

2016

## The Promise and Limits of Cooperative Federalism as a Constitutional Principle

Warren J. Newman

*Department of Justice of Canada*

Follow this and additional works at: <https://digitalcommons.osgoode.yorku.ca/sclr>

 Part of the [Law Commons](#)



This work is licensed under a [Creative Commons Attribution-Noncommercial-No Derivative Works 4.0 License](#).

---

### Citation Information

Newman, Warren J.. "The Promise and Limits of Cooperative Federalism as a Constitutional Principle." *The Supreme Court Law Review: Osgoode's Annual Constitutional Cases Conference* 76. (2016).

DOI: <https://doi.org/10.60082/2563-8505.1329>

<https://digitalcommons.osgoode.yorku.ca/sclr/vol76/iss1/4>

This Article is brought to you for free and open access by the Journals at Osgoode Digital Commons. It has been accepted for inclusion in The Supreme Court Law Review: Osgoode's Annual Constitutional Cases Conference by an authorized editor of Osgoode Digital Commons.

# The Promise and Limits of Cooperative Federalism as a Constitutional Principle

Warren J. Newman\*

## I. INTRODUCTION

In this article, I shall address the Supreme Court of Canada's recent jurisprudence on cooperative federalism and its promise for the future, from the perspective of federalism as an underlying constitutional principle. In its jurisprudence, particularly over the past decade, the Court moved from an ostensibly neutral view on what form federalism, as a normative concept, should take, to one of not just tolerating but actively encouraging flexible and cooperative federalism. There are limits to the ambit of cooperative federalism as an organizing principle, and it must be balanced with other principles, including parliamentary sovereignty and the separation of powers, and occasionally, with the fact that sections 91 and 92 of the *Constitution Act, 1867*<sup>1</sup> grant powers that are, in principle, exclusive and not concurrent (even though they may apply concurrently to certain matters through the double-aspect doctrine). On the separation of powers, there are also limits to what courts can do as adjudicative bodies in encouraging cooperation, and it falls principally to federal and provincial political actors to determine the dynamics and degree of cooperation, given the diversity of views and perspectives inherent in a federal system. Given its origins in the political dynamics of federal-provincial relations and its implementation largely

---

\* B.A., B.C.L., LL.B. (McGill), LL.M. (Osgoode), Ad. E.; of the Bars of Quebec and Ontario; Senior General Counsel, Constitutional, Administrative and International Law Section, Department of Justice of Canada. The views expressed in this article were meant to stimulate debate in the context of the Osgoode Constitutional Cases Conference held on April 8, 2016; they do not bind the Department or the Government of Canada. The author wishes to express his appreciation for the conveners of the conference, Professors Sonia Lawrence and Benjamin Berger, and for the helpful comments of an anonymous reviewer, as well as for fellow panellists.

<sup>1</sup> (1867), 30 & 31 Vict., c. 3 [formerly *British North America Act*].

through political agreements and more or less informal institutional or administrative arrangements and concertation, cooperative federalism might be better understood and applied in the legal context as a modality of the federal principle, rather than as a full-blown constitutional principle in its own right.

## II. A FEDERAL UNION

The first purpose of the *British North America Act* was to unite the provinces of Canada, Nova Scotia and New Brunswick, and one might be forgiven if, upon a cursory reading of its opening provisions, one was to discern this as the first principle as well. The preamble to the Act spoke of the prospective “Union” as being conducive to the welfare of the provinces and as promoting the interests of the British Empire; that on the “Establishment of the Union” it would be expedient to provide for the constitution of legislative authority as well as to declare the nature of the executive government in the new Dominion — a monarchical form of government “under the Crown of the United Kingdom” — and to provide for the “eventual Admission into the Union” of other parts of British North America. Section 3 of the Act (“Declaration of Union”) authorized the Queen, on the advice of Her Majesty’s Privy Council, to declare by proclamation that the uniting provinces “shall form and be One Dominion under the Name of Canada”. Section 146 enabled the admission of other colonies or provinces “into the Union”, and at least 20 other provisions in the Act referred to “the Union”.<sup>2</sup>

However, what was contemplated was to be a *federal* union; the provinces were (in the words of the preamble) to be “federally united”; the Canadian union would (in the words of the Supreme Court) “be able to reconcile diversity with unity”.<sup>3</sup> In the *Quebec Secession Reference*, the Court explained that the principle of federalism underlying the provisions of the *Constitution Act, 1867* had “triumphed early”, ensuring a practice of federalism that, principally through a balanced interpretation of the federal-provincial distribution of legislative powers,

---

<sup>2</sup> Sections 12, 41, 61, 65, 88, 102, 107, 111, 112, 113, 114, 115, 119, 121, 123, 124, 129, 130, 139, 140.

<sup>3</sup> *Reference re Secession of Quebec*, [1998] S.C.J. No. 61, [1998] 2 S.C.R. 217, at para. 43 (S.C.C.) [hereinafter “*Quebec Secession Reference*”]. For useful commentary, see notably Jean-François Gaudreault-DesBiens, “The ‘Principle of Federalism’ and the Legacy of the *Patriation* and *Quebec Veto References*” (2011) 54 S.C.L.R. (2d) 77. For a comparative view, see W.J. Newman, “Adjudicating Divisions of Powers Issues: A Comparative Perspective” (2003) 21 S.C.L.R. (2d) 139.

maintained the diversity of the new country and the autonomy of the provinces within it.<sup>4</sup> At the same time, the *Constitution Act, 1867* was “an act of nation-building”; the “first step in the transition from colonies separately dependent on the Imperial Parliament for their governance to a unified and independent political state in which different peoples could resolve their disagreements and work together toward common goals and a common interest”. Federalism, the Court emphasized again, “was the political mechanism by which diversity could be reconciled with unity”.<sup>5</sup>

### III. THE FEDERAL PRINCIPLE AND FEDERALISM

The *federal principle* — as earlier judgments of the Supreme Court termed it, perhaps more appositely — is integrated into the very structure of the Constitution, and is reflected, in legal terms, in the division of powers, but also in central institutions (including the Senate and the Supreme Court) that are constitutionally entrenched and protected. It is also a principle that has, in political terms, provided the underlying reason for some important constitutional practices and conventions.

