

10-1-2018

Reassessing the Constitutional Foundation of Delegated Legislation in Canada

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Recommended Citation

Lorne Neudorf, "Reassessing the Constitutional Foundation of Delegated Legislation in Canada" (2018) 41:2 Dal LJ 519.

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This article assesses the constitutional foundation by which Parliament lends its lawmaking powers to the executive, which rests upon a century-old precedent established by the Supreme Court of Canada in a constitutional challenge to wartime legislation. While the case law demonstrates that courts have continued to follow this early precedent to allow the parliamentary delegation of sweeping lawmaking powers to the executive, it is time for courts to reassess the constitutionality of delegation in light of Canada's status as a liberal democracy embedded within a system of constitutional supremacy. Under the Constitution of Canada, Parliament is placed firmly at the centre of public policymaking by being vested with exclusive legislative authority in certain subject matters. Parliament must therefore play the principal federal lawmaking role. The Supreme Court's 1918 judgment should no longer be followed to the extent that it allows courts to accept near unlimited delegation of Parliament's lawmaking powers to the executive. Instead, and to that extent, the judgment should be seen as an historical anachronism, a holding that was suitable for a young country in the context of the First World War but now out of step with the constitutional role of Parliament as seen through the contemporary approach to constitutional interpretation. Courts and Parliament must take delegation more seriously, and constitutional safeguards should be established to better protect the role of Parliament as lawmaker in chief and restore the proper constitutional balance. Achieving this goal would be a major advance toward the democratic, representative and accountable federal lawmaking process contemplated by the Constitution. It is possible through reforms to strengthen the judicial scrutiny of the vires of regulations and creating effective parliamentary mechanisms to scrutinize and supervise the exercise of delegated lawmaking powers.

Cet article évalue les fondements constitutionnels qui permettent au Parlement de confier son pouvoir législatif à l'exécutif, lesquels reposent sur un précédent remontant à un siècle établi par la Cour suprême du Canada dans le cadre d'une contestation constitutionnelle de lois qui prévalaient en temps de guerre. Bien que la jurisprudence démontre que les tribunaux ont continué de suivre ce précédent pour permettre la délégation parlementaire de pouvoirs législatifs considérables à l'exécutif, il est temps pour les tribunaux de réévaluer la constitutionnalité de la délégation à la lumière du fait que le Canada a le statut de démocratie libérale fondé sur la suprématie de la Constitution. En vertu de la Constitution du Canada, le Parlement est fermement placé au centre de l'élaboration des politiques publiques en étant investi d'un pouvoir législatif exclusif dans certains domaines. Le Parlement doit donc jouer le rôle principal de législateur fédéral. L'arrêt de 1918 de la Cour suprême ne devrait plus être suivi dans la mesure où il permet aux tribunaux d'accepter une délégation quasi illimitée des pouvoirs législatifs du Parlement à l'exécutif. Au lieu de cela, et dans cette mesure, le jugement devrait être considéré comme un anachronisme historique, une position qui convenait à un jeune pays dans le contexte de la Première Guerre mondiale, mais qui n'est plus en phase avec le rôle constitutionnel du Parlement, comme le montre l'approche contemporaine de l'interprétation constitutionnelle. Les tribunaux et le Parlement doivent prendre la délégation plus au sérieux, et des garanties constitutionnelles devraient être établies pour mieux protéger le rôle du Parlement en tant que législateur en chef et rétablir l'équilibre constitutionnel approprié. La réalisation de cet objectif constituerait une avancée majeure vers la réalisation du processus législatif fédéral démocratique, représentatif et responsable prévu par la Constitution. Il est possible, grâce à des réformes, de renforcer le contrôle judiciaire de la légalité de la réglementation et de créer des mécanismes parlementaires efficaces pour contrôler et superviser l'exercice des pouvoirs législatifs délégués.

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Introduction

The year 2017 marked 150 years since the time of Canadian Confederation and the coming into force of the *British North America Act, 1867*,¹ the country's founding document. Since that time, Canada's institutions have changed by adapting to new economic, political and social realities. One important trend has been the growth of delegated legislation in the lawmaking landscape, driven by the increased complexity of modern life and its seemingly insatiable need for detailed regulations.² In

1. 30 & 31 Vict, c 3 (UK) [*Constitution Act, 1867*].

2. This trend has been taking place over a long period of time: see John Willis, ed, *Canadian Boards at Work* (Toronto: Macmillan, 1941). In the UK, delegated legislation "is the standard form of law-

contemporary Canada, nearly all bills introduced in Parliament include provisions delegating lawmaking powers to the executive, typically to the federal cabinet and individual ministers.³ Such bills authorize the executive to make laws behind closed doors, outside of the ordinary public parliamentary process. By way of an example, section 27(1) of the *Transportation of Dangerous Goods Act, 1992*⁴ provides in part:

The Governor in Council may make regulations generally for carrying out the purposes and provisions of this Act...

Sections 27(1) and 27.1(1) of the *Act* list 39 areas in which Parliament has delegated specific lawmaking authority to the federal cabinet.⁵ Using these powers, the cabinet has made (among others) the *Transport of Dangerous Good Regulations*,⁶ which consists of thousands of provisions that comprise 481 pages of statutory text—more than 10 times the size of the parent *Act*. This is not an isolated example. By volume, delegated legislation is made at a rate of nearly 5-to-1 as compared to primary legislation.⁷ The extensive use of executive lawmaking is part of a broader trend to shift lawmaking power away from Parliament and into the hands of the executive. Notably, the *Transportation of Dangerous Goods Act, 1992* refers to regulations 67 further times for a variety of purposes, including to allow regulations to override all or part of the *Act*. For instance, section 3(3) provides that the “Act does not apply to the extent that its application is excluded by a regulation.”⁸ In other words, not only are broad lawmaking powers given by Parliament to the executive, these executive-made laws are permitted in some cases to override or even amend their enabling legislation. In other cases, “skeleton laws” are enacted by Parliament to delegate sweeping powers to the executive with little statutory direction.⁹

making” and regulations create legal rules relating to the “fundamental areas of national life”: Adam Tucker, “Parliamentary Scrutiny of Delegated Legislation” in Alexander Horne & Gavin Drewry, eds, *Parliament and the Law*, 2nd ed (Oxford: Hart Publishing, 2018) 347 at 350, 356.

3. In the UK, “[n]early all new Acts of Parliament delegate some degree of legislative power to the executive”: Tucker, *ibid* at 356.

4. SC 1992, c 34 [TDGA].

5. *Ibid*, ss 27(1)(a)-27(1)(v), 27.1(1)(a)-27.1(1)(k).

6. SOR/2017-253.

7. See Lorne Neudorf, “The Supreme Court and Parliament: Evolving Roles and Relationships” (2017) 78 Supreme Court Law Review 3 at 6.

8. TDGA, *supra* note 4, s 3(3). This section refers to regulations made in relation to importing, offering for transport, handing, or transporting of dangerous goods: TDGA, *supra* note 4, s 27(1)(e).

9. Lorne Neudorf, “Regulations Gone Wild,” *National Post* (28 January 2016) FP11. Elmer Driedger noted that when delegation provisions confer lawmaking discretion for a general purpose, “the regulation-making authority has a free hand to establish, not only the details, but also the main principles. The entire law is therefore to be left to the decision of subordinates”: Elmer A Driedger,

In looking at delegated legislation in 1953, JR Mallory wrote that “[i]t remains to be seen how far Parliament, the public, and political parties can adjust themselves to the challenge of the administrative state.”¹⁰ Since that time, the complexity and challenges of governance have amplified, leading to a reliance on regulations that Roderick Macdonald once described as an “apparent addiction.”¹¹ Adam Tucker has observed that the prevalence of delegated legislation in the modern state means that it is the “central form of legislation in the contemporary constitution.”¹² While there are important benefits to Parliament delegating some of its lawmaking powers to others, such as allowing detailed rules to be made quickly in response to new circumstances and saving Parliament’s time and resources for key policy debates,¹³ there are real concerns about the quality, transparency and accountability of a lawmaking process that is carried out mostly behind closed doors. Despite the fact that the regulation-making process includes a limited period of public consultation,¹⁴ cabinet deliberations are legally privileged as cabinet confidences.¹⁵ Cloaked in secrecy, the executive lawmaking process allows lawmakers to ignore comments received on draft regulations instead of giving them at least the appearance of due consideration in a public arena. In the realm of executive lawmaking, there is no public debate, and no formal way of introducing amendments to proposed laws like in Parliament. To make matters worse, the media pays virtually no attention to the enactment of new delegated legislation, which is simply promulgated as a *fait accompli* through its publication in Part II of the *Canada Gazette*.¹⁶ Such an environment creates the risk that important public policy choices could be made covertly through delegated legislation, allowing the government to avoid scrutiny and political accountability, a key aspect of the principle of legality.¹⁷

“Subordinate Legislation” (1960) 38:1 Can Bar Rev 1 at 29. See also Tucker, *supra* note 2 at 357.

10. JR Mallory, “Delegated Legislation in Canada: Recent Changes in Machinery” (1953) 19:4 Can J Economics & Political Science 462 at 471.

11. Roderick A Macdonald, “Understanding Regulation by Regulations” in Ivan Bernier & Andr  e Lajoie, eds, *Regulations, Crown Corporations and Administrative Tribunals* (Toronto: University of Toronto Press, 1985) 81 at 81.

12. Tucker, *supra* note 2 at 357.

13. Cecil T Carr observed in 1921 that “Parliament simply has not time” to make all laws directly: Cecil T Carr, *Delegated Legislation: Three Lectures* (Cambridge: Cambridge University Press, 1921) at 19. See also Macdonald, *supra* note 11 at 92.

14. Pursuant to a cabinet directive discussed in Part IV.4.a below.

15. *Canada Evidence Act*, RSC 1985, c C-5, s 39.

16. These requirements are discussed in Part IV.4.a below.

17. For a similar trend in the UK see Tucker, *supra* note 2 at 348 observing that the UK’s *European Union (Withdrawal) Bill* delegates lawmaking power to the executive that “will involve the exercise of extensive judgment by the Government.”

This article assesses the constitutional foundation by which Parliament¹⁸ lends its lawmaking powers to the executive, which rests upon a century-old precedent established by the Supreme Court of Canada in a constitutional challenge to wartime legislation. While the case law demonstrates that courts have continued to follow this early precedent to allow the parliamentary delegation of sweeping lawmaking powers to the executive, it is time for courts to reassess the constitutionality of delegation in light of Canada's status as a liberal democracy embedded within a system of constitutional supremacy. Under the Constitution of Canada, Parliament is placed firmly at the centre of public policymaking by being vested with exclusive legislative authority in certain subject matters. Parliament must therefore play the principal federal lawmaking role. The Supreme Court's 1918 judgment should no longer be followed to the extent that it allows courts to accept near unlimited delegation of Parliament's lawmaking powers to the executive. Instead, and to that extent, the judgment should be seen as an historical anachronism, a holding that was suitable for a young country in the context of the First World War but now out of step with the constitutional role of Parliament as seen through the contemporary approach to constitutional interpretation. Courts and Parliament must take delegation more seriously, and constitutional safeguards should be established to better protect the role of Parliament as lawmaker in chief¹⁹ and restore the proper constitutional balance. Achieving this goal would be a major advance toward the democratic, representative and accountable federal lawmaking process contemplated by the Constitution. It is possible through reforms to strengthen the judicial scrutiny of the *vires* of regulations and creating effective parliamentary mechanisms to scrutinize and supervise the exercise of delegated lawmaking powers.

18. This article focuses on the federal lawmaking process, although the application of constitutional and legal principles discussed may also apply to provincial legislatures. Section 92 of the *Constitution Act, 1867*, *supra* note 1 provides exclusive legislative authority in certain matters to "the Legislature" of each province. A constitutional assessment of delegated legislation in a province would also need to take into account applicable provincial constitutional norms in each case, which is beyond the scope of this paper. It is notable that provincial legislatures, like their federal counterpart, delegate considerable powers to the executive which carries the risk of misuse. For example, see the report of the Ombudsman of Ontario in relation to a regulation enacted by the Ontario cabinet that provided police with sweeping powers of investigation and detention in relation to the 2010 G20 summit in Toronto: Ombudsman of Ontario, *Caught in the Act*, by André Marin (Toronto: 7 December 2010), online (pdf): <ombudsman.on.ca/Files/sitemedia/Documents/Investigations/SORT%20Investigations/G20final-EN-web_1.pdf> [perma.cc/C8RX-87RT] ["G20 Report"]. Some of the proposed reforms in this article, while geared toward the federal lawmaking process, would also benefit the provincial lawmaking processes, such as strengthening the *vires* review of regulations.

19. Parliament has been referred to as the "grand inquest of the nation": see, e.g., *Stockdale v Hansard* (1839), 112 ER 1112 (QB) at 1123; *Howard v Gossett* (1845), 10 QB 411 (UK) at 414.

Part I of this article considers the location of sovereignty in Canada from the time of Confederation in 1867 to the *Charter of Rights and Freedoms*²⁰ in 1982. It finds that sovereignty resides in the Constitution as a series of foundational, legally binding rules and principles as opposed to Parliament as a sovereign institution in the Diceyan sense. The implication is that the Constitution places enforceable limits on Parliament's capacity to legislate, including the delegation of its lawmaking powers to others. Part II sets out and provides a critical analysis of the case law relating to the constitutional authority by which Parliament delegates its lawmaking powers. While it identifies precedent that supports the constitutional validity of delegation, it also notes that the case law contemplates enforceable constitutional limits to delegation. Part III sets out the contemporary living tree approach to constitutional interpretation and then critiques the Supreme Court's century-old precedent on delegation from this perspective, demonstrating the narrow and technical reading of the constitutional text adopted by the majority in that case, which has stunted judicial conceptions of the constitutional role of Parliament. In addition to its outmoded approach to interpreting the Constitution, a number of reasons are suggested for why this precedent should be reconsidered. Part IV charts a new way forward by taking a fresh constitutional look at the question of Parliament delegating its lawmaking powers to the executive. It is apparent from a purposive approach to the Constitution that Parliament is a key part of the constitutional architecture as a democratic, representative and accountable central lawmaker. The Constitution demands that both the courts and Parliament take the delegation of Parliament's lawmaking powers to the executive more seriously. Part IV then identifies shortcomings in the current approaches to the judicial review of the *vires* of regulations and the parliamentary scrutiny of regulations. Several reforms are proposed to strengthen these processes and safeguard Parliament's constitutional role. Finally, there is a brief conclusion.

I. *Locating sovereignty in Canada*

1. *Introduction*

The question of locating sovereignty in Canada is key to the question of the constitutional authority of Parliament to delegate its lawmaking powers to the executive. On the one hand, if Canada has a legal system based principally on an inheritance of parliamentary sovereignty from the United Kingdom, Parliament is likely to have few or no enforceable limits

20. *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [Charter].

on its capacity to delegate its lawmaking powers.²¹ On the other hand, if Canada has a legal system based principally on constitutional supremacy where hard limits are imposed on Parliament's legislative authority, and enforced by the courts, the question must be then asked of *what* the Constitution requires in relation to the delegation of lawmaking powers by Parliament to others (if anything). This Part considers conceptions of sovereignty in Canada from the time of Confederation to the advent of the *Charter*, concluding that while Parliament originally enjoyed considerable lawmaking latitude that was characterized as a form of limited or qualified sovereignty (although not meeting the strict definition of Diceyan sovereignty), it was always subject to some enforceable limits on its powers. Following the enactment of the *Charter*, however, it is clear that Parliament's legislative powers have been significantly circumscribed by the Constitution to the point where it is more accurate to describe Canadian sovereignty as residing in the Constitution as opposed to a single lawmaking institution.

2. *Defining parliamentary sovereignty*

In the first edition of his influential book, *Introduction to the Study of the Law of the Constitution*, published in 1885, AV Dicey described the sovereignty of the Westminster Parliament as "neither more nor less than this, namely, that Parliament thus defined has... the right to make or unmake any law whatever; and, further, that no person or body is recognised by the law of England as having a right to override or set aside the legislation of Parliament."²² Dicey maintained this formulation in each subsequent edition of the book, writing that its truth "has never been denied."²³ In the introduction to the eighth edition, published in 1931, Dicey reiterated that parliamentary sovereignty was the "dominant characteristic" of the English legal system.²⁴ This description of sovereignty represented the idea of total legislative freedom, with Parliament enjoying unfettered lawmaking latitude. Dicey wrote that as a foundational principle, parliamentary sovereignty could never coexist with limitations on Parliament's powers because any limit would be "a contradiction in terms" with sovereignty.²⁵ At the same time, however, Parliament could never be truly omnipotent. It

21. Notably an argument could still be made that delegation of sweeping lawmaking powers erodes the sovereignty of Parliament (especially in relation to Henry VIII clauses): see discussion in Tucker, *supra* note 2 at 358-360.

