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

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INTRODUCTION

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

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

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

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

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

neighbour's view?

recognise the reality of federal loyalty in the Canadian constitutional framework and debate the ways in which it can contribute to our federal life. This paper will proceed in four parts. Important paradoxes that arise from Canadian jurisprudence on cooperative federalism will be described (I). Second, this paper adopts a working definition of federal loyalty that guides a subsequent comparative

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

This paper's consideration of federal loyalty deals predominantly with the second set of questions described above. However, the first set of questions regarding the legal force of IGAs is by no means of lesser importance. In fact, since IGAs can affect rights of third parties, questions about the legal force of IGAs goes to heart of the rule of law in Canada. However, the principle of federal loyalty does not

to amend the Plan as it wished. Further, no legitimate

state oblige themselves to <u>respect each other</u> due to their agreement to found the compound state." ²²

Gamper observes that even in federations created by dissociation, federal loyalty arises where it is

two interesting case studies for the question this paper seeks to answer. Specifically, Germany provides a rich example of judicial interpretation of federal loyalty principles. Belgium, a dualist federation,

[22] In 1952's Housing Funding Case

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

[26] The Court then addressed the nature of "in agreement with the Länder" in §14 FHA

- the crux of the legal issues in the instant case. Before adoption by the Federal Parliament, the

bill described the requirement as an "agreement with the Bundesrat".²⁸

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

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

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

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

³¹ *Ibid* at para 62.

³⁰ *Ibid* at para 60.

³² Ibid at para 74.

³³ Blair, *supra* note 24 at 201.

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

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

[33] The process of negotiations between Bund and Länder is, like in the *Housing Funding Case*, central to determining the content of *Bundestreue*. In light of the then-uncertainty

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

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

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

Bundestreue

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

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

³⁶ *Ibid* at para 174.

³⁷ *Ibid* at para 185.

³⁸ Blair, *supra* note 24 at 183.

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

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

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

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

⁴² Article 35(1) GG.

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

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

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

⁴⁶ Ibid.

⁴⁷ *Ibid* at 162.

paper's question. Notably for Canadian scholars, Belgium's dualist federation is closer to our own. In contrast with Germany, the acceptance of federal loyalty into the Belgian legal order appears to have faced challenges, just as the official adoption of federalism was faced with challenges. For considerations of length, the analysis of the Belgian case will be limited to three questions: first,

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

Despite the Constituent's wish to leave federal loyalty outside of the courts, by 2010, Article 143 led to the invalidation of a legal norm.⁵⁷ Rasson suggests that this resulted from the melding together of pre-existing B

the reform noted: "La présente réforme de l'Etat renforce également <u>le besoin</u> de coordination entre l'Etat fédéral et les entités fédérées." ⁶¹

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

[50] The motivating factor for introducing a principle of loyalty in Belgium was linked to the fragility of the Belgian state. Specifically, Cerexhe spoke of limiting the centrifugal force0.2 0.2 (o) 07

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

IV CANADIAN FEDERAL LOYALTY: ROOM TO GROW?

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

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

In Secession Reference, the Supreme Court found that if ever a clear majority of Quebeckers expressed the desire to secede from the Canadian federation, <u>all</u> orders of government must participate in a negotiation process informed by the principles of federalism, democracy, constitutionalism and the rule of law, and the protection of minorities.⁶⁴ The Court stated, "The rights of other provinces and the federal government cannot deny the right of the government of Quebec to pursue secession, should a clear magovernment -39. -39.gove8(gove) 0 0 50p9. -39.7 50 0 0 50p9

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

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

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

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

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

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

⁷³ Hogg, supra note 6

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

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

CONCLUSION

The Canadian federation has, despite the text of its Constitution, evolved remarkable since its inception. Political and judicial actors, as well as the public, have engaged with difficult challenges to find reasoned ways through times of uncertainty. *Secession Reference* is the apotheosis of that effort. It recognises not only that principles of democracy and constitutionalism underpin our federation, but also that federal loyalty must govern sea74() -30 afor

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

[7987 words, including footnotes, excluding bibliography]

⁷⁶ Scholsem, *supra* note 51 at 335

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