It will be noted that in the *Quebec Secession Reference*, the Court spoke at length of the principle of federalism, but not of cooperative federalism *per se*. Indeed, in the *Employment Insurance Act Reference*, Deschamps J., writing for the Court, carefully stated an important proviso:

... To derive the evolution of constitutional powers from the structure of Canada is delicate, as what that structure is will often depend on a given court’s view of what federalism is. What are regarded as the characteristic features of federalism may vary from one judge to another, and will be based on political rather than legal notions. The task of maintaining the balance between federal and provincial powers falls primarily to governments. If an issue comes before a court, the court must refer to the framers’ description of the power in order to identify its essential components, and must be guided by the way in which courts have interpreted the power in the past. In this area, the meaning of the words used may be adapted to modern-day realities, in a manner consistent with the separation of powers of the executive, legislative and judicial branches.<sup>6</sup>

---

<sup>4</sup> *Id.*, at paras. 55, 58.

<sup>5</sup> *Id.*, at para. 43.

<sup>6</sup> *Reference re Employment Insurance Act (Can.)*, ss. 22 and 23, [2005] S.C.J. No. 57, 2005 SCC 56, [2005] 2 S.C.R. 669, at para. 10 (S.C.C.), revg [2004] J.Q. no 277 (Que. C.A.) (emphasis added).

That observation is, to my way of thinking, very apt. Indeed, the almost imperceptible shift in the jurisprudence from the recognition that, structurally, the Constitution embodies a *federal principle*, to the recognition of the principle of *federalism*, imported with it the potential for conflating the structural or foundational principle with the more abstract philosophical idea — and political ideology — of federalism itself.<sup>7</sup> That is not inherently a bad thing, as long as lawyers and judges are conscious of the limits of political philosophy in illuminating the meaning of the legal provisions of the Constitution, and the limits of their expertise as political philosophers.

#### IV. MANIFESTATIONS AND MODES OF FEDERALISM

An illustration may prove useful at this point. In 1965, in a seminal piece, the late, great political scientist James R. Mallory wrote that:

Canadian federalism is different things at different times. It is also different things to different people. This is not the result of widespread error but of simple fact, for political institutions which accommodate diversity will reflect the dimensions which are vital to the actors who work them.<sup>8</sup>

Professor Mallory discerned five forms of Canadian federalism over the previous century: *quasi-federalism* (Professor K.C. Wheare's description of the early period, characterized by central dominance), *classical federalism* (characterized by "the coordinate and autonomous relationship of the central and regional organs", and corresponding, in the case law of the courts, to what was often called the period of *legal federalism* marked by adherence to the exclusivity of federal and provincial powers), *emergency federalism* (characterized by the extreme centralization of power during wartime), *cooperative federalism* (which "reached its zenith in the period since 1945"), and *double-image federalism* (Mallory's term for the dimension of Canadian duality,

---

<sup>7</sup> As Professor Ronald Watts observed, federalism "is not a descriptive but a normative term and refers to the advocacy of multi-tiered government combining elements of shared-rule and regional self-rule. The essence of federalism as a normative principle is the perpetuation of both union and non-centralization at the same time." R.L. Watts, *Comparing Federal Systems*, 2d ed. (Montreal and Kingston: McGill-Queen's University Press, 1999), at 6.

<sup>8</sup> J.R. Mallory, "The Five Faces of Federalism", in P.-A. Crepeau & C.B. Macpherson, eds., *The Future of Canadian Federalism* (Toronto: University of Toronto Press, 1965), at 3. For a more recent, sensitive and book-length treatment of the measure, practice and habit of federalism (including a chapter on "parliamentary federalism"), vide David E. Smith, *Federalism and the Constitution of Canada* (Toronto: University of Toronto Press, 2010).

“the special relationship between French and English” which overlay, and “to some extent transcends”, the central-regional relationship between central and provincial institutions).

Other political scientists were to add to this typology and to speak of periods or modes of *executive federalism*, *concurrent or competitive federalism*, *fiscal federalism* and *asymmetrical federalism*.

Cooperative federalism is predicated largely on a web of more or less informal, ongoing intergovernmental relationships and institutional arrangements that seek to adapt the formal structure of the Constitution to the economic and social needs and fiscal realities of a modern federal state. Taken in that light, it is perhaps less a principle than a practice, and more political than legal in its nature and substance, even if it had developed partly in reaction to the formal constraints of legal federalism that had been imposed by the jurisprudence of the Judicial Committee of the Privy Council prior to the Second World War. Professor Peter Russell called post-war cooperative federalism “less a litigious struggle between Ottawa and the provinces to defend and expand their own enclaves of power than a matter of political compromise and administrative pragmatism.”<sup>9</sup> Political scientist Donald Smiley stated that “[c]operative federalism is in essence a series of pragmatic and piecemeal responses by the federal and provincial governments to the circumstances of their mutual interdependence.”<sup>10</sup> As Professor Peter Hogg described it, the “related demands of interdependence of governmental policies, equalization of regional disparities, and constitutional adaptation” have produced “a network of relationships between the executives of the central and regional governments”, through which “mechanisms are developed, especially fiscal mechanisms, which allow a continuous redistribution of powers and resources without recourse to the courts or the amending process”. These relationships have also been “the means by which consultations occur on the many issues of interest to both federal and provincial governments”.<sup>11</sup>

Cooperative federalism, as a phenomenon, has been subject to varying assessments over the years. Those who have tended to look upon it with favour have pointed to its inherent flexibility and adaptability.

