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Structural Cooperative Federalism

Kate Glover*

I. INTRODUCTION

This article considers the status of cooperative federalism as a legal principle in Canadian constitutionalism. It argues that our understanding of cooperative federalism – often called the “modern form” of federalism in Canada¹ – is enriched by looking to constitutional contexts beyond the division of powers. This article focuses on just one of those contexts, that is, it explores the lessons to be learned about cooperative federalism from the text and structure of Part V of the *Constitution Act, 1982*.²

This article argues that Part V, which sets out the procedure for formally amending the Constitution of Canada, is an expression of cooperative federalism, indeed, a strong one. The amending procedure calls for coordinated action between federal and provincial legislative actors when amending the Constitution in relation to many of the country’s most constitutionally meaningful issues. Cooperative federalism both describes part of the vision of government that informs Part V and helps to explain the animating principles and procedural demands of Part V. An in-depth look at Part V supports the claim that cooperative federalism is not simply a matter of modern political practice or judicial interpretation, as the cases suggest, but rather is embedded in the architecture of Canada’s Constitution. After exploring this claim, this article then considers its implications for the

* Assistant Professor, Faculty of Law, University of Western Ontario. An early version of this article was presented at the 19th Annual Osgoode Hall Constitutional Cases Conference. Thank you to the Conference participants for their helpful comments and to Sonia Lawrence and Benjamin Berger for their support and insight in the writing of this article. Thank you also to Howie Kislowicz, Mike Pal, and the anonymous reviewer of the SCLR for their careful, insightful comments. All errors and shortcomings are my own.

¹ See e.g., *Quebec (Attorney General) v. Canada (Attorney General)*, [2015] S.C.J. No. 14, 2015 SCC 14, [2015] 1 S.C.R. 693, at para. 147 (S.C.C.), affg [2013] J.Q. no 6676 (Que. C.A.) [hereinafter “*Quebec (AG)*”]; *Goodwin v. British Columbia (Superintendent of Motor Vehicles)*, [2015] S.C.J. No. 46, 2015 SCC 46, [2015] 3 S.C.R. 250, at para. 33 (S.C.C.) [hereinafter “*Goodwin*”]; *Canadian Western Bank v. Alberta*, [2007] S.C.J. No. 22, 2007 SCC 22, [2007] 2 S.C.R. 3, at para. 42 (S.C.C.), affg [2005] A.J. No. 21 (Alta. C.A.) [hereinafter “*Canadian Western Bank*”].

² *Constitution Act, 1982, Part V, being Schedule B to the Canada Act 1982 (U.K.)*, 1982, c. 11.

interpretation of sections 91 and 92 of the *Constitution Act, 1867*.³ Noting that the meaning of the cooperative principle will continue to unfold in future cases, this article considers whether some duties of regard or good faith should attach when governments engage in co-operative legislative partnerships.

Bringing the amending formula into the mainstream conversation on cooperative federalism is not the usual practice. Despite overlap in the aims of sections 91 and 92 and the amending procedures, these two parts of the Constitution are not often discussed in relation to each other. When they are, their relationship is usually described as one of alternatives or competitors – both are ways of achieving public policy goals, yet the former is the easier route given political realities.⁴ Rarely are the constitutional amending procedures read through the lens of cooperative federalism and rarely is Part V looked to as a source of insight into cooperative federalism or the interpretation of sections 91 and 92. This article begins to bridge this divide in an effort to deepen our understanding of cooperative federalism in Canadian constitutionalism.

This article proceeds in three parts. Part I canvasses recent jurisprudential claims about the status and role of cooperative federalism in Canadian constitutional law and politics. The cases establish that cooperative federalism is identified as a guiding principle of constitutional interpretation in division of powers cases and is understood to be an instantiation of the more general principle of federalism in modern Canada. Part II, the heart of the article, argues that despite the Supreme Court's contention that sections 91 and 92 are the "primary textual expression of the principle of federalism in our Constitution",⁵ cooperative federalism is relevant to constitutional practice and interpretation in contexts other than the traditional division of powers. In particular, the principle of cooperative federalism finds strong structural expression in Part V of the *Constitution Act, 1982*. Part III of this article considers the implications of a structural account of cooperative federalism for the division of powers context. It notes that these implications remain to be worked out in practice and in the jurisprudence, but wonders whether,

³ *Constitution Act, 1867 (U.K.)*, ss. 91, 92, 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App II, No. 5.

⁴ P.W. Hogg, *Constitutional Law of Canada* (5th ed. Suppl), at 5-46, cited in *Quebec (AG)*, *supra*, note 1, at para. 17.

⁵ *Reference re Secession of Quebec*, [1998] S.C.J. No. 61, [1998] 2 S.C.R. 217, at para. 47 (S.C.C.) [hereinafter "*Secession Reference*"].

at a minimum, the principle of cooperative federalism entails a level of regard by one legislative actor for the interests of its legislative partners when engaged in joint action. In this discussion, I draw on the Supreme Court's recent decision in *Quebec v. Canada* ("*Quebec (AG)*") as a case study.⁶ In particular, I explore the merits of the dissenting opinion and suggest that the principle of cooperative federalism may give rise to legal duties beyond those discussed in the judgment.

This article is not about the value of cooperation as the organizing principle of a federation. There are many ways to configure a federal relationship, with cooperation as only one possible orienting maxim. Such a maxim has virtues as a guide for political and interpretive practices. But those virtues will always depend on the context in which the cooperative principle is invoked⁷ and will always have limits.⁸ Instead, the normative prescription of this article is found in what it counsels for understanding the constitutional architecture. The argument is that when we account for Part V of the *Constitution Act, 1982*, we see that the roots of cooperation are more firmly grounded in the Constitution than the current jurisprudence suggests.

II. THE STATUS OF COOPERATIVE FEDERALISM IN DIVISION OF POWERS JURISPRUDENCE

In Canadian constitutional law, cooperative federalism is understood as both a descriptive concept and a legal principle.⁹ As a concept, it describes a political phenomenon, one in which agents of the central and regional governments develop mechanisms for redistributing powers and resources.¹⁰ As a legal principle, it serves as a guide for constitutional interpretation in division of powers cases. Cooperative federalism is to be "given due weight", meaning that sections 91 and 92 of the *Constitution Act, 1867* should be read to allow for "interplay, indeed overlap" between spheres of federal and provincial authority and to favour "the application of valid rules

⁶ *Quebec (AG)*, *supra*, note 1.

