. In the Yukon, the adoption of the *Human Rights Act*¹¹³ (the “*HRA of the Yukon*”) dates back to 1987.

Following the creation of Nunavut in 1999 from part of its former territory, the Northwest Territories adopted, in 2002, a new *Human Rights Act*¹¹⁴, and in 2003 Nunavut adopted its first statute with the same title¹¹⁵ (respectively, the “*HRA of the N.T.*” and the “*HRA of Nunavut*”). These two statutes came into force in 2004, thereby replacing the old *Fair Practices Act*, in force since 1990.

Whereas the *HRA of the N.T.* is silent on the matter, those of the Yukon and Nunavut provide particular rules for their prece-

112. In *Warman v. Lemire*, 2009 TCDP 26 (CanLII), a judge of the Canadian Human Rights Tribunal came to the following conclusion: [TRANSLATION] I concluded that Mr. Lemire contravened section 13 of the Statute [...] in the case of the article intitled “AIDS Secrets”. I also concluded, however, that subsection 13(1) and subsections 54(1) and 54(1.1) are incompatible with paragraph 2(b) of the *Charter*, that guarantees freedom of thought, belief, opinion and expression. The limit imposed by these provisions is not a reasonable limit within the meaning of section one of the *Charter*. Since a formal declaration of invalidity cannot be pronounced by the Tribunal (see *Cuddy Chicks Ltd. v. Ontario (Commission des relations de travail)*, 1991 CanLII 57 (CSC), [1991] 2 S.C.R. 5), I simply refuse to apply these provisions for the purposes of the complaint filed against Mr. Lemire, and I am not issuing any remedial order against him (see *Nova Scotia (Workers' Compensation Board) v. Martin*, 2003 SCC 54 (CanLII), 2003 SCC 54, at paragraphs 26 and 27).

This decision was the subject of judicial review, the appeal of which took place on 13 December 2011 in front of the Federal Court of Appeal.

113. Human Rights Act, R.S.Y. 2002, c. 116 [HRA of the Yukon].

114. Human Rights Act, S.N.W.T. 2002, c. 18 [HRA of the N.T.].

115. Human Rights Act, S.Nu. 2003, c. 12 [HRA of Nunavut].

dence. All three of them expressly provide that they are binding upon the government of the territory.¹¹⁶

In conformity with formal constitution law, the human rights statute of each territory expressly provides that it does not infringe or abridge the rights recognized to Aboriginal peoples by section 35 of the C.A. 1982.¹¹⁷ Besides, the *HRA of the Yukon* must be “interpreted in a manner consistent with the preservation and enhancement of the multi-cultural heritage of the residents of the Yukon”, pursuant to its section 2, which is almost identical to section 27 of the *Charter*.¹¹⁸

The *HRA of Nunavut* is somewhat unique in the sense that, pursuant to its section 2, its application must take place within the framework of *Inuit Qaujimagatuqangit*, “a collective term commonly used in Nunavut to define all values associated with traditional Inuit culture”.¹¹⁹ Section one of Nunavut’s *Education Act* gives a few examples of *Inuit Qaujimagatuqangit*, including “Inuuqatigiitsiarniq (respecting others, relationships and caring for people)”, “Pijitsirniq (serving and providing for family or community, or both)”, and “Aajiiqatigiinni (decision making through discussion and consensus)”.

These three statutes’ main purposes are to promote equality of opportunities and to provide protection against discrimination based on a limitative list of enumerated grounds in the fields of

116. *HRA of the N.T.*, *supra* note 114, s. 4; *HRA of the Yukon*, *supra* note 113, s. 38; *HRA of Nunavut*, *supra* note 115, s. 6.

117. *HRA of the N.T.*, *supra* note 114, s. 2; *HRA of the Yukon*, *supra* note 113, s. 1; *HRA of Nunavut*, *supra* note 115, s. 3-4.

118. About s. 27 of the *Charter*, see *R. v. Keegstra*, [1990] 3 S.C.R. 697 [*Keegstra*] (Lexum unpaginated electronic version). For examples of application, see *inter alia* *R. v. Edwards Books and Art Ltd.*, [1986] 2 S.C.R. 713 at 758; *Big M Drug Mart*, *supra* note 11 at para. 99; *A. (L.L.) v. B. (A.)*, [1995] 4 S.C.R. 536 at para. 63; *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143 (McIntyre J.) at 171; *R. v. Tran*, [1994] 2 S.C.R. 951 (Lexum unpaginated electronic version).

119. See “General Information”, online: Nunavut Human Rights Tribunal <<http://www.nhrt.ca/>> (Consulted on 10 March 2012).

employment, the supply of goods and services to the public, and tenancy. They also contain protections against harassment and discriminatory intimidation. Only the Northwest Territories and Nunavut laws also protect against publications that express or imply discrimination, or incite to it.¹²⁰ Similarly to the *Charter*, the three statutes expressly exclude positive discrimination from their scope of application.¹²¹ Their respective lists of enumerated grounds are, except for some particularities, identical.¹²² In addition to protection against discrimination, the *HRA of the Yukon* also provides for a bill of rights that resembles the *Canadian Bill*.

2.2. In Provincial Law

Each of the ten provinces has endowed itself with a human rights statute. As with the territorial statutes, all of these provincial statutes provide, at a minimum, protection against discrimination based on a limitative list of enumerated grounds, in the fields of employment, the supply of goods and services to the public, and tenancy. Saskatchewan and Quebec stand out, because they adopted statutes protecting a broader range of rights.

Except for British Columbia, where it would have been of no use given section 14 of its *Interpretation Act*,¹²³ all of these statutes expressly provide that they are binding upon the Crown of their respective province (or the state, in the case of Quebec). With the exception of Nova Scotia and New Brunswick, each of them provides for its precedence over other statutes and regulations of the province, whether prior or future.

