

# IS THE PEARSON AIRPORT LEGISLATION UNCONSTITUTIONAL?: THE RULE OF LAW AS A LIMIT ON CONTRACT REPUDIATION BY GOVERNMENT<sup>©</sup>

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It has long been assumed that Parliament has unlimited power to enact legislation cancelling valid contracts and denying compensation to any persons affected. This paper challenges that conventional wisdom. The author argues that the principle of the rule of law requires that governments be accountable in the ordinary courts for wrongful actions of government officials. This principle is undermined if government is absolved from any liability for breach of a fairly bargained and valid contract. Thus, legislation purporting to abrogate contracts and deny compensation is invalid, since it violates the implied limits on legislative authority associated with the rule of law. The author also explains how protecting contractual expectations in the manner suggested does not unduly limit Parliamentary sovereignty, and will not result in a wholesale constitutional entrenchment of property rights.

Il est généralement admis que le parlement a l'autorité absolue d'adopter des lois afin de résilier des contrats et de nier toute forme de compensation aux personnes affectées par cette résiliation. Dans cet essai, l'auteur conteste cette présomption. En effet, l'auteur soutient que le principe de la primauté du droit présuppose que les gouvernements sont redevables pour les actes posés par leurs fonctionnaires. Ce principe serait anéanti si le gouvernement pouvait limiter sa responsabilité suite à la rupture d'un contrat valide. Ainsi, une loi dont le but est de résilier un contrat et de nier toute compensation est invalide parce qu'elle viole les limites à l'autorité parlementaire associées au principe de la primauté du droit. De plus, l'auteur soutient que cette protection des obligations contractuelles n'enfreint pas la souveraineté parlementaire et que celle-ci ne résultera pas en un empiètement constitutionnel sur les droits relatifs à la propriété.

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## I. INTRODUCTION

Can the Canadian government repudiate a fairly bargained contract and deny access to the courts for compensation? Until recently, the answer to that question appeared relatively straightforward: there is no Crown immunity from the law of contracts and the Crown is generally bound by its contracts in the same manner as a private citizen.<sup>1</sup> But this general rule in favour of Crown liability is usually said to be subject to being displaced through legislation. Courts will interpret any legislation that expropriates rights strictly and will resolve ambiguities in favour of the person whose rights are being affected.<sup>2</sup> But assuming that the statutory intention to expropriate contractual rights is expressed clearly and unambiguously, the courts will give effect to the terms of the statute. This doctrine has been summarized in the pithy statement of one Ontario judge early in the twentieth century: “[t]he prohibition ‘[t]hou shalt not steal’, has no legal force upon the sovereign body.”<sup>3</sup>

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<sup>1</sup> See Ontario Law Reform Commission, *Report on the Liability of the Crown* (Toronto: Queen’s Printer, 1989) c. 3. Note, however, the power of the Crown to repudiate or to deny the validity of contracts that fetter some important executive power—the shadowy “executive necessity” doctrine recognized in *The Amphitrite* [1921] 3 K.B. 500 as a defence to a breach of contract. For a criticism of this “intolerably vague” doctrine, see P.W. Hogg, *Liability of the Crown* 2d ed. (Toronto: Carswell, 1989) at 171-72.

<sup>2</sup> See generally, G.S. Challies, *The Law of Expropriation* (Montreal: Wilson and Lafleur, 1963) at 12.

<sup>3</sup> See *Florence Mining Cox. Cobalt Lake Mining Co.* (1909), 18 O.L.R. 275 at 279 (C.A.).

While it has long been assumed that Parliament can shield the Crown from claims for breach of contract, there is a surprising lack of judicial authority directly on point. This is because the Parliament of Canada, in contrast to a number of provincial legislatures, has very rarely resorted to legislation in order to rewrite contracts in its favour.<sup>4</sup> Thus, while numerous judges and text writers have often affirmed that Parliament can nullify contracts and deny compensation, such statements have almost never been accompanied by any detailed analysis of the issue, since the context did not appear to demand it.<sup>5</sup>

Despite the paucity of judicial authority directly on point, no legal commentators have ever expressed any doubts about Parliament's unlimited authority to deny compensation for breaches of contract. Legislating away private rights may be manifestly unjust but, it is often said, it is not for the courts to assess the wisdom of Parliament's enactments. Thus, when the government of Canada introduced legislation in early 1994 purporting to cancel a series of contracts for the redevelopment of Pearson International Airport (the "Airport Contracts"), the Minister of Justice confidently asserted that the legislation, known as Bill C-22,<sup>6</sup> was perfectly valid and constitutional.

Bill C-22, as passed by the House of Commons in June 1994, was virtually unprecedented at the federal level in Canada.<sup>7</sup> It provided that a series of contracts entered into by the Crown "are hereby declared not to have come into force and to have no legal effect;"<sup>8</sup> that "no action or other proceeding ... lies or may be instituted by anyone against Her

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<sup>4</sup> The record at the provincial level is quite different, as there have been a significant number of provincial statutes enacted over the years purporting to nullify contracts. These cases are discussed in detail under Part IV(B)(1), below.

<sup>5</sup> Most courts simply assume, without any discussion, that Parliament or the provincial legislatures can rewrite contract terms and deny compensation. See, for example, the comments by McIntyre J. in *Re Upper Churchill Water Rights Reversion Act* [1984] 1 S.C.R. 297 at 327 [hereinafter *Upper Churchill Water*]: "no quarrel was made with the proposition that the Legislature of Newfoundland is fully competent to expropriate property within its boundaries." Similarly, text writers who discuss the issue treat it as a straightforward matter, not requiring any extensive discussion. For example, Hogg devotes a short paragraph to the issue in his book-length study of Crown liability: see *supra* note 1 at 172.

<sup>6</sup> See *An Act respecting certain agreements concerning the redevelopment and operation of Terminals 1 and 2 at Lester B. Pearson International Airport* (1st Sess., 35th Parl., 1994 [hereinafter Bill C-22]).

<sup>7</sup> The only instance of federal legislation comparable to Bill C-22 is found in the regulations enacted in 1942 under the *War Measures Act* which authorized expropriating property and contractual rights from Japanese Canadians: see "Order in Council establishing regulations respecting the British Columbia Security Commission," P.C. 1665, 11 March 1942.

<sup>8</sup> Bill C-22, *supra* note 6, cl. 3.

Majesty ... for anything done ... in the performance of any ... duties;”<sup>9</sup> and that “no one is entitled to any compensation from Her Majesty in connection with the coming into force of this Act.”<sup>10</sup>

Despite the exceptional nature of these provisions, Justice Minister Allan Rock told the Senate Committee examining the legislation that “there was no question” as to Parliament’s ability to enact the bill.<sup>11</sup> Mr. Rock stated that the only issue in terms of the bill’s legal effectiveness was whether Parliament had been clear in its intention to exclude any right to compensation. Mr. Rock asserted that Bill C-22 was perfectly clear in this regard and therefore, once enacted, it would effectively nullify the Airport Contracts.

Given that Mr. Rock was expressing the consensus view on this issue, one might have expected legal experts to line up in support of his conclusions. In fact, precisely the opposite occurred. The Senate Committee called upon a number of legal experts to opine on the constitutional validity of Bill C-22 and, while opinion was somewhat divided, the majority stated that Bill C-22 was unconstitutional.<sup>12</sup> The reason? According to a number of these experts, Bill C-22 violated the rule of law—a basic principle of the Constitution—and was, on that account, invalid.

This testimony caused the Senate to propose amendments permitting access to the courts for purposes of obtaining compensation for the government’s cancellation of the Airport Contracts. While the government rejected the arguments against the constitutional validity of the Bill, it did eventually produce amendments of its own designed to permit a limited right to claim compensation for out-of-pocket expenses.<sup>13</sup> But even with these amendments, the Bill remained

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<sup>9</sup> *Ibid.*, cl. 7.

<sup>10</sup> *Ibid.*, cl. 9.

<sup>11</sup> See *Proceedings of the Standing Senate Committee on Legal and Constitutional Affairs*, No. 10 (4 July 1994) at 7 [hereinafter *Senate Committee on Legal and Constitutional Affairs*].

<sup>12</sup> See, for example, *Senate Committee on Legal and Constitutional Affairs**ibid.*: the testimony of D. Gibson and D. Schmeiser, No. 11 (5 July 1994); K. Norman, No. 14 (17 November 1994); and G. Chipeur, No. 16 (1 December 1994). There were also views supporting the validity of the legislation: see the testimony of W.A. Mackay, No. 12 (27 October 1994).

<sup>13</sup> While the government initially rejected the Senate amendments and caused the House of Commons to re-pass Bill C-22 in its original form, by the end of 1994 it had come forward with a set of amendments of its own permitting very limited recourse to the courts for purposes of claiming out of pocket expenses only. In May 1995, the government modified these proposed amendments very slightly, claiming that the revisions would permit slightly broader access to the courts for compensation: see *Senate Committee on Legal and Constitutional Affairs**ibid.*, No. 2 (13 December 1994), and No. 33 (16 May 1995).

controversial. A Senate committee subsequently held hearings into and reported on the circumstances surrounding the government's cancellation of the Airport Contracts, concluding that the decision to cancel was wholly unsubstantiated.<sup>14</sup> In May 1996, the government announced a further series of amendments aimed at responding to the constitutional concerns that had been raised.<sup>15</sup> Unexpectedly, on 19 June 1996, the amended version of the Bill was defeated by the Senate on a vote of 48-48. Despite the fact that the legislation was not enacted, the legal issues raised are of continuing importance.

I was one of those who testified before the Senate Committee on the constitutional validity of Bill C-22. While I told the committee that I believed the legislation was invalid, I reached this conclusion based on relatively narrow grounds relating to the *Canadian Bill of Rights*<sup>16</sup> rather than on the broader basis of the "rule of law."<sup>17</sup> Indeed, I endorsed Mr. Rock's argument to the effect that the principle of the rule of law does not prevent Parliament from expropriating contractual rights and denying claims for compensation. I therefore agreed that it would be open to Parliament to deny all claims for compensation, provided that the legislative intention was clearly expressed.

While I continue to believe that Bill C-22, as originally proposed by the government, would have been found to be invalid, I have now concluded that the assumption with which I began—namely, that the rule of law does not constrain the ability of Parliament to expropriate contractual rights and deny compensation—is very probably mistaken. I now believe that the rule of law does limit Parliament's power to expropriate contractual rights, and that the original version of Bill C-22 violated that principle. This article is an attempt to explain how I have arrived at this conclusion.

The first section of the article examines a key threshold question: does the rule of law limit *Parliament's* power to pass legislation, or does it merely require that *the government* abide by whatever legislation

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<sup>14</sup> See *Report of the Special Senate Committee on the Pearson Airport Agreements* (December 1995) at xi-xiii [hereinafter *Senate Committee on the Pearson Airport Agreements*].

<sup>15</sup> The legislation was reintroduced by the government as Bill C-28, *An Act respecting certain agreements concerning the redevelopment and operation of Terminals 1 and 2 at Lester B. Pearson International Airport* (2d Sess., 35th Parl., 1996).

<sup>16</sup> S.C. 1960, c. 44, reprinted in R.S.C. 1985, App. III [hereinafter *Bill of Rights*].

<sup>17</sup> My argument, essentially, was that the procedure for claiming compensation in Bill C-22 was flawed in that it authorized the Minister of Transport to determine the amount of compensation, rather than an independent adjudicator. It therefore placed the Minister in the position of being a judge in his own cause, and violated the guarantee in section 2(e) of the *Bill of Rights* of an independent tribunal for the determination of one's rights and obligations.

