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# Canadian Federalism and the Principle of Subsidiarity: Should We Open Pandora's Box?

Eugénie Brouillet\*

Local assemblies of citizens constitute the strength of free nations.

— Tocqueville

## I. INTRODUCTION

Since the 1990s, a renewed interest in federalism as a principle for state organization has become apparent around the world, while integration, at the international level, has boosted national cultural identities and caused them to be more strongly affirmed. The federative principle creates a political and legal structure that can provide ways to express the identities of infra-state nations, by allowing their collective aspirations to be reflected in the political system. New federations have been created (Belgium, South Africa), and new federative systems of government have been devised (Spain, Italy, United Kingdom). The federative principle has provided inspiration for the creation of supranational entities that borrow some of its institutional features (European Union). This observation, which is encouraging for the future of federalism, must be balanced against a more disturbing trend: the threat posed to federalism by unitary forces.<sup>1</sup> Various socio-economic factors can give an undue advantage to the forces working towards union, and therefore towards the centralization of powers within federative states. This trend will have a major impact on the future of federalism in general, and on the survival and success of infra-state nations in particular.

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<sup>1</sup> Alain-G. Gagnon, "The Political Uses of Federalism", in François Rocher & Miriam Smith, eds., *New Trends in Canadian Federalism* (Peterborough, Ont.: Broadview Press, 1995) 23.

Within contemporary federations, a tendency towards the centralization of powers can be seen to result from judicial review based upon the distribution of powers.<sup>2</sup> This trend is apparently characteristic of democratic societies. According to Tocqueville, "... the intellect of democratic nations is peculiarly open to simple and general notions. Complicated systems are repugnant to it, and its favorite paradigm is that of a great nation composed of citizens all resembling the same pattern, and all governed by a single power."<sup>3</sup> This results in "a natural tendency in every organized society to strengthen its centre".<sup>4</sup> This proclivity towards centralization of power and enforced standardization raises crucial questions in a federative context. At the theoretical and normative levels, the federative principle requires a balance between the forces tending towards diversity and those pushing towards unity and, therefore, a balance in the exercise of the legislative powers of the federal and federated levels of government. These powers are, in fact, the primary legal manifestation of the twin desires for unity and diversity.

Canada is no exception to this trend towards the concentration of powers. In 1949, the abolition of the right of appeal to the Judicial Committee of the Privy Council made the Supreme Court of Canada the court of last resort in all matters.<sup>5</sup> From this point on, the federative stance of the Judicial Committee, careful to preserve the balance between the powers of the two levels of government by protecting the autonomy of the federal and provincial parliaments within their areas of jurisdiction, was gradually eroded by a centralizing interpretation of powers,<sup>6</sup> leading to a federative imbalance. The Supreme Court's reasoning in decisions involving the distribution of powers are increasingly founded on considerations that promote efficiency over diversity.<sup>7</sup>

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<sup>2</sup> Edmond Orban, *La dynamique de la centralisation dans l'État fédéral : un processus irréversible?* (Montréal, Quebec/Amérique, 1984) [hereinafter "Orban"]; A. Bzdera, "Comparative Analysis of Federal High Courts: A Political Theory of Judicial Review" (1993) 1 Can. J. of Pol. Sci. 26.

<sup>3</sup> Alexis de Tocqueville, *Democracy in America*, trans. Henry Reeve, Vol. II.

<sup>4</sup> Alain Delcamp, "Principe de subsidiarité et décentralisation" (1993) 23 Revue française de droit constitutionnel 609, at 616 [hereinafter "Delcamp"] (translation).

<sup>5</sup> *Act to Amend the Supreme Court Act*, S.C. 1949, c. 37.

<sup>6</sup> Eugénie Brouillet, *La négation de la nation. L'identité culturelle québécoise et le fédéralisme canadien* (Quebec: Les Éditions du Septentrion, collection Cahiers des Amériques, 2005), at 255-322 [hereinafter "Brouillet"].

<sup>7</sup> Concerning this functional approach to the distribution of legislative powers, see J. Leclair, "The Supreme Court of Canada's Understanding of Federalism: Efficiency at the Expense of Diversity" (2003) 28 Queen's L.J. 411; Brouillet, *id.*, at 319-22; G. Otis, "La justice constitutionnelle au Canada à l'approche de l'an 2000 : uniformisation ou construction plurielle du droit?" (1995-96) 27 Ottawa L. Rev. 261 [hereinafter "Otis"]; H. Brun, "L'évolution récente de quelques

In parallel with the growing popularity of federalism as a principle for state organization, a new focus on the principle of subsidiarity has become apparent. Since its formal inclusion in European Community law following the ratification of the Treaty on European Union, it has gradually made its way, albeit implicitly, into the legal framework of a number of national and multi-national states.<sup>8</sup> These two trends are not unrelated, since the principles of federalism and subsidiarity both offer a response to the centralization/decentralization dialectic of state power. In Europe, the enhancement of the federalist path in fact led the Member States to require that the principle of subsidiarity be formally enshrined in European Community law.

Over the last 10 years, the Supreme Court of Canada has referred explicitly to the principle of subsidiarity even though it is not found in the federation's formal constitutional structure. Two examples are found in the 2010 decisions *COPA*<sup>9</sup> and *Reference re Assisted Human Reproduction Act*.<sup>10</sup> As a result, this paper will focus on the role currently played by the principle of subsidiarity in the Canadian federative system. More specifically, we will try to identify the actual and potential effects of this principle on the balance of power between the federal and provincial governments. Would its inclusion help to restore a degree of balance, or would it encourage an even greater centralization of powers?

In a brief Part II, we will examine the close ties existing, at the theoretical level, between the principles of subsidiarity and federalism. After dealing with the idea of subsidiarity as a source of inspiration for the establishment of a federative form of government, we will say a few words about its use as a legal principle in the application of the rules governing the distribution of powers.<sup>11</sup>

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

<sup>8</sup> Examples include the strengthening of the principle in Germany, its formal inclusion in the constitution of Portugal, and its gradual appearance in French law: F. Chaltiel, "Le principe de subsidiarité dix ans après le Traité de Maastricht" (2003) 469 *Revue du Marché commun et de l'Union européenne* 366, at 372 and 373 [hereinafter "Chaltiel"].

<sup>9</sup> *Quebec (Attorney General) v. Canadian Owners and Pilots Assn.*, [2010] S.C.J. No. 39, [2010] 2 S.C.R. 536 (S.C.C.) [hereinafter "*COPA*"].

<sup>10</sup> [2010] S.C.J. No. 61, [2010] 3 S.C.R. 457 (S.C.C.).

<sup>11</sup> The distinction proposed by Jean-Claude Scholsem between "upstream subsidiarity" (or subsidiarity as a philosophic idea) and "downstream subsidiarity" (or subsidiarity as a legal principle) inspired the organization of ideas in this paper: J.-C. Scholsem, "Le principe de subsidiarité en question en droit constitutionnel belge" [hereinafter "Scholsem"], in Francis Delpérée, ed., *Le principe de subsidiarité* (Bruxelles: Bruylant, 2002) 495 [hereinafter "Delpérée"].

Part III will be devoted to an examination of the place given to the principle of subsidiarity in Canadian constitutional law, first as a notion underlying the adoption of a federative form of government in Canada, and then as a legal principle for regulating the exercise of powers. We will seek, in particular, to identify the effects of the principle on the centralization/decentralization dynamic of power within the federation. Although exclusivity was largely applied to the distribution of powers at the birth of the Canadian federation, the so-called modern or cooperative view of federalism adopted by the Supreme Court has generated a large number of *de facto* overlapping powers that clearly favour the federal government, to the detriment of provincial autonomy. The creation of zones of overlapping powers has provided fertile ground for the discreet, but increasingly apparent, emergence of a constitutional principle of subsidiarity in Canada. A form of subsidiarity is implicitly present in some constitutional doctrines governing the distribution of powers, namely, the national concern doctrine, the trenching power, and the general trade and commerce power. In addition, for at least a decade, a constitutional principle of subsidiarity has been stated with increasing explicitness in the jurisprudence of Canada's highest court.

## II. INTRODUCTORY REMARKS ON SUBSIDIARITY AND FEDERALISM

Subsidiarity and federalism both offer possible responses to the centralization/decentralization dialectic.

### 1. Subsidiarity as a Founding Idea of Federative States

Subsidiarity is far from being a new idea. Although it has blossomed recently as a regulating principle for public powers, its roots can be traced back to numerous philosophers who, over the centuries, have examined the relationship between political power and civil society, or between political communities.<sup>12</sup>

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<sup>12</sup> Although traces of the idea of subsidiarity can be found in Aristotle and Thomas Aquinas, it was not systematically theorized until the early 17th century by Johannes Althusius in *Politica methodice digesta*. See Philippe Brault, Guillaume Renaudineau & François Sicard, *Le principe de subsidiarité*, "Aperçu philosophique" (Paris: La documentation française, 2005), 11-23 [hereinafter "Brault *et al.*"]. See also Chantal Millon-Delsol, *L'État subsidiaire : ingérence et non-ingérence de l'État, le principe de subsidiarité aux fondements de l'histoire européenne* (Paris: Presses universitaires de France, coll. Léviathan, 1992).