---

<sup>9</sup> P.H. Russell, cited in David A.M. Seccareccia, “The Applicability of Co-Operative Federalism: Lessons Learned from the Assisted Human Reproduction Act” (2013) *Electronic Thesis and Dissertation Repository*, Paper 1582, at 18 [hereinafter “Seccareccia”].

<sup>10</sup> D.V. Smiley, “Co-operative Federalism: An Evaluation”, in J. Peter Meekison, ed., *Canadian Federalism: Myth or Reality*, 2nd ed. (Toronto: Methuen, 1971) 320, at 320 [hereinafter “Meekison”].

<sup>11</sup> P.W. Hogg, *Constitutional Law of Canada*, 5th ed. Supplemented (Toronto: Thomson Carswell, 2007), c. 5.8 (“Cooperative federalism”).

Those who have seen its effects as potentially insidious or pernicious<sup>12</sup> have claimed (depending on their perspective) that it threatens to centralize,<sup>13</sup> or conversely, to decentralize,<sup>14</sup> powers well beyond what the formal structure of the Constitution contemplates.

## V. JUDICIAL CONSIDERATION

The courts have not been impermeable to this kind of political analysis and discourse, but in moving with the times, they were still usually careful to distinguish between what was text and what was context, and what might be considered a legal principle as opposed to a political practice or a convention binding political actors. Thus, in the *Anti-Inflation Act Reference*, Laskin C.J.C., writing for a majority of the Supreme Court, dismissed an argument advanced by an intervener that cooperative federalism constituted a limit upon Parliament's legislative authority:

One of the submissions made by counsel for Secondary School Teachers' organizations concerned provincial co-operation, but it was put in terms of an objection to the validity of the federal legislation, the proposition being that inflation was too sweeping a subject to be dealt with by a single authority, i.e., the federal Parliament, and that the proper constitutional approach, at least as a first approach, was through federal-provincial co-operation in terms of their respective powers under the respective enumerations in ss. 91 and 92. If this is meant to suggest that Parliament cannot act in relation to inflation even in a crisis situation, I must disagree. No doubt, federal-provincial co-operation along the lines suggested might have been attempted, but it does not follow that the federal policy that was adopted is vulnerable because a co-operative scheme on a legislative power basis was not

---

<sup>12</sup> For a searching critique of cooperative federalism (and its arguable potential for stifling, through collusion and opaque practices, the competition naturally inherent in a federation) from the perspective of a Canadian economist, see Albert Breton, "Towards a Theory of Competitive Federalism" (1987) 3 *European Journal of Political Economy* 263. For an able summary of and critical observations on Professor Breton's views, see Seccareccia, *supra*, note 9, at 29-38.

<sup>13</sup> For an illustration, see Jean-Marc Léger, "Cooperative Federalism or the New Face of Centralization", in Meekison, *supra*, note 10, at 317.

<sup>14</sup> Smiley, *supra*, note 10, at 332: "The first kind of danger to the Canadian federal system in cooperative federalism is that provincial pressures for autonomy will so weaken the federal government that it will be unable to discharge its responsibilities for the integration and development of the Canadian economy, for economic stabilization and growth and for interregional and interpersonal equalization. There are strong forces towards the enhanced power of the provinces."

tried first. Co-operative federalism may be consequential upon a lack of federal legislative power, but it is not a ground for denying it.<sup>15</sup>

In the *Patriation Reference*, while a majority of the Court opined that the process undertaken by the federal government was constitutionally lawful, a second majority of the same Court recognized the existence of a constitutional convention requiring a substantial degree of provincial consent before constitutional amendments affecting provincial powers could be put forward, by way of resolutions of the federal houses of Parliament, for enactment by the United Kingdom Parliament. “The reason for the rule”, the Court stated in its majority reasons, “is the federal principle.”

... Canada is a federal union.

.....

The federal principle cannot be reconciled with a state of affairs where the modification of provincial legislative powers could be obtained by the unilateral action of the federal authorities.<sup>16</sup>

In the *Quebec Veto Reference*, a unanimous Supreme Court, while perhaps prepared to recognize the existence of a principle of Canadian duality (which, it was urged by the Attorney General for Quebec, should here be taken in the special sense of Quebec’s distinctiveness as a society), could not conclude that the principle had, in and of itself, given rise to a binding convention.

We have been referred to an abundance of material, speeches made in the course of parliamentary debates, reports of royal commissions, opinions of historians, political scientists, constitutional experts which endorse in one way or another the principle of duality within the meaning assigned to it by the appellant, and there can be no doubt that many Canadian statesmen, politicians and experts favoured this principle.<sup>17</sup>

However, the Court held that it was not necessary to look further into the matter because the appellant had failed “to demonstrate compliance

---

<sup>15</sup> *Re: Anti-Inflation Act (Canada)*, [1976] S.C.J. No. 12, [1976] 2 S.C.R. 373, at 421 (S.C.C.) (emphasis added).

<sup>16</sup> *Re: Resolution to amend the Constitution of Canada*, [1981] S.C.J. No. 58, [1981] 1 S.C.R. 753, at 905 (S.C.C.), varg [1981] M.J. No. 95 (Man. C.A.).

<sup>17</sup> *Re: Objection by Quebec to a Resolution to amend the Constitution*, [1982] S.C.J. No. 101, [1982] 2 S.C.R. 793, at 814 (S.C.C.), affg [1982] C.A. 33 (Que. C.A.).

with the most important requirement for establishing a convention, that is, acceptance or recognition by the actors in the precedents.”