22. Albert Venn Dicey, *Introduction to the Study of the Law of the Constitution*, 8th ed (London: Macmillan, 1931) at 36.

23. *Ibid* at xviii-xix.

24. *Ibid* at xviii-xix, 39.

25. *Ibid* at 66.

was limited in a temporal dimension in the sense that today's Parliament could not control the future state of the law, which was always subject to amendment by a later Parliament.²⁶ Dicey put forward the argument that a *contemporary* Parliament is the true location of sovereignty, writing that there is "futility inherent in every attempt of one sovereign legislature to restrain the action of another equally sovereign body."²⁷ He did not, however, concede this temporal aspect of sovereignty as a real limitation. It instead operated as a support to ensure that total legislative power remained in the hands of each new Parliament.²⁸ Parliament, therefore, held total lawmaking discretion at any moment in time and would be capable of making any change to the law. For this Part, therefore, parliamentary sovereignty can be defined as complete and total lawmaking freedom from the perspective of a contemporary Parliament.

3. *A new constitutional era*

Pre-Confederation settlements in Canada established colonial legislatures that were modelled on British institutions, including the Westminster Parliament. These institutions, however, were always subject to certain limitations on their powers imposed by the Imperial Parliament.²⁹

On 1 July 1867, the *Constitution Act, 1867*³⁰ came into force and ushered in a new constitutional era. It founded a country from three colonial governments by establishing a national institutional framework, creating Canada's lawmaking institutions and vesting them with certain roles and functions. Importantly, sections 91 and 92 divided the total realm of lawmaking authority into two spheres—allocating legislative power in various subject matters to either the federal Parliament or to the legislatures of the provinces.³¹ Federalism was essential to the creation of Canada, a point recognized by the Supreme Court of Canada in its 1998 judgment in *Reference re Secession of Quebec*,³² which considered the legality of a unilateral secession from Canada by Quebec. In that case,

26. *Ibid* at 65. Parliament might also need to pass new legislation in the requisite "manner and form," which may have been established by a previous Parliament, although this can be amended.

27. *Ibid* at 63, 65.

28. Dicey provides several examples: *ibid* at 62-63. The English case law also supports this view: see, e.g., the discussion in *Ellen Street Estates Ltd v Minister of Health*, [1934] 1 KB 590 at 596-597 (per Scrutton and Maugham LJJ).

29. For an overview of pre-confederation legal developments see, e.g., Phillip Buckner, ed, *Canada and the British Empire* (Oxford: Oxford University Press, 2008).

30. *Constitution Act, 1867*, *supra* note 1.

31. *Ibid*, ss 91-92. Although it should be noted that the Constitution places additional limits on the powers of Parliament than what appears in ss 91-92. For example, s 96 constitutionally shields superior courts from parliamentary intrusions into their traditional judicial functions.

32. [1998] 2 SCR 217, 161 DLR (4th) 385.

the unanimous Supreme Court identified federalism as a foundational principle of the Constitution, observing that it provided a compromise for colonial delegations at constitutional conferences by being “the political mechanism by which diversity could be reconciled with unity.”³³ In limiting the powers of Canada’s lawmaking institutions, therefore, federalism rejected a single legislature that enjoyed total lawmaking freedom. Despite some belief that Canada inherited a system of parliamentary sovereignty from the preamble to the *Constitution Act, 1867*, which establishes Canada “with a Constitution similar in Principle to that of the United Kingdom,” it is clear that at its inception, the federal system meant that its national Parliament did not meet the Diceyan sense of parliamentary sovereignty.³⁴

Within the scope of their constitutional competences, however, both federal and provincial legislatures were free to enact any legislation that they wished. This broad lawmaking latitude is why early Privy Council jurisprudence spoke of the Canadian legislatures as holding “plenary and as ample” powers like the Imperial Parliament,³⁵ but within certain constitutional constraints. The critical question of demarcating these bounds was an evolving one that would be determined by judicial interpretations of the Constitution in individual cases that built up a body of constitutional jurisprudence over time. In deciding challenges to legislation under the *Constitution Act, 1867*, the Privy Council and Supreme Court of Canada began to illuminate the limitations of state institutions, including Parliament, and scrutinized statutes for constitutional compliance. Where statutes were seen by the courts as exceeding their constitutional authority, they were struck down as legally unenforceable, in clear contrast with Diceyan sovereignty that allows for the judicial recognition of constitutional principles but allows for Parliament to legislate against such norms if it does so expressly and clearly.³⁶ In addition to Canada’s departure from a strict conception of parliamentary sovereignty in 1867, the Imperial Parliament remained the supreme lawmaker for an array of

33. *Ibid* at paras 37, 43.

34. For a discussion of whether the parliaments of former British colonies could ever be made truly supreme by achieving their independence through an Act of the Westminster Parliament (which could, in theory, be rescinded), see Peter C Oliver, *The Constitution of Independence: The Development of Constitutional Theory in Australia, Canada, and New Zealand* (Oxford: Oxford University Press, 2005).

35. *Hodge v The Queen* (1883), 9 App Cas 117 at 132, [9] AC 13 (PC) [*Hodge*]. The Privy Council referred to s 92 of the *Constitution Act, 1867*, *supra* note 1 as a limitation to parliamentary sovereignty in Canada.

36. For an example of a statute being struck down as unconstitutional see *Re Board of Commerce Act 1919 and the Combines and Fair Prices Act 1919*, [1922] 1 AC 191, 60 DLR 513 (PC). The principle of legality in this sense is best articulated by Lord Hoffmann in *R v Secretary of State for the Home Department Ex p Simms* (1999), [2000] 2 AC 115 at 131 (HL (Eng)) [*Simms*].

colonies around the world including Canada. This legislative superiority continued for 64 years until the *Statute of Westminster 1931*³⁷ curtailed the role of Westminster in Canadian law.

Given enforceable constitutional limits to Parliament's powers, it is hardly surprising that Dicey himself concluded that the Parliament of Canada was an institution of a different quality than that at Westminster. In writing generally about federal states, Dicey observed that the division of lawmaking powers between spheres of governments created "non-sovereign legislatures." Specifically, in relation to Canada, Dicey wrote that its federal Parliament was "not in reality sovereign."³⁸ Dicey viewed the *Constitution Act, 1867* as having been more influenced by American constitutionalism than British institutions:

Turn for a moment to the Canadian Dominion. The preamble to the British North America Act, 1867, asserts with diplomatic inaccuracy that the Provinces of the present Dominion have expressed their desire to be united into one Dominion "with a constitution similar in principle to that of the United Kingdom." If preambles were intended to express anything like the whole truth, for the word "*Kingdom*" ought to have been substituted "*States*": since it is clear that the Constitution of the Dominion is in its essential features modelled on that of the Union. This is indeed denied, but in my judgment without adequate grounds, by competent Canadian critics...[N]o one can study the provisions of the British North America Act, 1867, without seeing that its authors had the American Constitution constantly before their eyes, and that if Canada were an independent country it would be a Confederacy governed under a Constitution very similar to that of the United States.³⁹

The enactment of the *Charter* as part of the *Constitution Act, 1982* expanded the limits of Parliament's power, narrowing its legislative freedom considerably. Parliament was no longer constrained only by subject-matter in a federal system—its laws would now be struck down and ruled unconstitutional by the courts when they infringed new broadly worded rights and freedoms and a series of new rules relating to institutions and governance. The *Constitution Act, 1982* made clear that all actions taken by the state (including statutes enacted by Parliament) which were inconsistent with any part of the Constitution would be legally invalid and of no force or effect to the extent of the inconsistency.⁴⁰ Following the enactment of the *Charter*, Canadian courts did not hesitate to strike down

37. 22 & 23 Geo 5, c 4 (UK).

38. Dicey, *supra* note 22 at 90, 117.

39. *Ibid* at 161-162.

40. *Constitution Act, 1982*, s 35, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11, s 52.

entire statutes and parts of statutes, applying a robust interpretation of the new constitutionally-entrenched guarantees.⁴¹ The *Charter* therefore placed significant new limits on state powers and cemented the location of Canadian sovereignty in the Constitution as opposed to a single lawmaking institution. After 1982, any lingering doubts about the location of Canadian sovereignty were resolved as it now clearly resided in the Constitution as the supreme law, which created and empowered all other lawmaking institutions.⁴²

II. *The constitutional authority for delegated legislation*

1. *Introduction*

Given that Canada is embedded within a system of constitutional supremacy, having a Constitution that imposes enforceable limits on Parliament's powers, the question that follows is: what, if anything, does the Constitution require in relation to the delegation of lawmaking powers by Parliament to others? While there is no express provision in the Constitution speaking directly to delegation, courts have heard and decided constitutional challenges to Parliament's capacity to delegate its lawmaking powers to the executive and have shed some light on the question through the jurisprudence. This Part begins by reviewing scholarly views on the constitutionality of delegation and then moves to a critical assessment of the relevant case law, which focuses on a key precedent established by the Supreme Court of Canada in 1918.

2. *Scholarly views*

The question of the constitutionality of Parliament delegating its lawmaking powers to others has received little scholarly attention, possibly because of what is seen as strong precedent upholding its constitutionality.⁴³ Aside from a brief discussion in Peter Hogg's leading constitutional law text,⁴⁴

41. The first Supreme Court of Canada case striking down an entire statute under the *Charter* was *R v Big M Drug Mart Ltd*, [1985] 1 SCR 295, 18 DLR (4th) 321.

42. *Constitution Act, 1982*, *supra* note 40, s 52(1). It should be noted that the Constitution of Canada can be amended through six prescribed processes set out in the *Charter*: see ss 38, 41, 43-47 of the *Constitution Act, 1982*, *supra* note 40.

43. In 1975, Gerard V La Forest declared that the delegation of legislative power was no longer a "live subject" because of "greater flexibility in constitutional interpretation": Gerard V La Forest, "Delegation of Legislative Power in Canada" (1975) 21:1 McGill LJ 131 at 131 (focusing on delegation between federal and provincial legislatures). An insightful overview of the academic study of delegated legislation in the past century can be found in Michael Taggart, "From 'Parliamentary Powers' to Privatization: The Chequered History of Delegated Legislation in the Twentieth Century" (2005) 55:1 UTLJ 575.

44. Peter W Hogg, *Constitutional Law of Canada*, 5th ed (Toronto: Carswell, 2007) (loose-leaf updated 2018, release 1), vol 1 at 14.1-14.3. Hogg concludes that sweeping delegations are valid on the basis of *Shannon v Lower Mainland Dairy Products Board*, [1938] AC 708, [1938] 4 DLR 81

a note in Ruth Sullivan's text on statutory interpretation,⁴⁵ and a section in John Keyes' book on executive legislation,⁴⁶ there is only one article exploring the question in-depth written by John Willis that appeared in a 1939 issue of the *Harvard Law Review*⁴⁷ and a masters' dissertation written in 1996 by Diane McMurray, a student at the University of Ottawa.⁴⁸ Willis accepted the constitutional validity of Parliament delegating its lawmaking powers to the executive where the authority was limited to creating ancillary legislation to complement a statutory scheme. He opposed Parliament enacting "skeleton legislation" that would empower the executive to "clothe the bare bones" of a statute.⁴⁹ Nevertheless, Willis did not advocate a change to constitutional precedent on the question of delegation. McMurray's dissertation goes further in considering a new approach to the constitutionality of delegation. Throughout her paper, she builds a case against Parliament delegating its lawmaking powers to the executive. Her analysis focuses on the mistaken application of Westminster sovereignty to Canada, which has resulted in courts permitting legislatures to do as they see fit with delegation. In McMurray's view, this judicially-sanctioned latitude has led to unaccountable executive power with worrying implications for democracy. McMurray observes that measures that are designed to keep the executive in check have largely failed because of cabinet's strong influence over Parliament through party discipline. Because of its party control, the executive can essentially determine which lawmaking powers Parliament delegates to it.⁵⁰ McMurray writes that with broad delegated powers, the cabinet is "free to make important policy choices about how this country is to be governed outside the legislative process—behind closed doors free from parliamentary scrutiny."⁵¹ She concludes by arguing in favour of a "sacred" legislative jurisdiction that would belong to Parliament alone, and which should be constitutionally shielded from delegation.⁵² McMurray's call for reform to delegation is

[Shannon cited to DLR] (PC), discussed further below.

45. Ruth Sullivan simply notes that "[i]t is well-established that, subject to few constraints, Canadian legislatures can delegate whatever powers they possess": Ruth Sullivan, *Sullivan on the Construction of Statutes*, 6th ed (Markham: LexisNexis, 2014) at 412.

46. John Mark Keyes, *Executive Legislation*, 2nd ed (Markham: LexisNexis, 2010) at 109-115 discussing the relevant cases.

47. John Willis, "Administrative Law and the British North America Act" (1939) 53:2 Harv L Rev 251.

48. Diane McMurray, "Re-examining the Law-Making Power in the Canadian Constitution: A Case for a Non-Delegation Doctrine" (LLM Thesis, University of Ottawa, 1996) [unpublished].

49. Willis, *supra* note 47 at 253.

50. McMurray, *supra* note 48 at ii.

51. *Ibid.*

52. *Ibid.*

powerful and insightful, although it is not clear from her work where the line should be drawn in terms of which lawmaking powers would be reserved only to Parliament.

3. *Case law*

McMurray is correct that the early case law emphasized the autonomy of Canadian legislatures, going so far as to compare them to sovereign parliaments. Yet the cases should be understood as less about transplanting a robust vision of parliamentary sovereignty into Canada and more about the courts prodding along and encouraging the development of a new country with a distinct identity from the United Kingdom. The Privy Council judgment in the 1883 case of *Hodge v. The Queen*,⁵³ for instance, suggests that Canadian legislatures inherited a version of parliamentary sovereignty, which included the capacity to delegate their lawmaking powers to others. On the facts of the case, a constitutional challenge was brought against an Ontario statute that delegated power to the License Commissioners of Toronto to issue tavern licenses. The challenge focused on the argument that the enabling legislation exceeded the legislature's competence as the subject matter of regulating taverns was not assigned to the provincial legislatures under section 92 of the *Constitution Act, 1867*. In other words, the case was one related to federalism and the doctrine of *ultra vires*. It is considered a watershed in constitutional law for its articulation of the 'double aspect' doctrine, allowing a degree of subject-matter overlap between the federal and provincial legislatures despite the insistence of their Lordships that they "do not think it necessary in the present case to lay down any general rule or rules for the construction of the British North America Act."⁵⁴ After upholding the constitutionality of the Ontario statute, the Privy Council went on to consider the delegation power. It commented in *obiter dicta* upon the general quality of the lawmaking powers of the new Canadian legislatures, stating that they were "in no sense delegates of or acting under any mandate from the Imperial Parliament."⁵⁵ The Privy Council continued:

[The British North America Act] conferred powers not in any sense to be exercised by delegation from or as agents of the Imperial Parliament, but authority as plenary and as ample within the limits prescribed by Sect. 92 as the Imperial Parliament in the plenitude of its power possessed and could bestow. Within these limits of subjects and area the Local Legislature is supreme, and has the same authority as the Imperial

53. *Hodge*, *supra* note 35.

54. *Ibid* at 128, 130.

55. *Ibid* at 132.

Parliament, or the Parliament of the Dominion, would have had under like circumstances to confide to a municipal institution or body of its own creation authority to make bye-laws or resolutions as to subjects specified in the enactment, and with the object of carrying the enactment into operation and effect.

It is obvious that such an authority is ancillary to legislation, and without it an attempt to provide for varying details and machinery to carry them out might become oppressive, or absolutely fail. The... judgment of the Court of Appeal contains abundance of precedents for this legislation entrusting a limited discretionary authority to others, and has many illustrations of its necessity and convenience. It was argued at the bar that a Legislature committing important regulations to agents or delegates effaces itself. That is not so. It retains its powers intact, and can, whenever it pleases, destroy the agency it has created and set up another, or take the matter directly into its own hands. How far it shall seek the aid of subordinate agencies, and how long it shall continue them, are matters for each Legislature, and not for courts of law, to decide.⁵⁶

This *dictum* of the Privy Council in *Hodge v. The Queen* advances a robust conception of parliamentary sovereignty that is difficult to square with the logic and design of the Canadian constitutional framework—even the limited skeletal framework of the *Constitution Act, 1867*. Scholars have critiqued the case on this basis. For example, writing in 1976, J Noel Lyon observed that the Privy Council effectively provided Parliament with overly broad lawmaking latitude on the “unexamined assumption that Canadian legislatures enjoy a supremacy of the same quality as that of the Parliament of the United Kingdom.”⁵⁷ The attachment to parliamentary sovereignty limited only by degree has proven resilient with many judgments relying on the Privy Council’s *dictum* for concluding that Canadian legislatures enjoy sovereignty similar to that in the United Kingdom.⁵⁸ Even the Supreme Court of Canada observed in *Reference re Secession of Quebec* that despite “obvious differences between the governance of Canada and the United Kingdom,” there was a “continuity of the exercise of sovereign power transferred from Westminster to the federal and provincial capitals of Canada.”⁵⁹ This notion of ‘limited sovereignty’ can be best explained by considering the context in which these early cases were decided:

56. *Ibid.*

57. J Noel Lyon, “The Central Fallacy of Canadian Constitutional Law” (1976) 22:1 McGill LJ 40 at 43.

58. See, e.g., *The Canadian Reform Conservative Alliance Party Portage-Lisgar Constituency Association v Harms*, 2003 MBQB 11 at para 12; *Joseph Jacob Holdings Ltd v Prince George (City)*, (1980), 118 DLR (3d) 243 at 248-249, [1981] 2 WWR 675 (BCSC); *Micas v Attorney-General for Saskatchewan*, [1928] 3 WWR 523 at 527-529, 23 Sask LR 412 (QB); *Credit Foncier Franco-Canadien v Ross*, [1937] 3 DLR 365 at 368-369, [1937] 2 WWR 353 (ABCA).

