

DEVELOPMENT OF DUTIES OF FEDERAL LOYALTY: LESSONS LEARNED, CONVERSATIONS TO BE HAD

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INTRODUCTION

[1] Is federal loyalty a necessary condition to the functioning of a federation? It depends whom one asks. In much of Europe, the question may be met with nods of approval accompanied with shrugs of uncertainty. “Yes,” the European jurist may say, “but it’s complicated.” The South African jurist may proudly display her Constitution, saying “Of course!” However, in much of Canada, the question may be greeted with perplexed looks and a question in reply: “What *is* federal loyalty?”

[2] Despite its anachronistic undertones, federal loyalty is a legal doctrine that features prominently in modern federations. The principle goes by different names in different places. Germany’s iteration of the principle, *Bundestreue*, is regarded as an archetype. In Italy, *leale collaborazione* looms large on relations between the Italian state and the regions. In Belgium, *loyauté fédérale/federale loyautéit/föderale Loyalität* was a seed planted deep in an outlying corner of the 1993 Constitution. Perhaps to the surprise of many, it has grown into a doctrine similar to its German counterpart. It figures even in the functioning of the European Union, where ‘federal’ loyalty is arguably the essence of the duty of sincere cooperation enshrined in Article 4(3) of the Treaty on European Union.¹

[3] Federal loyalty calls on the orders of government within a federation to exercise a minimum level of consideration for their federal partners.² If federal loyalty were applied to relationships between individuals, it would arise in the following example familiar to Canadians: When clearing one’s driveway after a blizzard, should one throw the excess snow onto one’s neighbour’s lawn? Should one ensure that no pile of snow is so high that it would block a

¹ See generally Marcus Klamert, *The Principle of Loyalty in EU Law* (Oxford: Oxford University Press, 2014).

² See generally Ana Gamper, “On Loyalty and the (Federal) Constitution” (2010) 4 *Vienna Online J. on Int’l Const. L.* 157 2010.

neighbour's view? If one has a snow blower, should one offer to clear one's neighbour's driveways as well?

[4] Despite this readily understandable (and admittedly facetious) illustration, the principle of federal loyalty is seldom discussed in Canadian federal thought.* The principle of cooperative federalism was developed by the Courts to allow federal partners to bring flexibility to our rigid constitution. Unlike federal loyalty, it does not mandate mutual consideration between federal partners. Instead, it renders flexible our rigid Constitution. Together, federal and provincial governments can cooperate almost free from the limitations of our nineteenth-century division of competences.³ However, Canadian jurisprudence on cooperative federalism reveals significant, arguably unsettling, paradoxes.⁴

[5] There are lessons to be learned from the experiences and experiments of other federations. Comparative study may reveal ways in which Canadian federalism may or may not benefit from the development of a principle of federal loyalty. Such a study is particularly salient considering our famously unamendable constitution. Does federal loyalty require a 'big bang moment' or can it grow from a seed planted into a federation's constitutional earth? Is it necessarily an enforceable legal principle or can it be an aspirational doctrine? Can and should judges proclaim such a principle?

[6] This paper argues that federal loyalty has a place in the Canadian federation. Arguably, it took its place at its very centre in *Reference re Secession of Quebec*.⁵ While further judicial development remains improbable, this paper argues that Canadian scholars should

* This shortage of thought is especially felt in reviewing English Canadian scholarship.

³ See for example *Reference re Pan-Canadian Securities Regulation*, 2018 SCC 48 at paras 16-20 [*Pan-Canadian Securities*].

⁴ See generally Johanne Poirier, "Une source paradoxale du droit constitutionnel canadien: les ententes intergouvernementales" (2016) 1 *Revue québécoise de droit constitutionnel* 1.

⁵ See *Reference Re Secession of Quebec*, [1998] 2 SCR 217, 1998 CanLII 793 (SCC) [*Secession Reference*].

recognise the reality of federal loyalty in the Canadian constitutional framework and debate the ways in which it can contribute to our federal life. This paper will proceed in four parts. Important paradoxes that arise from Canadian jurisprudence on cooperative federalism will be described **(I)**. Second, this paper adopts a working definition of federal loyalty that guides a subsequent comparative study of the doctrine **(II)**. Third, studies of the German and Belgian cases will highlight important lessons we Canadian scholars can learned **(III)**. Finally, drawing on Canadian jurisprudence and lessons from comparative study, this paper will argue that federal loyalty exists under Canadian constitutional law **(IV)**. While the judicial development of a constitutional principle of federal loyalty is unlikely, is it that federal loyalty duties have become a constitutional convention? This paper argues that this incremental development may be possible.

I CANADIAN COOPERATIVE FEDERALISM: A PARADOX

[7] The paradox of Canadian cooperative federalism arises from the gradual but radical evolution of inter-governmental relations and the division of powers. The text of *Constitution Act, 1867* (CA-1867) foresaw a Canadian federation in name only. The federal order was vested with strong, centralising powers that arguably made Ottawa the imperial master of the provinces.⁶ Strikingly, these powers still exist. However, readers must dig deeper. For example, a first-time reader would not know that responsible government infuses our monarchical constitution. Understanding Canadian federalisms requires the same deeper inquiry.

[8] It must be remarked that the radical changes to federal-provincial powers were made by judicial intervention. Very quickly after Confederation, the Judicial Committee of the Privy Council (JCPC) interpreted away the centralising force of CA-1867.⁷ In *Hodge v. the Queen*,

⁶ Peter Hogg, *Constitutional Law of Canada*, 5th ed, vol 1 (Toronto: Carswell, 2018) at 5-19 – 5-22.

⁷ Henri Brun, Guy Tremblay & Eugénie Brouillet, *Droit constitutionnel* (Cowansville: Éditions Yvon Blais, 2014) at para VI-1.45.

the law lords held that the provincial legislatures, within their spheres of competence, wielded the same plenary powers as the Imperial Parliament or the Dominion Parliament.⁸ The provinces were in no way the delegates of the federal order. This marked the first unforeseen transformation of Canadian federalism.