In the *OPSEU* case, Beetz J. held that an enactment by a provincial legislature that bears on the operation of an institution of the provincial government can be considered to be an amendment to the constitution of the province, provided, *inter alia*, that “it is not otherwise entrenched as being indivisibly related to the federal principle or to a fundamental term or condition of the union”.<sup>18</sup>

Chief Justice Dickson, in his concurring opinion in *OPSEU*, underscored the movement, in the recent cases of the Court, towards allowing for “a fair amount of interplay and indeed overlap between federal and provincial powers”,<sup>19</sup> favouring the doctrines of pith-and-substance and double-aspect over the “watertight compartments” approach<sup>20</sup> that was still reflected, to some extent, in doctrines such as interjurisdictional immunity.

In 1990, Sopinka J., writing for a unanimous Supreme Court in the *Canada Assistance Plan Reference*,<sup>21</sup> rejected an argument advanced by the Attorney General of Manitoba that a unilateral, legislative termination of a federal-provincial agreement under which a province had acquired vested rights to monetary contributions would be *ultra vires* Parliament, or alternatively, even if it were within Parliament’s legislative authority under the division of powers, it would be unconstitutional in light of the “overriding principle of federalism”.<sup>22</sup> Justice Sopinka, who throughout his opinion had underlined that the “applicable constitutional principle” in this reference was parliamentary sovereignty,<sup>23</sup> denied a role to the courts in supervising the exercise of the federal spending power. “If a statute is neither *ultra vires* nor contrary to the *Canadian Charter of Rights and Freedoms*, the courts have no jurisdiction to supervise the exercise of legislative power.”<sup>24</sup>

---

<sup>18</sup> *Ontario Public Service Employees’ Union v. Ontario (Attorney General)*, [1987] S.C.J. No. 48, [1987] 2 S.C.R. 2, at 40 (S.C.C.), affg [1980] O.J. No. 3863 (Ont. C.A.) [hereinafter “*OPSEU*”].

<sup>19</sup> *Id.*, at 18.

<sup>20</sup> For a consideration of this and other constitutional metaphors, see W.J. Newman, “Of Castles and Living Trees: The Metaphorical and Structural Constitution” (2015) 9 *Journal of Parliamentary and Political Law* 471.

<sup>21</sup> *Reference re Canada Assistance Plan (B.C.)*, [1991] S.C.J. No. 60, [1991] 2 S.C.R. 525 (S.C.C.), revg [1990] B.C.J. No. 1377 (B.C.C.A.).

<sup>22</sup> *Id.*, at 565.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*, at 567 (emphasis added).

By 2005, in the *Pelland* case, Abella J. upheld the validity of a federal-provincial arrangement for the marketing of chicken production, an arrangement which, she noted, “both reflects and reifies Canadian federalism’s constitutional creativity and cooperative flexibility”.<sup>25</sup> Moreover, the administrative delegation “in aid of cooperative federalism” was upheld therein in accordance with a long line of judicial precedent.<sup>26</sup>

Two years later, in *Canadian Western Bank v. Alberta*, which quickly became the leading case (and a valiant effort to articulate a unified field theory of federalism and its attendant constitutional doctrines), Binnie and LeBel JJ. recognized that “while the task of maintaining the balance of powers in practice falls primarily to governments, constitutional doctrine must facilitate, not undermine what this Court has called ‘co-operative federalism’”.<sup>27</sup> In this case, that meant restricting the ambit of the doctrine of interjurisdictional immunity, a broad application of which would be “inconsistent”, the Court held, “with the flexible federalism that the constitutional doctrines of pith and substance, double aspect and federal paramountcy are designed to promote”.<sup>28</sup> Moreover, Binnie and LeBel JJ. made the leap beyond the legal text of the Constitution to the larger political context in which federalism operates:

... Canadian federalism is not simply a matter of legalisms. 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.<sup>29</sup>

This emphasis on the importance of cooperation, in a federal state, amongst political actors was not, of course, an injunction, and construed in the context of the case, simply meant that courts should be encouraging rather than hindering cooperation in their application of constitutional doctrines of interpretation to the resolution of the legal issues before them. Nevertheless, it would not be long before divergent perspectives on the Court would emerge as to just what facilitating cooperative federalism might require.

---

<sup>25</sup> *Fédération des producteurs de volailles du Québec v. Pelland*, [2005] S.C.J. No. 19, 2005 SCC 20, [2005] 1 S.C.R. 292, at para. 15 (S.C.C.), affg [2003] J.Q. no 3331 (Que. C.A.) [hereinafter “*Pelland*”].

<sup>26</sup> *Id.*, at para. 55.

<sup>27</sup> *Canadian Western Bank v. Alberta*, [2007] S.C.J. No. 22, 2007 SCC 22, [2007] 2 S.C.R. 3, at para. 24 (S.C.C.), affg [2005] A.J. No. 21 (Alta. C.A.).

<sup>28</sup> *Id.*, at para. 42.

<sup>29</sup> *Id.*

Thus it was that in *Lacombe*,<sup>30</sup> *Canadian Owners and Pilots Association*,<sup>31</sup> and the *Assisted Human Reproduction Act Reference*,<sup>32</sup> Deschamps and LeBel JJ. parted company with McLachlin C.J.C. (joined by Binnie J., amongst others) in their analysis of the demands of federalism — and more particularly, cooperative federalism — in these cases. In her dissenting reasons in *Lacombe*, Deschamps J. invoked not only “the unwritten constitutional principle of federalism”, but also what she called “its underlying principles of co-operative federalism and subsidiarity”,<sup>33</sup> to restrict the scope and application of interjurisdictional immunity and paramountcy.<sup>34</sup> In the *Assisted Human Reproduction Act Reference*, the diverging views related to the scope of the criminal law power in the area of health and, *inter alia*, the ancillary powers doctrine in federalism analysis. Thus, in the opinion of the Chief Justice, the rational, functional connection test employed in relation to ancillary provisions recognizes that the federal and provincial heads of power “are no longer watertight”.