59. *Reference re Secession of Quebec*, *supra* note 32 at para 44.

a new country was starting to develop its own identity and building its national security after a period of colonial government and anxiety following the American Civil War and the threat of a possible invasion from the south. The Privy Council rightly confirmed the importance of the *Constitution Act, 1867* in placing Canada on its own path with a new national government. The Canadian legislatures were not mere delegates of Westminster but held a true original jurisdiction and inherent powers. The message conveyed by the Privy Council is that the institutions created by the Constitution were capable of forging their own way; they were encouraged to do so within the limits imposed by the Constitution and subject to applicable laws of the Imperial Parliament. *Hodge v. The Queen* and similar cases are therefore less about the Canadian legislatures holding a robust sovereignty free of constraints and more about encouraging the growth and development of a Canadian identity distinct from the United Kingdom under a new constitutional framework—through institutions that were equipped to effectively respond to local needs and circumstances.⁶⁰

The more difficult aspect of the judgment is that the Privy Council turned to sovereignty to justify the delegation of lawmaking powers by Parliament to the executive, the reasoning being that the sovereign Westminster Parliament was itself capable of delegating lawmaking powers, and by extension the somewhat sovereign Canadian legislatures should also have this power. By adopting this reasoning, the Privy Council failed to consider in its *obiter* the question of what, if anything, the Constitution might have to say about the matter, perhaps an unsurprising neglect of British judges sitting in the sovereign Parliament at Westminster

60. But see *Shannon*, *supra* note 44, in which the Privy Council suggested that a Diceyan conception of sovereignty *did* apply to Canadian legislatures in relation to “matters falling within the classes of subjects in relation to which the constitution has granted legislative powers” (at 87). According to their Lordships, “[w]ithin its appointed sphere the Provincial Legislature is as supreme as any other Parliament” (at 87). In that case, the Privy Council held that the British Columbia legislature was empowered to delegate the regulation of producing, packing, transporting, storing and marketing of dairy products in the province. While the Privy Council suggests there is unlimited legislative power within subject-matter jurisdiction, their Lordships overstate the position under the written Constitution. Moreover, the delegation of lawmaking power under the *Natural Products Marketing (British Columbia) Act, Amendment Act, 1936* c 34, while broad, was not a wholesale delegation. To the extent the case can be read as suggesting an unlimited power for legislatures to delegate their lawmaking powers to others, as has been accepted by Hogg, *supra* note 44 at 14.2-14.3 and the Supreme Court of Nova Scotia in *Hartling v Nova Scotia (Attorney General)*, 2006 NSSC 225 at paras 16-20, it should not be followed on the basis that it is *per incuriam*. The Privy Council set out its full reasoning on the constitutionality of delegation in a single, dispositive paragraph without reference to other relevant precedent that spoke of constitutional limits such as *Hodge*, *supra* note 35 and *In Re Gray*, [1918] SCR 150, 42 DLR 1 [*In Re Gray* cited to SCR]. Such a broad proposition of constitutional law cannot be safely or reliably extracted from this attenuated observation that fails to engage with the relevant case law and other aspects of the Constitution.

Palace. To their credit, though, their Lordships implied the existence of some limits to the delegation power in Canada. First, their Lordships speak of delegation as a power that would be “ancillary” to legislation, arising from the practical need to fill in the details of a statutory scheme.⁶¹ The delegation of ancillary matters by Parliament to the executive is not only allowable, but is expected, which raises the question of how courts would treat substantial (not ancillary) delegations. Second, their Lordships refer with approval to judgments of the Ontario Court of Appeal which endorse the delegation of a “limited discretionary authority to others.”⁶² Third, their Lordships highlight the unimpaired capacity of the legislature to supervise the exercise of executive lawmaking and revoke or amend delegated legislation and grants of authority at pleasure.⁶³ This latter point, an important theme of later court judgments, places responsibility on Parliament to supervise the executive in making delegated legislation.

The 1918 Supreme Court of Canada judgment in *In Re Gray*⁶⁴ remains the leading judgment on the constitutionality of delegation. In that case, the Supreme Court squarely addressed the question, and the judgment is seen to have endorsed a broad capacity for Parliament to delegate its lawmaking powers to others. In subsequent cases, Canadian courts have cited *In Re Gray* as authority for accepting the constitutional validity of any delegation of legislative powers no matter how broad. For instance, in *Sga'nism Sim'augit (Chief Mountain) v. Canada (Attorney General)*,⁶⁵ the British Columbia Court of Appeal observed that “[t]he case law on delegation of legislative powers admits of few, if any restrictions, on the scope or content of what powers may constitutionally be delegated” and that “there is no constitutional impediment to a sweeping delegation of legislative powers.”⁶⁶ Similarly, in *Hartling v. Nova Scotia (Attorney General)*,⁶⁷ the Nova Scotia Supreme Court saw *In Re Gray* as endorsing “the constitutionality of delegating full power to legislate as opposed to simply the power to make regulations ancillary to the legislation.”⁶⁸ When a challenge to this interpretation was raised in *Apotex Inc v. Canada (Health)*,⁶⁹ the Federal Court of Appeal refused to “take a fresh look at

61. *Hodge*, *supra* note 35 at 132.

62. *Ibid* [emphasis added].

63. *Ibid*.

64. *In Re Gray*, *supra* note 60.

65. 2013 BCCA 49.

66. *Ibid* at paras 89, 90.

67. 2006 NSSC 225.

68. *Ibid* at para 18.

69. 2010 FCA 334.

Parliament's authority to delegate."⁷⁰ Courts have also treated legislation made by the executive as if it was itself an Act of Parliament, drawing upon a theory of agency. For example, in *R v. JP*,⁷¹ the Ontario Court of Appeal upheld the delegation of lawmaking powers by Parliament to the cabinet to create an access scheme for medical marijuana, holding that "subordinate legislation in the form of regulations is as much an expression of Parliament's will as is a provision in a statute."⁷² Whether or not *In Re Gray* properly read actually stands for these propositions, courts have accepted it as such and it has become an established *de facto* precedent supporting the constitutional validity of near limitless delegation of parliamentary lawmaking power to the executive.

On the facts of *In Re Gray*, the federal *War Measures Act*, 1914⁷³ was challenged as a constitutionally impermissible delegation of Parliament's lawmaking power to the executive. The argument against the delegation was that it was too broad, and essentially handed over an entire swathe of parliamentary lawmaking powers to the executive. Section 6 of the *Act* granted authority to the cabinet "to do and authorize such acts and things, and to make from time to time such orders and regulations, as [it] may by reason of the existence of real or apprehended war, invasion or insurrection, deem necessary or advisable for the security, defence, peace, order and welfare of Canada...." In considering the provision, Chief Justice Fitzpatrick distinguished Canada from the United Kingdom, writing that a supreme Parliament "is not the case in this country, which has its constitution founded in the Imperial statute."⁷⁴ Chief Justice Fitzpatrick then sought to locate a specific term in the *Constitution Act*, 1867 that would limit the capacity of Parliament to delegate its powers to the executive.⁷⁵ In Chief Justice Fitzpatrick's view, an express constitutional term would be needed to distinguish the Canadian Parliament from that of Westminster.⁷⁶ After finding no such term, Chief Justice Fitzpatrick held that Parliament enjoyed the authority to delegate its lawmaking powers to the executive "to carry out the object of an Act, instead of setting out all the details in the Act itself."⁷⁷ Nevertheless, the Constitution could impose some limits on

70. *Ibid* at para 63.

71. (2003), 67 OR (3d) 321 (CA), 231 DLR (4th) 179 [*R v JP*].

72. *Ibid* at para 26.

73. (1914), 5 Geo 5, c 2.

74. *In Re Gray*, *supra* note 60 at 156.

75. *Ibid* at 157.

76. *Ibid* where the Chief Justice wrote: "I cannot, however, find anything in that Constitutional Act which, so far as material to the question now under consideration, would impose any limitation on the authority of the Parliament of Canada to which the Imperial Parliament is not subject."

77. *Ibid* at 156.

delegation. Parliament would not be permitted to abdicate its legislative powers and could only delegate “within reasonable limits.”⁷⁸ As already seen in the Privy Council’s *obiter* in *Hodge v. The Queen*, Chief Justice Fitzpatrick held that the lawmaking powers delegated by Parliament to others “must necessarily be subject to determination at any time by Parliament.”⁷⁹ In commenting on the context of the impugned statute, Chief Justice Fitzpatrick highlighted the imminent threat of war at the time it was enacted. He observed that the *Act* had been designed to “clothe the executive with the widest powers in time of danger.”⁸⁰ The weight of war on the judgment was made clear in Chief Justice Fitzpatrick’s closing lines: “[o]ur legislators were no doubt impressed in the hour of peril with the conviction that the safety of the country is the supreme law against which no other law can prevail. It is our clear duty to give effect to their patriotic intention.”⁸¹

Justice Duff, concurring in the result, would have imposed an even lower standard of review. According to Justice Duff, it was not the role of a court to consider the intention of Parliament in enacting legislation, including the *War Measures Act, 1914*, because judicial speculation as to parliamentary motives “leads into a labyrinth where there is no guide.”⁸² Nevertheless, Justice Duff highlighted the statute’s enactment in the context of war which demanded “extraordinary powers be possessed by the executive.”⁸³ Justice Duff dismissed the argument that Parliament had abandoned its lawmaking powers on the basis that the statute did not prevent Parliament from repealing or amending it.⁸⁴ In Justice Duff’s view, when the executive made laws under delegated authority it acted as an agent of Parliament.⁸⁵

Justice Idington wrote a dissenting opinion in which he would have found the statute unconstitutional given the broad scope of the delegation. He considered it “startling”⁸⁶ that under the delegation provision, the executive could repeal the primary statute and “govern the country,”⁸⁷ subject only to “the possibility of parliament being convened once a year

78. *Ibid* at 157.

79. *Ibid*. Even if this is simply a consequence of a Canadian ‘limited version’ of parliamentary sovereignty, it is still a constitutional limitation.

80. *Ibid* at 158.

81. *Ibid* at 160.

82. *Ibid* at 169. Notably this is no longer the case: see the discussion of the modern approach to statutory interpretation in *Rizzo & Rizzo Shoes Ltd (Re)*, [1998] 1 SCR 27, 154 DLR (4th) 193.

83. *In Re Gray*, *supra* note 60 at 169.

84. *Ibid* at 170.

85. *Ibid*. See also *R v JP*, *supra* note 71.

86. *In Re Gray*, *supra* note 60 at 164.

87. *Ibid* at 165.

to act and seeing fit to revoke such orders.”⁸⁸ In the event of a change of government, the statute would allow a new executive to bypass Parliament and rule by regulation.⁸⁹ In Justice Idington’s view, and like McMurray’s conclusion, the Constitution required Parliament itself to make important laws—including the imposition of a military draft of every man in the country between the ages of 18 and 60, as such a decision captured the “mental and physical energies of every member of the entire population.”⁹⁰ He wrote:

The several measures required to produce such results must be enacted by the Parliament of Canada in a due and lawful method according to our constitution and its entire powers thereunder cannot be by a single stroke of the pen surrendered or transferred to anybody. ... [A] wholesale surrender of the will of the people to any autocratic power is exactly what we are fighting against.⁹¹

A number of observations can be made about *In Re Gray*. At the outset, the language used by Chief Justice Fitzpatrick is consistent with the limits to delegation implicitly contained in the *obiter* of the Privy Council in *Hodge v. The Queen*. Chief Justice Fitzpatrick’s judgment in no sense imparts an absolute power for Parliament to delegate its lawmaking powers to others. Instead, the *Constitution Act, 1867* imposed at least two limits. First, Parliament could not abdicate its lawmaking powers by giving them away wholesale to the executive. According to Chief Justice Fitzpatrick and Justice Duff, Parliament would abdicate its powers if it was no longer capable of amending or repealing the delegation. The continuing availability of parliamentary supervision, and to the degree necessary, control of the executive alleviated concern about the executive usurping Parliament, a point also made by the Privy Council in *Hodge v. The Queen*. Second, according to Chief Justice Fitzpatrick, delegation of legislative power must be within reasonable limits. The question is: what will be seen by the courts as an unreasonable and thus unconstitutional delegation? It may be argued that the Supreme Court’s upholding of the sweeping delegation at issue in *In Re Gray* suggests that anything equal or less in degree can be safely presumed reasonable and thus unassailable. While appealing, this

88. *Ibid* at 165.

89. *Ibid* at 166.

90. *Ibid* at 165.

91. *Ibid*. Note that in addition to Chief Justice Fitzpatrick and Justices Duff and Idington, three other judges sat on the case. At 175-176 of the judgment, *ibid*, Justice Anglin agreed with the majority in finding that the delegation provision was constitutional on the basis that within its subject-matter jurisdiction, Parliament held complete sovereignty (citing *Hodge*, *supra* note 35 for support). Justice Davies agreed with Justice Anglin. Justice Brodeau agreed with Justice Idington’s dissent.

argument ignores that the judgment is shot through with judicial anxiety over national security. The context of the case was imminent war, a national crisis and an existential threat to a country not yet 50 years old. It stands to reason that the very same delegation of lawmaking power in section 6 of the *War Measures Act, 1914* might not be viewed as reasonable outside the context of an exceptional national security threat, a position reinforced by Chief Justice Fitzpatrick's observation that delegated powers were normally used by Parliament to fill in the details of a statute to further the Act's object.⁹² As in other areas of the law, what is reasonable will turn on the circumstances, which calls for the court to examine the relevant facts to determine whether the delegation can withstand constitutional muster. The starting point is that the delegation of lawmaking power to the executive will be presumed reasonable if it is limited to authorizing the executive to fill in the details of a statute to further its purpose, as this is its expected use. A departure from this ordinary use would require some kind of extraordinary and compelling justification put forward by the state, such as the exigencies of a national emergency as in *In Re Gray*.

The Supreme Court of Canada confirmed its majority holding in *In Re Gray* in the 1943 *Chemicals Reference* case.⁹³ On the facts of the case, a constitutional challenge was brought against the parliamentary delegation of lawmaking authority to the executive to regulate the use of chemicals. While the Supreme Court upheld the constitutionality of the relevant aspects of the statute, the judges emphasized the role of Parliament in holding the executive to account by supervising and controlling the exercise of delegated authority. For example, Chief Justice Duff held that while there is a "risk of abuse when wide powers are committed in general terms to any body of men," it was clear from the statute that Parliament had not abandoned its control of the executive.⁹⁴ The delegation provisions did not "transform the Executive Government into a legislature, in the sense in which the Parliament of Canada and the legislatures of the provinces are legislatures."⁹⁵ Justice Rinfret, writing for himself and Justice Taschereau, reiterated that "Parliament retains its power intact and can, whenever it pleases, take the matter directly into its own hands."⁹⁶ On the question of whether Parliament had abdicated its powers, Justice Rinfret held

92. *In Re Gray*, *supra* note 60 at 156.

93. *Reference as to the Validity of the Regulations in Relation to Chemicals Enacted by Order in Council and of an Order of the Controller of Chemicals Made Pursuant Thereto*, [1943] SCR 1, [1943] 1 DLR 248 [cited to SCR].

94. *Ibid* at 12.

95. *Ibid* at 13.

96. *Ibid* at 18.

that there was no evidence of an intention for Parliament to abandon legislative control in the subject matter. Moreover, Parliament had “made no abandonment of control, in fact.”⁹⁷ Similarly, Justice Davis observed that while it was concerning to see “the most extensive and drastic powers of control into the hands of individuals or boards who are in no way responsive to the will of the electorate,” there remained a safety valve in that “the House of Commons as representative of the people has, in a practical sense, full power to amend or repeal” any delegated legislation that would be made by the executive.⁹⁸ Likewise, Justice Kerwin dismissed concerns about the broad lawmaking powers that had been given to the executive, writing that “[i]f at any time Parliament considers that too great a power has been conferred upon the Governor in Council, the remedy lies in its own hands.”⁹⁹ The judgment reiterates *In Re Gray* in that Parliament holds the constitutional authority to delegate considerable lawmaking powers to the executive, provided the delegation does not amount to an abdication of its lawmaking role. If Parliament is capable of maintaining supervisory control over the exercise of delegated authority, the delegation will not be viewed as an abdication.