⁷ Jeremy Webber, *The Constitution of Canada: A Contextual Analysis* (Oxford: Hart Publishing, 2015), at 169-171.

⁸ See *e.g.*, Rosalind Dixon and Richard Holden, "Constitutional Amendment Rules: The Denominator Problem" in Tom Ginsburg, ed., *Comparative Constitutional Design* (Cambridge: Cambridge University Press, 2012), at 195.

⁹ *Quebec (AG)*, *supra*, note 1, at para. 17.

¹⁰ *Id.*, citing Hogg, *supra*, note 4, at 5-46.

adopted by governments at both levels” over enforcing strict jurisdictional silos.¹¹ “Canadian federalism is not simply a matter of legalisms”, Justices Binnie and LeBel wrote in *Canadian Western Bank*. Rather, the “Constitution, though a legal document, serves as a framework for life and for political action within a federal state, in which the courts have rightly observed the importance of co-operation among government actors to ensure that federalism operates flexibly”.¹²

Recent case law shows that cooperative federalism is invoked as “the guiding principle” when applying the division of powers doctrines. For example, the jurisprudence provides that the doctrine of incidental effects should allow for interjurisdictional overlap, as long as each order of government is properly pursuing objectives within its jurisdiction.¹³ Similarly, the doctrine of paramountcy is to be narrowly construed and applied. In the absence of clear evidence, the courts are to avoid broad articulations of Parliamentary purpose that would bring federal legislation into conflict with provincial statutes.¹⁴ As the courts have explained, unsupported expansive readings of the purpose of federal legislation undermine opportunities for cooperative schemes.¹⁵ In addition, the courts have tightened the yoke of interjurisdictional immunity in light of cooperative federalism. Resorting to interjurisdictional immunity or applying it rigorously is inconsistent with the “dominant tide”, that is the *cooperative tide*, of Canadian federalism.¹⁶

Despite the status of cooperative federalism as a “guiding principle” in division of powers cases, the jurisprudence confirms that the principle has limits. These limits arise when “legislative overlap jeopardizes the balance between unity and diversity”.¹⁷ If, for example, it is impossible to comply with overlapping federal and provincial statutes or if a provincial statute frustrates a Parliamentary purpose, the risk of imbalance becomes real and

¹¹ *Saskatchewan (Attorney General) v. Lemare Lake Logging Ltd.*, [2015] S.C.J. No. 53, 2015 SCC 53, [2015] 3 S.C.R. 419, at para. 22 (S.C.C.) [hereinafter “*Lemare Lake Logging*”]; *Goodwin*, *supra*, note 1, at para. 33.

¹² *Canadian Western Bank*, *supra*, note 1, at para. 42.

¹³ *Goodwin*, *supra*, note 1, at paras. 32-33; *Canadian Western Bank*, *supra*, note 1, at para. 28.

¹⁴ *Lemare Lake Logging*, *supra*, note 11, at paras. 21, 23.

¹⁵ *Id.*, at para. 23.

¹⁶ *Quebec (AG)*, *supra*, note 1, at para. 17; *Canadian Western Bank*, *supra*, note 1, at para. 37.

¹⁷ *Alberta (AG) v. Moloney*, [2015] S.C.J. No. 51, 2015 SCC 51, [2015] 3 S.C.R. 327, at para. 16 (S.C.C.), affg [2014] A.J. No. 155 (Alta. C.A.) [hereinafter “*Moloney*”]. Put another way, the limits of cooperative federalism arise when its invocation would “override or modify” the balance captured by ss. 91 and 92: *Reference re Securities Act*, [2011] S.C.J. No. 66, 2011 SCC 66, [2011] 3 S.C.R. 837, at para. 61 (S.C.C.) [hereinafter “*Securities Reference*”]; *Quebec (AG)*, *supra*, note 1, at para. 19.

the cooperative principle cedes to the doctrine of paramountcy.¹⁸ In addition, cooperative federalism cannot be used to limit the scope of federal or provincial legislative authority or to ground a positive obligation to cooperate when the Constitution authorizes unilateral action.¹⁹

The scope of the principle of cooperative federalism was at issue in *Quebec (AG)* and ultimately divided the Court. The main question in the case was whether Parliament could unilaterally dismantle the long gun registry and destroy the data held within it. The majority held that Parliament had this authority. The registry had been validly established under Parliament's jurisdiction over criminal law and could therefore be validly dismantled in the same way. According to the majority, Parliament was under no constitutional obligation to consult Quebec when repealing the registry enactments, to consider the effects on Quebec, or to offer the registry data to officials in Quebec.²⁰ Cooperative federalism did not entail otherwise.

The majority in *Quebec (AG)* conceded that its analysis might have been different had the registry been a "truly interlocking federal-provincial legislative framework".²¹ In contrast, the dissenting judges believed that the legislative scheme establishing the registry had already met the requisite standard of partnership. On this point, Justices LeBel, Wagner, and Gascon, writing jointly in dissent (Abella J. concurring), were of the view that the nature of the registry scheme was such that the "interlocking" standard had been met. In their view, the federal and provincial actors had entered into a true partnership with respect to firearms control and in pursuit of both federal (criminal law) and provincial (public safety and administration of justice) purposes.²² In looking to the constitutional consequences of this intergovernmental partnership, the dissenting judges reasoned that the division of powers doctrines had to protect joint schemes at both the time of implementation and in the process of dismantling.²³ It would "hardly make sense", they wrote, "to encourage co-operation and find that schemes established in the context of a partnership are valid while at the same time refusing to take this particular context into account when those schemes are terminated".²⁴

¹⁸ See e.g., *Moloney, id.*

¹⁹ *Quebec (AG)*, *supra*, note 1, at para. 20.

²⁰ *Id.*

²¹ *Id.*, at para. 4.

²² *Id.*, at paras. 115-135.

²³ *Id.*, at para. 152.

²⁴ *Id.*, at para. 152.