120. *HRA of the N.T.*, *supra* note 114, s. 13; *HRA of Nunavut*, *supra* note 115, s. 14.

121. *HRA of the N.T.*, *supra* note 114, s. 67; *HRA of the Yukon*, *supra* note 113, s. 13; *HRA of Nunavut*, *supra* note 115, s. 7(2).

122. See Northwest Territories Human Rights Commission and Yukon Human Rights Commission, *Know Your Rights: Human Rights in the Northwest Territories and Yukon*, June 2011 at 7-17.

123. *Interpretation Act*, R.S.B.C. 1996, c. 238, s. 14.

Leaving aside the rather odd and definitely colourable 1946 *Alberta Bill of Rights*¹²⁴ which the following year was held unconstitutional by the Privy Council on division of powers grounds – for notably relating to “banking” without being severable¹²⁵ –, Saskatchewan acted as a precursor by adopting, as early as 1947, the *Saskatchewan Bill of Rights*, the first statute in the history of Canada to deal with human rights in a global way. Similarly to the *Racial Discrimination Act* adopted by the Ontario legislator three years before, however, it was a penal statute: its enforcement was only effected by way of conviction and fines. Its implementation was therefore hampered by the requirement of a proof beyond reasonable doubt, and its logic remained alien to the indemnification of the person whose rights had been infringed. Provinces then progressively adopted statutes providing for mediation and reparation, and setting up implementation mechanisms composed of commissions and jurisdictional bodies, inspired by the New York model.¹²⁶ This led, in 1951, to the adoption of the *Saskatchewan Human Rights Commission Act*. In 1979, Saskatchewan “codified” and unified its human rights legislation by adopting the *Saskatchewan Human Rights Code*.¹²⁷ While its Part II protects against discrimination in the same way other provincial statutes do, its Part I consists of a general bill of rights.

It was Ontario, however, which was the first province, in 1962, to actually codify its various human rights statutes in a single instrument called the *Human Rights Code*,¹²⁸ which established a commission.

124. *An Act Respecting the Rights of Alberta Citizens*, S.A. 1946, c. 11. This Act was an attempt at “quasi-constitutionalizing” the Social Credit’s program.

125. *Alberta (A.G.) v. Canada (A.G.)*, [1947] A.C. 503 (P.C.).

126. Brooke JEFFREY & Philip ROSEN, “The Protection of Human Rights in Canada” (1979) 2:3 *Canadian Parliamentary Review* 37.

127. *Saskatchewan Human Rights Code*, S.S. 1979, c. S-24.1.

128. *Human Rights Code*, R.S.O. 1990, c. H.19.

Nova Scotia adopted its first *Human Rights Act* in 1963, and endowed it with a commission in 1967. This statute underwent a major overhaul in 1991.¹²⁹

New Brunswick's *Human Rights Act* was originally adopted in 1967, replaced in 1971, and significantly revised and modernised in 2011.¹³⁰

In 1968, Prince Edward Island adopted the *Human Rights Code*, replaced in 1975 by the current *Human Rights Act*.¹³¹

Newfoundland and Labrador's *Human Rights Code* was first adopted in 1969, and replaced in 2010 by the *Human Rights Act*.¹³² Although it generally provides for its precedence, in accordance with section 35 of the C.A. 1982, it gives way to statutes and agreements of implementation of Aboriginal land claims agreements.¹³³

Alberta adopted the *Individual's Rights Protection Act* in 1972, since renamed the *Alberta Human Rights Act*.¹³⁴

British Columbia's *Human Rights Code* was adopted in 1973, and reviewed comprehensively in 1984.¹³⁵

In 1974, Manitoba adopted *The Human Rights Act*, replaced in 1987 by *The Human Rights Code*.¹³⁶

129. *Human Rights Act*, R.S.N.S. 1989, c. 214.

130. *Human Rights Act*, R.S.N.B. 2011, c. 171.

131. *Human Rights Act*, R.S.P.E.I. 1988, c. H-12.

132. *Human Rights Act*, S.N.L. 2010, c. H-13.1 [HRANL].

133. *Ibid.*, s. 4 and 7, relating to the Voisey's Bay Inuit Impacts and Benefits Agreement, the Voisey's Bay Innu Impacts and Benefits Agreement, and the Labrador Inuit Land Claims Agreement Act.

134. *Alberta Human Rights Act*, R.S.A. 2000, c. A-25.5. About the 1946 *Alberta Bill of Rights*, see *supra* notes 124-125.

135. *Human Rights Code*, R.S.B.C. 1996, c. 210.

136. *The Human Rights Code*, C.C.S.M. c. H175.

Finally, Quebec's *Charter of human rights and freedoms*¹³⁷ (the "*Quebec Charter*") was adopted in 1975. Like the other provincial statutes on the matter, the *Quebec Charter* applies to private relationships as well as to those involving the state,¹³⁸ while affecting only, of course, "those matters that come under the legislative authority of Quebec".¹³⁹ It provides for its precedence and, as is the case for some other quasi-constitutional human rights statutes, for a possibility of express derogation from it.¹⁴⁰ When in doubt on the interpretation of another statute of the *Quebec* legislature, however, before concluding that the *Quebec Charter* takes precedence over such a statute, the latter should be interpreted as being in keeping with the former.¹⁴¹ The *Quebec Charter* stands out from the crowd of provincial statutes on this matter, because it protects a more comprehensive range of fundamental rights, including certain rights that are unique to Quebec.¹⁴² There is, for instance, the right to assistance, and its corollary obligation to aid any person whose life is in peril, under certain conditions.¹⁴³ The *Quebec Charter* also protects political rights (the right of petition to the National Assembly¹⁴⁴ and the right to be candidate and to vote¹⁴⁵), as well as judicial rights whose object is, in essence, the same as that of the Canadian *Charter's* legal rights.¹⁴⁶ It distinguishes itself even further by the protection that it bestows upon a wide variety of economic and social rights, including every child's right to protection, ethnic minorities' right to maintain and develop their cultural life, and every person's right to free public

137. Charter of human rights and freedoms, R.S.Q. c. C-12 [Quebec Charter].

138. *Ibid.*, s. 54.