Less than a decade after the *Chemical Reference*, the Supreme Court of Canada decided *Attorney General of Nova Scotia v. Attorney General of Canada*.¹⁰⁰ On the facts of the case, the delegation of certain lawmaking powers by a provincial legislature to the federal Parliament was challenged as being unconstitutional. The Supreme Court agreed. It held that delegation from one level of legislature to another violated the principle of federalism. According to the Supreme Court, horizontal delegation disrupted the federal balance between legislatures that was struck by the *Constitution Act, 1867*. Chief Justice Rinfret held that although Canadian legislatures were “sovereign within their sphere defined by *The British North America Act*,” they did not have unlimited capabilities as they were limited by constitutional bounds.¹⁰¹ He wrote:

The country is entitled to insist that legislation adopted under section 91 should be passed exclusively by the Parliament of Canada in the same way as the people of each Province are entitled to insist that legislation concerning the matters enumerated in section 92 should come exclusively from their respective Legislatures. In each case the Members elected to

97. *Ibid.*

98. *Ibid.* at 25-26.

99. *Ibid.* at 30.

100. [1951] SCR 31, [1950] 4 DLR 369 [cited to SCR].

101. *Ibid.* at 33-44 (effectively making the point that they do not enjoy true Diceyan parliamentary sovereignty).

Parliament or to the Legislatures *are the only ones entrusted with the power and the duty to legislate* concerning the subjects exclusively distributed by the constitutional Act to each of them.

No power of delegation is expressed either in section 91 or in section 92, nor, indeed, is there to be found the power of accepting delegation from one body to the other; and I have no doubt that if it had been the intention to give such powers it would have been expressed in clear and unequivocal language. ...

[T]he word “exclusively” used both in section 91 and in section 92 indicates a settled line of demarcation and it does not belong to either Parliament, or the Legislatures, to confer powers upon the other.¹⁰²

The passage is striking as many of the points made by Chief Justice Rinfret would seem to apply to the delegation of legislative power from Parliament to the executive—particularly the observation that the *Constitution Act, 1867* did not expressly empower Parliament to delegate its lawmaking powers to others. The judgment also reiterates that the elected members of Parliament are the only individuals entrusted by the Constitution with the power to make federal laws. Chief Justice Rinfret dismissed this comparison, writing that lawmaking powers delegated by Parliament to the executive were “of a character different from [this] delegation.”¹⁰³ While it is certainly true that federalism is an animating feature of the Constitution, as discussed earlier, the rejection of the obvious analogy between horizontal and vertical delegation without further justification for their differential treatment is unsatisfactory. Why does delegation from one legislature to another require express constitutional authorization while delegation from Parliament to the executive rely on the inverse starting point of the Constitution not ruling it out? Why does delegated legislation not undermine trust in the elected members of the legislatures as it does in the case of delegation between legislatures? In both cases, Parliament retains its supervisory powers intact, including its ability to control the exercise of delegated power. Why is this emphasized only in the case of delegation to the executive? While it may be that horizontal delegation between the provinces and the federal Parliament implies the control of one legislature by the other, any delegation would presumably be made with the consent of both legislatures—and the actual exercise of any delegated powers would be expected to occur through a lawmaking partnership and mutual consent else risk revocation. The hollowness of the differential treatment is telling as following the Supreme Court’s judgment,

102. *Ibid* at 34 [emphasis added].

103. *Ibid* at 35.

the provincial legislatures and Parliament quickly worked around this limitation by taking advantage of the judicial acceptance of delegation to the executive: executive agencies were established to receive and exercise both federal and provincial lawmaking powers concurrently.¹⁰⁴

III. *Contemporary constitutional interpretation*

1. *Introduction*

This Part begins by setting out the living tree interpretive approach to the Constitution, which is grounded in a large, liberal and purposive reading of the constitutional text that facilitates its evolution over time in response to new circumstances. Courts play the key role in this adaptive process by interpreting constitutional norms in relation to the facts of individual cases. The exercise is a balancing act. On the one hand, judges value certainty and predictability, which weigh in favour of following past precedent and making only incremental constitutional change. On the other hand, judges seek to reconcile constitutional principles with social realities to promote the relevance of the Constitution, which weighs in favour of an expansive constitutional interpretation. This Part critically reviews the approach of the Supreme Court of Canada in *In Re Gray* from the perspective of the living tree which brings into sharp contrast the narrow and technical interpretation of the Constitution adopted by the judicial majority in that case. This outmoded interpretive approach has resulted in a stunted constitutional conception of Parliament, which does little to safeguard its role as the chief democratic, representative and accountable lawmaking institution in Canada.

2. *The living tree approach*

Early Canadian courts adopted a narrow reading of the constitutional text, treating it like the text of an ordinary statute. The *Persons Case* is illustrative.¹⁰⁵ In that case, the unanimous Supreme Court of Canada¹⁰⁶ held that the words “qualified persons” in the *Constitution Act, 1867* referred exclusively to men, with the consequence that women were ineligible for appointment to the Senate. According to Chief Justice Anglin, the Supreme Court was disinterested in the question of the desirability of women Senators. Instead, the judges were called upon “to construe, to

104. See, e.g., *PEI Potato Marketing Board v Willis*, [1952] 2 SCR 392, [1952] 4 DLR 146 (delegation of federal powers to a provincial board upheld as constitutional).

105. For a detailed scholarly treatment of the case see Robert J Sharpe & Patricia I McMahon, *The Persons Case: The Origins and Legacy of the Fight for Legal Personhood* (Toronto: University of Toronto Press, 2007).

106. *Reference re meaning of the word “Persons” in s. 24 of British North America Act*, [1928] SCR 276, 1928 4 DLR 98 [*Persons Case SCC* cited to SCR].

the best of our ability, the relevant portions of the [*Constitution Act, 1867*], and upon that construction to base our answer.”¹⁰⁷ In other words, giving meaning to the Constitution was a simple and neutral exercise in statutory interpretation. Chief Justice Anglin held that the existing male-only common law definition had been imported into the provisions of the *Constitution Act, 1867*. Women were therefore ineligible to be named as Senators.¹⁰⁸ The Privy Council reversed. In its decision,¹⁰⁹ their Lordships came to the view that “qualified persons” included both men and women. Lord Sankey held that past precedent, including both Roman and English authorities, was “not of itself a secure foundation on which to build the interpretation of the [*Constitution Act, 1867*].”¹¹⁰ He noted that former British colonies encompassed peoples at “every stage of social, political and economic development and undergoing a continuous process of evolution.”¹¹¹ Lord Sankey then penned his famous dictum on the proper interpretative approach to the Constitution:

[The *Constitution Act, 1867*] planted in Canada a living tree capable of growth and expansion within its natural limits. The object of the Act was to grant a Constitution to Canada. ... Their Lordships do not conceive it to be the duty of this Board—it is certainly not their desire—to cut down the provisions of the Act by a narrow and technical construction, but rather to give it a large and liberal interpretation so that the Dominion to a great extent, but within certain fixed limits, may be mistress in her own house...¹¹²

The living tree has since become the leading approach to constitutional interpretation in Canada.¹¹³ In applying the living tree, courts seek to give meaning to the constitutional text in light of the realities and exigencies of contemporary society. This goal is accomplished by stepping back from the technical rules of statutory construction to consider the rationale of the constitutional elements that together form a basic structure or architecture.¹¹⁴ The living tree calls upon courts to “determine and give

107. *Ibid* at 281-282.

108. *Ibid* at 290.

109. [1930] AC 124, [1930] 1 DLR 98 [cited to AC].

110. *Ibid* at 132.

111. *Ibid*.

112. *Ibid* at 133.

113. *R v Blais*, 2003 SCC 44 at para 40. For a commentary on selective cases in which the living tree doctrine was applied see Will Walachow, “The Living Tree” in Peter Oliver, Patrick Macklem & Nathalie Des Rosiers, eds, *The Oxford Handbook of the Canadian Constitution* (Oxford: Oxford University Press, 2017), ch 42.

114. See *Re Residential Tenancies Act*, [1981] 1 SCR 714 at 723, 123 DLR (3d) 554 [cited to SCR]; *Reference re Provincial Election Boundaries (Saskatchewan)*, [1991] 2 SCR 158 at 180, 81 DLR (4th) 16; *Law Society of Upper Canada v Skapinker*, [1984] 1 SCR 357 at 366, 9 DLR (4th) 161

effect to the broad objectives and purposes of the Constitution.”¹¹⁵ Through progressive interpretation, the living tree promotes constitutional evolution and the “structuring the exercise of power by the organs of the state in times vastly different from those in which it was crafted.”¹¹⁶ While courts are encouraged to adopt a liberal interpretation, the Constitution is not an empty vessel that depends upon judicial discretion in each new case.¹¹⁷ It should grow and expand only within its “natural limits” as observed by Lord Sankey.¹¹⁸ The Supreme Court has cautioned judges not to “invent new obligations foreign to the original purpose of the provision at issue.”¹¹⁹ Giving a broad and purposive meaning to the constitutional text in light of the social context must also be balanced against the important values of legal predictability and certainty, which weigh in favour of a constrained interpretation.¹²⁰ A provision’s history and its past interpretations operate to limit interpretive discretion.¹²¹ The case law demonstrates that courts are reluctant to use the living tree to impose major new obligations on the state (particularly those carrying cost implications).¹²² At the same time, however, the Constitution should not stand in the way of progressive policies that would have been beyond the contemplation of the framers.¹²³

[*Skapinker*]; and *Reference re Senate Reform*, 2014 SCC 32 at para 26 [*Reference re Senate Reform*]. This approach may require the court to consider social science evidence, which often comes to the court through intervenors: for a critical assessment see, e.g., Ian Brodie, *Friends of the Court: The Privileging of Interest Group Litigants in Canada* (Albany: State University of New York Press, 2002). For a comparative view see Lorne Neudorf, “Intervention at the UK Supreme Court” (2013) 2 Cambridge J Intl & Comparative L 16.

115. *Re Residential Tenancies Act*, *supra* note 114 at 723. See also *Hunter v Southam*, [1984] 2 SCR 145 at 156-157, 11 DLR (4th) 641 per Dickson J.

116. *Reference re Same-Sex Marriage*, 2004 SCC 79 at para 23 [*Reference re Same-Sex Marriage*].

117. Bradley W Miller has pointed out that the living tree approach may not be incompatible with originalism: see Bradley W Miller, “Beguiled by Metaphors: The ‘Living Tree’ and Originalist Constitutional Interpretation in Canada” (2009) 22:2 Can JL & Jur 331.

118. See *Reference re Same-Sex Marriage*, *supra* note 116 at paras 26-28, where the Supreme Court held that it was not a task of the judiciary to work out the natural limits to constitutional expansion in the abstract. Instead, the burden fell to the party advancing a restrictive constitutional interpretation to identify an “objective core of meaning” that would have a limiting effect.

119. *R v Blais*, *supra* note 113 at para 40.

120. *Skapinker*, *supra* note 114 at 366. See also the restrictive judicial use of constitutional exemptions to mandatory minimum sentences partly on the basis of certainty and predictability: *R v Ferguson*, 2008 SCC 6.

121. See, e.g., Aileen Kavanagh, “The Idea of a Living Constitution” (2003) 16 Can JL & Jur 55 (arguing that the living tree encompasses incremental change because of significant constraints on judicial discretion). See also *R v Blais*, *supra* note 113 at para 40.

122. *Auton (Guardian ad litem of) v British Columbia (Attorney General)*, 2004 SCC 78 rejecting a Charter claim for the funding of a certain medical treatment for preschool-aged autistic children.

123. See, e.g., *Reference re Same-Sex Marriage*, *supra* note 116, especially at paras 22-23, 26-28.

3. *The approach of In Re Gray*

The Supreme Court of Canada's judgment in *In Re Gray* can be critiqued from the perspective of the living tree approach to reveal the extent of the narrow and technical reading of the Constitution by the judicial majority.¹²⁴ In his reasons, Chief Justice Fitzpatrick applied the English precedent of *R v. Halliday*¹²⁵ in support of Parliament's capacity to delegate lawmaking powers to the executive. He observed that in *R v. Halliday*, their Lordships relied upon the United Kingdom Parliament's "absolute power untrammelled by any *written instrument*"¹²⁶ in coming to the view that it could delegate its powers to others, a position in contrast with the Canadian Parliament that was created and limited by a written Constitution.¹²⁷ After noting this key difference, Chief Justice Fitzpatrick searched the text of the *Constitution Act, 1867* for a provision that would restrict delegation.¹²⁸ Finding none, he declared delegation to be constitutional in Canada. This approach cuts against the grain of the living tree as it adopts a purely textual reading of the Constitution instead of considering broader constitutional objectives or its underlying architecture that relate to the role and function of Parliament. Furthermore, Chief Justice Fitzpatrick's textualist approach does not see the Constitution as capable of growth and expansion. Under Chief Justice Fitzpatrick's view, unless the text expressly provided otherwise, the Canadian constitutional order was anchored to that of the United Kingdom.

Justice Duff focused on the ordinary techniques of statutory interpretation as it was "the function of a court of law to give effect to the enactments of a legislature according to the force of the language which the legislature has finally chosen for the purpose of expressing its intention."¹²⁹ Justice Duff cited precedent to find that the delegation at issue was framed broadly enough to authorize the executive to make regulations "concerning any subject falling within the legislative jurisdiction of parliament."¹³⁰ Justice Duff found that the grant of authority was so broad it would even

124. It should be noted that *In Re Gray* was decided more than a decade before the Privy Council's adoption of the living tree metaphor in the *Persons Case*. *In Re Gray* therefore adopted the prevailing approach to the interpretation of the Constitution at the time it was decided. The critique offered in this section seeks to demonstrate the extent of its narrow and technical approach that has resulted in a limited constitutional conception of the role of Parliament.

125. [1917] AC 260.

126. *Ibid* at 271, emphasis added.

127. *In Re Gray*, *supra* note 60 at 157.

128. *Ibid*.

129. *Ibid* at 169.

130. *Ibid* at 166 (with the exception that the grant of authority was subject to the duration of the war, or be at a time of apprehended war). Justice Duff also found that the context of the statute confirmed that Parliament intended to delegate sweeping powers: *ibid* at 168-169.

allow the cabinet to amend primary legislation—commonly referred to as a Henry VIII clause. Nevertheless, he held that it was a “very extravagant description” for counsel to have argued that the delegation amounted to an abdication of Parliament’s legislative authority.¹³¹ On its terms, the grant of power could only be used in the case of real or apprehended war and measures taken must be “advisable.”¹³² Like Chief Justice Fitzpatrick, Justice Duff cited *R v. Halliday* for the proposition that regulations were not constitutionally limited to complementing a statutory scheme but could also be used to amend primary legislation if allowed by the words of the delegation.¹³³ None of this was constitutionally concerning. Justice Duff found that the constitutional order remained intact as Parliament was capable of revoking the original delegation or a regulation made under it.¹³⁴ Citing Maitland, Justice Duff held that the executive acted as an agent of Parliament, which meant that regulations were equivalent as a source of law to primary legislation.¹³⁵ Justice Duff’s approach to the Constitution is clearly inconsistent with the living tree. While he wrote of a constitutional balance, Justice Duff envisioned the judicial role as a mechanistic one to simply give effect to statutes including those that delegated lawmaking power—a view that misapplies parliamentary sovereignty to Canada. Furthermore, Justice Duff refused to think more broadly about the role of Parliament under the *Constitution Act, 1867*. The passing reference to Maitland’s agency theory to rebuff counsel’s objections to delegation failed to consider why agency should be applicable in the Canadian constitutional context. The question of agency in delegation, being the idea that the executive steps into the shoes of Parliament in making regulations, would require a purposive analysis of the Constitution to consider its compatibility. Finally, the fact that Justice Duff upheld a Henry VIII clause that permitted the executive to broaden the scope of its own powers in the absence of the safeguards of the parliamentary process is especially concerning, as such a clause could be used to usurp Parliament. Such provisions avoid all constitutional checks and balances and should be held unconstitutional.¹³⁶

131. *Ibid* at 170.

132. *Ibid*. Notably, both of these conditions were to be assessed by the cabinet itself.

133. *Ibid* at 167-168.

134. *Ibid* at 170.

135. *Ibid*. While both primary legislation and regulations have the force of law, it is of course clear in the UK that primary legislation cannot be legally invalidated while secondary legislation may be quashed by a court on the basis of the *ultra vires* doctrine where it exceeds the scope of authority from the enabling legislation.