... The complexity of modern legislation will often render it impossible for one level of government to fulfil its constitutional mandate without trespassing on the jurisdiction of the other level. The Court’s endorsement of a flexible, cooperative approach to federalism suggests that this kind of pragmatic lawmaking should be encouraged ...<sup>35</sup>

Justices LeBel and Deschamps countered that in their view the attempt to extend the reach of the legislation under the criminal law power was “specious” and “unacceptable under the constitutional principles which

---

<sup>30</sup> *Quebec (Attorney General) v. Lacombe*, [2010] S.C.J. No. 38, 2010 SCC 38, [2010] 2 S.C.R. 453 (S.C.C.) [hereinafter “*Lacombe*”].

<sup>31</sup> *Quebec (Attorney General) v. Canadian Owners and Pilots Association*, [2010] S.C.J. No. 39, 2010 SCC 39, [2010] 2 S.C.R. 536 (S.C.C.).

<sup>32</sup> *Reference re Assisted Human Reproduction Act*, [2010] S.C.J. No. 61, 2010 SCC 61, [2010] 3 S.C.R. 457 (S.C.C.), varg [2008] J.Q. no 5489 (Que. C.A.).

<sup>33</sup> *Lacombe*, *supra*, note 30, at para. 119.

<sup>34</sup> *Id.*, at para. 116, for example: “with all due respect for the Chief Justice, despite the fact that she refers expressly to co-operative federalism, her approach to the doctrine of interjurisdictional immunity is antithetical to co-operation between the levels of government and the views expressed by Binnie and LeBel JJ., writing for the majority, in *Canadian Western Bank*”. See also para. 107.

<sup>35</sup> *Reference re Assisted Human Reproduction Act*, *supra*, note 32, at para. 139. For example, s. 68 of the impugned legislation (authorizing the Governor in Council to declare provisions of the statute inapplicable in a province where a provincial law contains similar provisions, pursuant to an agreement with the province) “provides a flexible approach to federal-provincial cooperation, which is appropriate to modern federalism, where matters frequently attract concurrent legislative authority” (para. 152). Justices LeBel and Deschamps replied that s. 68 had given the federal government “a legal tool to impose its own standards” and that provincial regulatory action would only be “tolerated” where “the provinces in question adhere to the federal scheme” (para. 272).

ground federalism”, including the principle of subsidiarity, and the connection between the criminal law provisions and the ancillary provisions was “artificial”.<sup>36</sup>

In canvassing the principle of federalism in the *Securities Act Reference*, a unanimous Court noted that while the Judicial Committee of the Privy Council had “tended to favour an exclusive powers approach”, the Supreme Court itself had “moved towards a more flexible view of federalism that accommodates overlapping jurisdiction and encourages intergovernmental cooperation”, citing the decisions in *Pelland*, *OPSEU* and *Canadian Western Bank* as examples of the Court’s having “rejected rigid formalism in favour of accommodating cooperative governmental efforts”.<sup>37</sup> Having said all that, the Court then pulled back significantly:

While flexibility and cooperation are important to federalism, they cannot override or modify the separation [*sic*; division] of powers. The *Secession Reference* affirmed federalism as an underlying constitutional principle that demands respect for the constitutional division of powers and the maintenance of a constitutional balance between federal and provincial powers.

In summary, notwithstanding the Court’s promotion of cooperative and flexible federalism, the constitutional boundaries that underlie the division of powers must be respected. The “dominant tide” of flexible federalism, however strong its pull may be, cannot sweep designated powers out to sea, nor erode the constitutional balance inherent in the Canadian federal state.<sup>38</sup>

The Court went on to find the Canada’s proposed *Securities Act* to be *ultra vires* Parliament’s trade and commerce power, but returned, almost lyrically, to the virtues of “a cooperative approach” that would recognize the “essentially provincial nature of securities regulation while allowing Parliament to deal with genuinely national concerns”:

It is not for the Court to suggest to the governments of Canada and the provinces the way forward by, in effect, conferring in advance an opinion on the constitutionality on this or that alternative scheme. Yet we may appropriately note the growing practice of resolving the complex governance problems that arise in federations, not by the bare logic of either/or, but by seeking cooperative solutions that meet the needs of the country as a whole as well as its constituent parts.

---

<sup>36</sup> *Id.*, at paras. 271, 273 and 278.

<sup>37</sup> *Reference re Securities Act*, [2011] S.C.J. No. 66, 2011 SCC 66, [2011] 3 S.C.R. 837, at paras. 56-58 (S.C.C.).

<sup>38</sup> *Id.*, at paras. 61-62 (emphasis added).

Such an approach is supported by the Canadian constitutional principles and by the practice adopted by the federal and provincial governments in other fields of activities. The backbone of these schemes is the respect that each level of government has for each other's own sphere of jurisdiction. Cooperation is the animating force. The federalism principle upon which Canada's constitutional framework rests demands nothing less.<sup>39</sup>

One cannot fail to be impressed by the Court's leadership, in cases such as *Pelland*, *Canadian Western Bank* and the *Securities Act Reference*, in accommodating, encouraging and promoting cooperative federalism, not only as a discipline for itself, but also as a practice to which enlightened federal and provincial governmental actors would be wise to adhere. The fact that governments of various political stripes and perspectives do not always see eye to eye on policy priorities and do not always arrive at agreement or harmony in coordinating legislative initiatives is no reason not to continue to signal the advantages of cohesion. Many of the important lessons in life are best learned through repetition, tedious though it might seem.