Parliament chooses to enact from time to time? I explain why—contrary to the conventional wisdom, as well as to my own original views on this question—I now believe that the rule of law binds Parliament as well as the government. As such, the principle of the rule of law represents a substantive limitation on Parliament's ability to pass laws, in addition to the requirement that the government abide by whatever laws Parliament may see fit to enact.

The second section of the paper examines the meaning and content of the principle of the rule of law. I argue that the core meaning of the rule of law is that governments are not above the law. This means more than simply that governments must obey whatever laws happen to be enacted by Parliament. It also embodies substantive limitations on the laws that Parliament may enact. In order to comply with the standards of the rule of law, legislation must not provide for the arbitrary treatment of citizens by state officials.

The third section of the paper considers whether legislation repudiating government liability for breach of contract is inconsistent with the principle of the rule of law. I conclude that such legislation is contrary to the rule of law since it permits government to absolve itself from the consequences of its own wrongful acts. Such legislation purports to place governments above the law, thus contradicting the fundamental precept that governments should not be permitted to treat citizens in an arbitrary manner.

The third section of the paper also examines the statements that have been made by courts and other jurists to the effect that Parliament may expropriate contractual rights and deny compensation, as long as the expropriating statute is clear. I argue that, despite the frequency of such statements, they have rarely been made in the context of a statute which actually purported to nullify contractual rights. In fact, in cases where statutes have purported to nullify contractual rights and deny access to the courts for compensation, courts have usually found such legislation to be unconstitutional. It is true that courts have arrived at this conclusion for reasons other than the principle of the rule of law; the most common basis for striking down statutes expropriating contractual rights is that they are contrary to the federal division of powers between Parliament and the provincial legislatures. Nevertheless, while the *reasoning* in these cases does not endorse the constitutional doctrine I propose, the *results* in the cases are largely consistent with my analysis. In short, my claim—that the rule of law requires government to honour its contractual commitments—could actually be said to be immanent in the case law. This conclusion is more than a little surprising (to say the least) given the widespread assumption

to the effect that Parliament has an unlimited power to expropriate contractual rights and deny compensation.

I also consider whether my analysis is inconsistent with the fact that the *Canadian Charter of Rights and Freedoms*<sup>18</sup> does not contain any guarantee for property rights. I explain why the protection of contractual expectations is distinguishable from a more generalized constitutional guarantee for property rights. As such, constitutional protection for contractual expectations does not entail reading into the constitution a guarantee for property rights, contrary to the intentions of the drafters of the 1982 Constitution.

The final section of the paper examines the broader public policy implications of the constitutional doctrine I propose. In recent years, governments at both the federal and provincial levels in Canada have rewritten the terms of contracts and denied recourse to the courts for persons whose rights have been affected. Such attempts at contract repudiation are, in many cases, a response to the fiscal crisis facing the Canadian state, as governments intent on “downsizing” seek to renege on prior commitments with a minimum of cost to the taxpayer. Given the fact that such fiscal difficulties can be expected to persist and deepen in the years ahead, it can be expected that governments will continue to find contract repudiation an attractive political expedient. Yet, if the analysis set out in this paper is correct—namely, that government cannot rewrite contracts in its favour without compensating those persons affected—this option may no longer be available.

## II. THE RULE OF LAW BINDS PARLIAMENTS AS WELL AS GOVERNMENTS

### A. *The Traditional View*

For many years, it has been accepted that the rule of law is a basic principle of the Canadian constitutional order. The judgment of Rand J. in *Roncarelliv. Duplessis*<sup>19</sup> is the leading authority in this regard. Quebec Premier Maurice Duplessis had cancelled Frank Roncarelli’s liquor licence because Roncarelli had posted bonds for Jehovah’s Witnesses arrested for distributing literature in breach of municipal by-

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<sup>18</sup> *Canadian Charter of Rights and Freedoms* Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter *Charter*].

<sup>19</sup> [1959] S.C.R. 121 [hereinafter *Roncarelli*].

laws. The Supreme Court of Canada held that the cancellation of the appellant's liquor licence by Premier Duplessis amounted to a "gross abuse of legal power expressly intended to punish [Roncarelli] for an act wholly irrelevant to the statute, a punishment which inflicted on him, as it was intended to do, the destruction of his economic life."<sup>20</sup> Rand J. stated that this abuse of power was wholly inconsistent with the rule of law:

[I]n the presence of expanding administrative regulation of economic activities, such a step and its consequences are to be suffered by the victim without recourse or remedy, that an administration according to law is to be superseded by action dictated by and according to the arbitrary likes, dislikes and irrelevant purposes of public officers acting beyond their duty, would signalize the beginning of disintegration of the rule of law as a fundamental postulate of our constitutional structure. An administration of licenses on the highest level of fair and impartial treatment to all may be forced to follow the practice of "first come, first served," which makes the strictest observance of equal responsibility to all of even greater importance; at this stage of developing government it would be a danger of high consequence to tolerate such a departure from good faith in executing the legislative purpose.<sup>21</sup>

The language of Rand J. was broad and expansive, referring to the need for the "administration of licenses on the highest level of fair and impartial treatment to all," particularly given the "expanding administrative regulation of economic activities."<sup>22</sup> Yet despite this expansive language, most commentators regard the case as merely standing for the proposition that governments do not possess inherent powers. The statute in *Roncarelli* did not authorize the Premier to cancel Roncarelli's liquor licence on account of offering assistance to Jehovah's Witnesses, and Premier Duplessis's action was therefore unlawful. Government officials must act in accordance with the law as set down by the legislature and the courts. But, at least on this view, *Roncarelli* says nothing about fettering the legislature's right to enact legislation. Thus, while the rule of law stands for the principle of legal validity—that every official act must be justified by law—it does not limit the ability of Parliament to change the law at will.

This interpretation of the rule of law is certainly widely accepted by courts and commentators. No less an authority than A.V. Dicey, perhaps the leading proponent of the rule of law as a basic element of the British constitutional tradition, assumed that the principle did not constrain the sovereignty of Parliament. The sovereignty of

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<sup>20</sup> *Ibid.* at 141.

<sup>21</sup> *Ibid.* at 142.

<sup>22</sup> *Ibid.*

Parliament—which Dicey characterized as “that absolute despotic power”—meant, for him, that Parliament has the “right to make or unmake any law whatever.”<sup>23</sup> Dicey states explicitly that Parliament has the power to interfere with private rights such as those of contract and property. While such private rights are “in civilised states justly held specially secure and sacred,” Dicey leaves no doubt that Parliament has the power to override them and that this is perfectly consistent with the principle of the rule of law:

A ruler who might think nothing of overthrowing the constitution of his country, would in all probability hesitate a long time before he touched the property or interfered with the contracts of private persons. Parliament, however, habitually interferes, for the public advantage, with private rights.<sup>24</sup>

A more recent illustration of this same reasoning can be found in the submission to the Senate Committee examining Bill C-22 by Joel Bakan and David Schneiderman. Bakan and Schneiderman assert that “the rule of law cannot serve as a basis for holding that a law is of no force and effect.”<sup>25</sup> They arrive at this conclusion based on a distinction between a constitutional “principle” and a constitutional “provision.” The rule of law, Bakan and Schneiderman assert, is undoubtedly a constitutional *principle*, but it is not itself a constitutional *provision*. Only violation of constitutional provisions can give rise to a finding that a statute is invalid.<sup>26</sup> The authors conclude that this analysis is consistent with the cases that have discussed the principle of the rule of law: courts, they claim, have never relied upon the principle of the rule of law “on its own” to hold legislation invalid.<sup>27</sup> Bakan and Schneiderman apply this reasoning to Bill C-22 and conclude that there is no basis for suggesting that Bill C-22 is invalid based on the principle of the rule of law:

On the basis of the legal framework established by these cases, the constitutional principle of rule of law imposes only one constraint on Parliament in relation to Bill C-22: namely, that Parliament act within its constitutionally prescribed powers; or, in other words, that Bill C-22 be consistent with the *provisions* of the Constitution. Bill C-22 is valid unless it violates a provision of the Constitution. The rule of law is not a provision

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<sup>23</sup> A.V. Dicey, *Introduction to the Study of the Law of the Constitution* 10th ed. (London: Macmillan, 1965) at 40.

<sup>24</sup> *Ibid.* at 48-49.

<sup>25</sup> See J. Bakan & S. Schneiderman, “Submission to the Standing Senate Committee on Legal and Constitutional Affairs Concerning Bill C-22” at 2 [unpublished].

<sup>26</sup> The authors base this conclusion on the statement in section 52 of the *Constitution Act, 1982*, *supra* note 18, that “any law that is inconsistent with the *provisions* of the Constitution is ... of no force and effect.” See Bakan & Schneiderman, *supra* note 25 at 2 [emphasis in original].

<sup>27</sup> *Ibid.* at 3.

of the Constitution, and nor has it ever been treated as such by the Supreme Court of Canada.<sup>28</sup>

If this analysis is correct, it yields results that may seem rather surprising. For example, in the *Roncarelli* case, the Premier of Quebec could have simply caused the legislature to grant him the statutory power to cancel liquor licences for any reason whatsoever. This would have cured the specific legal defect found by Rand J., namely, that the Premier had acted beyond the specific powers conferred upon him by the legislature. As amended, the statute would have granted the Premier unlimited power to cancel liquor licences.<sup>29</sup> Therefore, he would have been within his rights to cancel Roncarelli's liquor license because he was offering financial assistance to Jehovah's Witnesses. Would such an amended statute have passed constitutional muster?

On the Bakan-Schneiderman theory outlined above, the answer presumably would have to be "yes." The question, however, is whether this traditional assumption as to the limited ambit of the rule of law would be accepted by a contemporary Canadian court. The recent Supreme Court of Canada case-law on the rule of law has suggested that this principle is not satisfied merely by requiring the government to abide by whatever laws Parliament sees fit to enact. Rather, the Supreme Court has indicated that the rule of law binds Parliament as well as the government, and that the principle can be used to rule legislation unconstitutional.

### B. *The Rule of Law as an Implied Limitation on Parliament*

If we turn to the Supreme Court of Canada jurisprudence on the rule of law, the first point that jumps out from the cases is their recent vintage: almost all of the major Supreme Court cases on point were decided in the past decade. The principle of the rule of law is certainly

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<sup>28</sup> *Ibid.* at 4 [emphasis in original].

<sup>29</sup> Of course, courts are notoriously reluctant to interpret any grant of statutory power as conferring unlimited discretion. As Rand J. observed in *Roncarelli*, *supra* note 19 at 140: "[i]n public regulation of this sort there is no such thing as absolute or untrammelled 'discretion,' that is that action can be taken on any ground or for any reason that can be suggested to the mind of the administrator." However, Rand J. immediately qualifies this statement when he completes the sentence as follows: "no legislative Act can, *without express language* be taken to contemplate an unlimited arbitrary power exercisable for any purpose, however capricious or irrelevant, regardless of the nature or purpose of the statute" [emphasis added]. The "without express language" qualifier suggests that, if the legislature truly wishes to confer unlimited discretion on an official, the courts will give effect to such intention as long as it is reflection in "express language."

far from novel. As noted above, the rule of law principle in Anglo-Canadian law is usually traced back to the writings of Dicey more than a century ago.<sup>30</sup> Yet, despite the long-standing character of the principle, the Supreme Court of Canada had almost never relied upon the rule of law as a ground of decision in a constitutional case prior to 1985.

That has changed quite dramatically in the past decade. Since 1985, the Supreme Court of Canada has based a number of path-breaking constitutional decisions on the rule of law principle. What is significant is not just the increasing frequency with which the rule of law is being referred to, but the language used by Court to describe the principle. The Court has stated that the rule of law is a fundamental principle which underlies the whole of the Constitution. It has described the rule of law as an implied limitation that must be read into all provisions of the Constitution—including the provisions conferring jurisdiction on Parliament and the provincial legislatures.