136. Justice Campbell in *Ontario Public School Boards’ Association v Ontario (Attorney General)* (1997), 151 DLR (4th) 346 at para 51, 45 CRR (2d) 341 (ONSC) wrote that an authorization for

Only Justice Idington in dissent took a broader view of the constitutional architecture and saw that the *Constitution Act, 1867* placed Parliament at the centre of federal lawmaking, which limited its ability to delegate its legislative powers to others outside of Parliament.¹³⁷ While he did not develop this argument in detail, it is evident from the judgment that that he saw certain policy choices as being reserved exclusively to the deliberative process of Parliament and incapable of delegation to the executive.

The consequence of *In Re Gray* and its narrow and technical approach to reading the constitutional text has been a stunted conception of the role and purpose of Parliament. While the judgment imposes some limits to delegation (abdication and delegation within reasonable limits), it is now largely an anachronism, a case that was decided for a young country facing the threat of imminent war. In the century since, the Canadian constitutional landscape has been reshaped: the living tree is the leading interpretive approach and has spawned major doctrinal developments that have given life to the constitutional text. In addition, the transformative enactment of the *Charter* in 1982 clothed the basic structure of the *Constitution Act, 1867* and advanced a more complete vision of democratic, representative and accountable lawmaking in Canada. *In Re Gray* now finds itself sitting uneasily in the repertoire of world-class constitutional jurisprudence produced by the Supreme Court of Canada.¹³⁸ In addition, the judgment has produced problematic outcomes. It is responsible for questionable doctrines, such as the differential treatment of horizontal and vertical delegation. It also provides support for Henry VIII clauses. The judicial endorsement of the sweeping delegation of lawmaking powers to the executive has contributed to a system of modern lawmaking that is dependent upon executive discretion and lawmaking in secret with few checks and balances. The ease by which Parliament can delegate its powers to the executive has eroded the lawmaking role of Parliament as it has facilitated the shift of tremendous legislative power into the hands of the executive. To the extent it allows courts to accept the validity of nearly all delegation provisions with little meaningful controls, *In Re Gray* should no longer be followed. While certainty and predictability are important values that favour following precedent, the time has come for the courts

the executive to amend primary legislation is "constitutionally suspect because it confers upon the government the unprotected authority to pull itself up by its own legal bootstraps and override arbitrarily, with no further advice from the Legislative Assembly, and no right to be heard by those who may be adversely affected by the change, the very legislative instrument from which the government derives its original authority."

137. *In Re Gray*, *supra* note 60 at 165.

138. See, e.g., Ehud Barak, "A Judge on Judging: The Role of a Supreme Court in a Democracy" (2002) 116:1 Harv L Rev 19 at 111-112.

to reassess the constitutional foundation of delegated legislation and adopt measures to safeguard the constitutional role of Parliament.

IV. *Charting a new way forward*

1. *Introduction*

This Part begins by reassessing the constitutional foundation of delegated legislation in Canada by applying a living tree interpretation to the Constitution on the question of Parliament delegating its lawmaking powers to others. The result is a new view of delegation that respects Parliament's constitutional role as lawmaker in chief and its democratic, representative and accountable qualities. It argues that the Constitution supports, and indeed requires, delegation to be taken more seriously by both the courts and Parliament. It then provides an overview of existing practices to the judicial review of the *vires* of regulations and the parliamentary scrutiny of regulations. Each is shown to be problematic. Reforms are proposed to overcome these shortcomings. These reforms include strengthening the judicial review of the *vires* of regulations and developing effective parliamentary mechanisms to supervise and scrutinize the exercise of delegated lawmaking powers. The Constitution provides the impetus for these reforms as they stand to better protect the lawmaking role of Parliament and provide important checks and balances, particularly in the context of a Parliament controlled by the executive that can use that control to delegate lawmaking powers to itself. The reforms offer a practical and workable solution with sufficient flexibility while ensuring that Parliament is responsible for the formulation of national policy and continues to play an active role in lawmaking. While scholars tend to characterize controls of delegated legislation as focused on substance or procedure,¹³⁹ policy or legality,¹⁴⁰ merits or technical aspects,¹⁴¹ the reforms do not easily fit into this paradigm as they take a broader, holistic view of what is needed to restore the constitutional balance.

2. *The constitutional impetus for reform*

There are a number of good reasons for courts and Parliament to take delegation more seriously, and to move forward with reforms that will safeguard Parliament's constitutional role and restore the constitutional

139. Gabrielle Appleby & Joanna Howe, "Scrutinising Parliament's Scrutiny of Delegated Legislative Power" (2015) 15:1 OUCJL 3 and Andrew Edgar, "Judicial Review of Delegated Legislation: Why Favour Substantive Review over Procedural Review?" in John Bell et al, eds, *Public Law Adjudication in Common Law Systems: Process and Substance* (Oxford: Hart, 2016) 189.

140. Edward C Page, *Governing by Numbers: Delegated Legislation and Everyday Policy-Making* (Oxford: Hart, 2001).

141. Tucker, *supra* note 2.

balance. Under the living tree approach, courts take a large, liberal and progressive interpretation of the Constitution. In *Reference re Senate Reform*,¹⁴² the unanimous Supreme Court held that “the Constitution must be interpreted with a view to discerning the structure of government that it seeks to implement.”¹⁴³ Courts are guided by “assumptions that underlie the text,” which considers how the various elements work together to form a constitutional architecture.¹⁴⁴ Applying this approach to the question of delegation would move courts beyond their impoverished view of Parliament in the case law, which currently sees Parliament as a simple lawmaking mechanism that can transfer its powers to anyone in a line of statutory text. This attenuated view fails to engage with how the Constitution sees Parliament: as a key part of the basic constitutional architecture, possessing democratic, representative and accountable qualities and as the key player in bringing together different constituencies to formulate national policy and resolve pressing questions facing the country as a whole.

On the question of delegation, the constitutional text is silent. But this silence does not mean that the Constitution can have nothing to say on the question. The act of delegation involves Parliament lending its exclusively vested lawmaking powers to a body that operates outside the strictures of the parliamentary process. Delegation must be reconciled with the role, function and purpose of Parliament as these are envisioned by the Constitution. What is Parliament’s role? The *Constitution Act, 1867* establishes Parliament as the chief lawmaker for the country as a whole. Section 91 vests Parliament with exclusive legislative authority to make laws in thirty subject matters and laws for the peace, order and good government of the country. It establishes a power-sharing arrangement by allocating federal legislative power to Parliament’s three components, namely the Queen, the Senate, and the House of Commons. By explicitly mentioning these entities, section 91 reiterates that each is to play a part in the lawmaking process. The centrality of Parliament to federal lawmaking is not just seen in section 91 but is reflected throughout the text of the *Constitution Act, 1867*.¹⁴⁵ The historical record reinforces the constitutional design of Parliament to decide questions of national policy, demonstrating

142. *Reference re Senate Reform*, *supra* note 114.

143. *Ibid* at para 26.

144. *Ibid*.

145. Among others, *Constitution Act, 1867*, *supra* note 1, s 12 (Parliament may alter the exercise of executive power by the Governor General), s 18 (Parliament has the power to define the privileges, powers and immunities of the Senate and House of Commons), ss 40-41 (Parliament has the power to alter electoral districts and qualifications for election).

how this key institution was created to bring together the country and forge a new national identity. Sir John A Macdonald, a leading architect of the Constitution and later Canada's first Prime Minister, advocated a constitutional settlement that would avoid the "weakness of the American system."¹⁴⁶ Parliament was designed by its framers to overcome what was seen as the fatal defect of the United States Constitution that had resulted in the Civil War—the extensive powers reserved to individual states. The Canadian Parliament was instead to be a consolidated body that enjoyed lawmaking powers in subject matters of national interest, and for the peace, order and good government of Canada,¹⁴⁷ to bring the new country together.¹⁴⁸ While operating under the constraints of a written constitution, Parliament would be a robust legislature reflecting "one people and one government."¹⁴⁹ In Macdonald's view, Parliament would be much more than "merely a point of authority connecting us to a limited and insufficient extent."¹⁵⁰ Parliament's purpose was to resolve the "great questions which affect the general interests of the Confederacy as a whole."¹⁵¹

The sweeping delegation of Parliament's legislative powers to a body outside of Parliament risks undermining Parliament's constitutional role. Delegation permits important decisions that affect the country as a whole to be made through a process that excludes Parliament and does not embody the qualities of Parliament that are reflected in the Constitution—specifically its democratic, representative and accountable qualities.¹⁵² These qualities explain why Parliament was placed by the framers at the centre of federal lawmaking: the House of Commons is made up of hundreds of democratically elected members, and is the only House of

146. Provincial Parliament of Canada, *Parliamentary Debates on the Subject of the Confederation of the British North American Provinces* (Quebec: Hunter, Rose & Co, 1865) at 41 [*Parliamentary Debates*].

147. *Constitution Act, 1867*, *supra* note 1, s 91.

148. *Parliamentary Debates*, *supra* note 146 at 33: "Ever since the union was formed the difficulty of what is called 'State Rights' has existed, and this had much to do in bringing on the present unhappy war in the United States. They commenced, in fact, at the wrong end. They declared by their Constitution that each state was a sovereignty in itself, and that all the powers incident to sovereignty belonged to each state, except those powers which, by the Constitution, were conferred upon the General Government and Congress. Here we have adopted a different system. We have strengthened the General Government. We have given the General Legislature all the great subjects of legislation. ... We have thus avoided that great source of weakness which has been the cause of the disruption of the United States."

149. *Ibid* at 41.

150. *Ibid*.

151. *Ibid* at 40.

152. While these principles may not be fully realized in practice, they are nevertheless foundational attributes of Parliament as an institution.

Parliament in which a money bill can be initiated;¹⁵³ the Senate includes regional representation from the four regions of Ontario, Quebec, the Maritime provinces and the Western provinces, and came to “represent various groups that were under-represented in the House of Commons... [serving] as a forum for ethnic, gender, religious, linguistic, and Aboriginal groups that did not always have a meaningful opportunity to present their views through the popular democratic process”;¹⁵⁴ and the public process for enacting legislation in each House includes three readings, opposition debate, detailed committee study, a mechanism for amending bills and ultimately a vote. The enactment of the *Charter* reinforced these qualities. While it further limited Parliament’s lawmaking powers, the *Charter* advanced a vision of the constitutional architecture with an even more democratic, representative and accountable role for Parliament: each citizen is guaranteed the right to vote and run for parliamentary elections;¹⁵⁵ Parliament must be dissolved for a fresh election every five years;¹⁵⁶ there must be a sitting of Parliament to transact business at least once every 12 months;¹⁵⁷ and English and French are guaranteed equality of status in their use in all institutions of Parliament.¹⁵⁸ The Supreme Court of Canada’s jurisprudence affirms this constitutional vision and reiterates an evolving set of democratic norms of which Parliament plays the key role. In *Figueroa v. Canada (Attorney General)*,¹⁵⁹ a majority of the Supreme Court observed that the text of the right to vote appears to simply guarantee that each citizen can place a ballot in a box.¹⁶⁰ Taking a purposive approach, however, the majority held that the guarantee was more robust. It meant that each citizen was entitled not only to vote but to play a meaningful role in the selection of their representatives to the legislature, which was necessary to maintain the free and democratic state contemplated by the *Charter*.¹⁶¹ In *Reference re Secession of Quebec*,¹⁶² the unanimous Supreme Court noted the importance of democratic and representative institutions to Canada’s system of government. The Court

153. *Constitution Act, 1867*, *supra* note 1, s 53.

154. *Reference re Senate Reform*, *supra* note 114 at para 16 referring to Benoît Pelletier, “Réponses suggérées aux questions soulevées par le renvoi à la Cour suprême du Canada concernant la réforme du Sénat” (2013) 43 RGD 445.

155. *Charter*, *supra* note 20, s 3.

156. *Ibid*, s 4(1).

157. *Ibid*, s 5.

158. *Ibid*, ss 16(1), 17(1), 18(1), 20(1).

159. 2003 SCC 37 [*Figueroa*].

160. *Ibid* at para 19 citing *Dixon v British Columbia (Attorney General)*, [1989] 4 WWR 393 at 403, 59 DLR (4th) 247 (BCSC).

161. *Figueroa*, *supra* note 159 at paras 25-26.

162. *Supra* note 32.

held that democracy was one of four unwritten principles that formed the “lifeblood” of the Constitution.¹⁶³ According to the Court:

[T]he democracy principle can best be understood as a sort of baseline against which the framers of our Constitution, and subsequently, our elected representatives under it, have always operated. It is perhaps for this reason that the principle was not explicitly identified in the text of the *Constitution Act, 1867* itself. To have done so might have appeared redundant, even silly, to the framers.¹⁶⁴

None of these qualities are assured in the case of laws made by the executive. While the cabinet includes elected members of the House of Commons from the governing party,¹⁶⁵ it may also include appointed Senators. There is no guarantee of regional representation as the selection of cabinet is a prerogative of the Prime Minister.¹⁶⁶ Finally, key parts of the executive lawmaking process are carried out in secret with its deliberations being privileged from disclosure as cabinet confidences. According to Jeremy Waldron, legislatures have a “transparent dedication to lawmaking” in the sense of being known as the place where laws are made.¹⁶⁷ This explicit dedication provides accountability and directs the efforts and resources of those who wish to change the law into the venue dedicated to the task.¹⁶⁸ The same cannot be said about executive lawmaking as the process is opaque and poorly understood.¹⁶⁹ In addition, lawmaking carried out in secret challenges the principle of legality as accountability for policy choices can be avoided by making decisions covertly through delegated legislation. In effect, the delegation of broad powers that enable important policy matters to be decided by the executive gives the go-by to Parliament as lawmaker in chief, undermining its constitutional functions and purpose and the very qualities that make it uniquely qualified to decide important questions of national policy.

There are at least two additional constitutional arguments supporting a new approach to delegation. First, the rule of law is often seen to incorporate a minimum standard of lawmaking transparency and accountability that is difficult to reconcile with a lawmaking process carried out by

163. *Ibid* at para 51.

164. *Ibid* at para 62. Democracy is identified as core constitutional feature that is to be furthered when interpreting the Constitution: *Reference re Senate Reform*, *supra* note 114 at para 25.

165. Jeremy Waldron notes the importance of large numbers in legislatures: Jeremy Waldron, “Representative Lawmaking” (2009) 89:2 BUL Rev 335 at 340-345.

166. *Guegis v Novak*, 2013 ONCA 449.

167. Waldron, *supra* note 165 at 336.

168. *Ibid* at 339.

169. See, at the provincial level, the scathing report of the Ombudsman of Ontario in relation to a regulation enacted in connection with the 2010 G20 summit in Toronto: G20 Report, *supra* note 18.

the executive in secret. According to the unanimous Supreme Court of Canada in *Reference re Secession of Quebec*, democracy would not exist without the rule of law, as law provides the institutional framework that is necessary to realize democracy.¹⁷⁰ In order to maintain their legitimacy, the democratic institutions created by law “must allow for the participation of, and accountability to, the people.”¹⁷¹ Jeremy Waldron also links the rule of law and democratic institutions—specifically, the legislative process, writing that “if the rule of law requires that law be taken seriously and held in high regard in a society, one would think that particular emphasis should be given to the legitimacy of the processes by which legislatures enact statutes.”¹⁷² The acceptance of broad delegated powers that are exercised through an opaque lawmaking process is inconsistent with this notion of the rule of law.¹⁷³ Second, while the separation of powers is never a straightforward fit with a Westminster parliamentary system that involves some degree of overlap among the various branches of government, the Supreme Court of Canada has articulated a form of the separation of powers as a constitutional doctrine based on “core competencies” that have evolved in the different branches.¹⁷⁴ In the 2013 judgment of *Ontario v. Criminal Lawyers’ Association of Ontario*,¹⁷⁵ a majority of the Supreme Court held that:

Over several centuries of transformation and conflict, the English system evolved from one in which power was centralized in the Crown to one in which the powers of the state were exercised by way of distinct organs with separate functions. The development of separate executive, legislative and judicial functions has allowed for the evolution of certain core competencies in the various institutions vested with these functions. The legislative branch makes policy choices, adopts laws and holds the purse strings of government, as only it can authorize the spending of public funds. The executive implements and administers those policy choices and laws with the assistance of a professional public service. The

170. *Reference re Secession of Quebec*, *supra* note 32 at para 67.

171. *Ibid.*

172. Jeremy Waldron, “Legislation and the Rule of Law” (2007) 1:1 *Legisprudence* 91 at 99.

173. See, e.g., Peter Aucoin, Mark Jarvis & Lori Turnbull, *Democratizing the Constitution: Reforming Responsible Government* (Toronto: Emond Montgomery Publications, 2011) where the authors observe that the executive branch, headed by the Prime Minister, has grown in power while the functions of the House of Commons have diminished.