[9] A second transformation arose with the advent of cooperative federalism.⁹ Cooperative federalism must be distinguished from federal loyalty. Within the Canadian context, cooperative federalism is both an interpretive principle and a description of reality.¹⁰ Cooperative federalism describes the increasingly interlocking actions of the federal and provincial orders of government. These could be purely executive or administrative actions but can also include interlocking legislative regimes.¹¹ As an interpretive principle, cooperative federalism softens the application of traditional division of powers doctrines. Cooperative federalism extols courts to “facilitate interlocking federal and provincial legislative schemes and to avoid unnecessary constraints” on cooperative action.¹²

[10] A paradox arises upon studying jurisprudence dealing with cooperative regimes. Two sets of questions must be addressed.¹³ The first questions centre on the legal force of intergovernmental agreements (IGAs), which are the tool *par excellence* of Canadian cooperative federalism. The second set of questions confronts the “missing juridical link between the requirements of jurisdictional autonomy, on the one hand, and of intergovernmental cooperation, on the other.”¹⁴ In other words, does the principle of cooperative federalism impose a duty upon

⁸ *Hodge v the Queen*,

⁹ See for example *Canadian Western Bank v. Alberta*, 2007 SCC 22, [2007] 2 SCR 3.

¹⁰ See *Quebec (Attorney General) v. Canada (Attorney General)*, 2015 SCC 14, [2015] 1 SCR 693 at paras 17-19 [*Firearms*].

¹¹ See *Canada (Attorney General) v PHS Community Services Society*, 2011 SCC 44, [2011] 3 S.C.R. 134 [*PHS*].

¹² See *Firearms* at paras 17-19; see also *Pan-Canadian Securities*, *supra* note 3 at paras 16-20.

¹³ See Poirier, *supra* note 4.

¹⁴ Jean-François Gaudreault-DesBiens, “Cooperative Federalism in Search of a Normative Justification: Considering the Principle of Federal Loyalty” (2014) 24:4 *Constitutional Forum constitutionnel* 1 at 2.

governments to consider the impact of their actions upon their federal partners, especially when they have entered into intricate, interlocking regimes? The current answer is a resounding “No.”

[11] This paper’s consideration of federal loyalty deals predominantly with the second set of questions described above. However, the first set of questions regarding the legal force of IGAs is by no means of lesser importance. In fact, since IGAs can affect rights of third parties, questions about the legal force of IGAs goes to heart of the rule of law in Canada. However, the principle of federal loyalty does not *per se* provide solutions for these questions. The crux of these questions lies in the dualist Canadian rules for the incorporation of extra-statutory norms into positive law. The most prominent example of this is the integration of international treaties into domestic law. To observe the Canadian paradox in respect of the legal force of IGAs, one needs only look to *Boucher v. Stelco Inc.*, where an IGA that was not properly incorporated into positive law was able to affect the rights of employees seeking pension benefits.¹⁵ While these questions are of paramount importance, they are beyond the scope of the present enquiry.

[12] In respect of the second set of questions raised above, Canadian jurisprudence indicates that there is no obligation upon orders of government to consider the impact of their actions upon federal partners. In *Reference Re Canada Assistance Plan (Re CAP)* the fate of a cooperative regime for the funding of social assistance and welfare plans was in question.¹⁶ The federal Parliament sought to amend legislation that resulted in the unilateral alteration the funding formula agreed upon between federal and provincial governments. Notably, the formula was set out entirely in a federal statute (the Plan). The Supreme Court held that the principle of parliamentary sovereignty, well anchored in Canadian constitutional law, empowered Parliament

¹⁵ See *Boucher v. Stelco Inc.*, 2005 SCC 64, [2005] 3 SCR 279 [*Boucher*]; See also Poirier, *supra* note 4.

¹⁶ See *Reference Re Canada Assistance Plan (BC)*, [1991] 2 SCR 525, 1991 CanLII 74 (SCC).

to amend the Plan as it wished. Further, no legitimate expectation of the provinces could give rise to a duty of consultation between the orders of government.

[13] Perhaps most shocking to certain streams of federal thought is Canadian jurisprudence which permits governments to intentionally place obstacles in front of their federal partners. In the *Firearms Commissioner Case*, the federal government sought to abolish the long-gun registry, which was established pursuant to a series of IGAs. Furthermore, it sought to destroy the registry's records. The Québec government pursued the federal government to prevent the destruction of Québec's records. Québec argued that the federal statute "encroache[d] massively on the ability of a provincial legislature to exercise as it sees fit its powers with respect to the administration of justice, public safety, the prevention of crime and the social costs associated with crime".¹⁷ Nonetheless, the majority upheld the principle of parliamentary sovereignty over cooperative federalism:

Neither this Court's jurisprudence nor the text of the *Constitution Act, 1867* supports using that principle [of cooperative federalism] to limit the scope of legislative authority or to impose a positive obligation to facilitate cooperation where the constitutional division of powers authorizes unilateral action. To hold otherwise would undermine parliamentary sovereignty and create legal uncertainty whenever one order of government adopted legislation having some impact on the policy objectives of another.¹⁸

The majority held that Parliament's order to destroy the long-gun registry was a valid exercise of competences.

[14] In summary, the paradox of Canadian cooperative federalism is that while the principle is oft-lauded by the Supreme Court, it has not in any way tempered an absolutist conception of the exercise of competences.¹⁹ This paper argues that this is not a necessary state of affairs. In particular, comparative study of Germany and Belgium demonstrate that federal loyalty

¹⁷ *Firearms*, supra note 10 at para 34.

¹⁸ *Firearms*, supra note 10 at para 20.

¹⁹ Gaudreault-DesBiens, supra note 14 at 1.

does not represent the threat to parliamentary sovereignty that the Supreme Court believes it to be. Both cases offer lessons from which Canadian jurists may draw inspiration in order to resolve the Canadian paradox.

II DEFINING FEDERAL LOYALTY

[15] For the purposes of a comparative law analysis in part III, federal loyalty must be defined. The feudal undertones of the English word ‘loyalty’ are difficult to escape. Terminology in other languages bears similar risks of anachronism. In French-speaking Belgium, the term is similar to that in English, ‘*loyauté fédérale*’. In Italian ‘*leale collaborazione*’ translates to “loyal collaboration.” An interesting connotation is observed in the German term ‘*Bundestreue*,’ which is specific to Germany’s highly developed form of federal loyalty. The compound word *Bundestreue* can be translated as “federal faith.” This paper advances neither feudal nor religious devotion.

[16] Gamper defines federal loyalty by distinguishing it from the notion of constitutional loyalty. This is the definition this paper adopts. Constitutional loyalty implies the supremacy of the constitution. This entails that “any kind of legal act that is contrary to the constitution must be eliminated or at least declared to be inapplicable.”²⁰ This concept is not foreign to Canadian constitutional law, it is the principle of constitutionalism. Section 52 of *Constitution Act, 1892* (CA-1982) entrenches this principle and enables courts to ensure adherence to the Constitution..