Despite its polysemous nature, the principle of subsidiarity can be defined as a principle by which the smallest possible social or political entities should have all the rights and powers they need to regulate their own affairs freely and effectively. It also requires that the responsibilities of the larger social and political entities be limited to the things that the smaller entities cannot accomplish alone.<sup>13</sup> It thus has a dual aspect: negative subsidiarity requires that a larger entity should not intervene in what a smaller one can do for itself; while positive subsidiarity requires that it must intervene to provide assistance when needed. This duality underlies the original nature of a subsidiary approach: “subsidiarity not only creates a *limit* on intervention by a higher authority in the affairs of a person or collectivity that is able to act for itself, but also an *obligation* to intervene in the affairs of that person or collectivity to *give* it the means to accomplish its objectives.”<sup>14</sup>

The dividing line between the two facets of the principle of subsidiarity is not always easy to place. However, the fact remains that since subsidiarity is based on “the idea that the power to act belongs to the player closest to the problem to be solved, on the grounds that that player’s actions are considered the most effective, it is that presumption that must first be rebutted.”<sup>15</sup> From this point of view, it is possible to state that the idea of subsidiarity includes, at least from a theoretical point of view, a degree of preference accorded to smaller entities.<sup>16</sup>

It remains, however, that the principle of subsidiarity can work either upwards (transfer of power from entities to the centre) or downwards (transfer of power from the centre towards entities), the effect produced in a specific case depending on the assessment made of the ability of the smaller entities to deal effectively with the case at hand. Subsidiarity is “neither a centralizing nor a decentralizing principle”, but rather “a dynamic principle that outlines the balance of forces present and the objectives of the entities making up the system”.<sup>17</sup> Seen from this angle,

<sup>13</sup> A. Alen, “Le principe de subsidiarité et le fédéralisme belge” [hereinafter “Alen”] in Delpérée, *supra*, note 11, at 461.

<sup>14</sup> Institut européen d’administration publique, *Subsidiarité : défi du changement* (Actes du colloque Jacques Delors, 1991), 8-9, cited in Delcamp, *supra*, note 4, at 621 (translation).

<sup>15</sup> F. Leurquin-De Visscher, “Existe-t-il un principe de subsidiarité?” in Delpérée, *supra*, note 11, at 25 (translation) [hereinafter “Leurquin-De Visscher”].

<sup>16</sup> Peter Hogg mentions the “implicit call for decentralization”: P.W. Hogg, “Subsidiarity and the Division of Powers in Canada” (1993) 3 N.J.C.L. 341, at 345 [hereinafter “Hogg”].

<sup>17</sup> Christine Mathis-Calvet, *Décentralisation et subsidiarité : les germes d’une évolution* (Thèse, Université Paris I - Panthéon-Sorbonne, 2004), 11, cited in J.-P. Derosier, “La dialectique centralisation/décentralisation. Recherches sur le caractère dynamique du principe de subsidiarité”, (2007) 1 R.I.D.C. 107, at 133 [hereinafter “Derosier”] (translation). Similar opinions are found in A.

subsidiarity is a principle that adds a degree of flexibility to governance by striking a balance between respect for the diverse entities present and a level of state cohesion.

As a largely indeterminate principle, subsidiarity does not dictate any clear positions. The European Union's Protocol (30) on the application of the principles of subsidiarity and proportionality (1997) emphasizes its dynamic nature:

The principle of subsidiarity provides a *guide* as to how those powers are to be *exercised* at the Community level. Subsidiarity is a *dynamic concept* and should be applied in the light of the objectives set out in the Treaty. It allows Community action within the limits of its powers to be *expanded* where circumstances so require, and conversely, to be *restricted* or *discontinued* where it is no longer justified.<sup>18</sup>

In the opinion of Alain Delcamp, this principle “leaves the actual conditions of its application open, meaning that the conditions may vary depending on the circumstances of time and place”.<sup>19</sup>

Thus defined, the principle of subsidiarity presents several similarities with the principle of federalism. They both offer a partial response to the centralization/decentralization dialectic and have the same virtues with regard to state governance.

Federalism is, primarily, a socio-political phenomenon of integration, a process of ongoing adaptation oscillating between the twin needs for unity and diversity, and between the centralization and decentralization of power. It is an approach to the organization of state powers that attempts to strike a balance between the individualist and group tendencies of the entities concerned. Federalism oscillates between two poles: full centralization, which results in the creation or retention of a unitary State, and full decentralization, which results in the creation or retention of more than one State.

Since any imbalance is, by definition, unstable, federalism must be understood as a process, in other words as a model undergoing a perpetual process of evolution and adaptation, rather than as a static system

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Breton, A. Cassone & A. Fraschini, “Decentralization and Subsidiarity: Toward A Theoretical Reconciliation” (1998) U. Pa. J. Int'l Econ. L. 21. In the view of other authors, however, subsidiarity is the opposite of decentralization: Jean Rivero, “Les compétences du pouvoir local dans les pays européens”, symposium held in Aix-en-Provence, “Rapport de synthèse”, *Annuaire européen d'administration publique*, Tome III (1980), 282, cited in Derosier, at 127.

<sup>18</sup> Protocol (30) on the application of the principles of subsidiarity and proportionality (1997), s. 3 (emphasis added).

<sup>19</sup> Delcamp, *supra*, note 4, at 621 (translation).

governed by immutable rules.<sup>20</sup> From this point of view, balance is an ideal to be attained and not an absolute criterion.<sup>21</sup> The essence of federalism is a delicate exercise in the *fair*<sup>22</sup> weighting of opposing forces. The flexibility offered by the federative principle makes it possible to imagine a panoply of legal arrangements more or less centralized or decentralized<sup>23</sup> in response to the social, political, historical and cultural realities of the groups involved.

One dictionary definition of “balance” is “a situation in which different elements are equal or in the correct proportions”.<sup>24</sup> Obviously, a perception of whether or not balance has been achieved in a specific case is partly dependent on the viewpoint of the person required to create or maintain it, and the concept is therefore subjective. However, in the federative field, the fact remains that the very survival of federalism depends on a delicate apportioning of opposing forces: the value of unity will be essentially preserved if the federal government is able to exercise its legislative powers without significant interference from the provincial governments, and vice versa with respect to the value of diversity. In the view of Professor Bruno Théret, “an ‘authentic’ federal system may ... be defined as a system that includes a mechanism for the self-preservation of the federal principle that constantly regulates the underlying contradiction between unity and diversity: if unity gets the upper hand over diversity or if, at the opposite extreme, diversity triumphs over

<sup>20</sup> Carl J. Friedrich, *Tendances du fédéralisme en théorie et en pratique* (Londres: Frederick A. Praeger Publishers, 1971), at 185.

<sup>21</sup> See F. Delpérée & M. Verdussen, “L’égalité, mesure du fédéralisme” [hereinafter “Delpérée & Verdussen”] in Jean-François Gaudreault-DesBiens & Fabien Gélinas, eds., *Le fédéralisme dans tous ses états. Gouvernance, identité et méthodologie* (Cowansville: Éditions Yvon Blais, 2005) [hereinafter “Gaudreault-DesBiens & Gélinas”] 199. The authors refer to the following comment by J.E. Trent: “the federal principle underlying all the others is the notion of balance” which “does not represent a chosen position but rather a basic attitude”: J.E. Trent, “Les origines du fédéralisme sont ses principes : le cas du Canada” in P. Destatte, ed., *L’idée fédéraliste dans les États-Nations* (Bruxelles, Presses universitaires européennes, 1999) 136 (translation). See also Olivier Beaud, *Théorie de la fédération* (Paris: PUF, 2007), 281: “this point of balance is rarely achieved, and the cursor swings sometimes one way, sometimes the other” (translation).

<sup>22</sup> What is considered to be a fair federal/federate balance can obviously vary within a given federation. Major differences can lead to profound disagreement about the future evolution of the federation, and therefore undermine federal solidarity and loyalty. Concerning these principles, see G. Laforest, “Se placer dans les souliers des autres partenaires dans l’union canadienne” in Guy Laforest & Roger Gibbins, eds., *Sortir de l’impasse : les voies de la réconciliation* (Montréal: Institut de recherche en politiques publiques, 1998) 55.

<sup>23</sup> Various institutional indices can help place a federative system on the scale of centralization/decentralization of powers: the external power of federated entities, concurrent powers, residual powers and the financial autonomy of each level of government. See Brouillet, *supra*, note 6, at 86-94.

<sup>24</sup> *Oxford Dictionaries Online*, online: <URL: <http://oxforddictionaries.com>>.



unity, then the term federalism can no longer be applied.”<sup>25</sup> The notion of balance is the key concept in a federative context.

In a federation that includes a national minority component, respect for the federative nature of the constitutional structure is vital, since this is what allows the national minority to express its collective cultural aspirations in political and legal terms. For this reason, when a majority and one or more minority nations co-exist within the same federation, the balance between federal and federated powers becomes a question of even more crucial importance. A centralizing trend can cause problems in federative regimes that include one or more infra-state nations that wish to govern themselves in one or more areas connected with their distinct identity.

The principles of subsidiarity and federalism are both a response to the shifting balance between the centralization and decentralization of state power, and both based on the underlying values of freedom, equality and justice. As dynamic and evolutive concepts, they require a balance between respect for the freedom of small entities (diversity) and the need for social cohesion and state coherence (unity). They are so closely linked that some observers have stated that subsidiarity is a typical characteristic of federative states.<sup>26</sup> The influence of the principle of subsidiarity can be detected in the rules governing the distribution of powers between the federal and federated levels of government.

In a federative context, the distinction between local affairs and affairs of general interest, between matters affecting particular interests and matters affecting the common interest, is the criterion used to decide which questions fall under the legislative power of the federated entities and which are the responsibility of the federal parliament.<sup>27</sup> It is possible to state that, in general, social and cultural matters (education, healthcare, social affairs, employment, language, *etc.*) and local matters are under the exclusive jurisdiction of the federated entities, while defence, the economy, the currency and international relations are under the exclusive jurisdiction of the federal parliament.<sup>28</sup>

By dividing legislative powers in this way between the levels of government, based on the degree of proximity to the citizens involved in each state intervention, the federal principle has some similarities with

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<sup>25</sup> B. Théret, “Du principe fédéral à une typologie des fédérations : quelques propositions”, in Gaudreault-DesBiens & Gélinas, *supra*, note 21, at 128 (translation).