174. Notably the branches of government are defined separately in the *Constitution Act, 1867*, *supra* note 1 under the headings of “Executive Power,” “Legislative Power” and “Judicature”—with certain powers and limits applicable to each set out under these headings. These headings in the Australian Constitution have given rise to a substantive doctrine of separation of powers: *R v Kirby*; *Ex parte Boilermakers’ Society of Australia*, [1956] HCA 10. For an analysis of the separation of powers and delegated legislation in Australia see Appleby & Howe, *supra* note 139.

175. 2013 SCC 43.

judiciary maintains the rule of law, by interpreting and applying these laws through the independent and impartial adjudication of references and disputes, and protects the fundamental liberties and freedoms guaranteed under the *Charter*.¹⁷⁶

The delegation of sweeping lawmaking powers by Parliament to the executive does not respect the competency of the legislature in making policy choices through its institutional processes, such as hearing witnesses and detailed study by committee.

3. *Judicial scrutiny of the vires of regulations*

a. *The current approach*

Canadian courts recognize that “subordinate legislation must, in order to be valid, come within the terms of the empowering statute.”¹⁷⁷ This form of judicial review involves a tripartite analysis: (i) interpreting the scope of lawmaking authority delegated by the enabling legislation; (ii) construing the meaning and purpose of the regulation at issue; and (iii) assessing the *vires* of the delegated legislation, in other words, whether the regulation falls within the scope of authority granted by its parent act. The current approach to *vires* review is problematic as it does not provide a sufficiently rigorous assessment of the scope of authority provided by the enabling legislation and whether the regulation fits within this authority. It also rewards the drafting of generic delegation provisions, which are seen by courts as supplying broad lawmaking latitude to the executive that minimizes the risk of regulations later being found to be legally invalid.

In the first and second parts of the analysis, courts consider the text, context and purpose of the legislation to determine the available scope of lawmaking authority and the meaning of the regulation.¹⁷⁸ According to the Supreme Court of British Columbia’s leading judgment in *Waddell v. Governor in Council*:¹⁷⁹

In determining the scope of a power or discretion delegated by Parliament it may be necessary to look beyond the literal terms of the particular delegating provision of the enactment to ascertain limitations on that power or discretion which must have been intended by Parliament. ... In determining whether impugned subordinate legislation has been enacted in conformity with the terms of the parent statutory provision, it is essential to ascertain the scope of the mandate conferred by Parliament,

176. *Ibid* at para 28.

177. *Heppner v Alberta (Minister of Environment)* (1977), 80 DLR (3d) 112 at 118, 4 Alta LR (2d) 139 [Heppner].

178. *United Taxi Drivers’ Fellowship of Southern Alberta v Calgary (City)*, 2004 SCC 19 at para 8.

179. (1983), 5 DLR (4th) 254, 49 BCLR 305 (BCSC) [*Waddell*].

having regard to the purpose(s) or object(s) of the enactment as a whole. The test of conformity with the Act is not satisfied merely by showing that the delegate stayed within the literal (and often broad) terminology of the enabling provision when making subordinate legislation. The power-conferring language must be taken to be qualified by the overriding requirement that the subordinate legislation accord with the purposes and objects of the parent enactment read as a whole.¹⁸⁰

Regulations are to be construed in light of their enabling legislation “having regard to the language and purpose of the Act in general and more particularly the language and purpose of the relevant enabling provisions.”¹⁸¹ Courts tend to adopt a generous reading of the grant of authority.¹⁸² There are numerous illustrations of courts taking an executive-friendly approach to the interpretation of enabling legislation. For example, in *Waddell*, the Supreme Court of British Columbia found the regulation to be consistent with its parent act—which was construed so broadly that it would have even allowed the executive to amend primary legislation.¹⁸³ In *Attorney General of Canada v. Inuit Tapirisat*,¹⁸⁴ the Supreme Court of Canada held that the wording of the delegation provision at issue provided almost complete legislative discretion to the executive, subject only to minimal jurisdictional limits.¹⁸⁵

In the third part of the analysis, courts adopt a deferential approach in working out whether the regulation fits within the scope of the authority provided by the enabling legislation. This deference is aided by a strong presumption of validity that regulations are “within the authority conferred by the Act and [courts] will not declare it invalid unless there is clear evidence to support such a finding.”¹⁸⁶ Courts will find an inconsistency with the enabling legislation only when the regulation is seen as “irrelevant,” “extraneous” or “completely unrelated” to the express terms of the statute

180. *Ibid* at paras 28-29. See also *Katz Group Canada Inc v Ontario (Health and Long-Term Care)*, 2013 SCC 64 at para 26 [Katz]: “Both the challenged regulation and the enabling statute should be interpreted using a ‘broad and purposive approach....’”

181. Sullivan, *supra* note 45 at 413 discussing *Bristol-Myers Squibb Co v Canada (Attorney General)*, 2005 SCC 26.

182. See also David Williams, “Subordinate Legislation and Judicial Control” (1997) 8 Public L Rev 77 who refers to this approach as a benevolent interpretation.

183. *Waddell*, *supra* note 179 at paras 32, 36. Such a provision is referred to as a “Henry VIII clause,” discussed earlier.

184. [1980] 2 SCR 735, 115 DLR (3d) 1 [*Inuit Tapirisat* cited to SCR].

185. *Ibid* at 756 (the case arose in relation to a claim for natural justice which was rejected).

186. *Heppner*, *supra* note 177 paras 30, 32 noting the presumption and that the burden of displacing it rests with the plaintiff. See also *114957 Canada Ltée (Spraytech, Société d’arrosage) v Hudson (Town)*, 2001 SCC 40. Keyes, *supra* note 46 at 544 notes that the review of a regulation for compatibility with its enabling legislation is “tempered by presumptions of validity.”

or its purpose.¹⁸⁷ For example, in *Kubel v. Alberta (Minister of Justice)*,¹⁸⁸ the Alberta Court of Queen's Bench considered a statute authorizing the provincial cabinet to define a "minor injury," which were subject to a cap on non-pecuniary damages arising from automobile accidents. The Court asked: "The term 'minor injury' signals that the Act intended to regulate less serious injuries, but less serious than what?"¹⁸⁹ While acknowledging that some limits were imposed by the enabling legislation, the Court cited with approval an academic summary of the case law that "subordinate legislation enacted by a Cabinet will be found to be *ultra vires* on the ground that it is inconsistent with the purposes of the enabling legislation only in an egregious case."¹⁹⁰ It then upheld the cabinet's definition of minor injuries as including certain physical disabilities and spinal injuries.¹⁹¹ The Court was unwilling to engage in more than a cursory probe of the regulation's *vires*, observing that in having formulated its definition, the cabinet had struck a balance among competing interests: "it is not the function of the courts to assess the merits of subordinate legislation in a consideration of the *vires* of the that (sic) legislation."¹⁹² And in the 2013 case of *Katz Group Canada Inc v. Ontario (Health and Long-Term Care)*,¹⁹³ the Supreme Court of Canada upheld regulations that were challenged as falling outside the purpose of their parent act. The unanimous Court found that the regulations were valid even though they were only indirectly connected with their enabling legislation.¹⁹⁴ According to the Supreme Court, the broad discretion provided by the legislature meant that a wide range of means were available to the executive, and whether the regulations at issue "ultimately prove to be successful or represent sound economic policy is not the issue."¹⁹⁵

187. *Katz*, *supra* note 180 at para 28 summarizing relevant case law.

188. 2005 ABQB 836 [*Kubel*].

189. *Ibid* at para 34.

190. *Ibid* citing DJM Brown & JM Evans, *Judicial Review of Administrative Action in Canada* (Toronto: Canvasback Publishing, 1998) (loose-leaf) vol 3 at para 14:3352. It appears this language comes from Justice Dickson in *Thorne's Hardware Ltd v The Queen*, [1983] 1 SCR 106 at 111, 143 DLR (3d) 577.

191. *Kubel*, *supra* note 188 at paras 5-12, 34. Such injuries could not substantially and chronically impair employment or daily living with no expectation of substantial improvement.

192. *Ibid* at para 32.

193. *Katz*, *supra* note 180.

194. *Ibid* at para 39.

195. *Ibid*. Recent case law reveals a divide among the Supreme Court on the proper analytical framework to apply to questions of the validity of a regulation under its enabling legislation. The first is the traditional *vires* approach, focused on jurisdiction and normally reviewed on a correctness standard (although correctness standard's bark is worse than its bite in this context, given the weaknesses of *vires* review as discussed). The second is a reasonableness review from the administrative law jurisprudence. For a recent example see *West Fraser Mills Ltd v British Columbia*

The deferential approach of the *vires* review of regulations can be better understood against the backdrop of Canadian administrative law more generally, in which courts have historically alternated between interventionist and deferential approaches to decisions made by statutory authorities. First, under the present judicial review framework, courts impose a robust quality assurance review of all decisions by public authorities that would implicate an individual's right, privilege or interest.¹⁹⁶ In such cases, procedural fairness must be followed. Procedural fairness may require the decision-maker to provide the individual with advance notice of the decision to be made, disclosure of evidence, an oral hearing, counsel, the opportunity to call evidence and cross-examine witnesses, a timely process and written reasons for the decision.¹⁹⁷ When a tribunal is exercising what the court sees as *legislative powers*, however, it is categorically exempt from the procedural fairness requirements on the basis of an analogy to Parliament and its unencumbered lawmaking process.¹⁹⁸ Second, when it comes to the merits review of a decision made by a public authority, courts impose a moderate "reasonableness" analysis, which requires the outcome to be within a range of possible, acceptable outcomes with respect to the law and the facts.¹⁹⁹ Decisions that are unreasonable, from the court's perspective, will be quashed as unlawful on the ground that Parliament intends its delegates to make reasonable decisions.²⁰⁰ When it comes to the merits review of *delegated legislation*, however, courts tip the scales of reasonableness to provide maximum deference to the executive. For example, in the Supreme Court of Canada's judgment in the 2012 case of *Catalyst Paper Corp v. North Cowichan (District)*,²⁰¹ Chief Justice McLachlin observed that municipal bylaws could be reviewed for *vires* to ensure that they come "within the

(*Workers' Compensation Tribunal*), 2018 SCC 22 [*West Fraser Mills*], in which the majority adopted a reasonableness review of a regulation while the dissenting judges in three separate opinions would have reviewed the regulation under a correctness of *vires* approach. The proposed reforms, discussed below, would seek to strengthen the *vires* approach while integrating reasonableness and proportionality review as additional steps in the *vires* analysis in certain circumstances.

196. For examples, see *Cardinal v Director of Kent Institution*, [1985] 2 SCR 643, 24 DLR (4th) 44 and *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817, 174 DLR (4th) 193.

197. See Grant Huscroft, "From Natural Justice to Fairness: Thresholds, Content, and the Role of Judicial Review" in Colleen M Flood & Lorne Sossin, eds, *Administrative Law in Context*, 2nd ed (Toronto: Emond Montgomery, 2012) 147.

198. *Homex Realty v Wyoming*, [1980] 2 SCR 1011, 116 DLR (3d) 1 and *Inuit Tapirisat*, *supra* note 184.

199. *Dunsmuir v New Brunswick*, 2008 SCC 9 [*Dunsmuir*].

200. *Ibid.*

201. 2012 SCC 2.

legislative constraints.”²⁰² But when it came to the merits review of bylaws, “reasonableness must be assessed in the context of the particular type of decision making involved and all relevant factors.”²⁰³ Because a municipal council typically enacts laws of general application that take into account economic, social and political factors, Chief Justice McLachlin held that bylaws would only be unreasonable in an exceptional case.²⁰⁴ While there are compelling reasons to relax the merits review of decisions taken by a democratic, representative and accountable body, the special treatment of legislative functions in administrative law seems to have spilled over into the *vires* analysis of regulations. When reviewing the exercise of legislative functions in administrative law, the court adopts a deferential posture, which appears to have also discouraged courts from imposing stringent standards that would limit delegated legislation on the question of *vires*.

b. *Proposed reform*

As guardians of the Constitution, the principle of legality and the rule of law, judges patrol the boundaries of delegation to ensure that the use of executive lawmaking power is constitutionally appropriate and otherwise lawful.²⁰⁵ It is proposed that courts should adopt a stricter interpretation of statutory provisions that delegate lawmaking power and strengthen the rigour of the *vires* review of regulations to overcome the current weaknesses that allow for the delegation of broad powers through generic words and exceptionally wide latitude for the exercise of delegated power. The case for reform is supported by the fact that delegation provisions are unique. Delegation involves a transfer of constitutionally sanctioned lawmaking power from one organ of the state to another. Lawmaking by the executive is not what is expected or apparent from the constitutional framework and it can be safely presumed that Parliament does not intend to casually lend its lawmaking powers to others. To be legally effective, and overcome this presumption, Parliament must make its intention to delegate clear. Excessive delegation also erodes Parliament’s constitutional role. Courts should be much slower in accepting the delegation of sweeping powers to the executive. The proposed reforms stand to better safeguard Parliament’s constitutional role as the principal architect of federal law and ensure that it cannot pass along its powers through generic statutory language. There

202. *Ibid* at para 11. Although, as already discussed, the *vires* review of regulations is also deferential.

203. *Ibid* at para 18.

204. *Ibid* at para 20.

205. In Australia, Appleby & Howe argue that the court should “prod” Parliament along to properly scrutinize delegated legislation: Appleby & Howe, *supra* note 139 at 10.

are also other benefits to reform. A strict judicial approach to delegation would have a knock-on effect of sharpening the legislative drafting of delegation provisions. It would also allow for a more meaningful review by the Clerk of the Privy Council who screens draft regulations and the joint parliamentary committee that scrutinizes regulations, both of which are discussed in more detail below. The reforms would also promote policy coherence by requiring greater consistency between enabling legislation and regulations. Finally, as there is already established precedent in Canadian law that supports a stricter approach, the reforms are not as radical as might first be imagined.²⁰⁶

It is proposed that courts should strengthen the *vires* doctrine in relation to regulations and impose a more stringent review. First, given that the main pressure point of the *vires* review is the scope of authority, the scope should be limited by adopting a stricter interpretation of the enabling legislation that can provide meaningful limits. The goal is to craft a well-defined window that the regulation must fit within in order to be confirmed as valid. Ambiguity or general language in the enabling legislation should be narrowly construed. Second, all regulations should be tested to ensure that they meet a minimum standard of rational connection to the statutory purpose, and therefore fall within the expected or ordinary use of the delegated power. This requirement should impose a direct, immediate connection with the objects of the parent act.²⁰⁷ Third, courts should read into the enabling legislation a series of presumptions that Parliament does *not* intend for the executive to: trespass unduly on rights and freedoms including those at common law, statute and in the *Charter*; enact regulations that operate retroactively; impose significant fiscal obligations on the state or persons; impose significant penalties on persons; or restrict the availability of judicial review.²⁰⁸ To the extent these kinds of powers are delegated by Parliament to the executive, courts should interpret them restrictively. Furthermore, given the potential for abuse in such a case, the court should take the additional step of applying a reasonableness review of regulations made under these powers to ensure

206. *In Re Price Brothers and the Board of Commerce of Canada* (1920), 60 SCR 265, 54 DLR 286. Notably, this case has not been cited by a Canadian court since 1978.

207. Given the risk of the executive altering the policy scope endorsed by Parliament, courts should more stringently review policies that may only be indirectly connected to the purpose of their enabling legislation as was the case in *Katz*, *supra* note 180.

208. Adapted from the mandate of the Standing Joint Committee for the Scrutiny of Regulations: Parliament of Canada, "Standing Joint Committee for the Scrutiny of Regulations: About" (3 December 2015), online: <parl.gc.ca/Committees/en/REGS/About> [perma.cc/7X8B-RZL7] at Mandate ["Mandate"].

that they can be justified.²⁰⁹ In the case where fundamental rights or liberties are likely to be implicated by a regulation, the court should take the further step of conducting a proportionality review to ensure that the means chosen by the executive would only minimally impair the rights or liberties.²¹⁰ By incorporating reasonableness and proportionality as steps in appropriate circumstances, the *vires* review would be considerably strengthened.²¹¹ Fourth, the assessment of *vires* should be made more rigorous by according less deference to the executive. Regulations and executive action should not be so strongly presumed to be compatible with the enabling legislation and a more common sense approach to testing the compatibility of the regulation with the enabling legislation should be carried out. The rationale of the current deferential approach is that it is not the role of the court to review (and thus apparently question) policy choices that are made by the executive. The Supreme Court has directed courts to avoid “judicializing the exercise of very broad executive power conferred by Parliament.”²¹² While there are valid concerns about the proper role of the court *vis-à-vis* the executive and avoiding perceptions of the judicial second-guessing of government policy, testing the *vires* of a regulation is an important legal question that takes into account the statutory purpose and the policy advanced by the regulation in order to test their compatibility. This exercise is not equivalent to the judge independently imposing a merits review of the executive: the judge reviews regulatory policy only to ensure its consistency with the direction established by Parliament. To maintain objectivity in the exercise, courts should expressly articulate the goal of consistency with primary legislation as part of its duty to uphold

209. This reasonableness review is envisioned as a component of the broader *vires* review of a regulation which would apply when the enabling legislation expressly ousts the ordinary interpretive presumptions. The form of the reasonableness review should be similar to a standard reasonableness review of administrative law: see, e.g., *Dunsmuir*, *supra* note 199. It would take into account the reasons for the enactment of the regulation that may be included in the regulatory impact analysis assessment published in the *Canada Gazette* during the consultative period or that can otherwise be inferred by the court.