The difficulty arises when strong adherents of cooperative federalism are confronted with what, to them, is clear evidence of an obstinate failure to embrace the wisdom behind the lesson. This can lead, once again, to starkly divergent views as to what federalism and other constitutional principles permit or require, not only amongst the relevant political actors, but amongst proponents on the bench.

In *Attorney General of Quebec v. Attorney General of Canada*,<sup>40</sup> a majority of the Supreme Court upheld Parliament's legislative authority to require the destruction of all records contained in the registries related to the registration of long guns, consequent upon Parliament's repeal, through the enactment of the *Ending the Long-gun Registry Act*, of the registration requirement and the decriminalization of the possession of an unregistered long gun. The Superior Court of Quebec had declared the impugned provision (section 29 of the Act) unconstitutional, and the Quebec Court of Appeal had reversed that decision.

Justices LeBel, Wagner and Gascon, supported by Justice Abella, wrote dissenting reasons. In their view, the trial judge had been correct in

---

<sup>39</sup> *Id.*, at paras. 132-133 (emphasis added).

<sup>40</sup> *Quebec (Attorney General) v. Canada (Attorney General)*, [2015] S.C.J. No. 14, 2015 SCC 14, [2015] 1 S.C.R. 693 (S.C.C.), affg [2013] J.Q. no 6676 (Que. C.A.). For a detailed and thoughtful critique, see Johanne Poirier, "Souveraineté parlementaire et armes à feu: le fédéralisme coopératif dans la ligne de mire?" (2015) 45 R.D.U.S. 47.

finding that a federal-provincial partnership had developed with respect to firearms control. This partnership, they wrote, was “consistent with the spirit of cooperative federalism”.<sup>41</sup> The “modern view” of federalism had replaced the “classical approach” with “a more flexible conception” of the division of powers.<sup>42</sup> Cooperative federalism had been developed to “adapt the principle of federalism to this modern reality”.<sup>43</sup>

Co-operative federalism reflects the realities of an increasingly complex society that requires the enactment of co-ordinated federal and provincial legislative schemes to better deal with the local needs of unity and diversity ... . From a legal perspective, it is by allowing for overlapping powers through the application of the pith and substance and ancillary powers doctrines that co-operative federalism is able to meet those needs and, in this sense, to enable the goals of federalism to be realized.

.....

In the novel circumstances of this case, our analysis must be guided by the Constitution’s unwritten principles. In particular, we must be careful not to place the principle of federalism and its modern form — co-operative federalism — in jeopardy.<sup>44</sup>

Justices Cromwell and Karakatsanis, writing for the majority of the Court, dismissed the appeal to cooperative federalism, as advanced by the Attorney General of Quebec.

Quebec invokes the principle of cooperative federalism in support of both its argument that s. 29 of the *ELRA* is *ultra vires* and its claim that Quebec has the right to receive the data contained in the CFR related to long guns connected to Quebec. In essence, Quebec is asking us to recognize that the principle of cooperative federalism prevents Canada and the provinces from acting or legislating in a way that would hinder cooperation between both orders of government, especially in spheres of concurrent jurisdiction.

In our respectful view, Quebec’s position has no foundation in our constitutional law and is contrary to the governing authorities from this Court.<sup>45</sup>

The reasons of the majority characterize cooperative federalism as a “descriptive concept” from which the courts have developed a

---

<sup>41</sup> *Id.*, at para. 149.

<sup>42</sup> *Id.*, at para. 147.

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*, at paras. 148, 151 (emphasis added).

<sup>45</sup> *Id.*, at paras. 15-16.

“legal principle” that has been employed “to provide flexibility” in the application of division-of-powers doctrines such as interjurisdictional immunity and paramountcy, facilitate the enactment of interlocking federal and provincial legislative measures and to avoid unnecessarily constraining legislative action by each order of government.<sup>46</sup> However, “the limits of cooperative federalism” include the primacy of the text of the Constitution. “The principle of cooperative federalism”, wrote Cromwell and Karakatsanis JJ., “cannot be seen as imposing limits on the otherwise valid exercise of legislative competence”:<sup>47</sup>

In our respectful view, the principle of cooperative federalism does not assist Quebec in this case. Neither this Court’s jurisprudence nor the text of the Constitution Act, 1867 supports using that principle to limit the scope of legislative authority or to impose a positive obligation to facilitate cooperation where the constitutional division of powers authorizes unilateral action. To hold otherwise would undermine parliamentary sovereignty and create legal uncertainty whenever one order of government adopted legislation having some impact on the policy objectives of another. Paradoxically, such an approach could discourage the practice of cooperative federalism for fear that cooperative measures could risk diminishing a government’s legislative authority to act alone.

We conclude that the principle of cooperative federalism does not prevent Parliament from exercising legislative authority that it otherwise possesses to dispose of the data.<sup>48</sup>

Justices Wagner and Côté recently reiterated this view on behalf of eight of the nine judges of the Court in *Rogers Communications v. Châteauguay*,<sup>49</sup> stating:

... [A]lthough co-operative federalism has become a principle that the courts have invoked to provide flexibility for the interpretation and application of the constitutional doctrines relating to the division of powers, such as federal paramountcy and interjurisdictional immunity, it can neither override nor modify the division of powers itself.

---

<sup>46</sup> *Id.*, at para. 17. (See also *Saskatchewan (Attorney General) v. Lemare Lake Logging Ltd.*, [2015] S.C.J. No. 53, 2015 SCC 15, [2015] 3 S.C.R. 419 (S.C.C.), varg [2014] S.J. No. 164 (Sask. C.A.), per Abella and Gascon JJ. for the majority (at para. 21): “Given the guiding principle of cooperative federalism, paramountcy must be narrowly construed.”)