<sup>26</sup> Alen, *supra*, note 13, at 461; H. Dumont, “La subsidiarité et le fédéralisme belge : un principe discret ou dangeureux?” in Delpérée, *supra*, note 11, at 472.

<sup>27</sup> Orban, *supra*, note 2, at 180.

<sup>28</sup> *Id.*, at 295-99.

the idea of subsidiarity. For Günther Hirsh, “the federal State represents subsidiarity as practised at the political level and state law level”.<sup>29</sup>

It is clear that the idea of subsidiarity underlies the adoption of any federative form of government. In some federal or federally based systems, subsidiarity has been made a regulating legal principle for the exercise of power. In these cases, the principle of subsidiarity is spoken of as a rule of law.

## 2. Subsidiarity as a Legal Principle

Although only a few federal or federally based systems have, up to now, made subsidiarity a formal normative principle, its introduction into European Union law in the early 1990s as a principle to guide the exercise of concurrent powers marked the beginning of a period of renewed interest in its presumed virtues in connection with federative-types of governance. Notably, it began to appear in the jurisprudence of several jurisdictional courts of last resort.

Given the significant influence of the European principle of subsidiarity on the constitutional laws of a certain number of national or multinational states, we will use its European definition as a point of reference. In addition, since many different authors have already examined the principle of subsidiarity as it appears in European Community law, this section of our paper will simply highlight its main characteristics, before it is compared to the principle as it is understood in Canada.

The principle of subsidiarity is presented as follows in European Community law:

The Community shall act *within the limits of the powers conferred upon it* by this Treaty and of the objectives assigned to it therein.

In areas which *do not fall within its exclusive competence*, the Community shall take action, in accordance with the principle of subsidiarity, only if and in so far as the objectives of the proposed action *cannot be sufficiently achieved by the Member States* and can therefore, by reason of the scale or effects of the proposed action, *be better achieved by the Community*.

Any action by the Community shall not go beyond what is *necessary* to achieve the objectives of this Treaty.<sup>30</sup>

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<sup>29</sup> G. Hirsh, “Le principe de subsidiarité dans une perspective comparatiste” in Delpérée, *supra*, note 11, at 57 (translation).

The legal context for its implementation has three stages:

- (1) The powers of the Community (whether exclusive or concurrent) are attributed powers, and are therefore subject to strict interpretation.
- (2) The principle of subsidiarity applies solely to the concurrent powers of the Community and Member States. It is therefore a principle for the *exercise* of those powers. The *attribution* of the powers is made by treaty (as is the attribution of exclusive powers). Two conditions are placed on the exercise of concurrent Community powers: “First, for an objective arising from the treaties, the objective must not be achievable by the Member States acting alone or simply cooperating with each other; second, the intervention by the Community must have a reasonable chance of correcting the lack of effectiveness of the Member States.”<sup>31</sup> In short, the question of whether action by the Community is necessary must be posed. The burden of proof is on the Community, which must present appropriate justification for its intervention,<sup>32</sup> since there is a presumption that it is preferable for the Member States to act. This is aptly summarized in the following formula: “... the rules must be: autonomy of the Member States when possible, intervention by the Community when necessary.”<sup>33</sup>
- (3) If a situation is assessed in the Community’s favour, the intensity of its action must then be examined. The means used by the Community must be proportionate to the objectives. This is the principle of proportionality: the Community can take any measure necessary to achieve the objective, but can go no further. The notion of necessity is therefore at the core of the reasoning when the grounds for Com-

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<sup>30</sup> Treaty on European Union, s. 5 (emphasis added).

<sup>31</sup> Brault *et al.*, *supra*, note 12, at 93 (translation).

<sup>32</sup> After consulting widely, the Community must, for every proposed piece of Community legislation, set out the grounds on which it is based and show that the proposal is consistent with the principles of subsidiarity and proportionality. The reasons given must be based on qualitative and, whenever possible, quantitative indicators: Protocol (30) on the application of the principles of subsidiarity and proportionality (1997), ss. 4 and 9. The Court of Justice of the European Union can oversee the legality of the actions of institutions with regard to compliance with the principles of subsidiarity and proportionality: Treaty on European Union, s. 220. The *Lisbon Treaty*, which came into effect on December 1, 2009, specifies that draft legislative acts must be justified with regard to the principles of subsidiarity and proportionality, and must contain a detailed statement making it possible to appraise compliance with those principles. It also strengthens the role of the National parliaments which may, in particular, send a reasoned opinion concerning compliance with the principles: Protocol (30) on the application of the principles of subsidiarity and proportionality (1997), ss. 4, 5 and 6, and *Protocol on the role of national parliaments*, ss. 2 and 3.

<sup>33</sup> Brault *et al.*, *supra*, note 12, at 93 (translation).

munity intervention are being examined, but also when the scope of its actions is being determined.

The principle of subsidiarity can be seen as “a refinement of the technique of concurrent powers”, used to avoid an abusive level of centralism.<sup>34</sup> This was the reason for which it was integrated into European Union law, to counterbalance the increased scope of European integration<sup>35</sup> and counteract the apprehended effects on the diversity of the Member States.

When the idea of subsidiarity becomes a rule of law, as is the case in the European Union, a certain number of questions are inevitably raised concerning, in particular, its normative value and, consequently, the role of the legal authority responsible for its implementation.

Subsidiarity is a principle that limits power but that has no normative character.<sup>36</sup> According to Alain Delcamp, “[i]t is evident that the notion of subsidiarity is unfocused and cannot itself, except with great difficulty, generate legal effects.”<sup>37</sup> Many authors stress that the principle is more political than legal in nature and highlight the difficulties encountered when it is implemented as a jurisdictional control measure.<sup>38</sup> The principle, as defined in Article 5 of the Maastricht Treaty, includes a number of qualitative elements that leave a large measure of assessment to the decision-maker. The evaluation of what is “necessary” to “sufficiently achieve” an objective, and of whether the objective can be “better achieved” in another way, relies on an analysis of effectiveness based on a cost/benefit approach for which the jurisdictional authorities are poorly equipped.<sup>39</sup>

The largely undetermined nature of the principle goes a long way towards explaining the reserved attitude of the Court of Justice of the European Union (“CJEU”) with regard to political organs.<sup>40</sup> It seems that

<sup>34</sup> Scholsem, *supra*, note 11, at 498 (translation).

<sup>35</sup> Resulting, in particular, from an extension of European Community powers and a broader application of qualified majority votes.

<sup>36</sup> Delcamp, *supra*, note 4, at 621 (translation).

<sup>37</sup> *Id.*, at 623 (translation).

<sup>38</sup> “Yet, despite its undoubted importance, subsidiarity is, as the abundant literature on the subject amply demonstrates, a cloudy and ambiguous concept which is readily open to instrumental use. The principle is politically complex and legally uncertain”: G. De Burca, “The Principle of Subsidiarity and the Court of Justice as an Institutional Actor” (1998) 36 *Journal of Common Market Studies* 217, at 218 [hereinafter “De Burca”].

<sup>39</sup> R. Dehousse, “Réflexions sur la naissance et l’évolution du principe de subsidiarité” in Delpérée, *supra*, note 11, at 364.

<sup>40</sup> G.A. Bermann, “Taking Subsidiarity Seriously: Federalism in the European Community and the United States” (1994) 94 *Colum. L. Rev.* 331, at 390-403.

the Court has only rarely heard cases brought by the Member States involving the principle of subsidiarity, and that it has never cancelled an act on grounds of subsidiarity.<sup>41</sup> In addition, according to several observers, the Court has remained laconic in its rulings on the conditions governing the implementation of the principle of subsidiarity. It applies a low level of control, relying on the opinion of the legislative authorities concerning the need for Community intervention.<sup>42</sup> The Court of Justice's reserve with respect to the application of subsidiarity is not unrelated to the need to preserve its own legitimacy, which derives in large part from the fact that its functions are perceived as being essentially jurisdictional rather than political: "the legitimacy of an institution depends as much on what it does as on what it is."<sup>43</sup>

It will probably be necessary to wait for years before observers can judge the concrete effects of the principle of subsidiarity on the centralization/decentralization of power dynamic within the European Union. Will it meet the expectations of those who see it as a counterweight to an extension of the federalist approach, and as a factor in the balance between the community-driven and individualistic tendencies of the European nations?

### III. THE PRINCIPLE OF SUBSIDIARITY AND CANADIAN FEDERALISM

In Part III of this paper, we will look briefly at how the general idea of subsidiarity was already present at the birth of the Canadian Federation, before seeking to identify traces of a legal principle of subsidiarity in Canadian constitutional law.

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<sup>41</sup> Brault *et al.*, *supra*, note 12, at 97. See also Chaltiel, *supra*, note 8, 368-70. A recent example is the *Regulation on roaming on public mobile communication networks* (Case C-58/08 Vodafone Ltd, Telefónica O2 Europe plc, T-Mobile International AG, Orange Personal Communications Services Ltd/Secretary of State for Business, Enterprise and Regulatory Reform on Regulation (EC) No 717/2007). The judgment confirms that the regulation was proportional to the objective of protecting consumers from high prices and was justified with regard to the principle of subsidiarity, given the need to ensure the harmonized operation of the internal market for roaming services.

<sup>42</sup> De Burca, *supra*, note 38. Florence Chaltiel mentions a "form of self-limitation by the Court with regard to subsidiarity": *supra*, note 8, at 339.