210. This proportionality analysis, as part of testing the *vires* of a regulation, draws from the *Oakes* test to constitutional infringement: *R v Oakes*, [1986] 1 SCR 103, 26 DLR (4th) 200. If a specific *Charter* infringement claim is made in relation to the validity a regulation, the ordinary section 1 analysis would also apply. For the Australian position see Edgar, *supra* note 139.

211. The proposed reform, by bringing reasonableness and proportionality review under a more robust doctrine of *vires*, would offer greater consistency of approach—allowing the courts to move past recent debates on the proper analytical framework to be applied: see *West Fraser Mills* and related discussion, *supra* note 195.

212. *Criminal Law Amendment Act, Reference*, [1970] SCR 777 at 801, 10 DLR (3d) 669 per Laskin J (in relation to the delegated power to bring legislation into force).

the rule of law and the principle of legality—and ensuring that Parliament plays its constitutional role as lawmaker in chief.²¹³

It is important to note the constitutional implications of the proposed reforms. The reforms seek to change the way in which courts interpret legislation and test the *vires* of regulations, both of which are common law doctrines. The impetus for the reform, however, is constitutional in the sense that the reforms will better safeguard Parliament's constitutional role and give effect to the principle of legality and the rule of law. Questions of statutory interpretation and *vires* in relation to delegation and regulations, while common law doctrines, operate against this constitutional backdrop. It is not suggested that every question of interpretation or *vires* should suddenly be transformed into a full-blown constitutional case: at a minimum, what is constitutionally required is the *availability* of judicial review to apply a meaningful assessment of the legal validity of a regulation in light of its enabling legislation, one that takes the role of Parliament as lawmaker in chief seriously. The reforms call upon courts to further develop the common law in this area, and to use constitutional controls only in limited circumstances to circumscribe the outer limits of acceptable delegation practices as discussed below. Finally, it should be noted that the reforms allow for Parliament to continue to delegate important policy questions to the executive, but only where clear words are used. In this way, Parliament will be required to put the public on notice that it has delegated the power to make law on defined questions to a body operating outside of Parliament, which will more effectively have Parliament “confront what it is doing and accept the political cost.”²¹⁴

In exceptional cases, courts should impose constitutional controls to limit the availability of delegation. As observed in the case law, delegation should not be constitutionally permitted where its effect would be the abdication and usurpation of Parliament by the executive. In addition, when generic words are used in enabling legislation, which are incapable of intelligent qualification by the text, context or purpose of the statute, the court should hold the grant of authority invalid on the basis that it is impermissibly vague, an established constitutional doctrine that is a principle of fundamental justice and the rule of law:

213. Page, *supra* note 140 at 157 notes the question of *vires* involves “an interpretation of what Parliament intended when it passed the parent legislation and thus scrutiny of legality can start to *appear* to define policy” (emphasis added). The concern over the judicial scrutiny of policy may be exaggerated as courts routinely consider policy and statutory objectives in interpreting and applying legislation: see Katz, *supra* note 180 at paras 3-18 discussing the policy (and challenge) of keeping prescription drug prices low. Courts also review the “reasonableness” of administrative action and test legislation for compliance with *Charter* rights and freedoms.

214. Simms, *supra* note 36 at 131 per Lord Hoffmann.

A vague provision does not provide an adequate basis for legal debate, that is for reaching a conclusion as to its meaning by reasoned analysis applying legal criteria. It does not sufficiently delineate any area of risk, and thus can provide neither fair notice to the citizen nor a limitation of enforcement discretion. ...It offers no grasp to the judiciary. This is an exacting standard, going beyond semantics.²¹⁵

In applying the vagueness doctrine to delegation provisions, courts must take into account the legitimate need to provide a certain measure of discretion to the executive to make regulations that align with and complement the enabling legislation in light of new circumstances. The line to be drawn is not straightforward but can be gradually developed through the jurisprudence. What is needed is an intelligible standard that can be applied by the executive in making regulations and independent courts in reviewing them. It is proposed that one way to draw the line would be to impose a requirement of reasonable foreseeability, or in other words, a minimum standard that permits a reader of the enabling legislation to predict the scope of regulations that may be made thereunder. The scope should be narrower than the general purposes of the legislation, with some specificity for the kinds of regulations contemplated. In Germany, for instance, the Constitutional Court requires that delegation provisions allow a citizen “to predict how a delegated power will be exercised, and to ascertain the interests and factors that must be taken into account by the delegated law-maker.”²¹⁶ A similar standard in Canadian law would prevent Parliament from using generic words that make it difficult for courts to impose and patrol meaningful boundaries of delegated powers. For example, section 27(1) of the *Transportation of Dangerous Goods Act, 1992* begins by delegating lawmaking powers “generally for carrying out the purposes and provisions of this Act.”²¹⁷ This generic provision should be seen as impermissibly vague on the basis that it does not allow the reader to predict with any specificity the kinds of regulations that could be made under it. By contrast, the provisions that follow in sections 27(1) and 27.1(1) of the *Act* would meet this hurdle. These provisions more clearly direct and focus the regulation-making power and provide the reader with a sense of what to expect. Section 27(1)(h) for instance delegates to

215. *R v Nova Scotia Pharmaceutical Society*, [1992] 2 SCR 606 at 639, 93 DLR (4th) 36 per Justice Gonthier for the Court. For an overview see Marc Ribeiro, *Limiting Arbitrary Power: The Vagueness Doctrine in Canadian Constitutional Law* (Vancouver: UBC Press, 2004).

216. Appleby & Howe, *supra* note 139 at 32. For a discussion of the non-delegation principle in the United States see Cass R Sunstein, *Designing Democracy: What Constitutions Do* (Oxford: Oxford University Press, 2003) cited in Appleby & Howe, *supra* note 139 at 28.

217. *Supra* note 4.

the executive the power to make regulations “respecting circumstances in which dangerous goods must not be imported, offered for transport, handled or transported.”²¹⁸

4. *Parliamentary supervision of delegated lawmaking*²¹⁹

a. *The current approach*

In 1972, Parliament established a mechanism to supervise executive lawmaking when it repealed the *Regulations Act* and replaced it with the *Statutory Instruments Act*²²⁰ (*SIA*). The *SIA* provides a series of minimum procedural requirements for the making of regulations. It also allows for a parliamentary committee to scrutinize regulations and report its findings to Parliament. The current approach to the parliamentary supervision of delegated lawmaking is problematic as the committee’s staff carries out most of the work behind closed doors, with the committee reporting on only a handful of regulations. In addition, the committee does not fully utilise the powers it has at its disposal, namely to report and call witnesses, and to recommend the revocation of problematic regulations. The inadequacies of the Canadian approach become readily apparent by reviewing the parliamentary scrutiny of regulations in the United Kingdom.

When moving the *SIA* for a second reading in the House of Commons in 1971, Minister of Justice John Turner stated that its “dry title...belies what I believe to be the importance of this bill.”²²¹ The Minister went on to explain why the new legislation was so important:

218. *Ibid.* In addition to the vagueness doctrine, which should be seen to apply generally to all Canadian legislation as part of the rule of law, when a regulation infringes a *Charter* right, it would also need to be justified under section 1. Part of the section 1 analysis includes the consideration of whether the limitation is “prescribed by law,” which could similarly limit the exercise of executive discretion in making delegated legislation. While the case law in this area is complex (and at times contradictory), there is apparent support for a standard that would limit open-ended lawmaking discretion. For secondary literature on point see Susan L Gratton, “Standing at the Divide: The Relationship Between Administrative Law and the *Charter* Post-*Multani*” (2008) 53:3 McGill LJ 477 and Robert Leckey, “Prescribed by Law/Une Règle de Droit” (2007) 45:3 Osgoode Hall LJ 571.

219. This Section incorporates and expands upon Lorne Neudorf, “Rule by Regulation: Revitalizing Parliament’s Supervisory Role in the Making of Subordinate Legislation” (2016) 39:1 Can Parliamentary Rev 29.

220. RSC, 1985, c S-22 [*Statutory Instruments Act*].

221. “Bill C-182, *Statutory Instruments Act*,” 2nd reading, *House of Commons Debates*, 28-3, vol 3 (25 January 1971) at 2734.

As a direct result of the exercise of regulation-making powers...the number of regulations that are being made has greatly increased and the lives of all Canadians are now directly affected by regulations. It is obvious and self-evident that the direct result of this increase of delegated legislation has been a gradual erosion of the power of Parliament in its role as guardian of the people of Canada.

In recent years concern has been expressed by members of the public as well as by Members of Parliament relating to the increase of legislative powers being given to the executive without any realistic form of parliamentary control. I deeply share the concern of those individuals. This legislation...is an attempt to restore a measure of parliamentary control over the executive...

It is my hope that the members of the scrutiny committee will be able to find the time to examine all regulations, but especially those that have wide application to the public. In this way, members of the public will be assured that Parliament is at least aware of those regulations which have an impact on their daily lives.²²²

The *SIA* applies to many forms of delegated legislation.²²³ It sets out a limited process for the review, publication and scrutiny of regulations, which may be supplemented by further requirements specified by the enabling legislation. First, each draft regulation is sent to the Clerk of the Privy Council for an initial review.²²⁴ This review considers whether the regulation is authorized by its enabling legislation, is an expected or ordinary use of the authority, does not unduly trespass on rights and freedoms and is in the proper form.²²⁵ Matters of concern may be drawn to the attention of the regulation-making authority, although the Clerk has no power to compel amendments or prevent a defective regulation from being made.²²⁶ Second, when the regulation is made by the cabinet, minister, or agency, it is again sent to the Clerk who then assigns it a registration number.²²⁷ Third, the final regulation is published in Part II of the *Canada Gazette*.²²⁸ In addition to the process under the *SIA*, a cabinet directive requires the pre-publication of draft regulations in Part I of the *Canada Gazette*, which allows for a period of public comment before the regulation is made, although it is not clear to what extent the government

222. *Ibid.*, at 2735-2736.

223. *Statutory Instruments Act*, *supra* note 220, s 2(1) "regulation," "statutory instrument."

224. *Ibid.*, s 3.

225. *Ibid.*, s 3(2).

226. *Ibid.*, s 3(3).

227. *Ibid.*, ss 5-6.

228. *Ibid.*, s 11.

takes into account comments received in making the final regulation.²²⁹ Draft regulations are typically published with a regulatory impact statement that explains their purpose. Once a regulation has been made and has the force of law,²³⁰ it can be scrutinized by a special parliamentary committee.

Following the enactment of the *SIA*, Parliament established the Standing Joint Committee for the Scrutiny of Regulations (SJCSR). As a joint committee, the SJCSR includes members of both Houses. The *SIA* provides that every statutory instrument made on or after January 1, 1972 is permanently referred to the SJCSR, which gives the committee an exceptionally broad mandate to inquire into nearly all regulations.²³¹ The SJCSR does not review the policies or merits of delegated legislation, but instead conducts a technical review on several grounds. For instance, the committee may flag regulations that are not authorized by the enabling legislation, are not *Charter* compliant or infringe other rights and liberties, operate retroactively or impose liabilities without express authority, exclude judicial review, infringe natural justice or the rule of law, are defective in drafting, are procedurally irregular, or are otherwise an unusual or unexpected use of the delegation power.²³² Notably, the committee also holds the power to review a regulation that “amounts to the exercise of a substantive legislative power properly the subject of direct parliamentary enactment,”²³³ although it is unclear whether this ground has been invoked or what criteria would be used to answer this question. The SJCSR reports to both Houses. It is empowered to bring forward a resolution to revoke a regulation.²³⁴ In such a case, 30 days’ notice must be given to the regulation-making authority to provide it with an opportunity to first remedy the problem.²³⁵ If the SJCSR remains unsatisfied and resolves to revoke the regulation, the resolution is deemed adopted by the Senate or Commons 15 sitting days later, unless a minister makes a motion otherwise.²³⁶ The House of Commons has adopted standing orders that elaborate the revocation procedure.²³⁷

229. Canada, Privy Council Office, *Guide to Making Federal and Regulations*, 2nd ed, Catalogue No J2-8/2001E-IN (Ottawa: Department of Justice, 2001), online (pdf): <canada.ca/content/dam/pco-bcp/documents/pdfs/fed-acts-eng.pdf> [perma.cc/Q9T2-LY7C], part 3.

230. See *Statutory Instruments Act*, *supra* note 220, s 9 for coming into force rules.

231. *Ibid.*, s 19.

232. Mandate, *supra* note 208.

233. *Ibid.*

234. *Statutory Instruments Act*, *supra* note 220, s 19.1.

235. *Ibid.*, s 19.1(2).

236. *Ibid.*, s 19.1(5).

237. House of Commons, “Delegated Legislation,” *Standing Orders*, ch XIV (29 November 2018) online (pdf): <ourcommons.ca/About/StandingOrders/SOPDF.pdf> [perma.cc/ZZR3-RECG].

The SJCSR is well-resourced. It benefits from a number of support staff, including clerks, assistants, analysts, research librarians, and the resources of the Parliamentary Budget Officer.²³⁸ Despite these resources, evidence of the scrutiny of regulations by parliamentarians on the committee is disappointing. Between 2004 and 2015, the SJCSR issued 22 reports, two of which received responses from the government. Only 11 reports were made in relation to a specific regulation, with some reports commenting on the same regulation.²³⁹ Instead of routinely reporting on particular regulations, SJCSR reports often discuss broader, thematic issues, such as questions relating to the interpretation of legislation. A comprehensive screen for each regulation is instead performed behind the scenes by SJCSR staff who draw problematic regulations to the attention of committee members. When a problem is discovered, SJCSR staff or members communicate directly with the regulation-making agency or minister.²⁴⁰ The advantages of this informal approach include allowing the government to save face and resolve the problem without political cost and avoiding the committee having to put forward a formal revocation resolution and risk its defeat (which could undermine the committee's standing). However, there are also shortcomings. First, communication between the committee and the government to resolve problems behind closed doors is hard to reconcile with the principle of transparency. Second, because communications are not published in the committee's reports, there is a missed opportunity to draw attention to potential abuses of power and important policy questions decided by regulations, which would better hold the government to account. Third, there is little opportunity for those outside the committee to identify systemic issues related to regulations that could help generate ideas to strengthen the scrutiny process. Fourth, there is a risk of the committee adopting an overly government-friendly approach when it carries out its reviews in secret, particularly when the committee is comprised of a majority of members from the governing party. Fifth, there is little incentive for the government to take the committee seriously if there is no real risk of public exposure, censure or revocation of a regulation.

A comparison to the parliamentary scrutiny of regulations in the United Kingdom reveals the inadequacy of the Canadian approach and

238. Parliament of Canada, "Standing Joint Committee for the Scrutiny of Regulations: 'About'" <parl.gc.ca/Committees/en/REGS/About> [perma.cc/7X8B-RZL7] at Staff assigned to the Committee ['About'].

239. For example, report 2 in 2006, report 5 in 2007, and report 3 in 2009 were all made in relation to the same broadcasting license fee regulation.

240. 'About,' *supra* note 238 at "Past Work."

that much more can be done (although this system also has its limitations—for example, its committees do not have the power of revocation).²⁴¹ In 1946, the Westminster Parliament enacted the *Statutory Instruments Act*²⁴² (*SIA UK*) to regulate the process of making delegated legislation. Like the Canadian Act, the UK statute defines a statutory instrument broadly.²⁴³ Unlike the Canadian Act, however, the UK statute provides for the parliamentary scrutiny of regulations at the earlier lawmaking stage as opposed to after the regulation has already been made. The possibility of earlier intervention provides a better opportunity to influence the direction of a regulation as it has not yet become law. There are two main methods of control for regulations in the UK: negative and affirmative resolutions, with the enabling legislation electing which procedure applies. The more common of the two is negative resolution, which deems a regulation to be approved *unless* there is an objection from either House. Pursuant to sections 5 and 6 of the *SIA UK*, there are two sub-forms of negative resolution procedures. The first requires a draft regulation to be laid before Parliament for 40 days. The regulation cannot be made if it is rejected by either House within that time. The second requires that when a regulation is made, it must be laid before Parliament for 40 days during which time either House may pass a motion to annul it. By contrast, the affirmative procedure is more stringent as it requires the express approval from both Houses. There are a variety of forms of the affirmative procedure seen in different statutes, including approval requirements for draft regulations, time limits in which approval must be given, and in some cases, approval only from the Commons.