[17] Federal loyalty, on the other hand, is more than adherence to the federal elements of a written constitution.²¹ This would be only constitutional loyalty *simpliciter*. Federal loyalty describes situations where “the territorial entities [including the “central” authority] of a compound

²⁰ Gamper, *supra* note 2 at 158.

²¹ *Ibid* at 160.

state oblige themselves to respect each other due to their agreement to found the compound state.”²²

Gamper observes that even in federations created by dissociation, federal loyalty arises where it is recognised (either by a constituent power or by courts) that mutual respect between the orders of government is one of the “constitutional requisites of federalism”²³

[18] If federal loyalty means mutual respect, the ways in which such respect manifests in legal systems varies widely. It can be a purely aspirational principle with no legal force. It can impose procedural requirements upon orders of government to consider the impact of their actions upon federal partners. It can prohibit causing harm to a federal partner in the exercise of competences. It can even, albeit rarely, mandate substantive requirements of equitable treatment of federal partners. A further consideration arises in respect of the consequences of breaching federal loyalty. Courts may mandate further negotiation between federal partners. A rarer consequence is the invalidation of legislation made in breach of federal loyalty. Whatever the case, for the purposes of comparative study, federal loyalty is any rule, whether it be legal or political, that calls for parties to respect each other. In other words, federal loyalty is any duty incumbent upon an order of government to have a minimum level of consideration for their federal partners in the otherwise legitimate exercise of their powers.

III LEARNING LESSONS: A COMPARATIVE ANALYSIS

[19] Comparative study of federal loyalty principles sheds light on whether further development of such a principle can occur in the Canadian context. For the purposes of this paper, this comparative study will be restricted to Germany **(1)** and Belgium **(2)**. While the examples of Austria, Italy, Spain, Switzerland, and South Africa all merit study, Germany and Belgium provide

²² *Ibid* at 162 [Emphasis added]

²³ *Ibid* at 162.

two interesting case studies for the question this paper seeks to answer. Specifically, Germany provides a rich example of judicial interpretation of federal loyalty principles. Belgium, a dualist federation, shows how a norm of federal loyalty can be introduced and woven into a legal order to which it was a stranger.

1. *Germany: 'Bundestreue'*

[20] The German case shows how federal loyalty can be given real content by courts. *Bundestreue* does not feature in the German Basic Law. It is entirely a product of judicial development. German jurisprudence has developed a sophisticated approach to adjudicating federal loyalty. Furthermore, its historical development suggests lessons learned throughout a long process of balancing by the German court. In determining what duties might flow from a Canadian conception of federal loyalty, German decisions provide a good yardstick.

[21] The Constitutional Court first set out the principle of *Bundestreue* in a 1952 decision on funding for housing in the wake of World War II **(i)**. By the 1960s, *Bundestreue* reached its high-water mark **(ii)**.²⁴ Notably, a few decisions from this halcyon period illustrate applications of federal loyalty that arguably go too far in imposing new, positive obligations upon orders of government **(iii)**. In recent jurisprudence, the Constitutional Court reined in the expansive scope of *Bundestreue* **(iv)**. It is arguable that this restriction of *Bundestreue* could be in reaction to its over-extension in the 1960s. Above all, however, it is important to take into account the various legal and non-legal factors that form the context of *Bundestreue*'s development **(v)**. On this point, Germany's history, culture, constitution, and legal tradition may sufficiently distinguish the German and Canadian federations.

²⁴ Philip M Blair, *Federalism and Judicial Review in West Germany* (Oxford: Clarendon Press, 1981) at 201.

i. Housing Funding Case, 1951: The birth of Bundestreue

[22] In 1952's *Housing Funding Case*, the Federal Constitutional Court first acknowledged the existence of *Bundestreue*.²⁵ After World War II, much of Germany lay in ruin. The federal order (the Bund) enacted the First Housing Act to allow the Federal Minister of Housing to distribute funds for reconstruction to the states (the Länder). At question was a disbursement of 91 million Deutschmark (DM) to be distributed to the Länder. On 31 March 1952, the Federal Minister sent a communication to the Länder outlining his decision on funds distribution. On 4 April 1952, at a joint meeting of ministers of construction, housing and settlement, the plan was approved by all but three Länder governments. Bavaria, Hesse, and Lower Saxony disagreed with the plan. Notably, Bavaria was excluded from this specific disbursement.

[23] Bavaria petitioned the Federal Constitutional Court on three issues. Most notably, Bavaria argued that distribution of funds should only occur with the agreement of all the Länder, and specifically according to the terms of an agreement reached in 1950 between the Länder governments known as the Düsseldorf Ratio ("*Düsseldorf Schlüssel*").²⁶ Under the Ratio, Bavaria would have been entitled to 16.7% of the 91 million DM earmarked for reconstruction.

[24] Key to Bavaria's position was that §14 of the *First Housing Act* (FHA) foresaw that distributions of funds were to be made "in agreement with the Länder" ("*in Einvernehmen mit die Länder*").²⁷ Bavaria contended that this condition was not met as three Länder disagreed with the distribution plan. It argued that the Düsseldorf Ratio, an agreement made between the Länder in 1950, was the 'agreement with the Länder' that should prevail in the instant case.

²⁵ Bundesverfassungsgericht, Karlsruhe, BVerfGE 1, 299 [*Housing Funding*].

²⁶ *Ibid* at para 24.

²⁷ *Ibid* at para 30.

[25] First, the Court dealt expediently with two preliminary matters. On the question of §14 FHA, the Federal Constitutional Court held that while “in agreement with the Länder” did feature in the provision, its text did not provide a guaranteed right to a portion of the funds earmarked for redistribution. Second, on the question of the Düsseldorf Ratio, the Court noted that the Bund was present at the 1950 meetings only as a guest. The Court held that upon consideration of the Bund’s actions in 1950 and subsequently, the Bund did not intend to be bound by the terms of the Düsseldorf Ratio.

[26] The Court then addressed the nature of “in agreement with the Länder” in §14 FHA – the crux of the legal issues in the instant case. Before adoption by the Federal Parliament, the bill described the requirement as an “agreement with the Bundesrat”.²⁸ This was eventually amended to make reference to the Länder, notwithstanding the fact that under the German constitution the Länder’s representatives comprise the Bundesrat. The Court interpreted this to mean that majority decision-making, permitted in the Bundesrat, could not have been the intention of the legislator in altering the language that was eventually adopted.

[27] At this point, the Court admitted it was confronted with a significant dilemma.²⁹ On the one hand, majority decision making would create the incentive for the Federal Minister to side with the majority of the Länder to the detriment of those in the minority. On the other hand, unanimous decision making would theoretically permit a single Land to block distribution of funds under the FHA.