<sup>43</sup> Marc Verdussen, *Les douze juges. La légitimité de la Cour constitutionnelle* (Bruxelles: Éditions Labor, 2006), 65 (translation).

## 1. The Idea of Subsidiarity at the Birth of the Canadian Federation

As we have seen, every federally based system shares something of the principle of subsidiarity, in the sense of “subsidiarity-proximity”.<sup>44</sup> The Canadian Federation is no exception.

The Canadian State emerged in 1867 from the wish expressed by four British colonies in North America to unite within a federative government framework.<sup>45</sup> One of the main centrifugal factors that determined the choice of the federative principle as the foundation for the new Constitution was the majority presence, within the territory of present-day Quebec, of a national group that wanted to retain its political autonomy in all matters relating to its cultural identity.<sup>46</sup> The creation of a provincial legislative assembly with voting control over the government and responsibility for all matters relating to cultural identity led Quebec’s political leaders to agree to Quebec’s entry into the Canadian Federation.

As is the case within all federative states, legislative powers were distributed on the basis of a distinction between matters of common interest and matters of so-called local interest, reflecting, at least in part, the principle of subsidiarity.<sup>47</sup> Given that the main objective of the federative union was to oversee the economic and military interests of the new federation, the related legislative powers were attributed to the federal parliament, which was given exclusive jurisdiction for raising public funds by any mode or system of taxation, and legislating in connection with the regulation of trade and commerce, banking, the issue of paper money, navigation, militia, military service and defence.<sup>48</sup> The matters under exclusive provincial jurisdiction included, generally, all matters of a merely local or private nature in the provinces, including all matters relating to the particular lifestyle in each province. Each province retained the power, within its boundaries, to legislate exclusively on property and civil rights, education, municipal institutions, the solemnization of marriage, local works and undertakings, the administration of

<sup>44</sup> This approach to subsidiarity adds nothing that is not already present in the concept of federalism and the principle of autonomy it includes: H. Dumont, “La subsidiarité et le fédéralisme belge : un principe discret ou dangereux?” in Delpérée, *supra*, note 11, at 472.

<sup>45</sup> Namely, the Province of Canada (comprising today’s Quebec and Ontario), New Brunswick and Nova Scotia: *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No. 5. The Preamble to the Act states that the colonies “have expressed their Desire to be federally united into One Dominion ...”.

<sup>46</sup> Brouillet, *supra*, note 6, at 140-45.

<sup>47</sup> Hogg, *supra*, note 16, at 346.

<sup>48</sup> *Constitution Act, 1867*, *supra*, note 45, s. 91.

justice, the constitution of the province, health and social services and generally all matters of a purely local or private nature, as well as the power to raise taxes within the province for provincial purposes.

The guiding principle for this distribution of powers was that matters of common interest for all the provinces were placed under the responsibility of a central parliament, while matters of particular interest for each province remained under provincial jurisdiction. For the inhabitants of the Province of Quebec at the time, these matters of particular interest were precisely the matters linked to their distinct identity. As stated, in the language of the time, by one of the founders of the Canadian federation, “Under the Federation system, granting to the control of the General Government these large questions of general interest in which the differences of race or religion had no place, it could not be pretended that the rights of either race or religion could be invaded at all.”<sup>49</sup>

Sections 91 to 95 of the *Constitution Act, 1867*<sup>50</sup> provided for the distribution of legislative powers between the federal and provincial levels of government. The sections contain two lists of matters of exclusive jurisdiction, one federal and one provincial, along with an extremely short list of matters under joint jurisdiction,<sup>51</sup> and assign all residual powers to the federal parliament.<sup>52</sup> Exclusivity was thus the main basis for the distribution of powers in Canada, as stated unequivocally in the Constitution.<sup>53</sup> However, this legal situation did not prevent the gradual introduction of the principle of subsidiarity into Canadian constitutional law.

## 2. Traces of the Legal Principle of Subsidiarity in Canadian Constitutional Law

Thanks to the adoption of the so-called cooperative or modern approach to the Canadian federation, an approach that has created numer-

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<sup>49</sup> *Parliamentary Debates on the Subject of the Confederation of the British North American Provinces*, 3rd Sess., 8th Provincial Parliament of Canada (Quebec: Hunter, Rose & Co., Parliamentary Printers, 1865), at 59 (George-Étienne Cartier).

<sup>50</sup> *Supra*, note 45.

<sup>51</sup> Agriculture and immigration (s. 95), and, added by later amendments, old age pensions and supplementary benefits (s. 94A), and interprovincial trade in natural resources (s. 92A(3)).

<sup>52</sup> The introductory paragraph to s. 91 states that the federal parliament may “... make Laws for the Peace, Order, and good Government of Canada, in relation to all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces.”

<sup>53</sup> The introductory paragraphs to ss. 91, 92 and 93 of the *Constitution Act, 1867*, *supra*, note 45, all state that the legislative authority assigned to the federal and provincial parliaments in the areas indicated is “exclusive” (the term “exclusively” is also used).

ous zones of *de facto* concurrent jurisdiction, the principle of subsidiarity has slowly but surely made its way into the legal sphere, initially in a latent form hidden behind the value of effectiveness but, more recently, as a formal constitutional principle.

*(a) Adoption of a Modern or Cooperative Approach to the Sharing of Powers*

Exclusivity means that only one level of government can legislate with respect to a given matter. The exclusive areas of jurisdiction of one level of government cannot, as a result, be invaded by the other level of government.

Exclusivity is fundamentally connected with the principle of autonomy for each level of government in the exercise of its legislative powers. However, it is clearly impossible, especially with the present-day trend towards increasingly numerous and complex government actions, to completely avoid all “zones of contact”<sup>54</sup> between the two levels of government. On the other hand, federalism will not survive for long if all legislative powers are completely decompartmentalized. On this point, we share the opinion of professors Francis Delpérée and Marc Verdussen that “... the more a [federative] State moves away from exclusivity of powers, the more it moves away from the ideal of equality that is the hallmark of federal States.” They add that “... as soon as [the] derogations [from exclusivity] become too numerous and too significant, to the point where they take the lead over the principle, the federal nature of the State is challenged.”<sup>55</sup>

In connection with exclusivity, two different paradigms for the sharing of legislative powers can be identified in Canadian jurisprudence and doctrine: the classic and the modern. The classic paradigm consists of the idea that the powers conferred by sections 91 and 92 constitute “watertight compartments”<sup>56</sup> and that any overlapping of the powers of the two levels of government is to be avoided as far as possible. The notion of

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<sup>54</sup> J. Beetz, “Les attitudes changeantes du Québec à l’endroit de la Constitution de 1867” in P.-A. Crépeau & C.B. Macpherson, eds., *L’avenir du fédéralisme canadien* (Toronto: University of Toronto Press, 1966), at 123.

<sup>55</sup> Delpérée & Verdussen, *supra*, note 21, at 200 and 203 (translation).

<sup>56</sup> The expression comes from the Judicial Committee of the Privy Council (the final court of appeal until 1949), in *Canada (Attorney General) v. Ontario (Attorney General)*, [1937] A.C. 326, 354 (P.C.), in which Lord Atkin commented: “While the ship of state now sails on larger ventures and into foreign waters she still retains the watertight compartments which are an essential part of her original structure.”



exclusivity plays a leading role in this classic paradigm, sometimes referred to as “dualist federalism”.

In contrast, in the modern paradigm, exclusivity is applied more selectively, leaving broad areas under concurrent jurisdiction.<sup>57</sup> The overlapping of the powers of the two levels of government is considered not only normal but advisable. The terms “flexible federalism” or “cooperative federalism” are often used to refer to this approach to the distribution of powers.

In general, the classic paradigm tends to favour respect for the autonomy of each level of government in the exercise of its legislative powers. More specifically, it protects provincial autonomy by limiting the duplication of laws which could lead to the application of the federal paramountcy doctrine in the event of a conflict. What is the position of the Supreme Court of Canada with regard to these two paradigms? In other words, what role is played by exclusivity in the recent jurisprudence?

It is by now well established that the Supreme Court of Canada sees its federative jurisprudence as part of a modern paradigm that promotes the overlapping of federal and provincial powers.<sup>58</sup> In many different decisions, it states that exclusivity is not compelling and does not represent “the dominant tide of constitutional doctrines”.<sup>59</sup> In fact, the Supreme Court considers that “[t]he history of Canadian constitutional law has been to allow for a fair amount of interplay and indeed overlap between federal and provincial powers,”<sup>60</sup> and that “the Constitution does not create ‘enclaves’ around federal or provincial actors.”<sup>61</sup> The terms “flexible federalism” and “cooperative federalism”<sup>62</sup> are frequently

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<sup>57</sup> Chief Justice Dickson constantly promoted this paradigm of power-sharing: K. Swinton, “Dickson and Federalism: In Search of the Right Balance” (1991) 20 Man. L.J. 483; B. Schwartz, “Dickson on Federalism: The First Principles of his Jurisprudence” (1991) 20 Man. L.J. 473.

<sup>58</sup> In the view of the Court, there are two exceptions to the modern paradigm, in other words two situations in which overlapping should be avoided in order to protect the powers of one level of government against the encroachments of the other: the interjurisdictional immunity doctrine and the federal paramountcy doctrine.

<sup>59</sup> *Ontario (Attorney General) v. OPSEU*, [1987] S.C.J. No. 48, [1987] 2 S.C.R. 2, 17 (S.C.C.).

<sup>60</sup> *Id.*, at 17-18. The idea was repeated in a unanimous Supreme Court decision, *General Motors of Canada v. City National Leasing*, [1989] S.C.J. No. 28, [1989] 1 S.C.R. 641 (S.C.C.) [hereinafter “*General Motors*”].