In short, my claim is that 1985 marks a key watershed in the Supreme Court's approach to the rule of law. Since 1985, the Supreme Court has clearly rejected the suggestion that the rule of law binds governments, but not legislatures. The Court's recent cases have clearly established that all constitutional powers, including the powers of Parliament itself, are subject to the requirements of the rule of law.

### 1. The New Approach Emerges

The first case to signal the Supreme Court's new approach to the rule of law is *Reference Re Manitoba Language Rights*. A unanimous Supreme Court described the constitutional status of the rule of law as follows:

[t]he *Constitution Act, 1982* ... is explicit recognition that "the rule of law [is] a fundamental postulate of our constitutional structure." The rule of law has always been understood as the very basis of the English Constitution characterising the political institutions of England from the time of the Norman Conquest. It becomes a postulate of our own constitutional order by way of the preamble to the *Constitution Act, 1982* and its implicit inclusion in the preamble to the *Constitution Act, 1867* by virtue of the words "with a Constitution similar in principle to that of the United Kingdom."

Additional to the inclusion of the rule of law in the preamble of the *Constitution Act* of 1867 and 1982, the principle is clearly implicit in the very nature of a Constitution. The Constitution, as the Supreme Law, must be understood as a purposive ordering of social relations providing a basis upon which an actual order of positive laws can be brought

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<sup>30</sup> *Supra* note 23.

<sup>31</sup> [1985] 1 S.C.R. 721 [hereinafter *Manitoba Language Reference*].

into existence. The founders of this nation must have intended, as one of the basic principles of nation building, that Canada be a society of legal order and normative structure: one governed by the rule of law. *While this is not set out in a specific provision, the principle of the rule of law is clearly a principle of our Constitution*<sup>32</sup>.

While the Court recognizes the principle of the rule of law as being “implicit in the very nature of a Constitution,” it also notes that the rule of law is “not set out in a specific constitutional provision.”<sup>33</sup> Does this mean, as Bakan and Schneiderman suggested, that the rule of law cannot be used “on its own” as a basis for striking down legislation?

The Court provides a clear answer to this very question later in its reasons in the *Manitoba Language Reference*. The Court notes that it has “in the past inferred constitutional principles from the preambles to the Constitution Acts and the general object and purpose of the Constitution.”<sup>34</sup> The Court then quotes the following passage from the judgment of Martland and Ritchie JJ. in the *Reference Re Resolution to Amend the Constitution*

However, on occasions, this Court has had to consider issues for which the *B.N.A. Act* offered no answer. *In each case, this Court has denied the assertion of any power which would offend against the basic principles of the Constitution*<sup>35</sup>.

What is significant about this passage is the statement that “any power”—including, presumably, the authority of Parliament and the provincial legislatures—is subject to the basic principles of the Constitution. In effect, what the Court is here saying is that the implied principles of the Constitution are limits on the sovereignty of Parliament and the provincial legislatures. The Court confirms that this is its intended meaning by quoting the following passage from the judgment of Martland and Ritchie JJ. in the *Patriation Reference* as correctly describing the nature of these “basic principles” that are inferred from the structure of the Constitution:

It may be noted that the above instances of judicially developed legal principles and doctrines share several characteristics. *First, none is to be found in express provisions of the British North America Acts or other constitutional enactments. Second, all have been perceived to represent constitutional requirements that are derived from the federal character of Canada’s Constitution. Third, they have been accorded full legal force in the sense of being employed to strike down legislative enactments. Fourth, each was judicially developed in response to a particular legislative initiative in respect of which it might*

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<sup>32</sup> *Ibid.* at 750-51 [citations omitted; emphasis added].

<sup>33</sup> *Ibid.*

<sup>34</sup> *Ibid.* at 751.

<sup>35</sup> [1981] 1 S.C.R. 753 at 851 [hereinafter *Patriation Reference*; emphasis added].

have been observed ... that “There are no Canadian constitutional law precedents addressed directly to the present issue.”<sup>36</sup>

Notice that the Court here is concerned with the same distinction made by Bakan and Schneiderman between constitutional “provisions” and constitutional “principles.” In fact, the Court emphasizes the sentence from the Martland-Ritchie judgment which points out that constitutional principles such as the rule of law are not found in “express provisions” of the constitution. Nonetheless, the Court affirms, these “principles” have been accorded “full legal force in the sense of being employed to strike down legislative enactments.”<sup>37</sup>

It is true that in *Manitoba Language Reference* the Supreme Court of Canada utilized the principle of the rule of law to uphold legislation, rather than to strike it down.<sup>38</sup> But the above passage leaves little doubt that, in an appropriate case, the principle of the rule of law could be used to invalidate legislation. In short, the *Manitoba Language Reference* makes it plain that the rule of law binds legislative as well as executive powers; all constitutional authority is subject to the implied limitation that it must be exercised in a manner consistent with the rule of law.

The Court reaffirmed this conclusion two years later in *OPSEU v. Ontario (A.G.)*,<sup>39</sup> a case involving a challenge to Ontario legislation restricting the political activities of civil servants in Ontario. One of the arguments raised by the appellants was that the restrictions were unconstitutional since they violated certain “unwritten guarantees” of freedom of expression. Although the Court upheld the legislation, the majority accepted the proposition that the *Constitution Act, 1867*<sup>40</sup> contemplates certain implied limitations on legislative power. The majority opinion by Beetz J. described these implied limitations in the following terms:

There is no doubt in my mind that the basic structure of our Constitution, as established by the *Constitution Act, 1867* contemplates the existence of certain political institutions,

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<sup>36</sup> *Manitoba Language Reference* supra note 31 at 752 [citations omitted; emphasis in original].

<sup>37</sup> *Ibid.*

<sup>38</sup> The Court held that immediately invalidating all the Acts of the Legislature of Manitoba would have produced a situation of legal chaos, and destroyed the positive legal order of the province. This, the Court concluded, would have undermined the principle of the rule of law. Therefore, the Court declared that all provincial legislation would remain temporarily in effect, notwithstanding the fact that it had not been translated into French as required by the *Manitoba Act, 1870*, R.S.C. 1970, App. II.

<sup>39</sup> [1987] 2 S.C.R. 2 [hereinafter *OPSEU*].

<sup>40</sup> (U.K.), 30 & 31 Vict., c. 3.

including freely elected legislative bodies at the federal and provincial levels. In the words of Duff C.J. in *Reference re Alberta Statutes* “such institutions derive their efficacy from the free public discussion of affairs” and, in those of Abbott J. in *Switzman v. Elbling* ... neither a provincial legislature nor Parliament itself can “abrogate this right of discussion and debate.” *Speaking more generally, I hold that neither Parliament nor the provincial legislatures may enact legislation the effect of which would be to substantially interfere with the operation of this basic constitutional structure.*

In the next paragraph, Beetz J. affirms that the basic structure of the Constitution represents an implied limitation on Parliament’s authority:

I should perhaps add that issues like the last will in the future ordinarily arise for consideration in relation to the political rights guaranteed under the *Canadian Charter of Rights and Freedoms* which, of course, gives broader protection to these rights and freedoms than is called for by the structural demands of the Constitution. *However, it remains true that, quite apart from Charter considerations, the legislative bodies in this country must conform to these basic structural imperatives and can in no way override them.*<sup>42</sup>

It is true that Beetz J. did not make reference in *OPSEU* to the principle of the rule of law. But there can be little doubt, given the Court’s statement in the *Manitoba Language Reference* to the effect that “the constitutional status of the rule of law is beyond question,” that the rule of law also qualifies as one of the “basic structural imperatives” of the Canadian Constitution. Therefore, to paraphrase Beetz J.’s statement in *OPSEU*, the legislative bodies in this country must conform to the rule of law and can in no way override it.

## 2. The Rule of Law as a Guarantee of Access to Courts

The next case of significance in terms of the principle of the rule of law is *The British Columbia Government Employees Union v. B.C. (A.G.)*<sup>43</sup> This case did not deal with the validity of a statute, but rather with the attempts of a striking trade union to block physical access to the courts. Nevertheless, former Chief Justice Dickson’s judgment is helpful for the comments he made on the importance of preserving access to the courts. Dickson C.J. noted that certain sections of the *Charter*, including

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<sup>41</sup> *OPSEU*, *supra* note 39 at 57 [emphasis added; citations omitted].

<sup>42</sup> *Ibid.* [emphasis added]. Similar references to certain “implied limitations” derived from the structure of the Canadian Constitution can be found in *Fraserv. Public Service Staff Relations Board* [1985] 2 S.C.R. 455 at 462-63; *RWDSU v. Dolphin Delivery* [1986] 2 S.C.R. 573 at 584; and *New Brunswick Broadcasting Co. v. N.S.*, [1993] 1 S.C.R. 319 at 375-78.

<sup>43</sup> [1988] 2 S.C.R. 214 [hereinafter *BCGEU #1*].

the preamble, section 52, and section 24, “are a complete answer to anyone seeking to delay or deny or hinder access to the courts of justice in this country.”<sup>44</sup> He continued as follows:

The rights and freedoms are guaranteed by the *Charter* and the courts are directed to provide a remedy in the event of infringement. To paraphrase the European Court of Human Rights in *Golderv. United Kingdom*... it would be inconceivable that Parliament and the provinces should describe in such detail the rights and freedoms guaranteed by the *Charter* and should not first protect that which alone makes it in fact possible to benefit from such guarantees, that is, access to a court. As the Court of Human Rights truly stated: “The fair, public and expeditious characteristics of judicial proceedings are of no value at all if there are no judicial proceedings.”<sup>45</sup>

Dickson C.J. also adopted the following passage from the judgment of the British Columbia Court of Appeal below:

We have no doubt that the right to access to the courts is under the rule of law one of the foundational pillars protecting the rights and freedoms of our citizens. It is the preservation of that right with which we are concerned in this case. Any action that interferes with such access by any person or groups of persons will rally the court’s powers to ensure the citizen of his or her day in court. Here, the action causing the interference happens to be picketing. *As we have already indicated, interference from whatever source falls into the same category*<sup>46</sup>

It might be argued that these broad statements should be limited to the facts of the particular case—namely, situations in which private persons attempt to hinder physical access to the courts. But the quoted passage from the Court of Appeal speaks of “interference from whatever source.”<sup>47</sup> There does not appear to be any principled distinction between physical and non-physical interference with court access, since the ultimate effect on the individual is the same. Nor, in my view, is there any principled basis for suggesting that the prohibition on limiting court access applies only to private persons and not the legislature. In fact, earlier in its judgment the British Columbia Court of Appeal had specifically drawn attention to a passage in the judgment of the trial judge in the case dealing with this very point:

It would be a monstrous situation, indeed, if a citizen were forced to delay or lose his Charter rights due to picketing or any other interference with his or her access to the courts. The maxim “justice delayed is justice denied” is apposite here. The court’s jurisdiction to deal with such interference quickly and resolutely is both necessary to

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<sup>44</sup> *Ibid.* at 228.

<sup>45</sup> *Ibid.* at 229 [citations omitted].

<sup>46</sup> *Ibid.* at 230, quoting from (1985), 20 D.L.R. (4th) 399 at 406 (B.C.C.A.) [hereinafter *B.C.G.E.U. #2*; emphasis added].