139. *Ibid.*, s. 55.

140. *Ibid.*, s. 52.

141. *Ibid.*, s. 53.

142. *Ibid.*, s. 1-9.

143. *Ibid.*, s. 2.

144. *Ibid.*, s. 21.

145. *Ibid.*, s. 22.

146. *Ibid.*, s. 23-38.

education, to information, and to live in a healthful environment in which biodiversity is preserved.¹⁴⁷

Moreover, the protection against discrimination might be of a wider extent under the *Quebec Charter* than under other instruments. Inspired by the ECHR, the *Quebec Charter* protects, in addition to the more general right to equality,¹⁴⁸ the more specific right to an equal recognition and exercise of one's human rights and freedoms.¹⁴⁹ The corresponding provision of the Canadian *Charter* only relates to gender equality.¹⁵⁰

3. THE ROLE OF SUPRANATIONAL LAW: A MATERIAL SOURCE OF INCONSTANT AUTHORITY

Supranational law's only authority, in Canadian law, is as a material source of law, not as a formal one. On this basis, it exerts a varying authority, based on an undetermined number of factors. It encompasses not only treaties that were ratified by Canada but have yet to be incorporated in its domestic law,¹⁵¹ but also values and principles enshrined in international law, and by the international society.¹⁵² The Supreme Court sometimes speaks equally of the two.¹⁵³

This relative authority has, until now, only been recognized with regard to supranational law relating to human rights, in cases where the *Charter* was invoked. As Ghislain Otis pointed

147. *Ibid.*, s.39-48. On this matter, see Pierre Bosset & Lucie Lamarche eds., *Droit de cité pour les droits économiques, sociaux et culturels – La Charte québécoise des droits et libertés en chantier*, Yvon Blais, 2011.

148. *Quebec Charter*, *supra* note 137, s. 10-20.1.

149. *Ibid.*, s. 10.

150. *Ibid.*, s. 28.

151. See *Health Services*, *supra* note 81 at para. 70 (about the Charter only); *Ordon Estate v. Grail*, [1998] 3 S.C.R. 437 [Ordon]; *Daniels v. White*, [1968] S.C.R. 517 [Daniels]; *Canadian Foundation for Children, Youth and the Law v. Canada (A.G.)*, [2004] 1 S.C.R. 76 at para. 31.

152. *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 [Baker] at para. 70; *R. v. Sharpe*, [2001] 1 S.C.R. 45 at para. 175-176.

153. *Hape*, *supra* note 56 at para. 53; *Fraser*, *supra* note 81 at para. 75.

out, however, constitutional rights of Aboriginal peoples are not any less important than those protected by the *Charter*, making it hard to justify a limitation of supranational law's authority to the latter.¹⁵⁴

Regarding the way this authority operates, the Supreme Court qualified it as a "rule of construction",¹⁵⁵ and as an "aid in interpreting".¹⁵⁶ In the same way that unwritten constitutional principles, or even pursuant to such a principle, unincorporated supranational law can intercede in case of gaps or ambiguities in domestic positive law.¹⁵⁷ The Supreme Court has also spoken of a "presumption of conformity" of domestic law with international law. This expression, in reality, represents a presumption according to which only compelling reasons can permit an interpretation of domestic law that runs contrary to international law.¹⁵⁸ Legal authorities tried to distinguish between ratified and unratified treaties with respect to this matter, considering the former as the basis of a persuasive authority, compared to the merely informative authority of the latter, which would be tantamount to the authority of foreign law.¹⁵⁹ However good this idea may seem to be, it

154. Ghislain OTIS, "Les réparations pour violation des droits fonciers des peuples autochtones : leçons de la Cour interaméricaine des droits de l'homme", (2009) 39:1 *Recherches amérindiennes au Québec* 99.

155. See *Daniels*, *supra* note 151 at 541.

156. *Baker*, *supra* note 152 at para. 70; *Society of Composers, Authors and Music Publishers of Canada v. Canadian Association of Internet Providers*, [2004] 2 S.C.R. 427 at para. 149 (LeBel J.).

157. See *Schavernoeh v. Canada (Foreign Claims Commission)*, [1982] 1 S.C.R. 1092 at 1098. See also *Keegstra*, *supra* note 118 at 750; *Slaight*, *supra* note 38 at 1056-1057; *Capital Cities Communications Inc. v. Canadian Radio-Television Commission*, [1978] 2 S.C.R. 141 at 173; *Daniels*, *supra* note 151 at 540-541; *Inland Revenue Commissioners v. Collico Dealings Ltd.*, [1961] 1 All E.R. 762, [1962] A.C. 1.

158. *Health Services*, *supra* note 81 at para. 70; *Hape*, *supra* note 56 at para. 54; *Ordon*, *supra* note 151 at para. 137; *Daniels*, *supra* note 151 at 541.

159. France HOULE & Noura KARAZIVAN, "Les rapports de relevance juridique entre les ordres législatifs canadien et international", (2008) 1 *Revue québécoise de droit constitutionnel* 1 (online); France HOULE, "La légitimité constitutionnelle de la réception directe des normes du droit international des droits de la personne en droit interne canadien", (2004) 45 *Les Cahiers de droit* 295; Jutta BRUNNÉE & Stephen J. TOOPE, "A Hesitant Embrace: The Application of Interna-

is by no means self-evident that it is reflected in the current jurisprudence of the Supreme Court. In fact, this jurisprudence refers much more willingly to the ECHR, in which Canada will never be a party, than to the *American Convention on Human Rights*,¹⁶⁰ to which it could accede as a member of the Organization of American States.