<sup>61</sup> *Westbank First Nation v. British Columbia Hydro and Power Authority*, [1999] S.C.J. No. 38, [1999] 3 S.C.R. 134, at para. 18 (S.C.C.).

<sup>62</sup> See also *Chatterjee v. Ontario (Attorney General)*, [2009] S.C.J. No. 19, [2009] 1 S.C.R. 624, at para. 32 (S.C.C.); *Canadian Western Bank v. Alberta*, [2007] S.C.J. No. 22, [2007] 2 S.C.R. 3, at para. 42 (S.C.C.) [hereinafter “*Canadian Western Bank*”]; *Bourdon v. Stelco Inc.*, [2005] S.C.J. No. 35, [2005] 3 S.C.R. 279, at para. 20 (S.C.C.); *Fédération des producteurs de volailles du Québec v. Pelland*, [2005] S.C.J. No. 19, [2005] 1 S.C.R. 292, at paras. 15 and 55 (S.C.C.); *Husky*

found in the jurisprudence, emphasizing the idea that the separation between the two levels of government is not absolute. In 2010, the Supreme Court reiterated its faith in this approach to Canadian federalism, which featured in the reasons given in four of its decisions that year.<sup>63</sup>

The application of the modern paradigm to federative disputes may have a negative impact on the provinces, since the legislative overlaps that result trigger the application of the federal paramountcy doctrine in cases of conflict between valid federal and provincial norms, meaning that the provincial norms become inoperative.<sup>64</sup>

Several doctrines governing the application of the distribution of powers derive from this modern paradigm. The resolution of a case involving the constitutionality of legislation in relation to the division of powers must begin with an analysis of the “pith and substance” of the impugned legislation. The incidental effects on a matter under the jurisdiction of another level of government have no impact on its constitutionality. This is the theory of ancillary powers. Last, certain matters may have both a provincial and a federal aspect, in which case the double aspect doctrine is applied to allow each level of government to adopt valid legislation concerning the aspect of the matter under its authority. All the theories relating to the question of validity are linked to modern views on the distribution of powers, since they allow and even promote overlapping between the two levels of government.<sup>65</sup> This major

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*Oil Operations Ltd. v. Canada (Minister of National Revenue)*, [1995] S.C.J. No. 77, [1995] 3 S.C.R. 453 (S.C.C.); *R. v. Wetmore*, [1983] S.C.J. No. 74, [1983] 2 S.C.R. 284 (S.C.C.); *Multiple Access Ltd. v. McCutcheon*, [1982] S.C.J. No. 66, [1982] 2 S.C.R. 161 (S.C.C.); *Re Anti-Inflation Act (Canada)*, [1976] S.C.J. No. 12, [1976] 2 S.C.R. 373 (S.C.C.).

<sup>63</sup> *Reference re Assisted Human Reproduction Act*, *supra*, note 10, at paras. 139 and 152; *COPA*, *supra*, note 9, at para. 44; *NIL/TU/O Child and Family Services Society v. B.C. Government and Service Employees' Union*, [2010] S.C.J. No. 45, [2010] 2 S.C.R. 696, at paras. 42-44 (S.C.C.); *Quebec (Attorney General) v. Lacombe*, [2010] S.C.J. No. 38, [2010] 2 S.C.R. 453, at paras. 107 and 116 (S.C.C.).

<sup>64</sup> Federal paramountcy is expressly provided for in relation to the matters of concurrent jurisdiction listed in ss. 92A(3) and 95 of the *Constitution Act, 1867*. In the case of s. 94A, the provincial legislation takes precedence. The principle of federal paramountcy has been extended in the jurisprudence to other conflicts between valid legislation: see Henri Brun, Guy Tremblay & Eugénie Brouillet, *Droit constitutionnel*, 5e ed. (Cowansville: Éditions Yvon Blais, 2008), at 455-60 [hereinafter “Brun *et al.*”]. The Supreme Court jurisprudence states that a provincial law becomes inoperative (deprived of its effects) if it *frustrates* Parliament’s legislative purpose. This criterion makes the application of federal paramountcy, and the inoperability of a provincial statute, dependent on an *express desire* by the federal parliament to exclude a provincial legislative act, however valid. See *Rothmans, Benson & Hedges Inc. v. Saskatchewan*, [2005] S.C.J. No. 1, [2005] 1 S.C.R. 188, at para. 21 (S.C.C.); *Canadian Western Bank*, *supra*, note 62, at para. 74.

<sup>65</sup> *Canadian Western Bank*, *id.*, at paras. 25-32.

dilution of exclusivity in the decisions of the highest Canadian court operates mainly to centralize powers, since the legislative conflicts arising from an increase in the number of zones of *de facto* concurrent jurisdiction are resolved in accordance with the federal paramountcy doctrine.<sup>66</sup>

In the wake of this gradual transformation of dualist Canadian federalism into so-called cooperative federalism, the principle of subsidiarity has quietly appeared in the jurisprudence of the Supreme Court.

*(b) The Value of Efficiency: Implicit Subsidiarity with Centripetal Effects*

Although the principle of subsidiarity is completely absent from the Canadian Constitution, traces of it can be detected in the Supreme Court's jurisprudence. The value of efficiency is at the heart of the scope given by the Supreme Court to the national concern doctrine, the trenching power, and the general trade and commerce power. However, in all these cases and in contrast to the European idea of subsidiarity, it operates only upwards, creates permanent effects, and can apply to matters that are not attributed to the federal parliament.

*(i) The National Concern Doctrine*

The national concern doctrine is a jurisprudential construct based on the introductory paragraph to section 91 of the *Constitution Act, 1867*, which states that the Parliament of Canada may "make Laws for the Peace, Order, and good Government of Canada, in relation to all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces". The Judicial Committee of the Privy Council was quick to recognize, based on this paragraph, that the federal parliament may be entitled to legislate in connection with any matter with a national dimension or of interest to the federation as a

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<sup>66</sup> *Kirkbi AG v. Ritvik Holdings Inc.*, [2005] S.C.J. No. 66, [2005] 3 S.C.R. 302 (S.C.C.) (ancillary powers doctrine); *Rothmans, Benson & Hedges Inc. v. Saskatchewan*, *supra*, note 64 (federal paramountcy doctrine). For an overview of the scope of these constitutional doctrines, see E. Brouillet, "The Federal Principle and the 2005 Balance of Powers in Canada" in J. Cameron, P. Monahan & B. Ryder, eds. (2006) 34 S.C.L.R. (2d) 307.

whole.<sup>67</sup> However, the Judicial Committee was careful to limit its use to exceptional circumstances.<sup>68</sup>

Over the decades, various matters have been attributed, by the Supreme Court, to the exclusive legislative competence of the federal parliament under this doctrine. They include aeronautics and the development of the national capital region.<sup>69</sup>

Until 1976, however, the limits of this power were never clearly articulated. In *Re Anti-Inflation Act*<sup>70</sup> the Supreme Court began to rationalize the doctrine by subjecting its use to certain conditions. The federal parliament could rely on the introductory paragraph to section 91 to legislate in matters of national concern only if they were circumscribed and not included in the categories assigned to the provincial legislatures.<sup>71</sup> *A contrario*, the matter had to be new (in other words not expressly attributed to the exclusive legislative jurisdiction of the provinces in 1867) and indivisible. The condition of indivisibility excluded matters that were an aggregate of several subjects under both provincial and federal jurisdiction, such as inflation.<sup>72</sup> The condition of newness confirmed the explicitly stated residual nature of the federal parliament's general power, which could only be used to intervene in matters not assigned to the legislative jurisdiction of the provinces.<sup>73</sup> Following this decision by the Supreme Court, the application of the national concern doctrine was apparently subject to a conceptual framework.

In 1988, in *R. v. Crown Zellerbach Canada Ltd.*,<sup>74</sup> the Supreme Court broadened the criteria used to determine whether a matter fell under federal jurisdiction based on the national concern doctrine. First, in complete contradiction to its position in *Re Anti-Inflation Act*,<sup>75</sup> the Supreme Court stated that the doctrine could now apply "to both new

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<sup>67</sup> *Russell v. R.* (1882), 7 App. Cas. 829 (P.C.), as interpreted in *Local Prohibition Case*, [1896] A.C. 348 (P.C.).

<sup>68</sup> *Ontario (Attorney General) v. Canada Temperance Federation*, [1946] A.C. 193, at 205-206; Lord Simon reiterates the theory laid down over 60 years earlier in *Russell*, but apparently more because of his attachment to *stare decisis* than to an actual desire to make it a broadly applied theory. In fact, he refers specifically to situations of war or pestilence.

<sup>69</sup> See, respectively, *Johannesson v. West St. Paul (Rural Municipality)*, [1951] S.C.J. No. 50, [1952] 1 S.C.R. 292 (S.C.C.), and *Munro v. Canada (National Capital Commission)*, [1966] S.C.J. No. 46, [1966] S.C.R. 663 (S.C.C.).

<sup>70</sup> *Supra*, note 62.

<sup>71</sup> *Id.*, at 457-58.

<sup>72</sup> *Id.*, at 458.

<sup>73</sup> *Brun et al.*, *supra*, note 64, at 555.

<sup>74</sup> [1988] S.C.J. No. 23, [1988] 1 S.C.R. 401 (S.C.C.).

<sup>75</sup> *Re Anti-Inflation Act*, *supra*, note 62.

matters which did not exist at Confederation and to matters which, although originally matters of a local or private nature in a province, have since, in the absence of national emergency, become matters of national concern”.<sup>76</sup> The Supreme Court’s new interpretation directly contradicted the introductory paragraph to section 91, which states clearly that the federal parliament could “make Laws for the Peace, Order, and good Government of Canada, in relation to *all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces*”.