[28] To resolve this dilemma, the Court invoked the principle of *Bundestreue*. The Court held that the Federal Minister must in this circumstance only distribute funds with the approval of all the Länder. However, the Länder cannot withhold their approval in ways contrary

²⁸ *Ibid* at para 57.

²⁹ *Ibid* at para 58.

to “federally friendly behaviour” (“*bundesfreundlichem Verhalten*”).³⁰ In other words, the Länder and the Bund have a duty to negotiate in good faith. On the one hand, the Federal Minister’s proposal must be appropriate in the circumstances. On the other hand, the Länder’s approval of such a proposal cannot be withheld without sufficient justification. Notably, the Court finds that it has the jurisdiction to decide whether proposals or refusals are made with sufficient reason of justification.³¹

[29] In this case, the Court found that the Federal Minister’s proposal was not sufficiently justified.³² To determine this, it looked to the entirety of circumstances surrounding financial redistribution in the wake of World War II. The disbursement of 91 million DM was intended to provide funds to build housing. However, upon examination of the Federal Minister’s proposal, the Court found that he had mixed purposes. Portions of the 91 million DM fund were allocated to cover shortfalls in Länder settlement budgets. The Court noted that other funds distributed under the Central Office for Emergency Aid were intended for these purposes. Therefore, Bavaria’s refusal of the Federal Minister’s proposal was justified.

[30] In the end, the Court ordered the Federal Minister and the Länder to continue negotiations.

ii. First Broadcasting Case, 1961: Bundestreue capable of unlimited extension?

[31] 1961’s *First Broadcasting Case* is the high-water mark for the *Bundestreue* principle.³³ Three legal issues raised in this case are pertinent to this paper’s enquiry. First, was the Bund competent to establish by law a federally-operated television station? Second, were negotiations between Bund and Länder regarding the eventual establishment of such a television

³⁰ *Ibid* at para 60.

³¹ *Ibid* at para 62.

³² *Ibid* at para 74.

³³ Blair, *supra* note 24 at 201.

station carried out in a ‘federally friendly’ manner? Finally, what the consequences for breach of federal loyalty?

[32] On the question of competence, the Court turned to Article 73(7) GG, which assigns competence over “postal and telecommunication services” to the Bund. The Bund argued that this provision granted the federal order competence to establish a federally-operated television station. The Court interpreted the competence narrowly. It held that the competence extended only to the technical matters of telecommunications, e.g. determining frequency ranges used by broadcasters. This narrow interpretation of the meaning of Article 73(7) GG preserved Land competence over cultural matters, and therefore over television broadcasters.³⁴

[33] The process of negotiations between Bund and Länder is, like in the *Housing Funding Case*, central to determining the content of *Bundestreue*. In light of the then-uncertainty surrounding the federal competence to establish a federal television station, the Bund sought to negotiate with the Länder. Specifically, it wished to determine whether it was feasible establish a federally-operated television broadcaster whether under law, a state contract, or an administrative contract.³⁵

[34] The Court held that the negotiation procedures undertaken by the Bund breached its duties of federal loyalty. First, the Bund did not negotiate directly with all the Länder. It only dealt directly with four Länder officials. Second, the Bund gave inadequate time to the Länder to approve the final contract for the establishment of the broadcaster. In fact, the Bund transmitted

³⁴ Bundesverfassungsgericht, Karlsruhe, BVerfGE 12, 205 [*First Broadcasting*] at paras 86-91; see also Donald P Kommers, *The Constitutional Jurisprudence of the Federal Republic of Germany*, 3rd ed, (Durham: Duke University Press, 2012) at 90 – 94.

³⁵ *Ibid* at para 24.

the contract only after it was already notarised.³⁶ The Court likened the negotiation procedures to a divide and conquer tactic. Such conduct is a breach of *Bundestreue*.

[35] Unlike in *Housing Funding Case*, the consequences for breach of federal loyalty are stronger. In *Housing Funding Case*, the Bund and Länder were ordered to renegotiate. Here, the decree establishing the federal television program was invalidated.³⁷ The Court ruled that the unconstitutionality of the procedures employed by the Bund also rendered unconstitutional the legal norm establishing the federal broadcaster. With this decision, the unwritten *Bundestreue* principle gained the power of a written constitutional provision: i.e. the power to invalidate a legal norm.

[36] Blair notes that the judgment in *First Broadcasting* marked the high point in the development of *Bundestreue*: “It now looked as if this indeterminate norm developed by the Constitutional Court might be capable of almost unlimited extension over every aspect of the political relations between Bund and Länder.”³⁸ Decisions contemporary to *First Broadcasting Case* support that this concern was validly held.³⁹ However, it appears that German courts have backed off of this expansive interpretation of *Bundestreue*.

iii. Contemporary restriction of *Bundestreue*

[37] Scholars note that *Bundestreue*'s prominence and strength has diminished since the 1960s. For the purposes of this paper, it suffices to cite a short passage from the 2001 Constitutional Court decision in *Pofalla I*:

[Bundestreue] does not in itself create a material constitutional relationship between the federation and a Land. It is of an accessory nature and does not on its own establish any independent duties for either the federation or a Land. . . . *[Bundestreue]* acquires significance only in the context of a statutory or

³⁶ *Ibid* at para 174.

³⁷ *Ibid* at para 185.

³⁸ Blair, *supra* note 24 at 183.

³⁹ See Bundesverfassungsgericht, Karlsruhe, BVerfGE 8, 104 [*Atomic Weapons I*]; see also Bundesverfassungsgericht, Karlsruhe, BVerfGE 8, 122 [*Atomic Weapons II*]; see also Blair, *supra* note 24 at 172; see also Kommers, *supra* note 34 at 95, 124 – 125.

contractual, that is to say, a legal relationship with its basis elsewhere. It mitigates or varies those other rights and duties or supplements them with secondary duties. . . .⁴⁰

[38] This decision returns to the first principles of *Bundestreue* set out in *Housing Funding*. Where there is a defined legal relationship between federal partners, a duty of federal loyalty will arise. In *Housing Funding*, a legislative framework provided for the distribution of funds to the Länder. If the Canadian regimes described in *Pan Canadian Securities and Firearms Commissioners Case* were transplanted to Germany, the interwoven agreements and legislation may establish a sufficient legal connection that could give rise to duties of federal loyalty. Furthermore, the duty may entail no more than good faith negotiations. All told, the German experience with *Bundestreue* admittedly demonstrates the potential for federal loyalty to become an unwieldy horse. However, it also demonstrates that the doctrine can be limited to cases of definite legal, extra-constitutional relationships and that the resulting duties would not undermine parliamentary sovereignty. Where federal partners disagree after good faith negotiations, they may proceed with their proposed course of action without fear that such actions would be annulled by the courts.

iv. The German context: The soil for Bundestreue

[39] A full analysis of the German context is beyond the capability of a Canadian jurist unfamiliar with every nuance of the German legal system and language. However, there are three sets of factors that should be identified which arguably contributed to the development of *Bundestreue*: first, the nature of the German federation and its legal system; second, historical acceptance of principles of loyalty; and third, the political realities of post-World War II Germany.