Suffice it to say that supranational law constitutes a material source of Canadian constitutional law, the influence of which is modulated by a myriad of factors: the signature or ratification of the instrument, its prescriptive or programmatic nature, its customary recognition, its object, etc.¹⁶¹

4. JURISDICTIONAL ENFORCEMENT

4.1. Of Constitutional Rights

Subsection 52(1) of the C.A. 1982 provides that “The Constitution of Canada is the supreme law of Canada, and *any law* that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.” In this context, “of no force or effect” does not mean inoperative, but rather, “invalid”.¹⁶² By virtue of many of its provisions, the Charter is in some respect of a greater purview than subsection 52(1) of the C.A. 1982. Pursuant to its subsection 32(1), it allows the review of any action of the federal and provincial governments, so that the

tional Law by Canadian Courts”, (2002) *Canadian Yearbook of International Law* 3.

160. *American Convention on Human Rights*, 22 November 1969, 1144 U.N.T.S. 123.

161. For further research on the subject, see Stéphane BEAULAC, “Interlégativité et réception du droit international en droit interne canadien et québécois” in *JurisClasseur Québec*, loose-leaf ed., coll. “Droit public”, *Droit constitutionnel*, Montréal, LexisNexis Canada, 2011; “Le droit international et l’interprétation législative : oui au contexte, non à la présomption”, in O.E. FITZGERALD *et al.* eds., *Règle de droit et mondialisation : rapports entre le droit international et le droit interne*, Cowansville, Yvon Blais, 2006, 413-454; Gibran Van Ert, *Using International Law in Canadian Courts*, 2nd ed., Toronto, Irwin Law, 2008.

162. *Re Manitoba Language Rights*, supra note 8 at para. 52.

rights it protects are enforceable against measures of individual scope that cannot necessarily be qualified as legal norms, or *law*.

In Canada, constitutional judicial review is decentralized. It developed as a natural extension of the rule of law, beginning as a control of the conformity of colonial legal rules to British imperial law. The higher courts, that is to say, provincial and territorial Superior or Supreme Courts, the Federal Court (to a large extent), the provincial, territorial and federal Courts of Appeal, and the Supreme Court of Canada (the final instance in all fields), are competent for judicial review, including constitutional review, and their decisions are effective *erga omnes*. Subject to the rules of *res judicata* and *rationæ loci* (territorial jurisdiction), a higher court's determination that a generally binding norm is invalid shall apply to all, and not only between the parties. The lower courts, such as the Provincial Courts, hold an indirect and ancillary jurisdiction for judicial review. Their decisions are only effective *inter partes*, and create or declare rights of individual scope. Administrative bodies and decision makers empowered to determine questions of law are also entitled to apply constitutional law in the manner of a lower court, but their conclusions in that respect can easily be reviewed by higher courts. Since it relates to review on the issue of validity, the foregoing only concerns judicial decisions based on rigid constitutional law. Decisions based purely on flexible constitutional law can only be a source of law of a general scope inasmuch as they contribute to the jurisprudence, following the principle of *stare decisis*.

The "normal" method of constitutional review, at least theoretically, is to allege unconstitutionality in a specific pending dispute, whether civil or criminal, or in the review process of an act of the administration that may concretely affect the plaintiff. In practice, however, a more abstract form of review may take place in one of two ways: by referral procedure, or by taking advantage of the relaxing in recent years of the conditions of recognition of a public interest standing.

While an appeal takes place in the ordinary procedure of litigation, a reference is a special procedure of an advisory nature, whereby a government asks a court for its opinion. In theory, a reference opinion is neither binding nor precedential.¹⁶³ Judicial practice, however, suggest that Canadian courts rely equally on appeal decisions and reference opinions.¹⁶⁴ In any event, both of these contribute to a formal source of unwritten constitutional law of general scope: the jurisprudence.

Beyond the mere validity review process, section 24 of the *Charter* allows a person whose rights have been violated, denied, or infringed in any other way, to seek reparation:

(1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

(2) Where, in proceedings under subsection (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.

The range of remedies that may be obtained under subsection 24(1)¹⁶⁵, which the Supreme Court considers as “a cornerstone upon which the rights and freedoms guaranteed by the *Charter* are founded”,¹⁶⁶ is as broad as the tribunal’s general jurisdiction to grant remedies¹⁶⁷ combined with, in the case of a

163. *Re Criminal Code*, (1910), 43 S.C.R. 434 at 436. See also *Ontario (A.G.) v. Canada (A.G.) (Reference Appeal)*, [1912] A.C. 571; Gerald RUBIN, “The Nature, Use and Effect of Reference Cases in Canadian Constitutional Law” (1959-1960) 6 *McGill Law Review* 168.

164. *Ontario (A.G.) v. Canada Temperance Federation*, [1946] A.C. 193 at 206.

165. See H. JEAN & G. LAPORTE, *supra* note 9 at para. 85-137.

166. *R. v. 974649 Ontario Inc.*, [2001] 3 S.C.R. 575 at para. 20 (the “*Dunedin*” case).

167. *Ibid.*

higher court with inherent jurisdiction, the equity dictum *ubi jus ibi remedium*¹⁶⁸ enable it to be: new trial, acquittal, new hearing, stay of proceedings¹⁶⁹, reduction of sentence, declaratory judgment, injunction or other form of mandatory order¹⁷⁰, damages¹⁷¹, and so forth, including costs against the Crown¹⁷².

It is however important to make a distinction between the higher and the lower courts on this issue. The former are always competent to grant remedies pursuant to subsection 24(1) (though they have full discretion to refuse),¹⁷³ and even the legislator may not curtail this jurisdiction,¹⁷⁴ whereas the latter, including administrative tribunals, may do so only if empowered by statute to grant remedy of the kind that is sought.¹⁷⁵

The availability of damages as a remedy under subsection 24(1) of the *Charter* was only recently confirmed in *Ward* in 2010.¹⁷⁶ It must be understood that damages pursuant to this provision are awarded at the expense of the Crown or of the public entity called into question and to which the *Charter* applies, if it owns a patrimony; but not at the expense of their servants, agents, employees, contractors, or any other actors to which the *Charter* does not apply.¹⁷⁷

Except in presence of bad faith, abuse of power or gross negligence, the state may not be held liable in damages under

168. This maxim means “where there is a right, there is a remedy”, or “where there is a wrong, there is a remedy”. See *inter alia* 3 William Blackstone Commentaries on the Laws of England §23.