What, then, must be accounted for in assessing the constitutional obligations attendant upon dismantling a joint legislative scheme? Justices LeBel, Wagner, and Gascon ultimately held that the impugned provision of the federal legislation dismantling the registry was unconstitutional because it was, in pith and substance, outside the federal criminal law power and was not justified under the ancillary powers doctrine. However, the reasoning of the dissenting judges was informed by the principle of cooperative federalism. According to the dissenting opinion, the logic of cooperative federalism gives rise to positive obligations on both legislative and judicial actors when assessing the constitutionality of legislation. They explain that in order to adopt legislation that terminates an intergovernmental partnership in a way that is consistent with the principle of cooperative federalism, Parliament or a provincial legislative assembly must consider the “reasonably foreseeable consequences” of the decision to terminate on the other order of government.²⁵ Similarly, when exercising their powers of judicial review, the courts must be mindful of the impact of the legislation on the partner’s exercise of powers.²⁶ Justices LeBel, Wagner, and Gascon were of the view that these obligations flow from the principles of cooperative federalism and the separation of powers:

...a co-operative scheme from which both the federal and provincial governments benefit cannot be dismantled unilaterally by one of the parties without taking the impact of such a decision on its partner’s heads of power into account.... In a co-operative context, actions of a government at one level can have serious consequences for the other level. It is therefore necessary to show vigilance for the increased risk of disrupting the constitutional balance that is protected by the principle of federalism. The concern here is not to alter the separation of powers in our Constitution through the application of co-operative federalism, but to ensure that it is respected.²⁷

Ultimately, cooperative federalism is concerned with ensuring that agents of the federation can respond to social and political realities, which do not necessarily fit neatly in the categories imagined by sections 91 and 92, in the exercise of their respective constitutional authority. As a legal principle, cooperative federalism favours interpretations of the division of powers that respect and facilitate cooperative intergovernmental efforts. In this way, the principle of cooperative federalism counsels expansive

²⁵ *Id.*, at para. 153.

²⁶ *Id.*, at para. 153.

²⁷ *Id.*, at para. 154.

(or, from a different perspective, intrusive) interpretations of jurisdictional authority. It “permits a government at one level to pass laws that have an impact on the powers of the other level”.²⁸ That said, in the ordinary division of powers context, the principle of cooperative federalism has no positive obligation of cooperation attached; it is permissive. Government officials are under no duty to cooperate or to interpret their authority expansively when pursuing legislative goals, but the opportunity to do so is available.

Quebec (AG) draws our attention to cases in which federal and provincial actors are involved jointly in a legislative scheme and disagree about whether and to what degree the scheme should survive. But the case law establishes that the principle of cooperative federalism is also invoked as the guiding interpretive principle in cases in which the legislative scheme under review has no coordinated or joint qualities.²⁹ In such cases, even though the impugned scheme is an exercise of unilateral efforts by one order of government, the principle of cooperative federalism is still called on to guide the constitutional analysis.³⁰ The cases show that the principle is consistently in play and is directed at authorizing the overlap and interplay of broadly interpreted legislative powers. That said, there remains some uncertainty about the scope, status and role of cooperative federalism as an interpretive principle in the division of powers context. Recent cases that consider the status of cooperative federalism describe cooperative federalism as the “modern” or “contemporary” version of federalism in Canada.³¹ On this view, federalism – an assumption “inherent in the structure of our constitutional arrangements”³² – sits at Canada’s constitutional core, aiming to reconcile diversity with unity, police the constitutional division of powers, and maintain a balance between federal and provincial powers.³³ It is a principle that takes on different meanings over time. As Justices LeBel, Wagner and Gascon explain in *Quebec (AG)*, the meaning of federalism has changed over the course of Canada’s constitutional history:

[146] According to the “classical” approach favoured by the Judicial Committee of the Privy Council until 1949, the heads of power

²⁸ *Id.*, at para. 154.

²⁹ See e.g., *Goodwin*, *supra*, note 1; *Canadian Western Bank*, *supra*, note 1.

³⁰ See e.g., *Lemare Lake Logging*, *supra*, note 11 and *Moloney*, *supra*, note 17.

³¹ *Quebec (AG)*, *supra*, note 1, at para. 147; *Goodwin*, *supra*, note 1, at para. 33; *Canadian Western Bank*, *supra*, note 1, at para. 42.

³² *Secession Reference*, *supra*, note 5, at para. 56.

³³ *Secession Reference*, *supra*, note 5, at para. 43; *Quebec (AG)*, *supra*, note 1, at para. 145.

constituted “watertight compartments”, and overlaps between them were to be avoided to the extent possible: *Reference re Securities Act*, at para. 56.

[147] The modern view of federalism rejects this approach and replaces it with a more flexible conception of the division of powers that is dominant in this Court’s recent jurisprudence. This conception “recognizes that in practice there is significant overlap between the federal and provincial areas of jurisdiction, and provides that both governments should be permitted to legislate for their own valid purposes in these areas of overlap”.... Such a conception thus facilitates intergovernmental co-operation.... Both in law and in the political arena, the concept of “co-operative federalism” has been developed to adapt the principle of federalism to this modern reality.³⁴

On this understanding, federalism is part of the scaffolding around which the Constitution is constructed; it cannot be extracted from the constitutional order without renovating the constitutional architecture on a grand scale.³⁵ Cooperative federalism, on the other hand, has constitutional status because it is the prevailing version of federalism *simpliciter*. It is, in other words, fruit of Canada’s constitutional living tree. It follows that the character of Canadian federalism can continue to evolve by virtue of political practice, prevailing attitudes, legislative experience, and so on, into an alternative version – cooperative or otherwise.

The principle of cooperative federalism is an expression of a political practice, one shaped by a long constitutional history of approaches to interpretation, justification, and limits. There is value in preserving its flexibility. The status of the principle of federalism – the “lodestar by which the courts have been guided”³⁶ – remains stable; its entrenched status is unaffected by changes in its meaning over time. Yet, the case law also establishes that the parts of the Constitution of Canada are linked and that constitutional meaning must come from the whole.³⁷ This

³⁴ *Quebec (AG)*, *supra*, note 1, at paras. 146-7, citing *Canada (Attorney General) v. PHS Community Services Society*, [2011] S.C.J. No. 44, 2011 SCC 44, [2011] 3 S.C.R. 134 at para. 62 (S.C.C.), affg [2010] B.C.J. No. 57 (B.C.C.A.) [hereinafter “*PHS*”]; *Canadian Western Bank*, *supra*, note 1, at paras. 36-37; *Securities Reference*, *supra*, note 17, at paras. 56, 57-8; and *OPSEU v. Ontario (Attorney General)*, [1987] S.C.J. No. 48, [1987] 2 S.C.R. 2, at 19-20 (S.C.C.), affg [1980] O.J. No. 3863 (Ont. C.A.) [hereinafter “*OPSEU*”].