The point of interest here is the fact that the Supreme Court expressly introduced the notion of “provincial inability” as the criterion used to determine whether a matter came under federal jurisdiction by reason of the national concern doctrine.

The Supreme Court formulated two criteria for the application of the doctrine. The matter must have (1) “a singleness, distinctiveness and indivisibility” without being an aggregate of matters and (2) “a scale of impact on provincial jurisdiction that is reconcilable with the fundamental distribution of legislative power under the Constitution”.<sup>77</sup> However, in the Supreme Court’s view, “[i]n determining whether a matter has attained the required degree of singleness, distinctiveness and indivisibility, it is relevant to consider what would be the effect on extra-provincial interests of a provincial failure to deal effectively with the control or regulation of the intra-provincial aspects of the matter.”<sup>78</sup>

Provincial inability is presumed, in the sense that it is not necessary to practically demonstrate the inability of one or more provinces with respect to the matter under consideration. In short, the possibility of inability is assessed *in abstracto*, along with its effects on the other provinces. And since it is always hypothetically present, the criterion is worthless as a means of controlling the centralization of powers.

In the case at hand, by a majority decision, the Supreme Court ruled that the control of water pollution met the criterion of singleness, distinctiveness and indivisibility, because a failure by a province to take effective charge of the intra-provincial aspects of the matter could have consequences for extra-provincial interests. As a result, since 1988 the federal parliament has had exclusive jurisdiction over pollution in provincial ocean waters, a matter that until then was under provincial

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<sup>76</sup> *R. v. Crown Zellerbach Canada Ltd.*, *supra*, note 74, at 432.

<sup>77</sup> *Id.*

<sup>78</sup> *Id.* (emphasis added).

authority. As stated by Professor Vilaysoun Loungnarath, "... since the principles established by *Crown Zellerbach*, the criterion of a matter's singleness, distinctiveness and indivisibility has lost practically all its effectiveness as a rampart for provincial jurisdiction; in fact, it is even used in reverse to extend federal jurisdiction ...".<sup>79</sup>

The legal context for the notion of provincial inability is significantly different from the context for the application of the principle of subsidiarity in European Union law. Unlike the European principle, which only produces its effects in a situation of concurrent jurisdiction, the Canadian notion can apply with regard to matters that are not under the jurisdiction of the federal parliament at all. Second, in general, the ability of a state entity to deal with a given matter can only be assessed in terms of the achievement of an objective. This is the case in the European Union, where the fundamental law drawn from various treaties assigns objectives to the Community that can only exercise its jurisdiction (exclusive or concurrent) in order to achieve them. However, in Canada, the distribution of powers is set up in such a way that the federal and provincial levels of government remain entirely free to identify the objectives pursued in connection with the matters assigned by the Constitution, provided of course that they respect the other constitutional provisions such as those included in the *Canadian Charter of Rights and Freedoms*.<sup>80</sup> Is this type of autonomy not, in fact, a feature of federative states?

In addition to these differences, the Canadian notion of efficiency can only work upwards, unlike the European principle of subsidiarity, at least in theory. The Canadian jurisprudence has no counterpart to the national concern doctrine that would allow a reverse transfer of jurisdiction to the provinces if a matter originally of national concern has since become local and private in nature.<sup>81</sup> Last, it is important to note that the federal parliament is under no requirement to justify the provinces' inability in a matter otherwise under their authority, once again distancing the Canadian notion of efficiency from the notion underlying the European principle of subsidiarity.

In light of this context, any judgment made of the provinces' effectiveness is necessarily subjective and hardly lends itself to judicial

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<sup>79</sup> V. Loungnarath, "Le rôle du pouvoir judiciaire dans la structuration politico-juridique de la fédération canadienne" (1997) 57 R. du B. 1003, at 1016.

<sup>80</sup> Part I of the *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

<sup>81</sup> One example is responsibility for marriage.

assessment. This illustrates some of the Supreme Court's preconceived ideas about "the operation, political or economic dysfunctions brought about by decentralization",<sup>82</sup> despite the fact that decentralization is inherent in a federative system as compared to a unitary system.

In practice, matters considered to be important in contemporary society are the most likely to be covered by a presumption of provincial inability or ineffectiveness and, as a result, to be placed in the category of matters of national concern. However, a judgment about provincial responsibilities and ability should be made by electors and not by the judicial powers, since the electors can, through a democratic process, sanction what they consider to be provincial ineffectiveness. In addition, the division of powers should be modified by the constituent rather than by the judicial power.

Overall, the national concern doctrine works only to centralize powers, has permanent effects, may be applied to matters under the exclusive jurisdiction of the provinces, and does not require the federal government to demonstrate a specific need. While drawing inspiration in part from the idea of subsidiarity, it diverges in several respects from the European understanding.<sup>83</sup> The same applies to the power of the federal parliament to encroach on areas of provincial jurisdiction.

#### (ii) The Ancillary Powers Doctrine

The ancillary powers doctrine can be used to protect the validity of a provision that encroaches on the powers of the other level of government because of the role the provision plays in a valid legislative scheme.

Until very recently, it was possible to advance that, despite the theoretical statements by the Supreme Court that the doctrine could be applied to preserve the constitutionality of both provincial and federal provisions, it had been invoked only for the benefit of the federal parliament.<sup>84</sup> Since the Supreme Court decision in *Lacombe*, it is now

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<sup>82</sup> Otis, *supra*, note 7, at 271.

<sup>83</sup> However, since the 1988 decision, this doctrine, although frequently invoked by the federal government in support of its legislative interventions, has been less frequently used by the Supreme Court, which prefers to validate its actions on the basis of the listed areas of jurisdiction, even if it has to extend their scope. See in particular: *R. v. Hydro-Quebec*, [1997] S.C.J. No. 76, [1997] 3 S.C.R. 213 (S.C.C.) and *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] S.C.J. No. 68, [1995] 3 S.C.R. 199 (S.C.C.), in connection with Parliament's power to legislate in relation to criminal law.

<sup>84</sup> When the encroachment is due to a provincial law, it is found to be inapplicable to things or persons under federal jurisdiction. The statements by the Supreme Court in *Global Securities*

clear that it can also be applied for the benefit of the provinces. In *Lacombe*, however, the Supreme Court decided that the conditions for its application had not been met.

To assess the type of link required between the contested provision and the legislative whole of which it forms a part, the Supreme Court has developed a “variable test”.<sup>85</sup> Since the Supreme Court decision in *General Motors*,<sup>86</sup> two criteria may be applied: necessity, or a functional relation. In the view of the Supreme Court, the selection of one or other of the criteria will depend on the extent of the encroachment on provincial jurisdiction. If the encroachment is “minimal”, simply demonstrating a functional relation between the contested provision and the legislative scheme as a whole is sufficient to find it valid. On the other hand, for a “substantial” or “serious” encroachment, the provision must be necessary to the federal legislative scheme.<sup>87</sup> In other words, “[t]he more necessary the provisions are to the effectiveness of the rules set out in the part of the statute that is not open to challenge, the greater the acceptable overflow will be.”<sup>88</sup> This method has had few practical applications; since being stated by the Supreme Court in 1989, the Court has always concluded that federal or provincial (in *Lacombe*<sup>89</sup>) encroachments in the areas of jurisdiction of the other level of government were “minimal” and, as a result, has always applied the “functional relation” test,<sup>90</sup> probably because it is difficult to distinguish between a minimal and a serious encroachment.<sup>91</sup>

Nevertheless, the functional relation test is part of an increasing tendency at the Supreme Court to reason in terms of efficiency. If an

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*Corp. v. British Columbia (Securities Commission)*, [2000] S.C.J. No. 5, [2000] 1 S.C.R. 494, at para. 19 (S.C.C.), and *Kitkatla Band v. British Columbia (Minister of Small Business, Tourism and Culture)*, [2002] S.C.J. No. 33, [2002] 2 S.C.R. 146, at para. 58 (S.C.C.), to the effect that the power to encroach could also act in favour of the provincial parliaments are based on a comment by Dickson C.J.C. in *General Motors* in which he actually referred to the provinces’ ability to produce incidental effects on federal powers: *General Motors of Canada v. City National Leasing*, *supra*, note 60, at 670. The Supreme Court did not apply for the power to encroach: in *Global Securities*, the provincial provision concerned was valid; in *Kitkatla Band*, the question centred on the application of a provincial provision to Indians.

<sup>85</sup> *Reference re Assisted Human Reproduction Act*, *supra*, note 10, at para. 193.

<sup>86</sup> *Supra*, note 60.

<sup>87</sup> *Quebec (Attorney General) v. Lacombe*, *supra*, note 63, at para. 44.

<sup>88</sup> *Reference re Assisted Human Reproduction Act*, *supra*, note 10.

<sup>89</sup> *Supra*, note 63.

<sup>90</sup> See notably *Kirkbi AG v. Ritvik Holdings Inc.*, *supra*, note 66; *Quebec (Attorney General) v. Lacombe*, *id.*; and *Reference re Assisted Human Reproduction Act*, *supra*, note 10.