169. *R. v. Bellusci*, 2012 SCC 44.

170. *Canada (A.G.) v. PHS Community Services Society*, [2011] 3 S.C.R. 134 at para. 141-153.

171. About the recently recognized possibility to obtain damages pursuant to subsection 24(1), see *Vancouver (City) v. Ward*, [2010] 2 S.C.R. 28 [*Ward*].

172. *R. v. 974649 Ontario Inc.*, *supra* note 166.

173. *Mills v. La Reine*, [1986] 1 S.C.R. 863 at 894-896.

174. *Rahey*, *supra* note 57; *R. v. Smith*, [1989] 2 S.C.R. 1120 at 1129.

175. *R. v. Conway*, [2010] 1 S.C.R. 765 at para. 82.

176. *Ward*, *supra* note 171.

177. *Ibid.* at para. 22. In this case, the provincial Crown was deemed liable in damages under subsection 24(1) of the *Charter* for the action of municipal police officers.

subsection 24(1) of the *Charter* for an injury resulting from the adoption or application of a legislative provision that was not yet declared unconstitutional.¹⁷⁸ Regarding actions of the executive power, however, this “immunity” can only come into play when the action was determined by and attributable to the impugned legislative provision.¹⁷⁹

Finally, in order to exclude evidence pursuant to subsection 24(2), it must be established that, “having regard to all the circumstances”, the admission of such evidence would “bring the administration of justice into disrepute”. According to *Grant*, when performing this analysis, a court must “assess and balance the effect of admitting the evidence on society’s confidence in the justice system”, having regard to three factors: “the seriousness of the Charter-infringing state conduct”, “the impact of the breach on the Charter-protected interests of the accused”, and “society’s interest in the adjudication of the case on its merits”.¹⁸⁰

4.2. Of Quasi-Constitutional Rights

Quasi-constitutional statutes on human rights always are (except for the *Canadian Bill*) the basis of an implementation system comprising one or two specialized bodies: either a tribunal of the “direct access” model accompanied or not by a commission, or a commission combined with a jurisdictional body.

Human rights commissions are mandated to receive complaints from individuals or groups of individuals regarding violations of the rights protected by their respective empowering statute. They promote alternative forms of dispute resolution.

178. *Mackin v. New Brunswick (Minister of Finance)*; *Rice v. New Brunswick*, [2002] 1 S.C.R. 405 at para. 78 (Gonthier J., majority reasons). Justice Gonthier referred to *Welbridge Holdings Ltd. v. Greater Winnipeg*, [1971] S.C.R. 957 and *Central Canada Potash Co. v. Government of Saskatchewan*, [1979] 1 S.C.R. 42.

179. See *Ward*, *supra* note 171 at para. 41.

180. See majority reasons in *R. v. Grant*, [2009] 2 S.C.R. 353 at para. 71 (McLachlin and Charron JJ.), rewording the criteria of *R. v. Collins*, [1987] 1 S.C.R. 265.

Commissions' mandate to defend human rights usually allows them to file complaints on their own initiative when the public interest requires it. Some commissions may give advisory opinions or issue declaratory judgments determining the discriminatory nature of an action or an omission.

Beyond a few minor differences, the complaint process is generally the same in every system composed of a commission combined with a jurisdictional body. The first step is the examination and investigation of the complaint by the Commission, during which mediation is encouraged between the parties. The Commission may, at this stage, dismiss a complaint on various grounds, in which case the complainant may apply to the jurisdictional body for a review of that decision. If the Commission determines that it is warranted by the situation, it transfers the complaint to that body.

These jurisdictional bodies, whether they are a tribunal, a panel of adjudicators, or a board of inquiry, are independent entities that deal with complaints referred to them, and with applications for review of the Commissions' decisions to dismiss complaints. If they agree with a complainant, they may command the other party to cease all violations of the complainant's rights, and order various corrective measures, such as indemnification or the granting of what was discriminatorily refused. The decisions of these bodies, which sometimes have a judicial tribunal status, are usually as binding and enforceable as a higher court's decision would be, but they are subject to appeal, or, failing that, to judicial review, in front of the superior or appellate court.

In most provinces, when a Commission transfers a complaint to a jurisdictional body, the Commission does not represent complainants before that body: its role is to represent the public interest in an objective manner. Some Commissions, however, may represent the complainant for all procedures.

In the “direct access” model, on the other hand, tribunals hear, in an adversarial process, the disputes that are brought before them by individuals alleging a violation of their rights.

Often, complainants are not prevented from seeking enforcement before the ordinary courts of law, and they may choose between the two procedural avenues.

Violation of the human rights statute is a penal offence in a majority of provinces and territories, while breach of an order rendered pursuant to it almost always is. Such an offence is punishable on summary conviction by way of monetary fine. In some provinces and territories, such as Yukon, however, only wilful obstruction or interference with a person acting under the authority of the Act, retaliation or threat of retaliation, and report of false information to the Commission constitute penal offences.¹⁸¹

4.2.1. In Federal Law

As aforementioned in section 2.1.1 of this report, the *Canadian Act* established the Canadian Human Rights Commission (the “CHRC”) and the Canadian Human Rights Tribunal (the “CHRT”).

The CHRC has a dual mandate, since it also ensures compliance with the *Employment Equity Act*.¹⁸² It began its work in 1978, the year following the adoption of the *Canadian Act*.¹⁸³ It is currently chairing the International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights, within the United Nations. The CHRC renders between 600 and 2000 decisions each year.¹⁸⁴

181. *HRA of the Yukon*, *supra* note 113, s. 29-32.