³⁵ On federalism as a fundamental unwritten principle of the Constitution, see *e.g.*, *Secession Reference*, *supra*, note 5, at paras. 33-48 and 55-60.

³⁶ *Secession Reference*, *supra*, note 5, at para. 56.

³⁷ *Reference re Senate Reform*, [2014] S.C.J. No. 32, 2014 SCC 32, [2014] 1 S.C.R. 704 at paras. 26-27 (S.C.C.) [hereinafter “*Senate Reform Reference*”].

view reflects a structural approach to constitutional interpretation. On such a model, an inquiry into the meaning of Canadian federalism should look beyond the traditional division of powers realm to other parts of the Constitution to gather interpretive insights from the constitutional order as a whole. This article takes up just one small part of this project – exploring the insights to be learned about cooperative federalism by looking beyond sections 91 and 92 to the Canadian constitutional amending procedure, to which I now turn.

III. COOPERATIVE FEDERALISM AND PART V

This section makes the claim that Part V of the *Constitution Act, 1982* is an expression of cooperative federalism, both as a descriptive concept (that is, in what it asks of Canada’s political actors who seek to amend the Constitution) and as an interpretive principle (that is, in what it requires of our understanding of the many amending procedures set out in Part V).³⁸ Not only is joint action required by the amending procedure, but the cooperative demands are broad and act as limits on related grants of unilateral jurisdiction. The subsections below trace the ways in which the amendment context lines up with the descriptive and interpretive dimensions of cooperative federalism. The aim is to establish that Part V properly belongs in the conversation about cooperative federalism and that its claim to this position is strong.

1. Cooperative Federalism as a Descriptive Concept

Cooperative federalism describes an aspect of the political practices and relationships contemplated by Part V. The demands for coordinated action that Part V makes are apparent on the face of the constitutional text. Part V sets out a number of amending procedures – multilateral, bilateral, and unilateral. The general rule, set out in section 38(1), provides that constitutional amendments require the consent (in the form of resolutions) of the Senate, the House of Commons, and the legislative assemblies of two-thirds of the provinces representing 50 per cent of the population of the provinces.³⁹ This general procedure applies to all amendments that do

³⁸ On federalism as the “unifying principle” of Part V, see Carissima Mathen, “The Federal Principle: Constitutional Amendment and Intergovernmental Relations” in Emmett Macfarlane, ed., *Constitutional Amendment in Canada* (Toronto: University of Toronto Press, 2016), at 65.

³⁹ *Constitution Act, 1982, supra*, note 2, s. 38(1).

not fall within one of the other (exceptional) procedures, including amendments in relation to proportionate representation, the method of selecting senators, and the Supreme Court of Canada.⁴⁰

The most onerous exception to the general procedure is set out in section 41. It requires unanimous consent of the Senate, House of Commons and the legislative assemblies of the provinces in order to amend the Constitution in relation to some of the most contentious areas of constitutional concern, including amendments to the composition of the Supreme Court, to the use of English and French, and to the amending procedure.⁴¹ Section 43 sets out a special procedure for amendments in relation to constitutional provisions that apply to some but not all of the provinces. These amendments require the consent of the Senate, the House of Commons, and the legislative assembly of the provinces to which the amendment applies.⁴² In addition, Part V provides for unilateral constitutional amendments at the federal and provincial spheres. Section 44 provides that, subject to sections 41 and 42, Parliament can unilaterally amend the Constitution of Canada in relation to Canada's executive, the Senate and the House by way of the ordinary legislative process. And section 45 provides that, subject to section 41, a provincial legislature can unilaterally amend the constitution of the province, again by means of the ordinary legislative process.⁴³

This review of the text of Part V shows that, like sections 91 and 92, Part V carves out spheres of authority for legislative assemblies based on subject matter and allocates jurisdictional power over those spheres to the provincial legislatures, to Parliament, and, for the most part, to Parliament and the provinces jointly. This plain reading of the text of Part V suggests that the overarching goal of Part V is to establish a code that ensures that the orders of government unite in order to amend the Constitution in ways that bear on the interests of central and local actors. Part V identifies areas of concern that are necessarily of joint interest to Parliament and the provinces and requires, as a result of that interest, cooperative efforts in order to bring about their reform. As the Supreme Court explained in the *Senate Reform Reference*, the purpose of Part V is

⁴⁰ *Id.*, s. 42(1).

⁴¹ *Id.*, s. 41.

⁴² *Id.*, s. 43.

⁴³ On legislative authority to amend the Constitution see Warren J. Newman, "Constitutional Amendment by Legislation" in Emmett Macfarlane, ed., *Constitutional Amendment in Canada* (Toronto: University of Toronto Press, 2016), at 105 and Warren J. Newman, "Putting One's Faith in a Higher Power: Supreme Law, the *Senate Reform Reference*, Legislative Authority and the Amending Process" (2015) 34 N.J.C.L. 99.

to implement amending procedures “designed to foster dialogue between the federal government and the provinces on matters of constitutional change”.⁴⁴

Cooperative federalism is concerned with upholding the constitutional balance of federal-provincial power. It aims to facilitate inter-governmental coordination in the exercise of constitutional authority. And it is directed towards the interpretation of distributions of supervisory power over certain spheres of social and political concern to the legislatures. If these premises are true, it is difficult to conclude that Part V falls outside the ambit of cooperative federalism. Indeed, the provisions of Part V immediately draw our gaze to the cooperative dimensions of the constitutional relationship between the central and regional powers. In its allocation of powers of consent and veto to Parliament and the provincial legislatures, the amending procedure constitutes a clear manifestation of cooperative federalism in Canadian constitutional life, one that relies on practices of negotiation, consultation, and ultimately consent, to bring about desired results.⁴⁵

2. Cooperative Federalism as an Interpretive Principle

Cooperative federalism also resonates as a conceptual frame and interpretive principle that can make sense of the intricacies of Part V. Indeed, the jurisprudence interpreting the amending procedure takes seriously the cooperative principle. For example, in the *Senate Reform Reference*, the Supreme Court interpreted the provisions of Part V, recognizing that it had to be interpreted as a whole, as the meaning of each provision could be discerned only in relation to the others. The interpretive exercise included discerning the scope of sections 44 and 45, the unilateral amending provisions. Section 44 authorizes Parliament to amend the Constitution in

⁴⁴ *Senate Reform Reference*, *supra*, note 37, at para. 31.