<sup>47</sup> *Ibid.*

protect the citizen and the rule of law. We wish to emphasize the words Chief Justice McEachern used when he granted the injunction:

*I doubt if [even] the Legislature has the capacity to deprive a superior court of its jurisdiction to protect itself and the public against criminal contempt. I also question whether such an unthinkable purpose could be accomplished without a constitutional amendment. As long as there are superior court judges then it seems arguable that they must, by definition, have and continue to enjoy the inherent power to protect their authority against criminal contempt.*

(Our emphasis).<sup>48</sup>

While Dickson C.J. did not specifically draw attention to this passage, he did adopt the Court of Appeal's statement to the effect that interference with court access "from whatever source" is contrary to the rule of law. This additional passage from the Court of Appeal's judgment makes plain that the Court of Appeal intended this limitation to encompass attempts to limit court access by the legislature as well as by private persons.

It might also be argued that Dickson C.J.'s comments only apply in situations where there has been an infringement of a specific *Charter* right. The former Chief Justice refers at a number of points to the fact that access to the courts is required in order to vindicate *Charter* rights. Thus, it might be argued, restricting access to the courts on non-*Charter* or non-constitutional issues does not infringe the rule of law.

While it is true that Dickson C.J. refers frequently in his judgment to the vindication of *Charter* rights, it would appear to be no less offensive to the rule of law to deny court access for non-*Charter* matters. In fact, the British Columbia Court of Appeal framed the issue as one involving the jurisdiction of the courts generally:

[T]he real issue before us is whether in a democratic society any person or bodies of persons can restrict the rights of its citizens to enjoy the benefits of the rule of law under the protection of an independent judiciary.<sup>49</sup>

The Court of Appeal noted that the independence of the judiciary had been guaranteed in England for close to three centuries:

It must be noted at the outset that judicial independence was won in England after centuries of struggle with the executive and legislative branches of government. It was finally achieved in 1701 by the *Act of Settlement*... when tenure for the judges was established.

As Sir William Holdsworth, the distinguished British legal historian has said in *A History of English Law*:

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<sup>48</sup> *BCGEU #2, ibid.* at 404-05.

<sup>49</sup> *Ibid.* at 401.

The judiciary has separate and autonomous power just as truly as the King or Parliament; and in the exercise of these powers, its members are not more in the position of servants than the King or Parliament in the exercise of their powers ... . The judges have powers of this nature because, being entrusted with the maintenance of the Supremacy of law, they are and long have been regarded as a separate and independent part of the constitution.<sup>50</sup>

After drawing attention to the preamble of the *Constitution Act, 1867*, which provides that Canada is to have a Constitution “similar in principle to that of the United Kingdom,” the Court of Appeal noted:

In inheriting a constitution similar in principle to that of the United Kingdom we have also inherited the fundamental precept that the courts represent a separate and independent branch of government.<sup>51</sup>

What these passages indicate is that right of access to the courts is in no way limited to the vindication of rights set out in the *Charter*. Rather, the rule of law encompasses the right of citizens to a “separate and independent branch of government”—the judiciary—for the determination of rights and obligations. Therefore, to deprive citizens of access to the courts for the determination of their rights, even if this is accomplished through legislation, must be inconsistent with the rule of law.

### C. *Explaining the Shift*

In my view these recent cases leave little doubt that, in an appropriate case, the rule of law can now be invoked to limit legislative powers. The Court has explicitly rejected the notion that only “provisions” of the Constitution can be used to strike down legislation and comes down squarely in favour of the proposition that the rule of law binds legislatures as well as governments.

How can we account for the Court’s shift in attitude since 1985? In part, the explanation may be attributable to the fact that the preamble to the 1982 Constitution made explicit reference to the principle of the rule of law. In the *Manitoba Language Reference* the Court noted the reference to the rule of law in the preamble, even as it denied that the preamble was the sole source of the constitutional significance of the principle. Yet without this constitutional foothold, the Court would presumably have had much more difficulty in according as much significance as it has in recent years to the rule of law.

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<sup>50</sup> *Ibid.* [citations omitted].

<sup>51</sup> *Ibid.* at 402.

At the same time, the emerging rule-of-law jurisprudence is part of a larger trend of the Court, a trend which seeks to subject all political and legislative choices to judicial review and oversight. The enactment of the *Charter* has placed the Court in the position of second-guessing the legislatures on a wide variety of policy matters that previously would have been regarded as off-limits. This, in turn, has made the Court much more comfortable with the notion of “unwritten” or “implied” constitutional limitations on the authority of Parliament. The shift in attitude is exemplified by comparing Beetz J.’s comments in the 1987 *OPSEU* case, with his 1978 decision in *Canada (A.G.) and Dupond v. Montreal*.<sup>52</sup> In *Dupond*, Beetz J. had poured cold water on the notion that legislative powers were subject to “implied limitations,” holding that there is no implied guarantee that “is so enshrined in the Constitution as to be above the reach of competent legislation.”<sup>53</sup> Less than a decade later, the same judge affirmed that there are, indeed, certain “basic structural imperatives” and that legislatures can “in no way override them.”<sup>54</sup>

The Court in the *Charter* era has clearly become an activist Court, willing to review the wisdom of Parliament’s legislative choices in a wide variety of public policy fields. Nor is such heightened judicial activism limited to *Charter* or constitutional cases. The operating premise for the contemporary Court seems to be that there is no area of state activity that is immune from judicial review and sanction.<sup>55</sup>

Whatever the explanation, the fact that there has been a shift in the Court’s approach to these questions is, in my view, unmistakable. This leads immediately to a second question: what is the content and meaning of the principle of the rule of law? To put this another way, assuming that the rule of law binds Parliament, how do we know when legislation offends the principle such that it should be ruled invalid?

Since the Court has not yet relied upon the rule of law as a basis for striking down legislation, the answer to this question must necessarily be somewhat tentative. Yet, the Court’s analysis of the principle in its recent cases does give us a number of important road marks in sketching out the answer.

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<sup>52</sup> [1978] 2 S.C.R. 770 [hereinafter *Dupond*].

<sup>53</sup> *Ibid.* at 796.

<sup>54</sup> *OPSEU*, supra note 39 at 57.

<sup>55</sup> Examples of this phenomenon in the non-constitutional context include *Nellesv. R.*, [1989] 2 S.C.R. 170 and *Careyv. R.*, [1986] 2 S.C.R. 637; in both instances the court abolished common law doctrines which had granted unreviewable discretion to Crown officials.

### III. THE RULE OF LAW AS A LIMIT ON ARBITRARY GOVERNMENT

There have certainly been a wide variety of meanings associated with the term “rule of law.” As McLachlin J. of the Supreme Court of Canada suggested in a 1991 lecture, “the term ‘Rule of Law’ means many things to many people.”<sup>56</sup> Despite such differences, I would suggest that the leading judicial and academic authorities on the rule of law subscribe to a common idea of the meaning of the principle. This core meaning is simply that the rule of law requires that individuals be protected from arbitrary government. E.C.S. Wade summarized this common understanding of the concept of the rule of law in his “Introduction” to Dicey’s *Introduction to the Study of the Law of the Constitution*:

The rule of law presupposes the absence of arbitrary power and so gives the assurance that the individual can ascertain with reasonable certainty what legal powers are available to government if there is a proposal to affect his private rights. A person who takes the trouble to consult his lawyer ought to be able to ascertain the legal consequences of his own acts and what are the powers of others to interfere with those acts.<sup>57</sup>

Many other statements to the same effect could be cited.<sup>58</sup> The Supreme Court of Canada in the *Manitoba Language Reference* suggested that the principle included at least two elements, the first of which was described as follows:

First, that the law is supreme over officials of the government as well as private individuals, and thereby preclusive of the influence of arbitrary power.<sup>59</sup>

Further elaboration of the meaning of the rule of law can be found in the recent Supreme Court of Canada decision in *R. v. Nova Scotia Pharmaceutical Society*<sup>60</sup> This case established the proposition that laws that are so vague as to be “unintelligible” are contrary to the

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<sup>56</sup> “Rules and Discretion in the Governance of Canada” (1992) 56 Sask. L. Rev. 167 at 168.

<sup>57</sup> *Supra* note 23 at cx-cxi.

<sup>58</sup> See, for example, Dicey, *ibid.* at 193: “[w]ith us every official, from the Prime Minister down to a constable or a collector of taxes, is under the same responsibility for every act done without legal justification as any other citizen.”

<sup>59</sup> *Supra*, note 31 at 749. The second meaning of the rule of law was described as follows: “the rule of law requires the creation and maintenance of an actual order of positive laws which preserves and embodies the more general principle of the normative order. Law and order are indispensable elements of civilized life”: *ibid.*

<sup>60</sup> [1992] 2 S.C.R. 606 [hereinafter *Nova Scotia Pharmaceutical*].

“principles of fundamental justice,” as guaranteed under section 7 of the *Charter*.

The Supreme Court held that this “void for vagueness” doctrine rested on two underlying rationales: fair notice to the citizen and the limitation of law enforcement discretion. With respect to “fair notice to the citizen,” Gonthier J. noted that it had a substantive component, “which could be described as a notice, an understanding that some conduct comes under the law.”<sup>61</sup> As for the limitation of law enforcement discretion, Gonthier J. tied this to the idea that government officials not be permitted to act arbitrarily: “[a] law must not be so devoid of precision in its content that a conviction will automatically flow from the decision to prosecute.”<sup>62</sup> Gonthier J. linked these values to the principle of the rule of law:

The two rationales of fair notice to the citizen and limitation of law enforcement discretion have been adopted as the theoretical foundations of the doctrine of vagueness. ... *These two rationales have been broadly linked with the corpus of principles of government known as the “rule of law,” which lies at the core of our political and constitutional tradition.*<sup>63</sup>

Later in his judgment, under the heading “Vagueness and the Rule of Law,” Gonthier J. again links the values of fair notice and limitation of law enforcement discretion to the rule of law:

The criterion of absence of legal debate relates well to the rule of law principles that form the backbone of our polity. Here one must see the rule of law in the contemporary context. Continental European studies ... are relevant. ... J.-P. Henry ... gives the following definition:

In theoretical terms, the *État de droit* is a system of organization in which all social and political relations are subject to the law. This means that relations between individuals and authority, as well as relations between individuals themselves, are part of a legal interchange involving rights and obligations.<sup>64</sup>

Gonthier J. also states that his comments with respect to vagueness are not limited to the criminal law context, but apply to all enactments:

Finally, I also wish to point out that the standard I have outlined applies to all enactments, irrespective of whether they are civil, criminal, administrative or other. The

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<sup>61</sup> *Ibid.* at 633-34.

<sup>62</sup> *Ibid.* at 636.

<sup>63</sup> *Ibid.* at 632 [emphasis added].

<sup>64</sup> *Ibid.* at 640, citing J.-P. Henry, “Vers la fin de l’État de droit?” (1977), 93 *Rev. dr. publ.* 1207 at 1208 [translation].

citizen is entitled to have the State abide by constitutional standards of precision whenever it enacts legal dispositions.<sup>65</sup>

He summarizes his analysis by once again linking the doctrine of vagueness to the rule of law.

The doctrine of vagueness can therefore be summed up in this proposition: a law will be found unconstitutionally vague if it so lacks in precision as not to give sufficient guidance for legal debate. This statement of the doctrine best conforms to the dictates of the rule of law in the modern State, and it reflects the prevailing argumentative, adversarial framework for the administration of justice.<sup>66</sup>

The underlying concern of the Court in cases such as *Nova Scotia Pharmaceutical*, *Manitoba Language Reference* and *BCGEU #1* is clear. The rule of law limits the arbitrary exercise of power by state officials. State officials must exercise their discretion in accordance with standards that are meaningful and are identified in advance. Otherwise the citizen is subject to decisions that are taken according to the shifting whims of state officials, rather than in accordance with a regime based on the rule of law.