182. *Employment Equity Act*, S.C. 1995, c. 44.

183. See “About us: Our Mandate”, online: Canadian Human Rights Commission <<http://www.chrc-ccdp.ca/>> (Consulted on 17 March 2012).

184. See “Resolving Disputes: Tools and Resources”, online: Canadian Human Rights Commission <<http://www.chrc-ccdp.ca/>> (Consulted on 17 March 2012).

A National Aboriginal Initiative was put in place in order to coordinate “Commission activities related to First Nations and Aboriginal issues”, and to “foster a dialogue on how to incorporate the unique context of First Nations communities into human rights protection mechanisms”.¹⁸⁵

When the CHRC considers that a complaint is justified and that the mediation process is not yielding any result, it refers the complaint to the CHRT. The CHRT then holds a hearing and renders a judgment. The CHRT is the only body that has express jurisdiction to determine if an action is discriminatory pursuant to the *Canadian Act*. The CHRC and CHRT’s decisions may be judicially reviewed by the Federal Court of Canada.¹⁸⁶ The CHRT usually renders between 40 and 65 decisions each year.¹⁸⁷

4.2.2. In Territorial Law

The *HRA of the N.T.* and the *HRA of the Yukon* both provide for a system composed of a commission combined with a jurisdictional body.¹⁸⁸ In Yukon, the latter is a panel of adjudicators, called a board of adjudication to hear the complaints.¹⁸⁹ In the Northwest Territories, it is an adjudication panel.¹⁹⁰

Any complaint relating to individuals or groups concerned by the *Indian Act* must, in Yukon, be referred to the Canadian Human Rights Commission. Some First Nations, however, are claiming exclusive jurisdiction over this matter by virtue of Chap-

185. “Expanding Knowledge: National Aboriginal Initiative”, online: Canadian Human Rights Commission <<http://www.chrc-ccdp.ca/>> (Consulted on 17 March 2012).

186. See “About the CHRT: Jurisdiction – Canadian Human Rights Act”, online: Canadian Human Rights Tribunal <<http://chrt-tcdp.gc.ca/>> (Consulted on 17 March 2012).

187. See “Tribunal Decisions”, online: Canadian Human Rights Tribunal <<http://chrt-tcdp.gc.ca/>> (Consulted on 17 March 2012).

188. *HRA of the N.T.*, *supra* note 114, parts 3-5; *HRA of the Yukon*, *supra* note 113, parts 3-4.

189. *HRA of the Yukon*, *supra* note 113, s. 22 and ff.

190. *HRA of the N.T.*, *supra* note 114, s. 48.

ter 13 of the Yukon self-government agreements. This claim is currently the subject of discussions between the Yukon Human Rights Commission, the Canadian Human Rights Commission and the First Nations.¹⁹¹

The *HRA of Nunavut*, for its part, has established the Nunavut Human Rights Tribunal (the “NHRT”), on the direct access model.¹⁹² In Nunavut, there is no commission mandated to conduct investigations for the complainants or to promote public awareness about human rights, and the NHRT has no staff whose function would be to investigate or to help complainants gather evidence. It is up to the parties to provide the NHRT with the relevant information, and it is on the sole basis of this information that the NHRT will render its judgment. At the time of this report, the NHRT, which receives about one application per month, has conducted only two hearings.¹⁹³

4.2.3. In Provincial Law

Except Ontario and British Columbia, all provinces chose a system composed of a commission combined with various jurisdictional bodies: the Saskatchewan Human Rights Tribunal, Alberta Human Rights Tribunals, the Manitoba Human Rights Board of Commissioners, the Labour and Employment Board appointed by the Minister to act as a Board of Inquiry in New Brunswick, Boards of Inquiry appointed by the Chief Adjudicator on the request of the Chairperson of the Commission in Newfoundland and Labrador, Boards of Inquiry appointed by the Chief Judge of the Provincial Court of Nova Scotia, and Human Rights Panels consisting of one or more Commissioners of the Prince Edward Island Human Rights Commission.

191. See “About us: The Yukon Human Rights Commission”, online: Yukon Human Rights Commission <<http://www.yhrc.yk.ca/>> (Consulted on 12 March 2012).

192. *HRA of Nunavut*, *supra* note 115, s. 16.

193. See “Decisions of the Nunavut Human Rights Tribunal”, online: Nunavut Human Rights Tribunal <<http://www.nhrt.ca/>> (Consulted on 13 March 2012).

Ontario and British Columbia substituted a direct access system for their prior commission system. In British Columbia, parties apply to the Human Rights Tribunal by way of complaint. The tribunal offers mediation in order to resolve their dispute. It holds a hearing only in the event of failure in the mediation process.¹⁹⁴ In the absence of a commission, a minister of the government is responsible to develop promotion and awareness programs for the public. A non-profit organization, the British Columbia Human Rights Coalition, was formed to overcome the lack of a commission. It promotes human rights and helps individuals to file their complaints before the tribunal.¹⁹⁵ Ontario's system, for its part, includes, since 2008, the Ontario Human Rights Commission and a direct access tribunal, the Human Rights Tribunal of Ontario.¹⁹⁶ Complaints must be filed directly to the tribunal, by way of application. The Commission's mandate, since 2008, is "to promote, protect and advance human rights through research, education and policy development",¹⁹⁷ and it is no longer involved in the complaint or investigation process.

Quebec is among the provinces that adopted a commission based system. The *Quebec Charter* is thus implemented and enforced, in addition to the judicial courts, by the *Commission des droits de la personne et de la jeunesse* (the "CDPDJ") established by its Part II, and by the Quebec Human Rights Tribunal (the "QHRT") established by its Part VI, which came into force in 1990. The CDPDJ ensures the promotion and protection of the rights protected by the *Quebec Charter*, and of the children rights protected by the *Youth Protection Act*¹⁹⁸ (the "YPA") and the *Youth Criminal Justice Act*.¹⁹⁹ It is also responsible for the application of

194. *Human Rights Code*, R.S.B.C. 1996, c. 210, s. 30.