<sup>91</sup> In *Reference re Assisted Human Reproduction Act*, *id.* (at para. 127), and *Lacombe*, *id.* (at para. 43), the Supreme Court notes, but does not respond to, a criticism by Peter W. Hogg, who considered that any assessment of the extent of the encroachment is subjective.



encroachment into an area of provincial jurisdiction is likely to facilitate the exercise of a power of the federal parliament, then why not authorize it? Not only has the permissive “functional relation” test been applied in practically all cases in favour of the federal parliament, in other words in support of centralization, but it has also led to an extension of the zones of concurrent jurisdiction, in other words to a weakening of the exclusivity, or watertightness, doctrine. Any conflict between a federal provision found to be valid by reason of the ancillary power doctrine, and a provincial law or provision that is also valid because of a particular area of jurisdiction, leads to a decision that the latter is inoperable and that the former is applicable under the federal paramountcy doctrine. Because of the potential effect on the balance of powers, the right to encroach on the legislative powers of the other level of government should be applied with the greatest care, on the basis of the provision’s necessity under the broader legislative scheme.

One comparison that comes immediately to mind is the criterion of necessity used systematically in European Union law to decide whether the Community’s jurisdiction applies in a field of concurrent jurisdiction, and to determine its extent. Although the use of the criterion is not without difficulties, it still represents a more significant rampart against an extension of central power than a mere “functional relation” test.

### (iii) The General Trade and Commerce Power

The idea of efficiency also underlies the scope given to the federal jurisdiction over general trade and commerce. Once again, it works only in an upwards direction and has permanent effects.

The current jurisprudence of Canada’s highest court is that federal jurisdiction over trade and commerce, as set out in section 91(2) of the 1867 Act and traditionally interpreted as applying only to extra-provincial (interprovincial and international) trade, allows the federal parliament to also legislate on general trade and commerce. This approach was applied for the first time in 1989 in connection with federal legislation to regulate competition, in the *General Motors* decision,<sup>92</sup> and in another case involving federal trade mark legislation.<sup>93</sup>

Five criteria can be used to determine when federal jurisdiction over general trade and commerce comes into play. The criteria, which the

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<sup>92</sup> *General Motors of Canada Ltd. v. City National Leasing*, *supra*, note 60.

<sup>93</sup> *Kirkbi AG v. Ritvik Holdings Inc.*, *supra*, note 66.

Supreme Court explains are non-cumulative and non-exhaustive, are as follows: (1) the impugned legislation must be part of a general regulatory scheme; (2) the scheme must be monitored by the continuing oversight of a regulatory agency; (3) the legislation must be concerned with trade as a whole rather than with a particular industry; (4) *the legislation should be of a nature that the provinces jointly or severally would be constitutionally incapable of enacting*; and (5) *the failure to include one or more provinces or localities in a legislative scheme would jeopardize the successful operation of the scheme in other parts of the country*.<sup>94</sup>

The combined objective of the fourth and fifth criterias is essentially to gauge the ability of the provinces to deal with the matter effectively. In 2005, the Supreme Court referred specifically to the “importance of an activity” as a criterion underlying the general trade and commerce power.<sup>95</sup> However, an assessment of the “importance” of an activity and of what the distribution of powers “should be” is clearly a political question that should not, in our view, be subject to adjudication by the courts. Some may wonder whether criteria such as these in fact place any limits at all on federal jurisdiction. The keenly awaited decision of the Supreme Court, expected to be released in the coming months, on the constitutional power of the federal parliament to pass legislation to regulate the securities trade (a matter until now under the exclusive jurisdiction of the provinces<sup>96</sup>) will reveal the scope that the courts intend to place, today, on the notion of provincial efficiency. Both the Alberta and the Quebec Courts of Appeal recently ruled that the federal initiative was invalid.<sup>97</sup>

Besides these traces of a form of subsidiarity that has been present in Canadian constitutional law for several decades and has had centralizing effects, a clearer constitutional principle of subsidiarity has recently begun to emerge.

<sup>94</sup> *General Motors of Canada Ltd. v. City National Leasing*, *supra*, note 60, at 661-63.

<sup>95</sup> *Kirkbi AG v. Ritvik Holdings Inc.*, *supra*, note 66, at para. 16.

<sup>96</sup> *Lymburn v. Mayland*, [1932] A.C. 318 (P.C.); *R. v. Smith*, [1960] S.C.J. No. 47, [1960] S.C.R. 776 (S.C.C.); *Multiple Access Ltd. v. McCutcheon*, [1982] S.C.J. No. 66, [1982] 2 S.C.R. 161 (S.C.C.); *Global Securities Corp. v. British Columbia (Securities Commission)*, *supra*, note 84.

<sup>97</sup> *Reference re Securities Act (Can.)*, [2011] A.J. No. 228, 2011 ABCA 77 (Alta. C.A.); *Québec (Procureure générale) c. Canada (Procureure générale)*, [2011] J.Q. no 2940, 2011 QCCA 591 (Que. C.A.).

(c) *Subsidiarity: A New Constitutional Principle in Canada?*

Over the last 10 years, the Supreme Court has, on four separate occasions, referred specifically to the principle of subsidiarity, something it had not done before. All the cases concerned, obviously, matters relating to the distribution of powers.

In 2001, in *Spraytech*,<sup>98</sup> the Supreme Court was asked to rule on the constitutionality of a municipal by-law governing and restricting the use of pesticides. The question at issue was whether a valid by-law conflicted with a federal, and equally valid standard, and if the federal paramountcy doctrine applied. The Supreme Court stated as follows in the majority decision:

The case arises in an era in which matters of governance are often examined through the lens of the *principle of subsidiarity*. This is the proposition that *law-making and implementation are often best achieved at a level of government that is not only effective, but also closest to the citizens affected and thus most responsive to their needs, to local distinctiveness, and to population diversity*. La Forest J. wrote for the majority in *R. v. Hydro-Quebec*, [1997] 3 S.C.R. 213, at para. 127, that “the protection of the environment is a major challenge of our time. It is an international problem, one that requires action by governments at all levels” (emphasis added). His reasons in that case also quoted with approval a passage from *Our Common Future*, the report produced in 1987 by the United Nations’ World Commission on the Environment and Development. The so-called “Brundtland Commission” recommended that “local governments [should be] empowered to exceed, but not to lower, national norms” (p. 220).

... [T]here is a fine line between laws that *legitimately complement each other* and those that invade another government’s protected legislative sphere.<sup>99</sup>

The environment is not a matter expressly mentioned in the Constitution. It is an aggregate of provincial and federal matters; in other words, both levels of government can legislate in this area, provided the laws enacted are connected to some matter under their jurisdiction.<sup>100</sup> This way of looking at the environment as a legislative field makes it, in practical

<sup>98</sup> 114957 *Canada Ltée (Spraytech, Société d’arrosage) v. Hudson (Town)*, [2001] S.C.J. No. 42, [2001] 2 S.C.R. 241 (S.C.C.) [hereinafter “*Spraytech*”].

<sup>99</sup> *Id.*, at paras. 3–4 (*per* L’Heureux-Dubé J. writing for a majority of four judges) (emphasis in italics added).

<sup>100</sup> *Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992] S.C.J. No. 1, [1992] 1 S.C.R. 3, at 62 (S.C.C.).

terms, an area of concurrent jurisdiction. As a result, it is not surprising to see the principle of subsidiarity invoked for the first time in a case hinging on the division of constitutional responsibilities in this field.

After applying the criteria to the facts of the case, the Supreme Court concluded that there was no conflict between the municipal by-law and the federal law, since the former completed the latter. As a result, the by-law was found to be operative. In this decision, the principle of subsidiarity was used by the Supreme Court only to highlight the need for cooperation between the various levels of government (federal, provincial and municipal) in the area of environmental protection.

A few years later, the Supreme Court revisited the issue in a case centring on the application of valid provincial standards to federal enterprises, namely, banks. In the theoretical portion of its decision, the Supreme Court concludes that an extensive application of the doctrine of interjurisdictional immunity,<sup>101</sup> which in practical terms protects only the powers of the federal government and, as a result, supports a centralizing trend in constitutional interpretation, would undermine the principle of subsidiarity, for which it borrows the definition from *Spraytech*.<sup>102</sup> Once again, in this decision, the principle does not play a decisive role in the application of the doctrines governing the distribution of powers. However, for the first time, the principle is linked to the notion of balance of powers.

More recently, in part of a decision focusing on federal paramountcy doctrine, Deschamps J. (dissenting) referred to the principle of subsidiarity as follows: “The unwritten constitutional principle of federalism and its *underlying principles of co-operative federalism and subsidiarity* favour a strict definition of the concept of conflict.”<sup>103</sup> This is a dissenting opinion, but one that reveals much about the gradual introduction of the principle of subsidiarity into Canadian constitutional law, since Deschamps J. refers to it as one of the principles underlying the principle of federalism.

In several decisions, the Supreme Court has had opportunities to address the nature, role and normative force of constitutional principles. In

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<sup>101</sup> Under the interjurisdictional immunity doctrine, a valid provincial law is not applicable to a federal enterprise if it is likely to *impair an essential element* of its activities, management or operations. Otherwise, the law is applicable: *Canadian Western Bank*, *supra*, note 62, at para. 48, *per* Binnie and LeBel JJ. for a majority of six judges.

<sup>102</sup> *Canadian Western Bank*, *id.*, at para. 45.

<sup>103</sup> *Quebec (Attorney General) v. Lacombe*, *supra*, note 63, at para. 119 (emphasis added).

*Reference re Secession of Quebec*,<sup>104</sup> it first states, concerning the nature of the principles, that they "... inform and sustain the constitutional text: they are the vital unstated assumptions upon which the text is based."<sup>105</sup> Next, it mentions that the constitutional principles underlying the written constitution "... may in certain circumstances give rise to substantive legal obligations ... which constitute substantive limitations upon government action". They may therefore "... give rise to very abstract and general obligations, or they may be more specific and precise in nature". Last, it states that the principles "... are also invested with a powerful normative force, and are binding upon both courts and governments".<sup>106</sup>

The underlying or implicit constitutional principles may help guide the interpretation of constitutional provisions and also, in some circumstances, remedy a deficiency or gap in the constitutional texts.<sup>107</sup> They constitute standards "that share the characteristic of having been formulated on the basis of inductive reasoning by jurisprudence".<sup>108</sup>

Although the Supreme Court has stated clearly that "the recognition of these constitutional principles ... could not be taken as an invitation to dispense with the written text of the Constitution,"<sup>109</sup> the fact remains that in 1998 it left the door open to a possible constitutionalization of other, completely unprecedented principles.<sup>110</sup> Accordingly, it does not seem unreasonable to suppose that the Supreme Court could gradually move towards this trend with the principle of subsidiarity.