[40] Germany's federal system is administrative. Notably, the Länder participate directly in the elaboration of federal laws through their direct representation in the Bundesrat. In

⁴⁰ Bundesverfassungsgericht, Karlsruhe, BVerfGE 103, 81 [*Pofalla I*], translated in Kommler, *supra* note 34 at 95.

this context, the rapid development of *Bundestreue* is easier to reconcile than it would be within dualist federations. Beyond conceptions of the basic structure of State organs, scholars note that certain provisions of the Basic Law hint at *Bundestreue*, even if they fall short of expressly providing for it.⁴¹ For example, Article 35(1) GG establishes that “All federal and Land authorities shall render legal and administrative assistance to one another.”⁴² Furthermore, the so-called *Finanzverfassung* (Finance Constitution) of Articles 104a – 108 GG also provide a textual basis for an unwritten principle of *Bundestreue*.⁴³ One final legal factor to be considered is that of German private law. German civil law’s notion of *Treu und Glauben* is described by comparative private law scholarship as stronger than Napoleonic civil law’s notion of *bonne foi*.⁴⁴ As a result, German *Treu und Glauben* more readily acts as a counterbalance to strict applications of *pacta sunt servanda* than its French counterpart. Blair posits that *Treu und Glauben* percolated into German constitutional law from its private law.⁴⁵

[41] Scholars note that notions of loyalty are deeply seated in German history, pre-dating the modern federal republic. Scholarship from the era of the German Empire theorises that the unification of Germany under the Kaiser did not create a new sovereign so much as it created a *Monarchenbund*, or league of monarchs.⁴⁶ This is evident in Bismarck’s statement in 1885 that “[t]he Reich has its firm foundation in the federal fidelity of the princes”.⁴⁷ Federal loyalty is

⁴¹ Constance Greywe-Leymarie, *Le fédéralisme coopératif en République fédérale d'Allemagne* (Paris: Economica, 1981).

⁴² Article 35(1) GG.

⁴³ Note the difference between the *Finanzverfassung* and s. 36, CA-1982.

⁴⁴ Bruno Zeller, “The Observance of Good Faith in International Trade” in Andre Janssen, Olaf Meyer, *CISG Methodology* (Hamburg: Hamburger Edition, 2009) at 135 – 136; §242 BGB.

⁴⁵ Blair, *supra* note 24 at 162 – 163.

⁴⁶ *Ibid.*

⁴⁷ *Ibid* at 162.

arguably so deeply rooted in the history of the German polity that one commentator argues that it does not feature in the Basic Law because it is an essential presumption to its existence.⁴⁸

[42] Finally, Germany's most recent history has left an indelible impact on the functioning of its federation. After the atrocities of World War II, the German constituent power was motivated by a desire to avoid any further repetition of history. Grewye-Leymarie notes that this translates into a willingness to submit as much of political life as possible to legal rules.⁴⁹ Ulrich Karpen notes that in this context, the moral authority of German judges was well respected: "The court at its best provides a symbol of reconciliation, open interpretation and an active fusion of idealism (as a continental heritage) and pragmatism (as a gift of the Anglo-Saxon-world of law)."⁵⁰

[43] *Bundestreue* is well equipped to handle intra-federal conflicts in the German context. Historically, it had an expansive application, imposing positive and negative duties upon the orders of government in all its dealings. However, it appears that the modern iteration of *Bundestreue* will only intervene in intergovernmental relationships where the Länder and the Bund have entered into a specific legal relationship either by agreement or statute. If early cases are any indication, *Bundestreue* will impose duties of rational behaviour when legal relationships have to be negotiated or renegotiated. *Bundestreue* will stand against arbitrary acts by federal partners.

2. *Belgium*

[44] The Belgian case illustrates how federal loyalty can be introduced and integrated into a legal-political system. Since Canadian constitutional law does not expressly recognise federal loyalty, this aspect of Belgian federalism offers important lessons that help to answer this

⁴⁸ Much like the presumption of responsible government in the Canadian Constitution.

⁴⁹ Grewye-Leymarie, *supra* note 41 at 2 – 3.

⁵⁰ Ulrich Karpen, "Application of the Basic Law" in Christian Stark, ed, *Main Principles of the German Basic Law* (Baden-Baden: Nomos Verlagsgesellschaft, 1983) at 81.

paper's question. Notably for Canadian scholars, Belgium's dualist federation is closer to our own. In contrast with Germany, the acceptance of federal loyalty into the Belgian legal order appears to have faced challenges, just as the official adoption of federalism was faced with challenges. For considerations of length, the analysis of the Belgian case will be limited to three questions: first, its introduction in the 1993 constitution as a purely political principle **(i)**, second, the way in which judicial interpretation enlarged its scope by merging it with pre-existing legal principles and ending with its formal acceptance as a justiciable norm in 2012 **(ii)**. Of course, none of this can be considered in isolation. Third, the specific Belgian context must be considered **(iii)**. The content of Belgian *loyauté fédérale* will not be discussed; it is the way in which the norm was introduced to the Belgian federation that is the object of this enquiry.

i. Federal loyalty introduced as a purely political provision

[45] Federal loyalty was introduced to the Belgian constitution with the reform of 1993, which also formally adopted a federal form of government. It was proposed by then-senator Étienne Cerexhe.⁵¹ Notably, his original proposal was for a federal loyalty principle more similar to German *Bundestreue*. The Constituent eventually adopted Article 143 of the Belgian Constitution, which foresaw a non-justiciable principle intended to avoid conflicts of interest.⁵² Prior to the formal adoption of federal loyalty, its existence in the Belgian legal order was fiercely debated.⁵³

[46] Under Article 143, conflicts between federal partners were to be settled politically not judicially. Article 143 was expressly left outside of the competence of the Cour d'arbitrage.