195. See "About us", online: The B.C. Human Rights Coalition, Your Rights to Know <<http://www.bchrcoalition.org/>> (Consulted on 17 March 2012).

196. An Act to amend the Human Rights Code, S.O. 2006, c. 30.

197. See Ontario Human Rights Commission, online: <<http://www.ohrc.on.ca/>> (Consulted on 17 March 2012).

198. *Youth Protection Act*, R.S.Q. c. P-34.1.

199. *Youth Criminal Justice Act*, S.C. 2002, c. 1.

the *Act respecting equal access to employment in public bodies*.²⁰⁰ The CDPDJ fulfills all the usual mandates devoted to a human rights commission, as described above. When it identifies circumstances that could foster discrimination, it is competent to implement employment equity programs and affirmative action programs to remedy the situation.²⁰¹ It is empowered to investigate any situation where it has reasons to believe that equality rights or children's rights have been violated, whether upon an application or on its own initiative. It must provide assistance in filing complaints to individuals, groups and organizations.²⁰²

The filing of a complaint to the CDPDJ or the beginning of an investigation stay the limitation period of any civil suit relating to the same facts.²⁰³ In all cases, the CDPDJ investigates and encourages mediation between the parties. It can refuse to act on various grounds, including in the case of a frivolous or vexatious complaint and in the case of impossibility to gather sufficient evidence. Such a dismissal must be rendered in a written decision explaining to the complainant the other recourses at his disposition, if applicable.²⁰⁴ If the complaint is neither dismissed nor settled in mediation, the CDPDJ has the discretion to decide if it will be deferred to the QHRT or to an adjudicator.

The QHRT is a "specialized, autonomous and independent judicial Tribunal [that] has as its mandate to hear and decide disputes in the areas of discrimination, harassment, exploitation of the elderly and of handicapped persons, and affirmative action programs".²⁰⁵ Its creation was meant to optimize the accessibility and efficiency of Quebec's human rights jurisdictional process, by

200. An Act respecting equal access to employment in public bodies, R.S.Q. c. A-2.01.

201. *Quebec Charter*, *supra* note 137, s. 86 and ff.

202. *Ibid.*, s. 72.

203. *Ibid.*, s. 76.

204. *Ibid.*, s. 77-78.

205. See "The Human Rights Tribunal", online: The Courts of Quebec <<http://www.tribunaux.qc.ca/>> (Consulted on 22 March 2012).

allotting the adjudication of complaints to a specialized body.²⁰⁶ The QHRT does not function on the direct access model. Complainants must, therefore, file their complaint with the CDPDJ first.²⁰⁷ If the latter decides to bring the case to the QHRT, it will act as the representative of the complainant,²⁰⁸ in contrast to the vast majority of commissions, which only stand for public interest. If the CDPDJ concludes instead that the complaint should not be referred to a tribunal, the *Quebec Charter* provides that the complainant may still take it to the QHRT, at his or her own expense²⁰⁹, but it is settled case law that the QHRT shall be validly seized if, and only if, the CDPDJ was nonetheless of the opinion that it had some merit²¹⁰.

The QHRT holds a hearing of the complaint. If it rules that there was an unlawful violation of a right protected by the *Quebec Charter*, it can order any remedy relating to the cessation of such violation and compensation for the injury resulting therefrom. No maximum is set for these damages. If the violation was intentional, punitive damages may also be awarded.²¹¹ This decision can be appealed to the Quebec Court of Appeal, on permission of one of its judges.²¹²

The CDPDJ is also vested with the power to investigate acts or attempts of retaliation, as well as other breaches of the *Quebec Charter*, and to report them to the Attorney General and to the Director of Criminal and Penal Prosecutions.²¹³ Violating the prohibition of discrimination of sections 10 to 19, or the prohibition of exploitation of the elderly and the disabled of section 48 consti-

206. See "About the Tribunal: History", online: The Courts of Quebec <<http://www.tribunaux.qc.ca/>> (Consulted on 22 March 2012).

207. *Quebec Charter*, *supra* note 137, s. 74 and 111 at para. 2.

208. *Ibid.*, s. 80.

209. *Ibid.*, s. 84.

210. *Hajjage v. McGill University*, 2012 QCCA 1272 (CanLII); *Ménard v. Rivet*, 1997 QCCA 9973 (CanLII).

211. *Ibid.*, s. 49.

212. *Ibid.*, s. 132.

213. *Ibid.*, s. 71(9).

tutes a penal offence.²¹⁴ This is also the case with the taking of reprisals, and the obstruction of the work of the CDPDJ or of one of its member. The CDPDJ has jurisdiction to prosecute on its own initiative.²¹⁵

CONCLUSION

Even if quasi-constitutional protection of human rights has been a reality for a few decades already, their codification into the supreme law of Canada in 1982 proved to be a significant step forward. The benefits of quasi-constitutional protection mainly concentrated in the field of private law relations. As the Supreme Court's jurisprudence relating to the *Charter* developed, the protection of the person against the action of the state, including the legislator, increased noticeably. This is particularly true for the fundamental freedoms of expression and religion, and for the legal rights. The picture is more mixed, however, regarding democratic rights. In contrast with the liberal interpretation of universal suffrage that led it to deem unjustified the privation of the right to vote of inmates serving a sentence of imprisonment of two years or more,²¹⁶ the Supreme Court refused to recognize the principle of equal suffrage, by preferring an ambiguous notion of right to "effective representation".²¹⁷ This notion nevertheless contributed, through its interactions with the electoral equal opportunity principle, to the highest court holding that requiring all political parties to present candidates in at least 50 electoral ridings in order to be allowed to register under the election law was unconstitutional. It must be understood that registration procured some benefits, including, apart from financial and fiscal benefits, to have the name of the party appear on the ballots next to the candidates' names.²¹⁸

214. *Ibid.*, s. 134.