⁴⁵ A challenge to this account could raise the concern that the multilateral provisions of Part V only call for agreement amongst legislative actors, not cooperation. The claim here would be that Part V contemplates a system of consent, veto, and dissent, rather than a more active process of cooperation. On this view, since cooperation and agreement are not the same, Part V is not an instance of cooperative federalism any more than the strict approach to the “exclusive” heads of power set out in sections 91 and 92. Admittedly, the type of intergovernmental interaction contemplated by Part V is political and subject to the wrangling of policy agendas and strategic negotiation. However, the political practices that are necessary to achieve the goals of Part V gesture to the cooperative dimensions of the contemplated multilateralism. In order to reach the consensus needed to formally amend the Constitution pursuant to the multilateral procedures set out in Part V, some process of common goal-setting, negotiation, and consent, as between the legislative actors, is required, a practice that can be reasonably described as cooperation.

certain enumerated circumstances. It provides, “Subject to sections 41 and 42, Parliament may exclusively make laws amending the Constitution of Canada in relation to the executive government of Canada or the Senate and House of Commons”. Section 45 is the provincial equivalent, providing, “Subject to section 41, the legislature of each province may exclusively make laws amending the constitution of the province”.

The interpretation of section 44 is particularly important for determining the scope of the Part V procedures. A broad interpretation of Parliament’s unilateral power for Senate reform, for example, would necessarily limit the multilateral power to reform the Senate provided for in section 42(1). A narrow interpretation of section 44, on the other hand, would allow for the multilateral provisions to have wide application. When undertaking the interpretive task in the *Reference*, the Court held that section 44 is narrow in scope. The Court drew on the principle underlying Part V, which entails joint action by Parliament and the provinces in matters of joint concern:

...ss. 44 and 45 give the federal and provincial legislatures the ability to unilaterally amend certain aspects of the Constitution that relate to their own level of government, but which do not engage the interests of the other level of government. This limited ability to make changes unilaterally reflects the principle that Parliament and the provinces are equal stakeholders in the Canadian constitutional design. Neither level of government acting alone can alter the fundamental nature and role of the institutions provided for in the Constitution. This said, those institutions can be maintained and even changed to some extent under ss. 44 and 45, provided that their fundamental nature and role remain intact.⁴⁶

In short, the Court interpreted the unilateral grants of amending power narrowly, thereby preserving a broad scope for the amending procedures that call for coordinated action. This approach flowed from the Court’s recognition that the partners to Canada’s federation are of equal status and that there is a need to respect the matters of joint concern set out in Part V. In this way, the interpretation of Part V was an instance in which the principle of cooperative federalism was implicitly invoked to limit the scope of unilateral powers under the Constitution.

The interpretive significance of the cooperative principle was highlighted again when the Court measured the government’s proposals for Senate reform against the procedural demands of Part V. In concluding that the implementation of consultative elections triggered the general

⁴⁶ *Senate Reform Reference*, *supra*, note 37, at para. 48.

amending formula, the Court reiterated the need for federal and provincial officials to act jointly in order to bring about reform that would have a qualitative impact on matters of joint concern. The “scope of s. 44 is limited”, the Court held. “[I]t does not encompass consultative elections, which would change the Senate’s fundamental nature and role by endowing it with a popular mandate.”⁴⁷

The same was true on the issue of altering the length of a senatorial term in office. In arguing that the multilateral procedures did not apply to government proposals to change the tenure of senators, the Attorney General argued that the multilateral provisions of section 42(1) (*i.e.*, those expressly listing categories of Senate reform that required joint action) should be narrowly interpreted in light of the grant of unilateral authority over Senate reform set out in section 44. The Court rejected this submission. While agreeing that the express subject matters listed in section 42(1) could not be read beyond their written terms, the Court held that the general amending rule, section 38(1), cannot be circumscribed by unilateral powers:

...the unilateral federal amendment procedure is limited. It is not a broad procedure that encompasses all constitutional changes to the Senate which are not expressly included within another procedure in Part V. The history, language, and structure of Part V indicate that s. 38, rather than s. 44, is the general procedure for constitutional amendment. Changes that engage the interests of the provinces in the Senate as an institution forming an integral part of the federal system can only be achieved under the general amending procedure...⁴⁸

The Court concluded that section 44 was indeed “an exception” to the general procedure and therefore could only apply when the proposed measure would not engage provincial interests.⁴⁹

The *Supreme Court Act Reference* offers another example of the cooperative principle being invoked in the interpretation of Part V. This opinion suggests that joint constitutional interests can impose constraints on the exercise of unilateral powers. This time, the unilateral power is outside Part V, found in section 101 of the *Constitution Act, 1867*, which authorizes Parliament to constitute, maintain, and organize a general court of appeal Canada. The Supreme Court of Canada is constituted by virtue of ordinary legislation,⁵⁰ pursuant to this exclusive federal power.

⁴⁷ *Id.*, at para. 69.

⁴⁸ *Id.*, at para. 75.

⁴⁹ *Id.*, at para. 75.

⁵⁰ *Supreme Court Act*, R.S.C. 1985, c. S-26.

The Court's task in the *Reference* was to determine the scope of section 101 in light of Part V. Recall that sections 42(1)(d) and 41(d) provide that constitutional amendments in relation to the Supreme Court must be made according to the general procedure and those in relation to the composition of the Court require unanimous consent. In undertaking this task, the Court relied on a broad interpretation of the cooperative provisions of Part V to limit the scope of Parliament's power under section 101:

It is true that at Confederation, Parliament was given the authority through s. 101 of the *Constitution Act, 1867* to "provide for the Constitution, Maintenance, and Organization of a General Court of Appeal for Canada". Parliament undoubtedly has the authority under s. 101 to enact routine amendments necessary for the continued maintenance of the Supreme Court, but only if those amendments do not change the constitutionally protected features of the Court. The unilateral power found in s. 101 of the *Constitution Act, 1867* has been overtaken by the Court's evolution in the structure of the Constitution, as recognized in Part V of the *Constitution Act, 1982*.⁵¹

According to the majority of the Court, not only had the evolution of the Court's constitutional status and the entrenchment of cooperative authority over reform of the Court narrowed the scope of Parliament's section 101 authority, it had also given rise to a positive obligation on Parliament to fulfil that authority. "[W]hat s. 101 now requires", the majority wrote, "is that Parliament maintain — and protect — the essence of what enables the Supreme Court to perform its current role." In other words, in light of the cooperative authority set out in Part V, Parliament is obligated to respect and preserve the joint interests of the federal and provincial actors manifested in the institutional dimensions of the Supreme Court of Canada.