As the Court in *BCGEU #1* emphasized, one of the most important ways that we prevent arbitrariness by government is through guaranteeing access to the courts. The existence of an independent judiciary, and guaranteed access to those courts by all citizens, is indispensable to the rule of law. The abolition of the courts, directly or indirectly, would make impossible a system of organization “in which all social and political relations are subject to the law.”<sup>67</sup>

Therefore, the rule of law must impose some limits on the ability of Parliament to prevent or abolish access to the courts for the purpose of holding government accountable.

#### IV. CONTRACT REPUDIATION AS A VIOLATION OF THE RULE OF LAW

##### A. *First Principles*

How does the analysis in the preceding two sections relate to the subject with which we began, namely, the ability of the government to repudiate contracts and deny claims for compensation?

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<sup>65</sup> *Ibid.* at 642.

<sup>66</sup> *Ibid.* at 643 [citations omitted].

<sup>67</sup> Henry, *supra* note 64 at 1208.

The simple answer is that if the rule of law means anything, it must prevent the Crown from entering into binding contracts and then, *for no good reason*, rewriting the terms of the contract terms in its favour without paying compensation. To permit the Crown to act in this manner is to authorize decisions that are, by definition, arbitrary and high-handed.

Now it might be observed that in cases of this kind it is Parliament, and not the Crown, that is rewriting the terms of the contract. That is, Parliament is exempting the Crown from its liability for a contract through the enactment of a statute. Does the existence of such a ratifying statute alter the conclusion that such a contract repudiation is inherently arbitrary? In my view, the answer to this must be “no.” This is because the traditional doctrine of Parliamentary sovereignty does not distinguish between cases in which there is some legitimate public policy justification for the desire by the Crown to escape from the contract, as opposed to those instances where the only motivation is expediency. The traditional or orthodox position is that Parliament may authorize the Crown to “skip out” on a contract *for any reason whatever*. In effect, it is an assertion that the word of government means nothing, that the state can solemnly promise something one day and renege on that promise the next, without any legal consequences, as long as such arbitrary action is ratified by statute. Because such a doctrine flatly contradicts the whole notion of government according to law, it must be contrary to the principle of the rule of law.

One possible escape from this conclusion is to suggest that there are, indeed, limits on the ability of government to renege on contractual commitments, but that these limits are political rather than legal or constitutional. Governments, like everyone else, want to maintain their reputation for keeping promises. A government that regularly breaks its promises for no good reason will come to be regarded as untrustworthy and eventually will discover that no one is willing to contract with it. The need to appear trustworthy will thus operate as a significant political constraint on officials contemplating contract repudiation for no legitimate reason.

No doubt such political constraints are real and meaningful. But the fact that the political system might provide some measure of restraint on arbitrariness does not necessarily lead to the conclusion that the legal system should therefore provide none. This is because the political constraints that exist are imperfect and uneven in application. They depend upon the short-term calculus of political officials as to whether the costs of contract repudiation outweigh the benefits. Moreover, politicians (as opposed to judges) have a clear interest in the

outcome, since the state stands to benefit financially if it successfully “skips out” on the contract.

Not only are political constraints no substitute for judicial and constitutional ones, political constraints are themselves impaired when they are not supplemented by legally enforceable limitations on contract repudiation. This is the finding from an authoritative comparative study of the growth of public enterprise in Canada and the United States in the late nineteenth and early twentieth centuries.<sup>68</sup> This study, written by economist James Baldwin for the Economic Council of Canada, attempted to explain why Canada has chosen public enterprise as a regulatory instrument more often than has the United States. What the study discovered was that the greater reliance on public enterprise in Canada could be traced to the fact that the Canadian legal system during this period failed to prevent the state from confiscating property. When the state acts unfairly and opportunistically, private firms tend to withdraw from the field, forcing the state to step in through the creation of public enterprise. Baldwin summarizes his argument as follows:

Where the government cannot be bound to abide by fairly written contracts, the cost of its abrogating such contracts will be less. In certain situations, political pressures to abrogate contracts without compensation will be too great for even fair-minded politicians who are reasonably cognizant of the long-run consequences of their actions. When this occurs, the regulatory process is more likely to fail and the contractual problem will be “internalized” via the creation of public enterprise. These overriding political pressures will not arise in every situation. When they do, they may be resisted. *But, over time, if constraints on the actions of the state do not emerge, the regulatory process will gradually be supplanted by the creation of public enterprise in those sectors where the contractual difficulties are greatest.*<sup>69</sup>

Baldwin suggests that judicially-imposed constraints on contract repudiation, far from being inconsistent with purely political constraints, are actually essential to the effective operation of the latter. In fact, Baldwin argues that it was only because the Canadian legal system was prepared to impose some limits on contract repudiation by government—for example, by construing confiscatory legislation narrowly—that the reliance on public enterprise did not become even more widespread.

The fact that the state must stand behind its promises does not necessarily mean that the government must perform a contract that it determines not to be in the public interest. What it does mean is that, if

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<sup>68</sup> See J.R. Baldwin, *Regulatory Failure and Renewal: The Evolution of the Natural Monopoly Contract* (Ottawa: Minister of Supply and Services Canada, 1989).

<sup>69</sup> *Ibid.* at 4 [emphasis added].

the government wishes to cancel or amend a contract, persons whose rights have been affected must be permitted to seek redress through the courts. It is the denial of court access, rather than the decision to repudiate the contract, which is contrary to the rule of law. As the Supreme Court of Canada stated in *BCGEU #1*, “the right to access to the courts is under the rule of law one of the foundational pillars protecting the rights and freedoms of our citizens.”<sup>70</sup>

Applying this analysis to the context of Bill C-22 would suggest that the government was perfectly within its rights to decide not to proceed with the Airport Contracts. Where it ran afoul of the rule of law was in seeking to enact legislation to limit access to the courts for redress by persons thereby affected. Such legislation would have had the effect of placing the government above the law and undermined the basic accountability that the rule of law requires.

I conclude that, in principle and apart from any pre-1985 Canadian judicial authority, the rule of law should operate to limit the power of Parliament to bar access to the courts in the manner contemplated by Bill C-22.

This brings me to consider the pre-1985 case law, which asserts that Parliament has an unlimited authority to repudiate contracts and deny access to the courts for purposes of seeking compensation. Does the existence of this case law preclude the conclusion that I propose?

#### B. *The Contrary Case Law*

The cases which seem to suggest that Parliament or the provincial legislatures have an unlimited authority to deny access to the courts for contract repudiation fall into three distinct categories.

The first is the cases dealing with contract repudiation by provincial legislatures; the second is the cases dealing with legislative power to expropriate property without the payment of compensation; and the third is the cases which state that a doctrine of “legitimate expectations” would be an unacceptable fetter on Parliament’s legislative powers. I will examine each of these groups of cases in turn and suggest that, when examined closely, none of them represents an obstacle to the conclusion I have thus far outlined.

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<sup>70</sup> *Supra* note 43 at 230.

## 1. The Provincial Contract Repudiation Cases

I noted in the introduction to this paper that, since the federal Parliament has rarely attempted to repudiate contracts and deny access to the courts, there is no case law dealing directly with Parliament's authority in this area. This is certainly not the case at the provincial level, since a number of provinces have purported to rewrite contract terms through legislation and deny court access for the persons whose rights were being expropriated.

These attempts at contract repudiation have usually led to litigation, and the courts have in many instances ruled the confiscatory provincial statutes to be unconstitutional. But these results have usually been based on division-of-powers considerations. The cases recite, usually without any detailed analysis, the orthodox view that Parliament or the legislatures can cancel any contract and deny compensation, as long as the statute is clearly worded.

For example, in *Upper Churchill Water*<sup>71</sup> the Newfoundland Legislature had enacted legislation purporting to cancel a contract for the supply of power to Hydro-Quebec. While the Supreme Court of Canada held that the legislation was *ultra vires* it based its decision on the fact that the statute was directed at contractual rights outside of the province. It was simply assumed that a provincial legislature could validly expropriate intra-provincial contractual rights. McIntyre J., writing for a unanimous Court, framed the issue in the following way:

One of the principal attacks made against the *Reversion Act* was that the Act interferes with civil rights existing outside the Province of Newfoundland. *While no quarrel was made with the proposition that the Legislature of Newfoundland is fully competent to expropriate property within its boundaries* it was argued that when the exercise of expropriation powers derogates from civil rights outside the Province the enactment is *ultra vires*<sup>72</sup>

Since there was no argument on the point, McIntyre J. does not cite any authority for the proposition that a province may nullify contractual rights "in the province" and deny compensation to the contracting parties. In fact, as I explain below, there is no case which has ever upheld a provincial statute nullifying contractual rights and denying compensation to the owner. The basis for the assumption seems to be that, since the legislature may expropriate property and deny compensation, it must also be able to abrogate contracts and deny

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<sup>71</sup> *Supra* note 5.

<sup>72</sup> *Ibid.* at 327 [emphasis added].

compensation. The only possible basis for impugning provincial legislation abrogating contractual rights is if the legislation interferes with contractual rights outside of the province.

The only difficulty with this way of approaching the issue is that a number of older cases dealing with the right of a province to nullify contractual rights do not seem entirely consistent with this theory. In a number of these cases, the courts had struck down provincial legislation interfering with contractual rights, even though the extra-provincial elements of the contracts were relatively minor. Indeed, these older cases had been criticized by Peter Hogg as taking “too narrow a view of the territorial limitation on provincial legislative competence.”<sup>73</sup> Hogg had singled out a number of cases for criticism, including *Ottawa Valley Power Co. v. Hydro-Electric Power Commission*<sup>74</sup> and *Royal Bank of Canada v. R.*<sup>75</sup> For example, Hogg’s comments on the *Ottawa Valley* case are as follows:

The contract had been made in Ontario. It required the company to deliver electric power to the Commission at the boundary between Ontario and Quebec, and required the Commission to pay the company in Toronto. But, despite these strong intraprovincial elements, Middleton J.A. for the Ontario Court of Appeal said that the statute “affected” rights outside Ontario, and was for this reason invalid.<sup>76</sup>

Hogg favours the analysis in another case, *Ladore v. Bennett*,<sup>77</sup> in which a provincial statute which affected extra-provincial rights was upheld.<sup>78</sup> Hogg notes that under the “pith and substance” doctrine, a provincial law that is primarily directed at a matter within provincial jurisdiction can validly “affect” rights outside of the province. Hogg argues that the cases such as *Ottawa Valley* and *Royal Bank* were wrongly decided, since the provincial statutes in those cases were primarily directed at contractual rights “in the province.” If the province is able to expropriate contract rights “in the province” and not pay compensation,

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<sup>73</sup> *Ibid.* at 331, McIntyre J., referring to P.W. Hogg, *Constitutional Law of Canada* (Toronto: Carswell, 1977) at 209-10.

<sup>74</sup> [1937] O.R. 265 (C.A.) [hereinafter *Ottawa Valley*].

<sup>75</sup> [1913] A.C. 283 (P.C.) [hereinafter *Royal Bank*].

<sup>76</sup> Hogg, *supra* note 73 at 209.

<sup>77</sup> [1939] A.C. 468 (P.C.) [hereinafter *Ladore*].

<sup>78</sup> In *Ladore*, provincial legislation had amalgamated certain municipalities. In the course of the amalgamation, the securities for the debts of the former municipalities were replaced by new bonds issued by the new municipality. Although certain out-of-province creditors were affected by the legislation, the Privy Council upheld it on the basis that its “pith and substance” was municipal institutions in the Province. See further discussion *infra* notes 87-100 and accompanying text.

which everyone seems to assume it can, then the statutes at issue in those cases should have been upheld.