<sup>47</sup> *Id.*, at paras. 18-19.

<sup>48</sup> *Id.*, at paras. 20-21 (emphasis added).

<sup>49</sup> *Rogers Communications Inc. v. Châteauguay (City)*, [2016] S.C.J. No. 23, 2016 SCC 23 (S.C.C.), per Wagner and Côté JJ. in joint reasons (McLachlin C.J.C. and Abella, Cromwell, Moldaver, Karakatsanis and Brown JJ., concurring).

It cannot be seen as imposing limits on the valid exercise of legislative authority: *Quebec (Attorney General) v. Canada (Attorney General)*, at paras. 17-19. Nor can it support a finding that an otherwise unconstitutional law is valid.<sup>50</sup>

## VI. COOPERATIVE FEDERALISM: A MEANS OF IMPLEMENTING THE FEDERAL PRINCIPLE

That position strikes me as fundamentally sound. The “principle of cooperative federalism” — *if it is* a legal or constitutional principle — must be balanced against other constitutional principles, including the well-established principle of parliamentary sovereignty and the emerging principle of the separation of powers (whereby the judicial branch, like the executive and legislative branches, must not overstep its bounds), and must not supplant the supremacy of the Constitution’s provisions, particularly the division of legislative powers established in sections 91 and 92 *et seq.* of the *Constitution Act, 1867*.

The jurisprudence has evolved to a point where even the majority position is that cooperative federalism began as a “descriptive concept” — that is, the essentially *political* understanding of cooperative federalism as a series of flexible, informal, pragmatic institutional and administrative arrangements — that has given rise to a *legal* principle itself commanding, or at least encouraging, flexibility in the application of the doctrines employed by the courts in construing the constitutional distribution of powers. While a remarkable development, this is not particularly troubling insofar as it has acted largely to date as a form of self-imposed judicial restraint on the impulse to improve upon our Constitution’s division of legislative jurisdiction and powers through creative interpretation. The challenge is to avoid taking the further, facile steps of abandoning the discipline of empirical analysis and conflating an interpretive rule or legal technique with an idealized constitutional principle of cooperative federalism, and then applying that broad principle normatively, without much discernment, to practical situations and dynamics perhaps better classified as something other than cooperative in character, and thereby altering the original form and

---

<sup>50</sup> *Id.*, at para. 39. Justice Gascon, in separate reasons, contended for a “flexible approach tailored to the modern conception of federalism, which allows for some overlapping and favours a spirit of co-operation” (at para. 93); Wagner and Côté JJ. agreed with a generous and flexible approach, but added (at para. 47): “However, flexibility has its limits, and this approach cannot be used to distort a measure’s pith and substance at the risk of restricting significantly an exclusive power granted to Parliament.”

function of the “principle” (as well as, perhaps, the constitutional division of powers itself).

In my respectful view, however, such problems can be avoided if *cooperative federalism* is better understood as a *modality* than a principle. Cooperative federalism, like executive federalism, concurrent federalism, and the many other descriptive and normative classifications that characterize the dynamics, at any given time, of the myriad interactions amongst political actors in a modern federal state like Canada, is a *means* of implementing the *federal principle* that is at the heart of the constitutional framework. With a principle comes structure and normativity. With a modality comes fluidity and flexibility — the very elements cooperative federalism was meant to convey.

By a modality, I do not wish to introduce yet another abstruse concept into the rarefied field of constitutional hermeneutics — a field increasingly plagued, from the point of view of the practitioner, by inaccessible and intangible notions. To the contrary, the idea of cooperative federalism as a modality is simply to see the cooperative mode as one manner, way or means — perhaps a privileged means, but still only one amongst others — of implementing (or in the language of the dictionary, of doing, expressing or experiencing) federalism and the federal principle.

I realize that beyond the structure and provisions of the *Constitution Act, 1867* on the division of legislative powers, arguments may be made that other parts of the Constitution of Canada favour the conceptualization of cooperative federalism as an underlying structural principle. Part III of the *Constitution Act, 1982*,<sup>51</sup> for example, records a commitment on the part of Parliament and the provincial legislatures and the federal and provincial governments to promote equal opportunities for the well-being of Canadians, furthering economic development to reduce disparity, and providing essential public services of reasonable quality to all Canadians. This undertaking is coupled with a commitment on the part of Parliament and the government of Canada “to the principle of making equalization payments” to ensure that provincial governments have enough revenue to provide “reasonably comparable levels of public services at reasonably comparable levels of taxation”.<sup>52</sup> Cooperative federalism, particularly in the 1960s and 1970s, was very much associated with the need for federal-provincial coordination, arrangements and

---

<sup>51</sup> Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

<sup>52</sup> *Constitution Act, 1982*, s. 36(2).

mechanisms to deal with fiscal imbalances, regional disparities, equalization payments and the social safety net. However, it should be noted that Part III also carefully preserves, in express terms, the legislative authority of Parliament and the provincial legislatures.

With respect to Part V of the *Constitution Act, 1982*, Professor Kate Glover has written that the multilateral procedures for constitutional amendment substantiate the claim that cooperative federalism is more than simply a modern mode of federalism but is “embedded within the constitutional architecture”.<sup>53</sup> In my view, Part V is at best agnostic as to the virtues of cooperative federalism. It is true that the multilateral procedures necessitate, as a matter of fact, some degree of coordination — and thus arguably cooperation — if they are to operate effectively to achieve constitutional change. However, the amending procedures, to the extent that they serve the dual purpose<sup>54</sup> of not only effecting constitutional change where the requisite federal and provincial authorizing resolutions have been obtained, but also protecting key institutions and provisions *against* constitutional change where no such consensus exists, might be said to rely as much on the possibility of the *non-cooperation* of federal and provincial legislative bodies as on their actual cooperation. In other words, in terms of political dynamics, the Part V multilateral procedures may reward the recalcitrance of political actors who do *not* want to achieve constitutional change, as much as they reward the cooperation of those who do want constitutional change.