This discussion of the relationships and requirements of the amending procedure shows that Part V properly belongs in a conversation about cooperative federalism in Canadian constitutional law. Indeed, Part V's expression of the principle of cooperative federalism is strong. As a descriptive concept, it provides that with some exceptions, the Constitution of Canada can be amended only with some measure of federal-provincial consensus, as determined by the subject matter of the proposed reform. Realizing that consensus requires coordinated action between provincial and federal political actors. The opportunity for

⁵¹ *Reference re Supreme Court Act, ss. 5 and 6*, [2014] S.C.J. No. 21, 2014 SCC 21, [2014] 1 S.C.R. 433, at para. 101 (S.C.C.) [hereinafter "*Supreme Court Act Reference*"].

unilateral reform is limited to matters of concern only to one level of government; actors from both orders of government must agree to proposals that engage federal and provincial interests. As an interpretive principle, the cooperative dimensions of Canadian federalism help to delineate the scope of the formal amending procedures. Indeed, the cooperative demands of the amending formula suggest that the grants of joint jurisdiction in Part V are not to be constrained by broadly interpreted unilateral powers. This approach culminates in the default amending procedure in Canada, which is, at its core, cooperative.

Ultimately, Part V imagines a structure of government in Canada in which coordination and consensus between orders of government are necessary in order to amend the Constitution in relation to issues that are of particular importance to the nation. It is not just the case that Part V would not make sense without an underlying conception of federalism. Rather, it's the case that Part V would not make sense without an underlying conception of a *cooperative* version of federalism.⁵² In particular, cooperative federalism offers a conceptual frame through which to assess the successes and failures of Part V that are linked to both descriptive accounts of political unwillingness to exercise multilateral Part V authority, and principled analyses of the logic and constitutional coherence of Canada's constitutional amending procedures. The next section moves from thinking about cooperative federalism as a way of understanding the animating principles and interpretive challenges of Part V to a consideration of how insights drawn from Part V can contribute to understanding other parts of the Constitution, and in particular, sections 91 and 92 of the *Constitution Act, 1867*.

IV. COOPERATIVE FEDERALISM AS CONSTITUTIONAL STRUCTURE

The strong claim to cooperative federalism in Part V suggests that the principle of cooperative federalism is not simply a matter of political practice or brought to life through judicial interpretation of sections 91 and 92 of the *Constitution Act, 1867*. Rather, the principle is also expressed through the obligations and procedures established by the constitutional text and structure of Part V. What does this mean? What does it mean to say that cooperative federalism is embedded in the

⁵² This picks up on a suggestion about the significance of cooperative federalism in the interpretation of Part V in Kate Glover, "Structure, Substance and Spirit: Lessons in Constitutional Architecture from the *Senate Reform Reference*" (2013) 67 S.C.L.R. (2d) 221, at 232-33.

structure of the Constitution, perhaps alongside other forms or understandings of federalism? The structural dimensions of the constitution take the form of principle, process, institution, and text. Together, and in conjunction with the constitution's substantive claims, the constitution's structural dimensions reflect the vision of government that the constitution is intended to implement.⁵³ Further, they refer to the basic internal structure of the constitution, that is, the ways the constitution and the institutions it imagines are configured, recognizing the ways in which the various components of the constitution are linked and tethered to each other in various, often shifting, ways.⁵⁴

If the constitution aims to realize a particular vision of political life, it follows that the constitution should be interpreted with a view to realizing and facilitating that vision.⁵⁵ A structural approach to constitutional interpretation draws insights about the meaning of the constitution from its architecture. Exercises of constitutional interpretation must account for these structural links, as well as the broader institutional frameworks, structures, and landscape imagined within them.⁵⁶ As the Supreme Court explained in the *Senate Reform Reference*:

The notion of architecture expresses the principle that “[t]he individual elements of the Constitution are linked to the others, and must be interpreted by reference to the structure of the Constitution as a whole”... The assumptions that underlie the text and the manner in which the constitutional provisions are intended to interact with one another must inform our interpretation, understanding, and application of the text.⁵⁷

⁵³ *Senate Reform Reference*, *supra*, note 37, at para. 26.

⁵⁴ *Id.*, at para. 26.

⁵⁵ See e.g., *Secession Reference*, *supra*, note 5, at paras. 49-54, 148; *OPSEU*, *supra*, note 34; *Supreme Court Act Reference*, *supra*, note 51; *Reference re B.C. Motor Vehicle Act*, [1985] S.C.J. No. 73, [1985] 2 S.C.R. 486, at 499-513, esp. 500-504 and 511-33 (S.C.C.), affg [1983] B.C.J. No. 2259 (B.C.C.A.); *R. v. Demers*, [2004] S.C.J. No. 43, 2004 SCC 46, [2004] 2 S.C.R. 489, at para. 86 (S.C.C.), revg [2002] J.Q. no 590 (Que. S.C.), *per* LeBel J.; Mark D. Walters, “Written Constitutions and Unwritten Constitutionalism” in Grant Huscroft, ed., *Expounding the Constitution: Essays in Constitutional Theory* (Cambridge: Cambridge University Press, 2008) 245, at 265ff; Robin Elliot, “References, Structural Argumentation and the Organizing Principles of Canada’s Constitution (2001) 80 Can. Bar Rev. 67. See also Charles L. Black Jr., *Structural and Relationship in Constitutional Law* (Baton Rouge: Louisiana State University Press, 1969); Philip Bobbitt, *Constitutional Fate: Theory of the Constitution* (Oxford: Oxford University Press, 1982); and J. Harvie Wilkinson III, “Our Structural Constitution” (2004) 104 Colum. L. Rev. 1867.

⁵⁶ See the sources listed *id.* See also *Senate Reform Reference*, *supra*, note 37, at para. 26.

⁵⁷ *Senate Reform Reference*, *supra*, note 37, at para. 26, citing *Secession Reference*, *supra*, note 5, at para. 50 and Walters, *supra*, note 55, at 264-65.