In *Upper Churchill Water*, McIntyre J. refers to Hogg's criticism of these earlier cases and notes the apparent conflict between *Ladore* and cases such as *Ottawa Valley* and *Royal Bank*. McIntyre J. opines that *Ladore* "states the law correctly" and that "where the pith and substance of the provincial enactment is in relation to matters which fall within the field of provincial legislative competence, incidental or consequential effects on extra-provincial rights will not render the enactment *ultra vires*."<sup>79</sup> With respect to the *Royal Bank* case, McIntyre J. indicates that "the factual basis for the ... case is not entirely clear from the report," and that "it must be assumed, however, that there was at least an implied finding that the pith and substance of the Act in question was in relation to extra-provincial rights if it is to be accepted today as authority."<sup>80</sup>

Since this early line of cases represents the foundation for the assumption that a province may nullify contracts "within the province," these cases bear close and careful scrutiny. As Hogg indicated, cases such as *Ottawa Valley* and *Royal Bank* are difficult to justify on the basis that there was an interference with contractual rights outside of the province. In fact, an alternative and, in my view, more persuasive way of accounting for the *results* in the cases is that there is an implied limitation on provincial power to interfere with contractual rights *per se*.

Consider, first, the *Ottawa Valley* case, involving contracts between the Hydro-Electric Power Commission of Ontario and Ottawa Valley Power Company, a Quebec company distributing power in Quebec. The Ontario provincial government had passed Orders-in-Council authorizing the Commission to enter into and perform the contracts with Ottawa Valley. Some years later, the province enacted the *Power Commission Act, 1935* of which section 2 declared the contracts "to be and always to have been illegal, void, and unenforceable as against The Hydro-Electric Power Commission of Ontario."<sup>81</sup> Section 3 of the same legislation provided as follows:

No action or other proceeding shall be brought, maintained or proceeded with against the said Commission founded upon any contract by this Act declared to be void and

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<sup>79</sup> *Upper Churchill Water* supra note 5 at 332.

<sup>80</sup> *Ibid.*

<sup>81</sup> S.O. 1935, c. 53.

unenforceable, or arising out of the performance or non-performance of any of the terms of the said contracts.<sup>82</sup>

The Ontario Court of Appeal, by a majority of 3-2, held that both sections 2 and 3 of this Act were *ultra vires*. The main argument advanced by counsel for the plaintiffs was that the legislation dealt with civil rights outside of the province and was for that reason *ultra vires*.<sup>83</sup> The three separate majority opinions each accepted this argument, and the case is usually cited for the proposition that a province may not legislate so as to impair extra-provincial contractual rights.

In fact, however, two of the three judges who formed the majority did not rely solely on the argument that the legislation impaired extra-provincial contractual rights. These two judges each advanced separate arguments which would have had the effect of limiting provincial power to derogate from contractual rights in general. Middleton J. arrived at this conclusion on the basis that any provincial legislation which purports to “destroy a contract” *necessarily* impairs rights outside of a single province:

A contract creates civil rights which, speaking generally, know no territorial limitation. When legislation does not merely prohibit resort to Provincial Courts but purports, as here, to destroy the contract itself, that legislation does not concern “Civil Rights in the Province,” but is an attempt to destroy civil rights which have no territorial limitation, and, in my view, it is *ultra vires* of the Province. *A fortiori* where the contract creates an obligation to pay money outside of the Province, that cannot be described as a civil right in the Province.<sup>84</sup>

In short, what Middleton J.A. is suggesting is a general limitation on provincial power to interfere with contractual rights, *regardless of the particular details of the contract in question*. This is because, as he puts it, contractual rights “know no territorial limitation.” Thus *any* attempt by the Province to nullify contractual rights would necessarily be beyond provincial jurisdiction.

Fisher J.A., another member of the majority, concluded that the legislation was invalid because it interfered with contractual rights outside of the province. But he, too, advanced a broader argument to justify the result in the case. This broader argument was that legislation

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<sup>82</sup> *Ibid.* A separate section of the same legislation (s. 6(4)) provided that “[w]ithout the consent of the Attorney General, no action shall be brought against the Commission or against any member thereof for anything done or omitted in the exercise of his office.” The Attorney General had declined to give consent to Ottawa Valley to sue the Commission. This section was also attacked and the Court of Appeal ruled that it was invalid.

<sup>83</sup> See *Ottawa Valley* *supra* note 74 at 328.

<sup>84</sup> *Ibid.* at 304.

which prohibits access to the Superior Courts is necessarily invalid, since it derogates from an “implied guarantee” in the Constitution:

There is another ground upon which the validity of secs. 2 and 3 may be attacked. Those sections, in fact, limit the jurisdiction of the Supreme Court of Ontario. The limitation being a particular and not a general limitation does not make any difference. The limitation is there and, whether particular or general, is nonetheless a limitation. Being a limitation its effect is to take away from the Supreme Court one at least of the essential characteristics of a Superior Court. The British North America Act does not, it is true, guarantee the continued existence of the Superior Court in each of the Provinces. *But it is quite clear that both secs. 96 and 127 [sic] are founded upon an unwritten guarantee of the continuance of the Superior Courts in the Provinces. To alter the essential character of the Supreme Court as a Superior Court in any vital particular, is contrary to the spirit of The British North America Act, and tantamount to an unauthorized repeal of that Statute in that respect. To do so therefore is beyond the power of any Legislature which is the creature of that Statute.*<sup>85</sup>

This analysis—with its references to “unwritten guarantees” and to the “spirit” of the *British North America Act*—is broadly similar to the discussion of the Court in the *Manitoba Language Reference* respecting the role played by certain “unwritten principles” of the Constitution, including the rule of law. It also foreshadows the analysis and conclusion of Dickson C.J. in *BCGEU #1*, to the effect that limitations on access to the courts are unconstitutional. While Fisher J.A. does not make any reference to the principle of the “rule of law,” his concern is precisely the same as that voiced by Dickson C.J. in *BCGEU #1*—namely, that guaranteed access to the courts is an implied principle of the Canadian Constitution.

What is particularly significant is that Fisher J.A. concludes that even a “particular limitation” on the jurisdiction of the courts is unconstitutional. In other words, it is not necessary to totally bar access to the courts in order to violate the unwritten guarantees of court access. Even a particular limitation, barring proceedings based on particular contracts, is “contrary to the spirit of the *British North America Act* and tantamount to a repeal of that Statute in that respect.”<sup>86</sup> This reasoning is, of course, relevant to Bill C-22, since the “no proceedings” clause in the Bill bars access to the courts only for particular kinds of actions. The reasoning of Fisher J.A. in the *Ottawa Valley* case would suggest that even this “particular limitation” offends the principle of the rule of law.

What of the Privy Council decision in *Ladore*,<sup>87</sup> a case in which legislation rewriting contract terms was upheld, and which McIntyre J.,

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<sup>85</sup> *Ibid.* at 333 [emphasis added].

<sup>86</sup> *Ibid.*

<sup>87</sup> *Supra*, note 77.

in *Upper Churchill Waters* says “states the law correctly?”<sup>88</sup> While it is true that, in *Ladore*, legislation which affected contractual rights was upheld, close analysis of the case indicates that it does not support an untrammelled provincial authority to nullify contractual rights.

*Ladore* concerned the validity of provincial legislation which amalgamated certain municipalities in Ontario into the City of Windsor. In the process of amalgamation, the securities for the debts of the various component municipalities were replaced by new bonds issued by the new City of Windsor with modifications in interest rates and other terms of the indebtedness.

The critical point to note about this process of debt adjustment, however, is that it was undertaken pursuant to a statute of general application, with creditors having extensive rights to participate in and approve any arrangement. The debt adjustment was undertaken pursuant to Part III of the *Department of Municipal Affairs Act, 1938*. Under this statute, the Ontario Municipal Board had to first be satisfied that a municipality had, *inter alia*, “failed to meet and pay any of its debentures or interest thereon” or “become so financially involved or embarrassed that default in meeting any of its obligations may probably ensue.”<sup>90</sup> If, “upon inquiry,” the Board is satisfied that any of these conditions is satisfied, it may vest control over the municipality in the Department of Municipal Affairs and declare that the municipality is subject to the provisions of Part III of the legislation, entitled “Special Jurisdiction Over Defaulting Municipalities.”<sup>91</sup> A notice to this effect is to be published in the *Ontario Gazette*, such publication to act as a stay of all actions and proceedings pending against the municipality.<sup>92</sup> The Board is given special powers to consolidate or reorganize the indebtedness of the municipality. However, before any such reorganization is effected, notice of the proposed order must be published in the *Ontario Gazette* at least three months in advance.<sup>93</sup> If creditors representing not less than one-third of the aggregate indebtedness of the municipality object in writing, no such order compromising debt is to be issued.

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<sup>88</sup> *Upper Churchill Waters*, supra note 5 at 332.

<sup>89</sup> S.O. 1935, c. 16.

<sup>90</sup> *Ibid.*, ss. 25(1)(a) and (c).

<sup>91</sup> *Ibid.*, s. 26(1).

<sup>92</sup> *Ibid.*, ss. 29 and 30.

<sup>93</sup> *Ibid.*, s. 35.

The point of reviewing the details of the legislation is to indicate that it established a standard scheme for debt adjustment, designed to protect the interests of both the municipalities and the creditors. The scheme was in no way inconsistent with rule of law principles, since it did not contemplate or authorize arbitrary actions by government. Indeed, the legislation here can be contrasted with that in the *Ottawa Valley* case, in which the Ontario government had specifically approved a particular contract, but then sought to enact legislation stating that the contract was absolutely void. In *Ottawa Valley* unlike *Ladore*, the government was acting in a high-handed and arbitrary manner since it was unilaterally attempting to deny all rights, rather than attempting to reach a consensual accommodation with the persons whose rights were being affected.

In terms of the facts that gave rise to the litigation in *Ladore*, the municipalities in the Windsor area had defaulted on a number of debentures and, by 1934, “something like a total default was threatened.”<sup>94</sup> The statutory procedure was followed and the majority of the creditors approved of the debt adjustment proposal, which provided that former creditors should receive debentures of the new city of equal nominal amount to those formerly held, but the interest was scaled down in various classes of debentures. The plaintiffs were four ratepayers and debenture holders who were unhappy with the proposed arrangement. They sought a declaration that the legislation under which it had been effected was invalid since it interfered with extra-provincial contractual rights.

The action was dismissed both at trial and by the Ontario Court of Appeal.<sup>95</sup> The Privy Council dismissed the appeal, rejecting the argument that the legislation was a colourable device to interfere with the rights of creditors outside of Ontario. Lord Atkin noted that it was imperative that the province have the power to deal with the situation of local governments that have become “ineffective or non-existent because of the financial difficulties of one or more municipal institutions.”<sup>96</sup> He continued:

[w]here the former bodies are dissolved it is inevitable that the old debts disappear, *to be replaced by new obligations of the new body* And in creating the new corporation with the powers of assuming new obligations it is implicit in the powers of the Legislature

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<sup>94</sup> *Supra* note 77 at 481.

<sup>95</sup> [1938] O.R. 324 (C.A.).

<sup>96</sup> *Ibid.* at 481.

(sovereign in this respect) that it should place restrictions and qualifications on the obligations to be assumed.<sup>97</sup>

While Lord Atkin states that the legislature is “sovereign in this respect,” note that this statement is premised on the fact that the old debts are “to be replaced by new obligations of the new body.”<sup>98</sup> In short, the reference to the sovereignty of the legislature cannot be interpreted as conferring absolute authority to simply cancel creditors’ rights and preclude their access to the courts absent their consent.