None of this is to gainsay the strong desirability of federal-provincial-territorial cooperation in the modern Canadian state, or to ignore the fundamental character of the federal principle in animating the provisions of the Constitution of Canada. Rather, it is to suggest that the expertise of courts may not lie with the elucidation of cooperative federalism as a constitutional norm and the evaluation, from a legal vantage point, of its good-faith implementation against some theoretical standard or idealized criterion.

---

<sup>53</sup> K. Glover, “Structural Cooperative Federalism” (a paper presented at the Osgoode Constitutional Cases Conference on April 8, 2016). See also, however, Carissima Mathen, “The Federal Principle: Constitutional Amendment and Intergovernmental Relations”, in Emmett Macfarlane, ed., *Constitutional Amendment in Canada* (Toronto: University of Toronto Press, 2016), c. 3. Professor Mathen writes, *inter alia* (at 75), that “The dominant judicial approach to Part V runs the risk of reifying the federal principle at the expense of other values.”

<sup>54</sup> I have discussed this dual purpose in previous writings: *vide* W.J. Newman, “Living with the Amending Procedures: Prospects for Future Constitutional Reform in Canada” (2007) S.C.L.R. (2d) 383, at 385-86; “Putting One’s Faith in a Higher Power: the *Senate Reform Reference*, Legislative Authority and the Amending Procedures” (2015) 34 N.J.C.L. 99, at 111.

In many cases, the *indicia* of federal-provincial cooperation will be self-evident, as when federal and provincial Attorneys General band together to defend the constitutionality of some federal or provincial legislative measure,<sup>55</sup> or an interlocking federal and provincial legislative and regulatory scheme, that has been attacked by some other party.<sup>56</sup> In other cases, the concept of cooperation itself may give rise to differing perspectives amongst the governmental actors before the courts.

Who must cooperate with whom for a constitutional norm or principle of cooperative federalism to be respected? Is there cooperation when some or perhaps most provinces fail to support a federal government initiative? Is there cooperation when the federal government demurs, for its own reasons, from advancing a measure initiated or supported by certain or perhaps most provinces? Cooperation is often in the eye of the beholder, and the perception of effective cooperation, or the lack of it, may depend on whose interests are at play, and whether one's own project or initiative is at stake or whether one is on the receiving end of importuning attentions aimed at achieving buy-in and consensus.

In the *Quebec Secession Reference*, the Supreme Court recognized that in the context of constitutional negotiations — even those governed by constitutional principles including federalism, democracy, constitutionalism and the protection of minorities — “the distinction between the strong defence of legitimate interests” by political actors and “the taking of positions which, in fact, ignore the legitimate interests of others” is one that “defies legal analysis”. The “reconciliation of legitimate constitutional interests” in such negotiations, the Court observed, is “necessarily committed to the political rather than the judicial realm” and the give-and-take of the negotiation process.<sup>57</sup>

Insofar as cooperative federalism as a concept is similarly predicated upon consultations, discussions and negotiations amongst political actors with a view to facilitating federal-provincial-territorial arrangements or developing complementary legislative measures, the courts should be slow to intervene on the basis of a claim that the principle of cooperative federalism has not been fully met or respected in course of that process or in some legislative outcome. The courts must continue to ask themselves whether there is a justiciable claim based upon the ambit of the provisions of the Constitution (most often in the area of the division

---

<sup>55</sup> *Rothmans, Benson & Hedges Inc. v. Saskatchewan*, [2005] S.C.J. No. 1, 2005 SCC 13, [2005] 1 S.C.R. 188, at para. 26 (S.C.C.), revg [2003] S.J. No. 606 (Sask. C.A.).

<sup>56</sup> *Pelland*, *supra*, note 25.

<sup>57</sup> *Reference re Secession of Quebec*, *supra*, note 3, at para. 101.

of powers), or whether, having regard to their expertise — the interpretation of law — an argument based on a constructive breach of a putative constitutional norm or principle of cooperative federalism would invite them into a realm best left to the dynamics of the political process.

To borrow another analogy from the Supreme Court's jurisprudence — this time in the field of administrative law — the fluidity of the political dynamics and the simultaneous advocacy, defence and balancing of legitimate interests amongst numerous federal and provincial political actors in the pursuit of cooperative federalism involves a polycentric evaluation that may be better performed by political scientists (and even pundits) than legal experts. As Bastarache J. stated in *Pushpanathan*, “[w]hile judicial procedure is premised on a bipolar opposition of parties, interests, and factual discovery, some problems require the consideration of numerous interests simultaneously, and the promulgation of solutions which concurrently balance benefits and costs for many different parties. Where an administrative structure more closely resembles this model, courts will exercise restraint.”<sup>58</sup>

Conceptualizing cooperative federalism as a modality for implementing the federal principle is one way of recognizing the limits of the courts' role in advancing this concept, and one that is more consonant with the Supreme Court's appreciation of its proper place in Canada's constitutional and democratic institutional framework. As long as cooperative federalism is not transformed into an obligation of result by the magical properties of constitutional principles, it should remain a useful means of approaching many of the challenges of the modern federal state.

---

<sup>58</sup> *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] S.C.J. No. 46, [1998] 1 S.C.R. 982, at para. 36 (S.C.C.), revg [1995] F.C.J. No. 1716 (F.C.A.).