The vision that underpins the constitution cannot be distilled to a single aim or principle. Canada's constitutional order strives to realize the ideals of democracy, the rule of law, federalism, human dignity, judicial independence, and more. But the claim of this article is that the vision imagined by Canada's constitution includes, alongside these other principles and iterations, an aspiration towards cooperative federalism. This aspiration captures the belief that joint action between orders of government is required at times in order for constitutional powers and goals to be exercised and realized. A constitutional vision shaped in part by cooperative federalism is one that accepts that the constitutional balance of the Canadian federation is preserved and promoted by the "enactment of co-ordinated federal and provincial schemes to better deal with the local needs of unity and diversity".⁵⁸ It is a vision that respects and values intergovernmental efforts as a way of addressing the needs and realities of social and political life. It is also a vision that directs our gaze to the insights of cooperative federalism across areas and contexts of constitutional interpretation.

The obvious next question is, what does this approach to constitutional interpretation entail? In part, an enriched structural understanding of cooperative federalism offers a principled justification for some parts of the existing state of the law. For example, the enriched approach provides support for considering the principle of cooperative federalism in all cases dealing with the interpretation of sections 91 and 92, even in cases in which the facts do not disclose deliberate or negotiated joint action between orders of government. When intergovernmental relations are understood, descriptively and structurally, in cooperative terms, then constitutional interpretation should promote and facilitate that vision of government, rather than hinder it. Once we accept that the constitution aims to implement some form of cooperative government, then we find support for an approach to constitutional interpretation that, at a minimum, respects and facilitates cooperative intergovernmental relationships.

On this approach, invoking cooperative federalism as the guiding interpretive principle in cases of unilateral action is neither a mischaracterization of the nature of Canadian federalism, nor a judicial misstep.⁵⁹ Rather, it is a manifestation of the deep constitutional character

⁵⁸ *Quebec (AG)*, *supra*, note 1, at para. 148, citing *PHS*, *supra*, note 34 and *Tsilhqot'in Nation v. British Columbia*, [2014] S.C.J. No. 44, 2014 SCC 44, [2014] 2 S.C.R. 257 (S.C.C.), revg [2012] B.C.J. No. 1302 (B.C.C.A.). See also *Daniels v. Canada (Indian Affairs and Northern Development)*, [2016] S.C.J. No. 12, 2016 SCC 12 (S.C.C.), varg [2014] F.C.J. No. 383 (F.C.A.).

⁵⁹ On the Court's role in managing the division of powers and cooperative federalism in particular, see Wade K. Wright, "Courts as Facilitators of Intergovernmental Dialogue: Cooperative

of cooperative federalism. In these cases, the reliance on cooperative federalism as the guiding interpretive principle can be justified as ensuring that the grants of power set out in sections 91 and 92 are interpreted in a way that allows for cooperation in present and future cases. In other words, cooperative federalism encourages interpretations of unilateral jurisdiction through the lens of the cooperative principle, such that future instances of cooperation dealing with the same subject matter are available.

A structural claim to cooperative federalism also lends support to an interpretive approach to the division of powers that takes seriously the interjurisdictional effects of joint engagement and disengagement. If the constitution aims to implement a vision of government that is not only federal but also, at least in some capacity, *cooperatively* federal, then some interpretive and practical consequences must flow therefrom.

The calibration of those consequences, both the duties and limits attendant upon cooperative government, will have to be worked out in future cases. But history shows that constitutional law and politics are sufficiently robust and flexible to ensure that the application and invocation of cooperative federalism are attentive to the particularities of context and the considerations raised by other constitutional values. In thinking through the implications of the embedded status of cooperative federalism in the ordinary legislative process, a structural understanding of cooperative federalism does not suggest or entail a positive duty on political actors to cooperate or to come to the negotiating table in the event that a cooperative hand is extended by the other order of government. Such obligations do not exist in the strong cooperative context of constitutional amendment, absent the obligations of engagement and negotiation in good faith that arise in special circumstances such as those contemplated in the *Secession Reference*. Indeed, in the amendment context, the legal requirement for consensus, and the political practices needed to bring it about, are engaged as soon as contemplated formal action touches on one of the subject matters in the multilateral amending procedure in a qualitatively significant way. There is no reason why cooperative federalism in the ordinary legislative context would or should entail the same approach. Indeed, the argument is not that the mandates of cooperation from Part V are transplanted to the legislative context. The argument is, rather, that both contexts are shaped by and bring life to the same principle; the way in which that principle comes to

Federalism and Judicial Review” (2016) 62 S.C.L.R. (2d) 365 and Wade K. Wright, “Facilitating Intergovernmental Dialogue: Judicial Review of Division of Powers in the Supreme Court of Canada” (2010) 51 S.C.L.R. (2d) 625.

life in each context will – and should – vary. Indeed, articulating the duties attendant upon a relationship between constitutional actors is a familiar exercise. This is the bread and butter of the division of powers jurisprudence, of the practices and jurisprudence dealing with the Crown’s duty to consult with Indigenous people in decision-making that could affect Aboriginal rights, and the circumstances addressed in, and following from, the *Secession Reference*.

That said, if cooperative federalism is a constitutional value to which Canada aspires, it is reasonable to conclude that some positive action is called for in order to realize that aspiration and, at a minimum, not to undermine it. The minimum positive action that can be imagined is an obligation, whether in the form of a duty of loyalty or good faith (as is relied on in the duty to consult and secession contexts), that would attach to the exercise of legislative authority once governmental actors have taken formal steps to enter an intergovernmental partnership. As the dissenting judges in *Quebec (AG)* explained, the logic of cooperative federalism demands such a minimum duty:

The dominant tide with respect to the division of powers admits of overlapping powers and favours co-operation between the different levels of governments. It also supports the validity of schemes established jointly through partnerships developed between members of our federation. In our opinion, our courts must protect such schemes both when they are implemented and when they are dismantled. It would hardly make sense to encourage co-operation and find that schemes established in the context of a partnership are valid while at the same time refusing to take this particular context into account when those schemes are terminated.⁶⁰

The dissenting judges’ reasoning reflects the notion, consistent with the broad strokes of the Part V context, that once provincial and federal efforts are engaged in a common enterprise, there are common interests in the management of that enterprise. These interests include, at a minimum, the management of the enterprise’s dismantling. As Professor Poirier points out, the dissenting opinion in *Quebec (AG)* reflects a richer account of cooperative federalism than the majority is willing to acknowledge. She explains that this account is ultimately more consistent with the principles established in earlier cases dealing with cooperative schemes:

The dissenting judges...have sought to deepen the meaning of “cooperative federalism”. Having promoted concerted action between

⁶⁰ *Quebec (AG)*, *supra*, note 1, at para. 52.