Lord Atkin then deals with the argument that the legislation interferes with the rights of creditors outside the province:

It was suggested in argument that the impugned provisions should be declared invalid because they sought to do indirectly what could not be done directly—namely, to facilitate repudiation by Provincial municipalities of obligations incurred outside the Province. It is unnecessary to repeat what has been said many times by the Courts in Canada and by the Board, that the Courts will be careful to detect and invalidate any actual violation of constitutional restrictions under pretence of keeping within the statutory field. A colourable device will not avail. But in the present case nothing has emerged even to suggest that the Legislature of Ontario at the respective dates had any purpose in view other than to legislate in times of difficulty in relation to the class of subject which was its special care—namely, municipal institutions.<sup>99</sup>

The implication from this passage is that, had the province been attempting merely to facilitate repudiation of municipal debts, the legislation might well have been held to be invalid. The invalidity would have been based on the theory that such legislation would interfere with extra-provincial creditors’ rights. But since in most cases there would be at least one creditor from outside the province, in practical terms the result would have represented a general limitation on provincial attempts to repudiate municipal debt. In short, despite suggestions that the province has “sovereign authority” in this respect, the case falls far short of establishing unlimited or unreviewable provincial authority to nullify contractual rights.

In fact, in cases in which a province has purported to nullify Crown contracts without some form of consent from the other contracting party, the courts have almost always ruled the legislation invalid.<sup>100</sup> This fact is striking, given the repeated statements to the

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<sup>97</sup> *Ibid.* [emphasis added].

<sup>98</sup> *Ibid.*

<sup>99</sup> *Ibid.* at 482.

<sup>100</sup> See, for example, *Credit Foncier Franco-Canadien v. Ross*, [1937] 3 D.L.R. 365 (Alta. C.A.), striking down Alberta legislation reducing interest on debts; *Beauharnois Light, Heat and Power Co. v. Hydro-Electric Power Commission* [1937] O.R. 796 (C.A.), striking down same

effect that there is no limit on the right of a province to nullify contractual rights “in the province.” As in *Upper Churchill Water* or the *Royal Bank* case, where the courts rule legislation invalid they typically base their conclusion on the fact that the legislation affects extra-provincial rights (even where the extra-provincial aspects of the contracts in question may be relatively minor). But the proposition that the province may unilaterally nullify contractual rights as long as those rights are located “in the province” seems to have simply been assumed to be correct, even in the absence of any direct authority on the point.

In short, the *results* in these cases, although admittedly not the reasons relied on by the courts, are entirely consistent with the conclusion that there is an implied limitation on provincial power to repudiate contracts. Whenever provinces have acted in a high-handed or arbitrary manner, repudiating contracts and denying compensation to those affected without their consent, the courts have found a way to intervene. I conclude that the provincial contract repudiation cases do not represent an obstacle to the conclusion outlined earlier—namely, that the unilateral power to rewrite contracts without the payment of compensation is contrary to the rule of law.

## 2. No Guarantee for Property Rights

Judges and text writers who state that Parliament may rewrite contract terms without paying compensation often assume that this conclusion necessarily flows from the fact that Parliament may expropriate property without paying compensation. There is considerable judicial authority for the proposition that the state may expropriate property without paying compensation.<sup>101</sup> Any claim for compensation must be found in a statute; in other words, there is no common law right to compensation for legislation expropriating property rights. While the courts will tend to interpret legislation which involves a “taking” of property as implicitly requiring that compensation

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legislation considered in the *Ottawa Valley* case; *Independent Order of Foresters. Bd. Trustees of Lethbridge Northern Irrigation Dist.* [1937] 4 D.L.R. 398 (Alta. S.C.), striking down Alberta legislation reducing the rate of interest on all provincial government securities; *Independent Order of Foresters v. Bd. Trustees of Lethbridge Northern Irrigation Dist.* [1937] 2 D.L.R. 109 (Alta. S.C.), also striking down Alberta legislation reducing the rate of interest on all provincial government securities. In *Day v. Victoria*, [1938] 53 B.C.R. 140, the British Columbia Court of Appeal upheld legislation restructuring the debt obligations of the City of Victoria, but the arrangement had been approved by the City’s creditors: see the recitals in the preamble to *Victoria City Debt Restructuring Act*, S.B.C. 1937, c. 77.

<sup>101</sup> See, generally, *Manitoba Fisheries v. R.*, [1979] 1 S.C.R. 101 [hereinafter *Manitoba Fisheries*].

be paid, the obligation to pay compensation flows from the terms of the statute rather than from any right at common law.

A number of respected commentators have pointed out that the drafters of the 1982 Constitution expressly decided not to include any protection for property rights in the *Charter*.<sup>102</sup> Therefore, it is claimed, the Canadian Parliament retains its plenary authority to expropriate property without paying compensation. The power to expropriate property, it is assumed, includes the power to expropriate contractual rights without paying compensation.

The main difficulty with this line of argument is that it incorrectly assumes that a generalized right to expropriate property without paying compensation necessarily includes the right to rewrite contract terms. In fact, the common law has never treated property and contract claims in an identical fashion. For example, the common law has never recognized that property owners are entitled to be compensated whenever the value of their property is negatively affected by legislation. Only in instances where the legislation amounts to a “taking” does a claim for compensation arise and, even here, the right to compensation flows from the terms of the statute rather than from any common law right.<sup>103</sup> But the common law has always maintained that a person who has contracted with the government is entitled to be compensated for any losses flowing from the government’s failure to keep its promise. While it has also been assumed that the Crown’s liability in contract could be limited through statute, absent such a statute, the common law position would require compensation. In short, those persons with whom the government has chosen to contract are in a different position from a mere property-holder whose property might be adversely affected by governmental or legislative action.

If we examine the cases stating that Parliament may expropriate property without paying compensation, we see that they in no way justify Parliament rewriting contractual terms without providing redress. For example, in the leading case of *Burmah Oil Co. v. Lord Advocate*,<sup>104</sup> the House of Lords considered claims for compensation from British companies whose property in Burma had been destroyed by order of the British government during the Second World War. There was no statute authorizing the destruction of the property, but the House of Lords held

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<sup>102</sup> See, for example, P.W. Hogg, *Constitutional Law of Canada*, 3d ed. (Toronto: Carswell, 1992) at 707.

<sup>103</sup> See, generally, *Manitoba Fisheries* *supra* note 101.

<sup>104</sup> [1965] A.C. 75.

that the destruction was lawful based on the prerogative power of the Crown to protect its realm and citizens in times of war.<sup>105</sup> However, by a majority of 3-2, the House of Lords also held that the destruction of the property, while lawful, gave rise to a right to compensation. The British Parliament passed a statute, the *War Damage Act, 1965*<sup>106</sup> reversing the judgment of the House of Lords. Section 1 of this Act provided as follows:

(1) No person shall be entitled at common law to receive from the Crown compensation in respect of damage to, or destruction of, property caused (whether before or after the passing of this Act, within or outside the United Kingdom) *by acts lawfully done* by, or on the authority of, the Crown during, or in contemplation of the outbreak of, a war in which the Sovereign was, or is, engaged.<sup>107</sup>

While the validity of *War Damage Act* was never tested in court, most commentators assume it to be valid. The enactment of the *War Damage Act* is often cited as authority for the proposition that Parliament may expropriate property, even if it involves overturning a court award of damages against the Crown. But notice that the terms of the statute only deny compensation in respect of acts “lawfully done.” It would not apply, in other words, to cases where the Crown had destroyed property and denied compensation in breach of a contractual obligation. For example, if the British government had expressly provided, by contract, that it would compensate certain property owners for damage caused during the war, nothing in the *War Damage Act* would operate to override those contract terms. In short, while the *War Damage Act* certainly stands for the proposition that Parliament may expropriate property without paying compensation, it certainly does not authorize Parliament’s unilateral rewriting of contractual terms without compensation.

The same analysis can be applied to all the other cases involving expropriation of property rights. In all cases where the courts have found that compensation was not payable, the statutes in question never purported to rewrite the terms of a valid and binding contract.

Some may object that the distinction I seek to draw between “mere” property claims, as opposed to claims for breach of contract, is unduly technical or formalistic. In fact, the distinction is entirely justified in principled terms. All forms of state regulation impose costs on those who are regulated including, in some cases, decreasing the

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<sup>105</sup> See the judgments of Lords Reid, Pearce, and Upjohn, *ibid.*

<sup>106</sup> (U.K.) c. 18 [hereinafter *War Damage Act*].

<sup>107</sup> *Ibid.* [emphasis added].

value of private property. It would be unjust to hold that property owners alone, as opposed to consumers, employees, *etc.*, are entitled to be compensated for the costs of state regulation. But the person who has contracted with the government is in a different position from a mere property owner. First of all, those contracting with the government are by no means limited to those with property. The Crown contracts with its employees, or with the providers of services, as well as with property holders. The only way that a contract claim can arise is if the Crown voluntarily decides to make a legally-binding promise. If the State wishes to avoid contractual liability, it may do so simply by choosing not to enter into contracts.

It is the element of voluntariness that distinguishes claims in contract from mere property claims. If the state were required to compensate any property owner whose rights were adversely affected by state regulation, the claims for compensation would be enormous and unavoidable. But claims in contract are subject to limitation by the state itself. If the state chooses to make legally binding promises—promises which can be and are relied upon by the other contracting parties—then it is entirely appropriate that it honour those commitments.

### 3. The Doctrine of Legitimate Expectations

A final consideration is whether the implied limitations associated with the rule of law would unduly limit the ability of the Legislature to change legislation. As a general rule, governments cannot bind their successors. It must be open to the legislature to change the law in accordance with its evolving views of the public interest.

For example, in *Reference Re Canada Assistance Plan*<sup>108</sup> the Supreme Court of Canada considered whether the doctrine of “legitimate expectations” prevented the government from introducing legislation limiting the government’s contributions under a shared-cost program with the provinces. Sopinka J., speaking for a unanimous Supreme Court, rejected this suggestion:

Parliamentary government would be paralysed if the doctrine of legitimate expectations could be applied to prevent the government from introducing legislation in Parliament. Such expectations might be created by statements during an election campaign. The business of government would be stalled while the application of the doctrine and its effect was argued out in the courts. Furthermore, it is fundamental to our system of government that a government is not bound by the undertakings of its predecessors. The

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<sup>108</sup> [1991] 2 S.C.R. 525 [hereinafter *CAP Reference*].

doctrine of legitimate expectations would place a fetter on this essential feature of democracy.<sup>109</sup>

The *CAP Reference* leaves no doubt that the Crown cannot contract away Parliament's right to enact legislation.<sup>110</sup> But, in my view, there is no inconsistency between this doctrine and the analysis that has been presented in this paper. The implied limitations associated with the rule of law—including the requirement that government honour its promises—do not in any way limit the ability of the legislature to implement policies that it deems to be in the public interest. The government and Parliament are free to decide not to proceed with a contract because they deem the contract to be contrary to the public interest. All that Parliament may not do is to deny access to the courts for persons whose rights are thereby affected.

Acceptance of this doctrine would not “paralyse” the operation of Parliament or stall the business of government. This is evident by the fact that the United States Constitution prohibits the States from “impairing the Obligations of Contracts.”<sup>111</sup> As originally drafted, the “contracts clause” applied not only to government attempts to repudiate its own contracts, but also to attempts by the state to rewrite the terms of contracts between private parties. But in the modern era, the U.S. Supreme Court has rarely invalidated legislation on the grounds that it adjusted contractual rights as between private parties. This so-called “contracts clause” has been interpreted as protecting, in particular, the rights of persons who have contracted with the government.<sup>112</sup> Yet this limitation on legislative power has not prevented Congress or the States

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<sup>109</sup> *Ibid.* at 559.