⁵¹ See Jean-Claude Scholsem, "De la *Bundestreue* à la loyauté fédérale: Fidélité ou inconstance?" in Joe Verhoeven, ed, *La Loyauté: mélanges offerts à Etienne Cerexhe* (Brussels: Larcier, 1997) at para 4; see also Anne-Catherine Rasson, "Le principe du «vivre ensemble» belge : une épopée constitutionnelle" (2012) CPDK 25 at para 51.

⁵² *La Constitution belge*, art 143; see also Francis Delpérée, *Le Droit constitutionnel de la Belgique* (Brussels: Bruylant, 2000) at para 761 ff.

⁵³ See Rasson, *supra* note 51 at para 47.

Instead of judicial adjudication, Belgian law foresaw a web of committees of concertation and negotiation procedures to facilitate the political process envisaged under Article 143. Reactions to the provision were mixed. Delpérée stated, “[qu’il] ne peut que regretter les solutions institutionnelles qu’instaure [l’article 143] de la Constitution”.⁵⁴ Suetens said it brought nothing new, but admitted it had a certain psychological utility.⁵⁵ On the question of ‘conflicts of interest’ Uyttendale calls it “un des concepts les plus fous de notre système institutionnel”.⁵⁶

ii. Federal loyalty gains strength and is eventually rendered justiciable.

[47] Despite the Constituent’s wish to leave federal loyalty outside of the courts, by 2010, Article 143 led to the invalidation of a legal norm.⁵⁷ Rasson suggests that this resulted from the melding together of pre-existing Belgian legal principles with the new norm of federal loyalty. Specifically, judicial application of principles of proportionality, reasonability and “vivre ensemble” were informed by the existence of the federal loyalty principle.⁵⁸ For his part, Cerexhe foresaw this eventuality. He doubted whether changing the language of Article 143 from applying to “conflicts of competences” to “conflicts of interest” would amount to any difference: “Le conflit d’intérêts ne résulte-t-il pas de l’exercice d’un droit ou d’une compétence en contradiction avec certains principes généraux de notre ordre juridique: la bonne foi, l’équité, le principe de proportionnalité?”⁵⁹

[48] In 2012, the *6e Réforme de l’État* amended Belgian law to make federal loyalty a formally justiciable norm within the competence of the Cour constitutionnelle.⁶⁰ The authors of

⁵⁴ See Scholsem, *supra* note 51 at 343.

⁵⁵ *Ibid.*

⁵⁶ *Ibid* at 344.

⁵⁷ See Cour constitutionnelle de la Belgique, n° 95/2010 and n° 124/2010; see also Rasson, *supra* note 51 at para 88 *ff.*

⁵⁸ See Rasson, *supra* note 51 at paras 69 – 71.

⁵⁹ See Scholsem, *supra* note 51 at 340.

⁶⁰ Belgium, *6e Réforme de l’État* at para 1.7.

the reform noted: “La présente réforme de l’Etat renforce également le besoin de coordination entre l’Etat fédéral et les entités fédérées.”⁶¹

iii. *Fragile Belgian lace: holding together*

[49] The Belgian example shows how even a non-justiciable constitutional norm can effectively perform a psychological function on State actors. It is beyond the scope of this paper to seek out more on this question, but it must be asked whether there are features in the Canadian Constitution that serve an equivalent ‘psychological function.’ Specifically, do recognised constitutional conventions fulfill a psychological function? Perhaps (see Part IV, *infra*).

[50] The motivating factor for introducing a principle of loyalty in Belgium was linked to the fragility of the Belgian state. Specifically, Cerexhe spoke of limiting the centrifugal forces of Belgian federalism. Therefore, Belgian *loyauté fédérale* is inherently linked to the survival of the federation. The words of the author of the *6e Réforme*, who evokes a ‘need’ for coordination between the federal and federated orders, echoes this sentiment.

[51] Unlike in Germany, Belgian federal loyalty’s advent is the result of political will. Canadian scholars will remember that even ample political will may fail to achieve constitutional change. To fully understand what lessons could be drawn from Belgium, a few factors must, however. First, Belgian federalism is intensely linked to identity: one is French-speaking or Dutch-speaking. In fact, it was in the form of language laws that Belgian federalism first began to appear.⁶² Second, Belgian constitutionalism is subject frequent review, always subject to inter-community

⁶¹ *Ibid.*, [Emphasis added].

⁶² See Marc Uyttendaele, *Précis de droit constitutionnel belge : regards sur un système institutionnel paradoxal*, 3rd ed, (Brussels: Bruylant, 2005), at para 709.

conflict. Third and finally, like Germany, Belgian private law features a provision of good faith that may have percolated through to its constitutional law.⁶³

IV CANADIAN FEDERAL LOYALTY: ROOM TO GROW?

[52] What then, of Canada? In the space remaining, I humbly offer an overview of the current and potential position of federal loyalty in Canadian constitutional law. Further study is undoubtedly required. While I hope this brief overview answers some questions, I hope that it elicits further questions and debate.

[53] I argue federal loyalty has been established in Canadian constitutional law by *Reference re Secession of Quebec*, and that it is time to call a spade, a spade (i). Moreover, the constitutional principle of federalism as described in *Secession Reference* planted seeds for further development of the federal loyalty principle. However, for the near future, further judicial development is improbable in light of recent Supreme Court decisions (ii). Nonetheless, I suggest that another reality should be recognised: a constitutional convention of federal loyalty (iii).

i. Calling a spade, a spade: Reference re Secession of Quebec and federal loyalty

[54] In *Secession Reference*, the Supreme Court found that if ever a clear majority of Quebecers expressed the desire to secede from the Canadian federation, all orders of government must participate in a negotiation process informed by the principles of federalism, democracy, constitutionalism and the rule of law, and the protection of minorities.⁶⁴ The Court stated, “The rights of other provinces and the federal government cannot deny the right of the government of Quebec to pursue secession, should a clear majority of the people of Quebec choose that goal, so

⁶³ See Rasson, *supra* note 51 at para 57.

⁶⁴ *Secession Reference*, *supra* note 5 at paras 88 – 101.

long as in doing so, Quebec respects the rights of others [...] parties cannot exercise their rights in such a way as to amount to an absolute denial of Quebec's rights".⁶⁵

[55] I argue that this is federal loyalty, and that it should be described as such.⁶⁶ The negotiation obligations described in *Secession Reference* fulfill Gamper's definition that federal loyalty means an obligation of mutual respect. In other words, there is a minimum level of consideration that orders of government owe to one another in the context of secession. Comparing this decision with the German decisions in *Housing Reference* and *First Broadcasting*, it appears the Supreme Court agrees that such negotiations cannot be ended arbitrarily, nor could any order of government attempt to divide and conquer their federal partners. This constraint on government actions for the benefit of federal partners is – without qualification – an expression of federal loyalty. The Court's words are clear; *in extremis*, federal loyalty forms a part of Canadian constitutional law. While the Court admits it would not oversee the negotiation process, it is certain that the decision in the *Secession Reference* has exerted a significant psychological effect on constitutional actors. This non-judicial aspect of federal loyalty should not be overlooked.