The UK Parliament has established a network of committees that together offer a robust scrutiny of regulations. Three committees are tasked with examining delegated legislation: the Joint Committee on Statutory Instruments (JCSI), the Secondary Legislation Scrutiny Committee (SLSC), and Delegated Legislation Committees (DLCs). First, the JCSI examines each regulation laid before Parliament to ensure that it complies with technical rules and that it followed the proper process for coming into force. It also reviews whether delegated powers are exercised in compliance with the enabling legislation. As the JCSI is a joint committee of the Lords and

241. For a four-country comparative study of parliamentary scrutiny of delegated legislation see John E Kersell, *Parliamentary Supervision of Delegated Legislation: The United Kingdom, Australia, New Zealand, and Canada* (London: Stevens, 1960). Adam Tucker offers a critique of the UK scrutiny committees: Tucker, *supra* note 2 at 363-70. See also Page, *supra* note 140 at 157-176 for a quantitative analysis of scrutiny in the UK.

242. (1946), 9 & 10 Geo 6, c 36.

243. *Ibid.*, s 1.

Commons, it reports to both Houses. The JCSI may also conduct informal scrutiny of draft regulations subject to affirmative resolution procedures when requested by the regulation-making authority. In the rare case where a statute does not require regulations to be laid before Parliament, the JCSI is still empowered to examine regulations made under it.²⁴⁴ Second, the SLSC is a committee of the House of Lords that reviews the policy implications of regulations that are subject to the negative resolution procedure. Its policy focus complements the JCSI's review of technical matters. There are several grounds on which a regulation might be flagged by the SLSC, including that the regulation is "politically or legally important," that it may be "inappropriate" because of new circumstances since its enabling legislation was made, that it "imperfectly achieves its policy objectives," that the government's material supporting the regulation is "insufficient," and that the consultation period was inadequate.²⁴⁵ Third, DLCs are *ad hoc* Commons committees formed to discuss new regulations. In the 2015-16 parliamentary session, there were 94 DLCs that considered specific regulations or orders. DLCs provide a platform for discussing the merits of delegated legislation. DLCs do not approve, reject, or amend regulations. Instead, each DLC debates a motion that the "Committee has considered" the instrument.²⁴⁶ Any regulation subject to an affirmative resolution is referred automatically to a DLC, with the regulation later brought to the floor of the Commons for a vote. Regulations or draft regulations subject to a negative resolution procedure are considered by a DLC only if they have been referred by the government.

In addition to these committees, the House of Lords has established a Delegated Powers and Regulatory Reform Committee that reviews every grant of authority made by each new bill to consider whether it "delegated powers to an inappropriate degree of parliamentary scrutiny."²⁴⁷ This Committee safeguards the supervisory role of Parliament in relation to regulations by ensuring that the usual scrutiny mechanisms are not

244. Joint Committee on Statutory Instruments, "Role," online: *Parliament of the United Kingdom* <www.parliament.uk/business/committees/committees-a-z/joint-select/statutory-instruments/role/> [perma.cc/F3EG-CLKX]. Except for local regulations.

245. Secondary Legislation Scrutiny Committee, "Terms of Reference," online: *Parliament of the United Kingdom* <www.parliament.uk/business/committees/committees-a-z/lords-select/secondary-legislation-scrutiny-committee/role/tofref/> [perma.cc/WA4M-CKRN].

246. See, e.g., First Delegated Legislation Committee, "Draft Conduct of Employment Agencies and Employment Businesses (Amendment) Regulations 2016," online (pdf): <www.publications.parliament.uk/pa/cm201516/cmgeneral/deleg1/160323/160323s01.pdf> [perma.cc/4YF8-VP6Y] at 3.

247. Delegated Powers and Regulatory Reform Committee, "Role of the Committee," online: *Parliament of the United Kingdom* <www.parliament.uk/business/committees/committees-a-z/lords-select/delegated-powers-and-regulatory-reform-committee/role/> [perma.cc/F62D-A6L7].

circumvented by new legislation. Its proposed amendments to bills are usually accepted by the government.²⁴⁸

The UK scrutiny committees are prodigious, and their many reports are a treasure trove of information. It is clear from reading the reports that the committees positively impact the quality of regulations made by the executive. The JCSI made 25 reports in the 2015–16 parliamentary session. In these reports, 86 problems were identified and reported to Parliament. For each, the report summarizes correspondence between the JCSI and the regulation-making authority. The reports indicate that a wide range of problems were discovered including regulations that were *ultra vires*, made an unexpected or unusual use of the delegated power, were defective in drafting or required further information.²⁴⁹ Similarly, in the 2015–16 parliamentary session, the SLSC made 35 reports to the House of Lords. These reports are of an exceptional quality, drawing attention to problematic regulations from a policy perspective. Special attention was drawn to 67 regulations while 104 other regulations were noted to be of interest. Each report includes a plain-language overview of the regulation and what it seeks to achieve and provides an insightful critical perspective. In the 2015–16 parliamentary session, the SLSC drew special attention to regulations that decided politically important issues or made major policy changes that should be the subject of primary legislation, did not benefit from a period of adequate consultation, were made on the basis of insufficient or incorrect evidence, used means that were unlikely to work in practice or achieve their objective, did not allow sufficient time for implementation, were delayed in being laid before Parliament, or were made even though the responsible individuals in the regulation-making authority lacked a basic understanding of the issues.²⁵⁰ In addition to reporting on flaws discovered in regulations, SLSC reports usefully suggest questions that can be asked by members in the House. Finally, for each DLC, a transcript of the debate is published by Hansard, which may be used for reference by members when the regulation comes to the floor of the Commons for a vote. In the 2015–16 parliamentary session,

248. UK, Chancellor of the Duchy of Lancaster, *Strathclyde Review: Secondary legislation and the primacy of the House of Commons* by Lord Strathclyde (London: HM Stationery Office, 2015), online (pdf): <gov.uk/government/uploads/system/uploads/attachment_data/file/486790/53088_Cm_9177_Web_Accessible.pdf> [perma.cc/8NQW-2PQ2] at 9.

249. Joint Committee on Statutory Instruments, “Publications,” online: *Parliament of the United Kingdom* <www.parliament.uk/business/committees/committees-a-z/joint-select/statutory-instruments/publications/> [perma.cc/ZBP2-AAAV].

250. Parliament of the United Kingdom, Secondary Legislation Scrutiny Committee, “Publications” <<http://www.parliament.uk/business/committees/committees-a-z/lords-select/secondary-legislation-scrutiny-committee/publications/>> [perma.cc/KEW9-F27J].

for example, the transcripts provide evidence of a focused debate on the regulation, often with the minister responsible answering questions.²⁵¹

b. *Proposed reform*

This reform seeks to strengthen the parliamentary scrutiny of regulations, overcoming the limitations of the existing process by moving it closer to that of the more robust United Kingdom system. UK scrutiny committees report on individual regulations, publish summaries of their correspondence with executive agencies, and explicitly consider the policy implications of new regulations. Their rate of productivity greatly outpaces that of their Canadian counterpart: each reporting UK committee generated more reports in a single parliamentary year than the Canadian committee in a decade. In addition, the UK benefits from a special committee to review the grants of authority in each new bill, which brings expert review to each delegation provision with the goal of safeguarding the lawmaking role of Parliament by preventing new legislation from circumventing the scrutiny processes. Canada should learn from and reform its mechanisms to match the quality and rigour of the UK system, including establishing a review of delegation provisions in new primary legislation, providing an opportunity for the scrutiny committee to review regulations at the earlier lawmaking stage, identifying flawed regulations in published committee reports and summarizing correspondence with departments, and considering the policy implications of regulations. The scrutiny committee should also use its existing powers more routinely and effectively, especially those of reporting, calling witnesses, and revocation, which will strengthen the parliamentary oversight of executive lawmaking and ensure its work is taken seriously.²⁵²

The justification for this reform is grounded in the constitutional role allocated to Parliament, which is vested with exclusive legislative authority in federal matters. Effective parliamentary scrutiny of executive lawmaking is part of a constitutional obligation that flows from the delegation of lawmaking power, otherwise vested in Parliament, to a body operating outside Parliament that may not share Parliament's democratic, representative or accountable qualities. As part of its constitutional responsibility for lawmaking, Parliament must put in place appropriate

251. Parliament of the United Kingdom, Delegated Legislation Committee, "Debates" <<http://www.parliament.uk/business/publications/hansard/commons/gc-debates/delegated-legislation-committee/>>.

252. A form of these proposals has been brought to the Canadian committee's attention: see Parliament of Canada, Standing Joint Committee for the Scrutiny of Regulations, *Minutes of Proceedings*, Issue No 28 (7 December 2017) (Lorne Neudorf), online: <parl.ca/DocumentViewer/en/42-1/REGS/meeting-29/evidence> [perma.cc/K5KA-PDPT].

mechanisms, and use those mechanisms in fact, to supervise the exercise of its powers by others.²⁵³ An analogy can be made to Parliament as a fiduciary to Canadians because of its responsibility to act in the public interest.²⁵⁴ This relationship imparts a duty to supervise its delegates. In the classic fiduciary relationship between a trustee and beneficiary, the trustee is required to act personally in carrying out the trust. Where delegation is permitted as an exception to the rule, for instance because of an authorization in the trust instrument or a statute that permits delegation in certain circumstances, the trustee must supervise the delegate and may be liable to make good a loss suffered by the beneficiary that is caused by inadequate supervision.²⁵⁵ By taking Parliament's role as lawmaker in chief seriously through the establishment of a system for the effective supervision of delegated legislation, Parliament will continue to play a meaningful role in the lawmaking process. The risk of unaccountable lawmaking power in the hands of the executive is too great: not only does it erode Parliament's constitutional role, it can also lead to abuses of power and defective laws.²⁵⁶

The groundwork for this constitutional obligation has already been carried out through the earlier cases that accept the validity of delegation on the premise that Parliament can supervise and control its delegate as necessary. Because the courts have already treated the possibility of supervision as part of the delegation equation, it is one further step to transform this expectation into a constitutional obligation—giving teeth to what has already been expected of Parliament as a responsible practice for more than a century. The question is what will be expected in terms of the

253. Tucker, *supra* note 2 at 361-363 in the context of the UK argues that constitutional principle demands that a minimum standard of parliamentary scrutiny be applied that includes public justification and vulnerability to defeat. Appleby & Howe, *supra* note 139 at 11 in the context of Australia argue for greater scrutiny of delegated legislation on the basis that the High Court judgment in *Williams v Commonwealth (No 1)*, [2012] HCA 23 indicated a greater willingness for judges to enforce the constitutional principle of responsible government.

254. For a scholarly discussion of this topic see, e.g., Evan Fox-Decent, *Sovereignty's Promise: The State as Fiduciary* (Oxford: Oxford University Press, 2011) and Lindsay Aagaard, "Fiduciary Duty and Members of Parliament" (2008) 31:2 Can Parliamentary Rev 31. The Supreme Court of Canada has recognized a fiduciary duty existing between the Crown and Aboriginal peoples: *Guerin v The Queen*, [1984] 2 SCR 335, 13 DLR (4th) 321.

255. Gareth H Jones, "Delegation by Trustees: A Reappraisal" (1959) 22:4 Mod L Rev 381 at 383 noting case law on supervision. For an example of a statutory supervisory duty see *Trustee Act*, RSBC 1996, c 464, s 15.5(3)(d).

256. For example, in 2017, the committee raised concerns about certain definitions used in firearms regulations, particularly the vagueness of the terms that were used: Parliament of Canada, Standing Joint Committee for the Scrutiny of Regulations, Proceedings—Evidence Issue 26 (23 November 2017) <parl.ca/DocumentViewer/en/42-1/REGS/meeting-27/evidence> [perma.cc/3E5L-R5QY]. The issues identified with this regulation demonstrate the importance of scrutiny and why the committee should be reformed to carry out a more robust scrutiny of regulations.

standard of supervision and scrutiny to meet this obligation? Parliament should establish and use a scrutiny mechanism that effectively maintains a role for Parliament in the lawmaking process and holds the executive to account in its use of lawmaking powers, ensuring that these are an expected use of the powers from Parliament's perspective. While there are practical limits of time and resources in reviewing the many thousands of new regulations (one of the reasons driving delegation in the first place), review by a committee or a series of committees is likely the best use of limited resources as such bodies can carry out a detailed review and report to Parliament. Moreover, technology may be able to play a role in alleviating some of the time and resource pressure by flagging questionable uses of delegated power.²⁵⁷ The constitutional obligation is best addressed by Parliament itself taking responsibility for federal lawmaking and strengthening its scrutiny mechanisms to make them more effective. If needed, a court may issue a declaration of the constitutional obligation as the impetus for Parliament to take the necessary action. In an extreme case where the scrutiny system is totally ineffective, the court may seek to enforce this constitutional obligation by holding inadequately scrutinized regulations as legally ineffective. While such an outcome would carry potentially serious legal consequences, a court in such a case could suspend the declaration of invalidity to provide Parliament with the opportunity to improve the scrutiny process.²⁵⁸

5. *A note on flexibility*

While the delegation of lawmaking powers to the executive risks undermining the constitutional role of Parliament as lawmaker in chief, Parliament should retain the ability to delegate its lawmaking powers to others where adequate safeguards are in place. The reality of lawmaking in the 21st century is that the details of complex statutory schemes, which often require the input of experts working in the field, cannot be made by Parliament alone.²⁵⁹ Regulations are necessary, and desirable, to complement primary legislation. Delegation provides the flexibility needed to do the job of changing detailed rules quickly in response to

257. Significant advancements have been made in artificial intelligence to quickly analyze thousands of pages of contracts, which may be adapted to regulations: see, e.g., Nicole Black, "Here's the Lowdown on Contract Analytics Software" *ABA Journal* (23 March 2018), online: <abajournal.com/news/article/heres_the_lowdown_on_contract_analytics_software> [perma.cc/DL9Q-LTND].

258. *Reference Re Manitoba Language Rights*, [1985] 1 SCR 712, 19 DLR (4th) 1 where the Supreme Court created a new constitutional remedy of a suspended declaration of constitutional invalidity to provide the government a period of time to fix constitutional defects before the provincial laws would be declared unconstitutional in order to preserve legal order.

259. For an overview of Parliament's contemporary role, see Neudorf, *supra* note 7.

new circumstances. But this flexibility does not authorize the executive to overtake Parliament as the body that formulates answers to important national questions. The proposed reforms will need to be flexibly applied in appropriate circumstances. For example, the delegation of lawmaking powers to a subordinate body that is itself democratic, representative and accountable would reduce concern over the delegation of Parliament's lawmaking authority. This flexibility should be applied to the three elected legislatures of the Northwest Territories, Nunavut and the Yukon, each of which is established by federal legislation that delegates lawmaking powers.²⁶⁰ Territorial governments are also confined in their lawmaking authority to a defined region, further diminishing concern about this form of delegation undermining the role of Parliament as national lawmaker in chief. It may also be necessary in emergency situations to provide additional flexibility to Parliament and the executive provided the delegation is reasonable and proportionate to the circumstances.²⁶¹

Conclusion

It is time to reassess the constitutional foundation of delegated legislation in Canada. Under the Canadian model of constitutional supremacy, we must first look to the Constitution on the question of Parliament delegating its lawmaking powers to others. The current approach, established a century ago, accepts the sweeping delegation of Parliament's powers to the executive. There are good reasons to reassess the constitutionality of delegation and move past this precedent, which is problematic not only because of its inconsistency with contemporary approaches to constitutional interpretation but also its outcomes that have facilitated the unchecked growth of unaccountable executive lawmaking power exercised in secret at the direct cost of Parliament's role as lawmaker in chief. The Constitution demands that courts and Parliament take delegation seriously, and better safeguard Parliament's lawmaking role. Under the living tree purposive approach to constitutional interpretation, Parliament was designed with democratic, representative and accountable qualities that make it exclusively qualified to exercise federal lawmaking power. It is a key part of the basic constitutional architecture. Delegation of sweeping lawmaking powers to the executive poses a serious risk to Parliament's role and threatens to undermine it completely in the context of a legislature controlled by the executive, which can delegate any or all of Parliament's lawmaking powers to itself. The balance can be restored by strengthening

260. *Northwest Territories Act*, SC 2014, c 2; *Nunavut Act*, SC 1993, c 28; *Yukon Act*, SC 2002, c 7.

261. However, it should be remembered that the role of the court in upholding the rule of law is often most needed at a time of crisis.

the judicial scrutiny of the *vires* of regulations and creating effective parliamentary mechanisms to scrutinize and supervise the exercise of delegated lawmaking powers. These reforms are practical and achievable, and by adopting them, the courts and Parliament will give meaning to the constitutional vision of Parliament and encourage Parliament to fulfil its proper purpose. Nothing less than the vibrancy of Canadian democracy is at stake.