215. *Ibid.*, s. 136.

216. *Sauvé v. Canada (Chief Electoral Officer)*, [2002] 3 S.C.R. 519.

217. *Reference re Provincial Electoral Boundaries (Sask.)*, [1991] 2 S.C.R. 158.

218. *Figueroa v. Canada (A.G.)*, [2003] 1 S.C.R. 912.

The constitutional *Charter* does not protect economic and social rights *per se*, which, in addition, are often weakly protected by flexible constitutional law.²¹⁹ Indirect formal constitutional protection of union rights pursuant to the freedom of association granted by paragraph 2(d) of the *Charter* might be conceivable, but the Supreme Court's case law on this matter could hardly be more unstable.²²⁰ A secondary route that could be taken by economic rights to accede to the supreme law is that of the right to security of the person under section 7. The Supreme Court, however, while theoretically leaving the door ajar for that possibility, tightly closed it in practice.²²¹

Section one of the *Charter*, which allows the state to justify, under some conditions, the restriction of a right or freedom protected by the *Charter*, leaves a margin of appreciation as wide as that recognized by the main national and supranational human rights jurisdiction. The Supreme Court's decision in *R. v. Oakes* generated a phenomenon of cross-fertilisation of the jurisprudence.²²² Section 33 of the *Charter*, which permits the suspension of some guarantees, has practically never been used, except by Quebec, which, indeed, never consented to the 1982 constitutional revision, and made extensive use of section 33 until 1993.²²³

219. On this matter, see P. BOSSET & L. LAMARCHE, *supra* note 147147.

220. *Supra* note 81, and its corresponding text.

221. *Gosselin*, *supra* note 88 at para. 81-83.

222. M. DESCHAMPS, M. ST-HILAIRE & P. GEMSON, *supra* note 85.

223. Saskatchewan used Section 33 in order to protect a back-to-work legislation (*The SGEU Dispute Settlement Act*, S.S. 1984-85-86, c. 111, s. 9) and to neutralize the effects of a decision of the Saskatchewan Court of Appeal that deemed the statute to be a breach of freedom of association. The Supreme Court finally ruled in favor of the province, making this suspension of rights useless. Alberta planned to use Section 33 in its Bill 26 of 1998. The derogation would have allowed to limit the indemnity payable to victims of a provincial program of sterilization. Public opposition, however, forced the government to back away. In 2000, in reaction to *M. v. H.*, [1999] 2 S.C.R. 3, that held that the law should give the same benefits to *de facto* spouses than to other spouses, the Albertan legislator used Section 33 to protect a statute providing that marriage could only be celebrated between a man and a woman. The Alberta *Marriage Act*, R.S.A. 2000, c. M-5, still provides at its paragraph 1(c) that " 'marriage' means a marriage between a man and a woman". Its paragraph 2(a), however, that provided that

Part II of the C.A. 1982, relating to special rights of Aboriginal peoples, had huge systemic repercussions, even if this field of state relations with the First Nations revealed some limitations. While Native Peoples have won some disputes about their aboriginal or treaty rights to engage in certain activities, the case law relating to the aboriginal title limited itself to better defining the issues in order to invite the state to a little more good will in its efforts to settle aboriginal title claims out of court by entering into treaties.²²⁴ The fairness of the national treaties negotiation process, however, is seriously questioned by experts, and is currently under review by the Inter-American Commission on Human Rights.²²⁵ The Supreme Court's continued hesitance on how to conceive the relation between the Charter's individuals rights and freedoms and Part II of the C.A. 1982's Aboriginal peoples special rights, revealed by the aforementioned dissenting and concurring reasons, is also a source of concern. It is hoped, at least by us, that when the issue will truly arise in front of the Supreme Court, it will choose the approach suggested by Justice Deschamps in *Beckman* over the one suggested by Justice Bastarache in *Kapp*.²²⁶

The Canadian human rights system is very easy to implement through litigation. This can probably be explained, on the one hand, by the coexistence of commissions²²⁷ and specialized tribunals responsible for the application of quasi-constitutional statutes, and on the other, by the decentralized nature of constitutional review. This is only true on the strictly legal level, however,

"[t]his Act operates notwithstanding (a) the provisions of sections 2 and 7 to 15 of the Canadian Charter of Rights and Freedoms", ceased to have effects on 23 March 2005, five years after its coming into force, as provided for by Section 33.

224. On this matter, see Sylvette GUILLEMARD & Maxime ST-HILAIRE, 1982-2001. Vingt ans de grands arrêts de la Cour suprême du Canada : 45 décisions choisies, présentées et commentées, Wilson & Lafleur, 2002 at 170-176.

225. *Hul'qumi'num Treaty Group v. Canada*, Inter-Am. C.H.R. n° 592/07, admissibility decision of 30 October 2009, online: <www.htg-humanrights.bc.ca/petition%20592-07.pdf>.

226. *Supra* note 96, and its corresponding text.

227. They are also responsible for non contentious implementation of human rights and freedoms, including promotion.

and financial accessibility to justice is another issue. The 2011 edition of the *Rule of Law Index* published by the World Justice Project gave Canada a 76 % grade regarding accessibility to criminal justice, and 66 % regarding accessibility to civil justice. This places Canada at the 10th and 16th rank, respectively, on a total of 66 ranked countries.²²⁸ Among countries with an equivalent level of revenues, Canada was still 10th and 16th on a total of 23. It needs to be pointed out, however, that one of the criteria of this index is the accessibility to “informal justice”.

228. World Justice Project, *Rule of Law Index 2011* at 14, online: The World Justice Project <<http://worldjusticeproject.org/rule-of-law-index/>> (Consulted on 2 April 2012).