[56] What then of situations falling short of secession? If we accept that the *Secession Reference* has imposed duties of federal loyalty, then a question asked by Gaudreault-DesBiens begs to be raised again:

if federal actors negotiating the secession of one of them from the federation are under a constitutional duty to negotiate in good faith the terms of that secession – even if it is a procedural obligation of means and not of results, is it not arguable that federal actors dealing with each other in the “ordinary life” of the federation are under a similar duty to act in good faith and to take into consideration the rights and interests of each other?⁶⁷

⁶⁵ *Ibid* at paras 92 – 93.

⁶⁶ See also Gaudreault-DesBiens, *supra* note 14 at 9, who agrees that *Secession Reference* can be interpreted as implicitly bringing loyalty principles to Canadian law.

⁶⁷ *Ibid* at 10.

[57] The Court’s discussion on the principles of democracy and federalism in *Secession Reference* provide a basis to answer this question: “No one majority is more or less “legitimate” than the others as an expression of democratic opinion”.⁶⁸ This language resembles language in the German *Housing Funding* case: “among [the Länder] is not the rule [...] that the majority decides”.⁶⁹ Does this mean that in contemplating “secession” from the Firearms Registry, the federal order ought to have been entered into good faith negotiations with the provinces? Would this respect the complexities of federal democracy? The Supreme Court has left traces of federal loyalty throughout the *Secession Reference*. Will such seeds ever blossom into federal loyalty?

ii. Further development as a constitutional principle improbable in near future

[58] Following two decisions by the Supreme Court in 2018, it seems unlikely that the Court will develop federal loyalty beyond its restricted application in *Secession Reference*. In *Mikisew* and *Pan-Canadian Securities*, the strength of parliamentary sovereignty was revitalised.⁷⁰ Notably, *Pan-Canadian Securities* reiterates the ability for orders of government to unilaterally legislate their exit from a cooperative regime.

[59] In light of this recent restatement of the doctrine of parliamentary sovereignty, it is unlikely that courts will warm to expanding federal loyalty in the near future. While other factors in Canadian law, both public and private, bear resemblances to the Belgian and German cases, (e.g. fiduciary duties and good faith) parliamentary sovereignty has a unique potency in the Canadian legal order. Its recent reinforcement only strengthens its already over-powered position.

⁶⁸ *Secession Reference*, *supra* note 5 at para 66.

⁶⁹ *Housing Funding*, *supra* note 25 at para 60.

⁷⁰ See *Mikisew Cree First Nation v Canada (Governor General in Council)*, 2018 SCC 40; see also *Pan-Canadian Securities*, *supra* note 3

iii. Possibility of recognising reality: a constitutional convention?

[60] Does the Belgian experience with federal loyalty carry an important clue for its Canadian proponents? In Belgium, federal loyalty was formally entrenched into the 1993 constitution as a non-justiciable norm. Prior to this, its existence was debated. The fledgling principle infused the understanding of recognised principles of Belgian law. In a sense, it served a particular psychological utility.⁷¹ In 2012, the purely political principle was formally recognised as justiciable.

[61] I argue that a similar seed can be planted in the soil of Canadian federalism that is not incompatible with its current complexion: federal loyalty as a constitutional convention. A constitution convention can arise where political actors engage in an activity because they feel bound to do so.⁷² Is consultation between federal partners a reality that is truly a constitutional convention? An anecdote shared by Hogg is illustrative: “It has been said only half in jest that there are usually more provincial cabinet ministers in Ottawa on any given day than there are federal cabinet ministers.”⁷³ On a more serious note, Poirier asserts that despite certain paradoxes, Canadian cooperative federalism is by and large effective and functioning.⁷⁴ This must be because of the will of political actors.

[62] It may be possible to examine the history of intergovernmental relations in Canada to determine that by and large, political actors felt bound to respect certain principles of federal loyalty. For example, additional research could examine representations made by political actors in the context of large cooperative schemes. This analysis could determine whether political actors feel bound to respect obligations to consult, and to take into consideration the impact of their

⁷¹ See Scholsem, *supra* note 51 at 343.

⁷² See *Reference re Resolution to amend the Constitution*, [1981] 1 SCR 753, [1981] SCJ No 58; see also Hogg, *supra* note 6 at 1-22.1 *ff.*

⁷³ Hogg, *supra* note 6 at 5-47.

⁷⁴ See generally Poirier, *supra* note 4.

actions on federal partners. The few times when such a hypothetical convention has been breached should not prevent its recognition.⁷⁵ Recognising a new constitutional convention would not unduly upset the current constitutional balance of Canadian cooperative federalism. Constitutional conventions only recognise a state of reality that serve as the normative basis for the life of our Constitution. Whether such recognition will thereafter lead to constitutional changes like those observed in Belgium is, however, another question.

CONCLUSION

[63] The Canadian federation has, despite the text of its Constitution, evolved remarkable since its inception. Political and judicial actors, as well as the public, have engaged with difficult challenges to find reasoned ways through times of uncertainty. *Secession Reference* is the apotheosis of that effort. It recognises not only that principles of democracy and constitutionalism underpin our federation, but also that federal loyalty must govern any situation where that federal might dissolve – in whole or in part.

[64] In the spirit of the creative and reasoned thinkers that have preceded me, I have offered in these few pages an analysis of federal loyalty as it exists in two of the world's federations, and how lessons learned from those federations could shape the development of the Canadian federation. I argue federal loyalty already is an integral part of Canadian federalism. Moving forward, it should be a topic of debate of both sides of any so-called solitudes. Such a debate is necessary, as federal loyalty may already be a constitutional convention ready for recognition.

[65] Finally, I do this debate not to pursue a partisan agenda, but only in the hope of suffusing Canadian constitutional life with a spirit best described by Scholsem:

⁷⁵ See *Reference re Resolution to amend the Constitution*, *supra* note 72.