<sup>110</sup> Although the case dealt with the doctrine of “legitimate expectations,” Sopinka J. made it clear that the result would not have been any different if there had been a binding contract that the Crown sought to overturn: see *ibid* at 560.

<sup>111</sup> U.S. Const. art. I, cl. 10 provides that “[n]o state shall ... pass any ... Law impairing the Obligation of Contracts.”

<sup>112</sup> See *Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518 (1819). The leading modern authority on point, adopting a narrow reading of the application of the contract clause in the context of private contracts, is *Home Building and Loan Ass'n v. Blaisdell*, 290 U.S. 398 (1934). But see *Allied Structural Steel Company v. Spannaus*, 438 U.S. 234 (1978), holding that legislation adjusting the rights of contracting parties must be founded on reasonable conditions and must be of a character appropriate to the public purpose justifying its adoption. Significantly, however, the U.S. Supreme Court has stated that no such judicial deference will be extended to efforts by the state to repudiate its own contracts. This is because, as the Court noted in the leading case of *U.S. Trust Co. of New York v. New Jersey* 431 U.S. 1 (1977) [hereinafter *U.S. Trust Co.*], the state has an unhealthy economic incentive to renege on its contractual commitments whenever the gain in dollars or convenience outweighs the loss in credibility.

from pursuing policies they believed to be in the public interest.<sup>113</sup> This is because the U.S. Supreme Court has held that legislation impairing contract rights can be upheld as long as the impairment is for an important public purpose and is narrowly tailored to achieve that purpose.<sup>114</sup> A similar approach in Canada would provide meaningful protection for contractual expectations, without unduly limiting the authority of Parliament or the provincial legislatures.

## V. THE RULE OF LAW APPLIED: IMPLICATIONS FOR PUBLIC POLICY

Assume that the argument that has been presented thus far is correct and were accepted by a court. What would be the implications for the constitutional validity of recent Canadian legislation, either proposed or enacted, that purports to rewrite contract terms and deny access to the courts?

Turning first to Bill C-22, it would seem clear that the legislation, as originally proposed by the government in early 1994, would be unconstitutional. The legislation purported to nullify a legally binding contractual obligation and to completely bar all court access for purposes of seeking redress. If the Constitution protects contractual expectations, then legislation such as Bill C-22 must necessarily be unconstitutional.

What of the government's proposed amendments to Bill C-22, which would have permitted access to the courts for purposes of claiming certain kinds of out-of-pocket expenses?<sup>115</sup> Is a partial limitation on court access a violation of the rule of law?

The American jurisprudence on the "contracts clause" may be helpful in responding to this question. As noted above, the U.S. courts do not regard the "contracts clause" as a complete bar to contract modification by Congress or the States. Rather, the courts require: (i) that any contract modification be undertaken for a significant and legitimate public purpose; and (ii) that the modification of contract

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<sup>113</sup> For a review of the modern American doctrine, see R. Rotunda & J. Nowak, *Treatise on Constitutional Law: Substance and Procedure* vol. 2, 2d ed. (St. Paul: West, 1992) at 447-56.

<sup>114</sup> See the discussion under Part V, below.

<sup>115</sup> The government amendments, proposed in early 1995, were rather complicated, containing a host of exclusions designed to severely limit any claim for compensation. For a discussion of some of the difficulties posed by various aspects of these exclusions, see *Senate Committee on Legal and Constitutional Affairs* *supra* note 11. In May 1996, further amendments were introduced which broadened the right to claim damages against the Crown.

obligations be narrowly tailored so as to promote the significant public purpose identified.<sup>116</sup> However, outside of cases of state insolvency, the desire of the state to save money cannot be regarded, in itself, as a significant public purpose: “a governmental entity can always find a use for extra money, especially when taxes do not have to be raised.”<sup>117</sup>

The government might argue that based on this kind of “interest balancing,” the proposed amendments to Bill C-22 should be sufficient to support its constitutional validity, even in light of the analysis set out in this paper. In support of this conclusion, the government might point to a review of the Airport Contracts conducted by Robert Nixon immediately after the election of the Liberal Government in October 1993.<sup>118</sup> The Nixon Report found that the process whereby the contracts were awarded “may leave one with the suspicion that patronage had a role in the selection of Paxport Inc. [as best overall proposal].”<sup>119</sup> Nixon also found that the revenue stream provided to the Government of Canada from the Airport Contracts was “far from overwhelming” while the rate of return to the Limited Partnership responsible for redeveloping the airport “could, given the nature of this transaction, well be viewed as excessive.”<sup>120</sup> The Nixon Report found that the Airport Contracts simply do not serve the public interest and should be cancelled. It also recommended that “it would be both necessary and indeed desirable to provide reasonable compensation.”<sup>121</sup> Such compensation would include any expenditures incurred to date, but “it would not be necessary in [Nixon’s] view for these negotiations to include compensation for lost opportunity or profits foregone. Given the circumstances of this unhappy transaction, and the very early stage of its life, there is no imperative for such compensation.”<sup>122</sup>

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<sup>116</sup> *U.S. Trust Co.*, *supra* note 112 at 25, *per* Blackmun J., delivering the opinion of the Court: “[a]s with laws impairing the obligations of private contracts, an impairment may be constitutional if it is reasonable and necessary to serve an important public purpose.”

<sup>117</sup> *Ibid.* at 26. The Court went on to note that considerations might well be different in a situation where a government was facing insolvency. In these kinds of exceptional situation, the state must act to compromise debt in order to protect the rights of creditors as well as its own rights. See *ibid.* at 27-28, discussing *Faitoute Iron and Steel Cov. Asbury Park (City of)* 316 U.S. 502 (1942).

<sup>118</sup> “Pearson Airport Review” (29 November, 1993) [hereinafter “Nixon Report;” unpublished].

<sup>119</sup> See *ibid.* at 9.

<sup>120</sup> *Ibid.* at 11.

<sup>121</sup> *Ibid.* at 13.

<sup>122</sup> *Ibid.*

The difficulty with relying on the Nixon Report as a basis for limiting compensation is that other independent and detailed audits of the Airport Contracts had reached quite different conclusions.<sup>123</sup> The Nixon Report was prepared over a 30 day period through a closed-door process that did not provide any guarantees of due process. The Nixon Report itself essentially raises questions and concerns about the Airport Contracts, as opposed to undertaking a detailed analysis of what amounted to a very complicated commercial transaction. In short, it seems difficult to conclude that the amended version of Bill C-22 could be justified based on such an inconclusive and hastily prepared internal review.<sup>124</sup> On the other hand, the further amendments proposed by the government in May 1996 broaden the right to seek compensation from the courts, increasing the likelihood that the legislation would be found to be valid.

What about other recent attempts by governments to rewrite contractual terms and limit access to the courts? For example, a number of provincial governments have enacted legislation rewriting collective agreements with their employees and, in some cases, preventing court actions for redress. In Ontario, the *Social Contract Act, 1993*<sup>125</sup> amended certain terms of collective agreements in the broader public sector and barred proceedings based on the enactment of those amendments.<sup>126</sup> The Saskatchewan government enacted legislation amending the notice requirements in its collective agreements, limiting employees to the notice they would have received at common law, and barring access to the courts for additional claims.<sup>127</sup>

Governmental attempts to rewrite the terms of contracts have by no means been limited to the employment context. In early 1995, the British Columbia government cancelled a major hydro-electric project and stated that no compensation would be payable to Alcan Aluminium Limited, which had invested more than \$500 million in the project.<sup>128</sup> In

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<sup>123</sup> See Report of Price Waterhouse to Transport Canada (8 July 1992) [unpublished]; Report of Raymond, Chabot, Martin, Paré to Transport Canada (26 October 1992) [unpublished].

<sup>124</sup> See the extensive analysis of the cancellation of the Airport Contracts, *Senate Committee on the Pearson Airport Agreements* *supra* note 14.

<sup>125</sup> S.O. 1993, c. 5.

<sup>126</sup> See *ibid.*, s. 47.

<sup>127</sup> See *The Crown Employment Contracts Act* S.S. 1991, c. 50.11, ss. 7 and 9.

<sup>128</sup> See Province of British Columbia (Office of the Premier), News Release, "B.C. Government Says No To Kemano Completion Project" 23 January 1995. While the government had threatened to introduce legislation barring compensation by Alcan, in July 1995 the parties entered into a "Standstill Agreement," providing for negotiations on the issue until 31 March 1996.

1993, the Saskatchewan government introduced legislation rewriting the terms of certain agreements that it had entered into with respect to a heavy oil upgrader project, but the legislation was never proceeded with when the parties agreed to a settlement of the issues.<sup>129</sup>

The facts and circumstances surrounding each of these pieces of legislation would necessarily have to be examined in detail before any conclusions respecting their constitutional validity could be offered. Yet, in general terms, the analysis that has been presented in this paper would suggest that all of these attempts to rewrite contract terms and deny compensation would be open to serious constitutional challenge.

Some might question the appropriateness of this result, particularly given the fiscal strait-jacket facing all governments in Canada in the mid-1990s. If governments are forced to honour their contractual commitments, this might be regarded as an unwarranted impediment to efforts aimed at reducing public expenditures and balancing budgets.

Yet, the short answer to this objection is that there is no reason why expenditure reduction must be achieved by singling out those persons who have contracted with the government. All the contracts in question were freely entered into by the government of the day. Honouring those contractual commitments simply requires that expenditure reductions be achieved other than through unilateral rewriting of binding contracts. Of course, the considerations might well be different in a case where a government was facing insolvency. The law generally recognizes that there must be a mechanism whereby persons who are genuinely insolvent are able to compromise debt. The same considerations would suggest that governments must necessarily have some scope for altering their contractual commitments to deal with a genuine threat of insolvency.<sup>130</sup>

While the rule of law requires that governments honour their contractual commitments, it does not necessarily mean that governments are required to meet or fulfill the expectations of citizens as to future public policy. As the Supreme Court of Canada noted in the *CAP Reference* it is simply impossible for governments to satisfy the expectations of all citizens, even if those expectations are reasonable in the circumstances. Some citizens may have developed reasonable expectations to the effect that the government's current policy on a

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<sup>129</sup> See *The NewGrade Energy Inc. Protection Act*, S.S. 1993, c. N-4.02.

<sup>130</sup> The U.S. Supreme Court has recognized that the compromise of state debt in this situation, assuming it is undertaken in a reasonable fashion, does not violate the contract clause. See *supra* notes 116-17 and accompanying text.

particular subject will not be changed; others may expect, equally reasonably, that such policies will be substantially altered. To require government to act in accordance with “legitimate expectations” would, indeed, paralyze the operation of the Parliamentary system.

## VI. CONCLUSION

This paper has argued that governments should be bound to the same moral standards as private citizens when it comes to the making and breaking of promises. Yet, at first blush, such a requirement might be thought to unduly limit the ability of the government of the day to achieve its preferred public policy objectives. In fact, however, the suggested limitations will operate to the long-term benefit of the state, rather than to its detriment. If governments are permitted to repudiate contracts at will, the state is effectively barred from undertaking permanently binding commitments. Anyone who is contemplating contracting with the government will be aware of the fact that, no matter how solemn the promise, the government can turn around the next day and “skip out” on the contract. This risk may lead the other party to decide that it would be better off investing its resources elsewhere, in jurisdictions which do offer protection for contractual expectations; alternatively, the private party may demand that the government pay a premium in order to discount the risk of future opportunistic behaviour by the state.

If contractual expectations are constitutionally protected, this risk premium is eliminated. This will facilitate the achievement of public policy goals, rather than impair them. It will also ensure that short-term political expediency is not permitted to undermine the core values associated with the rule of law—values that serve the long-term interests of both citizens and governments alike.