At the time of writing, the Supreme Court has just rendered a decision that appears to confirm the hypothesis that a constitutional principle of subsidiarity is gradually emerging. In *Reference re Assisted Human Reproduction Act*, the Supreme Court was asked to determine the

<sup>104</sup> [1998] S.C.J. No. 61, [1998] 2 S.C.R. 217 (S.C.C.).

<sup>105</sup> *Id.*, at 247, para. 49.

<sup>106</sup> *Id.*, at 249, para. 54.

<sup>107</sup> *Reference re Manitoba Language Rights (Man.)*, [1985] S.C.J. No. 36, [1985] 1 S.C.R. 721 (S.C.C.) (the rule of law); *New Brunswick Broadcasting Corp. v. Nova Scotia (Speaker of the House of Assembly)*, [1993] S.C.J. No. 2, [1993] 1 S.C.R. 319 (S.C.C.) (parliamentary privilege); *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1997] S.C.J. No. 75, [1997] 3 S.C.R. 3 (S.C.C.) (principle of judiciary independence); *Reference re Secession of Quebec*, *supra*, note 104 (principles of democracy, federalism, the rule of law and constitutionalism, protection of minorities).

<sup>108</sup> *Leurquin-De Visscher*, *supra*, note 15, at 29 (translation).

<sup>109</sup> *Reference re Secession of Quebec*, *supra*, note 104, at para. 53.

<sup>110</sup> The Supreme Court has recently identified a new principle underlying the Canadian Constitution, namely the principle of "honour of the Crown" in connection with the compact between the non-Aboriginal and the Aboriginal population with respect to ancestral and treaty rights: *Beckman v. Little Salmon/Carmacks First Nation*, [2010] S.C.J. No. 53, [2010] 3 S.C.R. 103, at para. 97 (S.C.C.), (*per* LeBel and Deschamps JJ. in a concurring opinion).

constitutionality of the federal provisions prohibiting and regulating certain acts connected with assisted human reproduction.<sup>111</sup> The Quebec government argued that the provisions were *ultra vires* since they related to assisted reproduction as a question of healthcare, a matter under provincial jurisdiction.<sup>112</sup> In support of the provisions' constitutionality, the federal government invoked its exclusive jurisdiction over criminal law.<sup>113</sup> In a firmly split decision, the Supreme Court concluded that some provisions were valid, and others invalid.<sup>114</sup>

This division reveals, within the Supreme Court, two different ways of articulating the principles of federalism and subsidiarity, and the role played by the balance of powers.

A first group of four judges concluded that all the contested federal provisions were invalid. In the theoretical portion of their decision that was focused on the applicable constitutional principles and doctrines, they first pointed out that federalism, which "implies that a government does not encroach on the powers of the other level of government",<sup>115</sup> is a constitutional principle that limits the operation of the Canadian state. Next, they stated that "the proper operation of Canadian federalism sometimes requires the application of a principle of subsidiarity in the arrangement of relationships between the legislative powers of the two levels of government."<sup>116</sup> In support of this view, they referred to a number of the previous decisions discussed above, and to a passage in the Supreme Court decision *Reference re Secession of Quebec*: "[t]he federal structure of our country also facilitates democratic participation by distributing power the government thought to be most suited to achieving the particular societal objective having regard to this diversity."<sup>117</sup>

After identifying the aim of the contested provisions and relating them to specific provincial powers, the judges state as follows:

In sum, the conclusion that the impugned provisions, far from falling under the federal criminal law power, relate instead to the provinces'

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<sup>111</sup> *Reference re Assisted Human Reproduction Act*, *supra*, note 10.

<sup>112</sup> *Constitution Act, 1867*, *supra*, note 45, s. 92(7), (13) and (16).

<sup>113</sup> *Id.*, s. 91(27).

<sup>114</sup> Four judges ruled that all the contested provisions were constitutional, while four judges arrived at the opposite conclusion, namely that all the provisions were unconstitutional. The ninth judge split the difference, finding some provisions valid and others invalid, creating a majority with either the first or the second group.

<sup>115</sup> *Reference re Assisted Human Reproduction*, *supra*, note 10, at para. 182, *per* LeBel and Deschamps JJ.

<sup>116</sup> *Id.*, at para. 183.

<sup>117</sup> *Id.*, at paras. 182-183 (quoting *Reference re Secession of Quebec*, *supra*, note 104, at para. 58).

jurisdiction ... is self-evident. *If any doubt remained, this is where the principle of subsidiarity could apply, not as an independent basis for the distribution of legislative powers, but as an interpretive principle that derives, as this Court has held, from the structure of Canadian federalism and that serves as a basis for connecting provisions with an exclusive legislative power.* If subsidiarity were to play a role in the case at bar, it would favour connecting the rules in question with the provinces' jurisdiction over local matters, not with the criminal law power.<sup>118</sup>

According to this group of judges, then, the principle of subsidiarity is an "important component" of Canadian federalism, an underlying principle of the Canadian Constitution that can help guide the courts in the interpretation and application of the express constitutional provisions of the constitutional texts. In this case, and in their view, the principle supports the preservation of the provincial sphere of autonomy in the field of assisted human reproduction as a healthcare service. The judges rely on the principle of subsidiarity to examine the constitutionality of the contested provisions rather than, as before, to analyze the valid, but overlapping, interventions of the two levels of government.

Four other judges concluded that all of the contested federal provisions were valid. Their analysis of the situation differs markedly, in particular concerning the principle of subsidiarity. In their view, "subsidiarity does not override the division of powers in the *Constitution Act, 1867*," and cannot prevent a level of government from legislating in its areas of competence: "[t]he criminal law power may be invoked ... and the exercise of this power is not restricted by concerns of subsidiarity."<sup>119</sup> The judges consider that the principle should only be used to allow the provinces, in the areas under their jurisdiction, but subject also to valid federal legislation, to supplement rather than exclude the federal laws. In short, the judges would confine the potential application of the principle of subsidiarity to conflicts between laws leading to federal paramountcy: "subsidiarity allows only [laws that legitimately complement each other]."<sup>120</sup>

The approach of this second group of judges appears to be more aligned with the way in which the principle of subsidiarity has been integrated into European Union law and into some national laws. The principle does not attribute competence, but governs its *exercise*, and as a

<sup>118</sup> *Id.*, at para. 273 (emphasis added).

<sup>119</sup> *Id.*, at para. 72.

<sup>120</sup> *Id.*

result can only be applied in a situation of concurrent jurisdiction. However, as we have seen, subsidiarity and the underlying notion of efficiency have, in recent decades, allowed the Supreme Court to validate federal interventions in matters attributed by the Constitution to the exclusive jurisdiction of the provinces.

One, but only one, solution is possible. Either the principle of subsidiarity must remain confined to the sphere of *de facto* concurrent jurisdiction and the idea of efficiency must cease being the determining criterion for constitutional doctrines connected with the question of validity and leading to a centralization of powers, or else it must continue to play a role in questions of validity, but while also benefiting the provincial level of government. To refuse, as the second group of judges does, to invoke the principle to support the legislative powers of the provinces, even though the notion of efficiency is already used to support the powers of the federal parliament, can only neutralize the rebalancing potential that the principle of subsidiarity could bring to Canadian federative law.

#### IV. CONCLUSION

Within federative systems, subsidiarity tends to resemble “a taking of control [by the federal level] or a disguised tutorship [over the federated level]”.<sup>121</sup> According to Professor Francis Delpérée, this explains the natural mistrust that constitutionalists have of this principle.

The intrinsically political nature of the principle of subsidiarity and the correspondingly broad latitude it leaves to the entity responsible for its application require that it be treated with caution, especially when its birth as a legal principle is a product of the actions of the courts rather than the constituent authority. Subsidiarity that is not organized or limited may, over time and given the natural tendency of all societies, contribute to a progressive concentration of powers and damage the federative balance. Constant vigilance is necessary, especially within federations that are characterized by a distribution of powers based on exclusivity and that, in addition, include a national minority. In such a context, centripetal forces are particularly apparent and are not without influence over the jurisdictional authorities responsible for interpreting and applying the fundamental law.

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<sup>121</sup> F. Delpérée, “Conclusions générales”, in Delpérée, *supra*, note 11, at 522 (translation).



In Canada, the increasingly prominent role given to the principle of subsidiarity leaves us with a lot to think about. Its effects on the balance of powers are hard to anticipate; its actual form is still largely undetermined, and depends on the creative choices made in the course of adjudication by the courts. If the past provides a glimpse of the future, then we must remain vigilant. The centralizing effects that have resulted, so far, from the use of effectiveness as a test in constitutional jurisprudence leave us skeptical with regard to the re-balancing potential of any Canadian constitutional principle of subsidiarity. In addition, the European experience shows that whatever the legal limits placed on the principle, it will always attract opportunistic reasoning, and is inevitably subject to a deferential attitude to the political organs of the state. For a minority nation like Quebec within the Canadian federation, this essentially political game provides no guarantees that its sphere of autonomy will be preserved. We must be careful not to let the principle of subsidiarity divert the Canadian federative pact from its original design.