orders, and having lowered the “picket fences” which defined the original Canadian federal system, they recognise that the judicial branch cannot logically slide back to a traditional dualist conception of federalism...The minority position is prudent, nuanced [and]...in line both with contemporary federal practice, and with jurisprudential development.⁶¹

Given the prominent role that cooperative federalism has already been given in the interpretation of sections 91 and 92, it is unlikely that the way in which the constitutional doctrines are articulated would change to accommodate an enriched structural account. The effect would more likely be felt in the details, in discerning the contexts in which a structural understanding of cooperative federalism has effects and those in which it does not. A structural understanding of cooperative federalism could likely justify an analysis that goes further than the dissent in *Quebec (AG)* was willing to go, drawing perhaps on comparative accounts of federal obligations of loyalty and good faith from other jurisdictions and contexts.⁶² One risk of these positive obligations is, as the majority in *Quebec (AG)* pointed out, that any recognition of a positive obligation would act as a deterrent of cooperative action.⁶³ Taking this further, drawing on experience from the amendment context, there is a risk of stalemate and inaction or attempts to do indirectly what cannot be achieved – or what is undesirable to achieve — directly. This account of the practical realities of Part V and what the practical realities might be in the legislative context raises the question as to whether it is appropriate or appealing to draw lessons about cooperation from the amendment context when the consensus called for in the amending formulas has proven to be unworkable in practice.

This question forces a confrontation with the constitutional elephant in the room – the dysfunctional, or perhaps non-functional, nature of the amending procedure. This challenge points out that while it is not the case that Part V has never been successfully invoked, political realities have made doing so difficult. This article argues that despite the

⁶¹ Johanne Poirier, *Taking Aim at Cooperative Federalism: The Long-Gun Registry Decision by the Supreme Court of Canada*, Int'l J. Const. L. Blog, Apr. 15, 2015, online: <<http://www.iconnectblog.com/2015/04/taking-aim-at-cooperative-federalism-the-long-gun-registry-decision-by-the-supreme-court-of-canada>>.

⁶² On the comparative possibilities from other jurisdictions, see *id.* On the comparative possibilities from other contexts, see *e.g.*, the obligations recognized in *Secession Reference*, *supra*, note 5 and *Haida Nation v. British Columbia (Minister of Forests)*, [2004] S.C.J. No. 70, 2004 SCC 73, [2004] 3 S.C.R. 511 (S.C.C.).

⁶³ *Quebec (AG)*, *supra*, note 1, at para. 20.

obstacles that have characterized attempts at constitutional amendment in the past, Part V remains a meaningful interpretive source. First, as explained above, the demands of structural interpretation require it. Second, the recent absence of political will to engage in constitutional negotiations about constitutional amendment does not erode the aspiration of multilateralism embedded in the structure of Part V or its effects. Given the attention and recognition shown to the amending procedures in political rhetoric, it cannot be argued that Part V has gone the way of disallowance and thus no longer warrants attention. Third, the variability of the duties and expectations that flow from constitutional principles mean that there is nothing inherent in the principle that limits its capacity to be adapted to the legislative context in a way that is both meaningful and not conducive to stalemate. We must expect and call on our political actors to embody and pursue constitutional ideals or, ultimately, change them. The space for cooperative efforts, whether in the constitutional amendment or legislative context, is an opportunity to imagine the full range of possible means by which to implement policy goals, rather than a burden to lament for its potential pitfalls.

V. CONCLUSION

This article contends that cooperative federalism has a deeper place in the architecture of the Constitution of Canada than is suggested in recent Supreme Court jurisprudence. It supports this claim by looking to the role of intergovernmental consensus contemplated in Part V of the *Constitution Act, 1982* and showing that Part V is a strong expression of cooperative federalism within Canadian constitutionalism. It argues that the “modern view” of federalism in Canada is enriched when it is understood as extending beyond the practices and interpretations of sections 91 and 92 of the *Constitution Act, 1867*.

More work remains to be done to further test, contest, and flesh out the implications of this claim in the various contexts of constitutional interpretation and practice. The historical account of the role of cooperative and non-cooperative action in the context of constitutional amendment will help to calibrate the scope and weight of the cooperative principle in political and interpretive practice going forward. So too will accounts of other cooperative and uncooperative dimensions of the constitution beyond sections 91 and 92. An obvious example would be an accounting of the implications of section 35.1 of the *Constitution Act*,

1982, which provides that before the provisions of the constitution dealing with Aboriginal rights are amended, a constitutional conference will be held and the Prime Minister will “invite representatives of the Aboriginal peoples of Canada to participate in the discussions on that item”.⁶⁴ Moreover, the concerns that accompany a structural account of cooperative federalism require further attention. For instance, does this account direct the evolution of federalism as an inherent assumption of the constitution in any particular ways? And, what are the limits on the use of a cooperative claim to establish obligations and expectations for political actors? The starting point for exploring these questions and concerns in the interpretive sphere could be more reflection on the articulation of federalism and the obligations that flow from it in the *Secession Reference*.

This additional exploration into cooperative federalism as a structural principle in Canadian constitutionalism will help to expand on the lessons of this article. It is not just that there is something to be learned about cooperative federalism when constitutional amendment is brought into the mix. There is also something to be learned about constitutional amendment from the traditional division of powers context and something to learn about that traditional context from experience with constitutional amendment. On the one hand, cooperative federalism offers a useful frame through which to think about the conceptual foundation for the amending procedures and the place of Part V in the broader constitutional context. On the other hand, allocations of constitutional power outside of the traditional context of sections 91 and 92 highlight the various ways in which constitutional interests intersect. They serve as a reminder that the issues of our political lives often resist the categorization as local or national, regional or central. These are lessons of structural constitutionalism. The hope is that this focus will contribute to ensuring that those powers are interpreted and exercised in a constitutionally principled, and structurally sound, way.

⁶⁴ Section 35.1 provides: “The government of Canada and the provincial governments are committed to the principle that, before any amendment is made to Class 24 of section 91 of the “*Constitution Act, 1867*”, to section 25 of this Act or to this Part, (a) a constitutional conference that includes in its agenda an item relating to the proposed amendment, composed of the Prime Minister of Canada and the first ministers of the provinces, will be convened by the Prime Minister of Canada; and (b) the Prime Minister of Canada will invite representatives of the Aboriginal peoples of Canada to participate in the discussions on that item”. On the impact of cooperative federalism on relationships between federal, provincial and Indigenous governments, see John Borrows, *Canada’s Indigenous Constitution* (Toronto: University of Toronto Press, 2010), at 200.