Loyauté : le mot lui-même est superbe, droit comme une épée, il brille encore dans nos esprits de l'éclat de la chevalerie. La loyauté, c'est tout à la fois franchise, ouverture et fidélité, noblesse et droiture, goût du juste et du vrai. Elle peut aussi être choc et combat, mais toujours à visage découvert et en pleine lumière. Méprisant les ruses et les coups bas, elle refuserait la victoire elle-même si celle-ci devait être acquise au prix des manœuvres et de mensonges. Ainsi, que ce soit dans l'amitié ou dans l'affrontement, la loyauté est gage de la parole donnée et sens de l'honneur.⁷⁶

[7987 words, including footnotes, excluding bibliography]

⁷⁶ Scholsem, *supra* note 51 at 335

BIBLIOGRAPHY

LEGISLATION: CANADA

Constitution Act, 1867 (UK), 30 & 31 Vict, c 3, s 91, reprinted in RSC 1985, Appendix II, No 5.

LEGISLATION: FOREIGN

Bundes-Verfassungsgesetz (Austria)

La Constitution belge (Belgium)

Grundgesetz für die Bundesrepublik Deutschland (Germany)

JURISPRUDENCE: CANADA

Canadian Western Bank v Alberta, 2007 SCC 22, [2007] 2 SCR 3

Ontario Hydro v Ontario (Labour Relations Board), [1993] 3 SCR 327

Ontario Public Service Employees' Union v Ontario (Attorney General), [1987] 2 SCR 2, [1987] SCJ No 48

Québec (Attorney General) v Canada (Attorney General), 2015 SCC 14, [2015] 1 SCR 693

R v Comeau, 2018 SCC 15, [2018] SCJ No 15

Reference re Manitoba Language Rights, [1985] 1 SCR 721, [1985] SCJ No 36

Reference re Objection by Quebec to a Resolution to amend the Constitution, [1982] 2 SCR 793, [1982] SCJ No 101

Reference re Remuneration of Judges, [1997] 3 SCR 3, [1997] SCJ No 75

Reference re Resolution to amend the Constitution, [1981] 1 SCR 753, [1981] SCJ No 58

Reference re Secession of Quebec, [1998] 2 SCR 217, [1998] SCJ No 61

Reference re Securities Act, [2011] 3 SCR 837, [2011] SCJ No 66

Reference re Senate Reform, 2014 SCC 32, [2014] 1 SCR 704

Reference re Weekly Rest in Industrial Undertakings Act, [1936] SCR 461, [1936] SCJ No 31

Rogers Communications Inc v Châteauguay (City), 2016 SCC 23, [2016] SCJ No 3

Valin v Langlois, 3 SCR 1, [1879] SCJ No 2

JURISPRUDENCE: AUSTRIA

Verfassungsgerichtshof, Vienna, VfSlg 8831/1980

Verfassungsgerichtshof, Vienna, VfSlg 10292/1984

Verfassungsgerichtshof, Vienna, VfSlg 15552/1999

Verfassungsgerichtshof, Vienna, VfSlg 14534/1996

JURISPRUDENCE: BELGIUM

Cour constitutionnelle, Brussels (1994), 49/1995

Cour constitutionnelle, Brussels (1992), 42/1997

JURISPRUDENCE: GERMANY

Bundesverfassungsgericht, Karlsruhe, B1 BVerfGE 299

Bundesverfassungsgericht, Karlsruhe, 6 BVerfGE 309

Bundesverfassungsgericht, Karlsruhe, 8 BVerfGE 122

Bundesverfassungsgericht, Karlsruhe, 61 BVerfGE 149

Bundesverfassungsgericht, Karlsruhe, 72 BVerfGE 330

Bundesverfassungsgericht, Karlsruhe, 81 BVerfGE 310

SECONDARY MATERIAL: MONOGRAPHS

Blackstone, William, *Commentaries on the Laws of England*, (London: Cavendish Publishing, 2001)

Currie, David P. *The Constitution of the Federal Republic of Germany* (Chicago: University of Chicago Press: 1994)

Dicey, Albert Venn, *Introduction to the study of the law of the constitution* (Indianapolis: Liberty/Classics, 1982)

Keating, Michael and Guy Laforest, *Constitutional politics and the territorial question in Canada and the United Kingdom : federalism and devolution compared*

Hogg, Peter W, *Constitutional Law of Canada*, 5th ed, (Scarborough: Thomson Carswell, 2007)

Palermo, Francesco & Karl Kössler, *Comparative Federalism: Constitutional Arrangements and Case Law* (Oxford and Portland: Hart Publishing, 2017)

Smith, Paul, ed, *Bagehot: the English Constitution* (Cambridge: Cambridge University Press, 2001)

SECONDARY MATERIAL: ARTICLES

- Gamper, Anna, "On Loyalty and the (Federal) Constitution" (2010) *Vienna Online J. on Int'l Const. L.* 157
- Gaudreault-Desbiens, Jean-François & Johanne Poirier, "From Dualism to Cooperative Federalism and Back" in Peter C Oliver, Patrick Macklem, & Rosiers N. Des, eds, *The Oxford Handbook of the Canadian Constitution* (Oxford: Oxford University Press, 2017)
- Happaerts, Sander, Simon Schunz & Hans Bruyninckx, "Federalism and Intergovernmental Relations: The Multi-Level Politics of Climate Change Policy" in *Belgium, Journal of Contemporary European Studies*, 20:4, 441-45
- Leclair, Jean, "Canada's Unfathomable Unwritten Constitutional Principles: (2002) 27 *Queen's LJ* 389
- McLachlin, Beverly, "Unwritten Constitutional Principles: What is going on?" (2006) 4 *NZJPIL* 147
- Newman, Warren J, "The Principles of the Rule of Law and Parliamentary Sovereignty in Constitutional Theory and Litigation" (2005) 16:2 *NJCL* 175
- Poirier, Johanne, "Le partage des compétences et les relations intergouvernementales: la situation au Canada" in Bernard Fournier & Min Reuchamps, eds, *Le fédéralisme en Belgique et au Canada : Un dialogue comparative* (Brussels: de Boeck, 2009), 103-118
- , "Souveraineté parlementaire et armes à feu : le fédéralisme coopératif dans la ligne de mire" (2015) 45: *RDUS* 47
- , "The Belgian Federation: Tools of Appeasement, Instruments of Confrontation" in Rehka Saxena, ed, *Varieties of Federal Governance – Major Contemporary Models* (Cambridge: Cambridge University Press, 2011), 344-477
- Rasson, Anne-Catherine, "Le principe du « vivre ensemble » belge : une épopée constitutionnelle" (2012) 1 *CPDK* 25
- Smend, Rudolf, "Ungeschiebenes Verfassungsrecht im monarchischen Bundesstaat" in *Festgabe für Otto Mayer zum siebzigsten Geburtstag* (Darmstadt: Scientia Verlag, 1976)

