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The 2018 Pan-Canadian Securities Regulation Reference: Dualist Federalism to the Rescue of Cooperative Federalism

Johanne Poirier*

I. INTRODUCTION

In 2018, the impact of Canadian federalism on securities regulation returned one more time to the Supreme Court of Canada. In its *Reference re Pan-Canadian Securities Regulation*, the Court had once more to clarify "who can do what" with regards to capital markets.[1] But it was also tasked with assessing the normative instruments through which federal partners were attempting to act in a coordinated fashion. The Court's advisory opinion offers a relatively predictable interpretation of the division of powers in economic matters, and more specifically, the scope of federal jurisdiction over "Trade and Commerce".[2] However, more significantly, the reference raised a number of fundamental questions about the dominant and competing conceptions of Canadian federalism, the role of courts in monitoring the behaviour of members of the federation, the legal status of intergovernmental agreements, and the fluid line dividing law and politics in the practice and theory of federalism.

The central theme of this article is the way in which, in the *2018 Securities Reference*, the Supreme Court relies on a maximalist and traditional conception of parliamentary sovereignty to protect complex

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1 *Reference re Pan-Canadian Securities Regulation*, [2018] S.C.J. No. 48, 2018 SCC 48 (S.C.C.) [hereinafter "*2018 Securities Reference*"].

2 Section 91(2), *Constitution Act, 1867* (UK), preamble, 30 & 31 Vict., c. 3, s. 91, reprinted in R.S.C. 1985, Appendix II, No. 5.

cooperative arrangements elaborated by the "political branches" of some members of the federation.[3]

Part I briefly surveys how the Canadian federation was mostly conceived — and still largely remains — structurally dualist, despite pragmatic and jurisprudential evolution favouring cooperative federalism. It recalls the constitutional saga regarding securities regulation, including the invitation to cooperate addressed to federal partners by the Supreme Court in the 2011 *Securities Reference*.[4] It then offers a review of the fundamentals of parliamentary sovereignty, and argues that the Supreme Court of Canada — in case law leading to the *2018 Securities Reference* — conceived of parliamentary sovereignty a "sword" which members of the federation may always brandish to unilaterally circumvent, or withdraw from, cooperative arrangements, clearly reinforcing the dualist dimension of Canadian federalism.

Part II then analyzes how the Supreme Court reasoned, in contrast to the Québec Court of Appeal, that intergovernmental executive decision-making mechanisms which constrain — in practice — the legislative autonomy of participating provinces do not amount to constitutionally inadmissible limitations on their parliamentary sovereignty. It does so by evoking the potential use of the parliamentary sovereignty "sword" by legislatures but also by transforming this pivotal instrument of dualist federalism into a "shield" to protect collaborative schemes. The Court's approach facilitates the elaboration of complex arrangements by the political branches, somewhat on the margins of the formal constitution. This approach enables government — legislatures, yes, but mostly the executives — to engage in para-constitutional engineering, both with judicial blessing and protection from judicial scrutiny.

The final conclusion acknowledges that this development may promote effective and "modern" federalism, but also underlines concerns about the impact of "informal" arrangements on third parties, and on accountability for executive action in a federal state grounded in the rule of law.

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[3] This exploration is necessarily limited by the space available. The author is preparing a parallel paper on the role of courts in the face of intergovernmental arrangements, notably those that formally leave legislative sovereignty intact but that have substantive distorting effects on legislatures' actual capacity to exercise that sovereignty.

[4] *Reference re Securities Act*, [2011] S.C.J. No. 66, [2011] 3 S.C.R. 837, 2011 SCC 66 (S.C.C.) [hereinafter "*2011 Securities Reference*"].

II. Regulating Securities Cooperatively in a Dualist Federation: The Context and the Issues

The *2018 Securities Reference* raises a number of significant issues concerning the co-existence of both dualist and cooperative conceptions of federalism in the Supreme Court's jurisprudence. After sketching these co-existing and competing conceptions (1.), this section of the paper reviews the constitutional saga surrounding the regulation of capital markets in Canada culminating with the *2011 Securities Reference*'s call for intergovernmental cooperation (2.).[5] In response, several provinces, one territory, and Ottawa designed a cooperative system whose constitutionality was, once more, challenged before a Supreme Court that seemed to wonder why some provinces were "back again"! (3.). Finally, this section reviews the concept of parliamentary sovereignty (4.) and the mobilization of this concept by the Court in two earlier cases in which it seemed to be in tension with cooperative federalism (5.).

1. Dualist Federalism vs. Cooperative Federalism in Canada

Canada's original federal architecture, adopted in 1867 was, and essentially remains, formally dualistic. It is comprised of two orders of governments, each endowed with its own autonomous legislative and executive institutions. By contrast to the situation in the vast majority of federations, constituent units do not formally participate in the federal law-making process through a proper federal second chamber. Moreover, normative action (the adoption of legislation and regulation) as well as their implementation follow parallel — not interwoven — patterns.[6] Hence, officially, Canada's federal architecture is "dualist" and not "integrated".[7]

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[5] *Id*.

[6] *The Liquidators of the Maritime Bank of the Dominion of Canada v. The Receiver-General of the Province of New Brunswick*, [1892] A.C. 437 (P.C.).

[7] With the exception of criminal law and the administration of justice, which is the only instance of officially "administrative" federalism: see ss. 91(27) and 92(14), *Constitution Act*, *1867*. For a comparative analysis of the distinctions between integrated and dualist federalism in general, see Johanne Poirier & Cheryl Saunders, "Conclusions: Comparative Experience of Intergovernmental Relations in Federal Systems" in Johanne Poirier, Cheryl Saunders & John Kincaid, eds., *Intergovernmental Relations in Federal Systems: Comparative Structures and Dynamics* (Oxford: Oxford University Press, 2015) 440-98, at 445-47 [hereinafter "Poirier & Saunders, 'Conclusions'"] and Johanne Poirier & Cheryl Saunders, "Comparing Intergovernmental Relations in Federal Systems: An Introduction" in *id*., 1-13, at 5-6 [hereinafter "Poirier & Saunders, 'Introduction'"].

The original division of powers reinforced this dualist structure. Each order of government was designed to fulfil rather independently a number of functions. The judicial committee of the Privy Council, in its decisive case law of the first 80 years of the Canadian federation, mostly — but not exclusively — reinforced the dualistic vision of the federal system put in place in 1867.[8] Rather rapidly, however, it appeared that despite explicit wording of the opening paragraphs of sections 91 and 92 of the *Constitution Act, 1867*, the principle of "exclusivity" needed to be nuanced. Having given birth to the "watertight compartments" metaphor, the Privy Council recognized early on the possibility of normative overlap through an evocation of the double aspect doctrine.[9]

Gradually, with the advent of the welfare state in the 1950s, members of the federation started to engage in intergovernmental schemes that went against the grain of the classically exclusive division of powers.[10] While courts continued to trace constitutional barriers between "exclusive" competences, they also tolerated schemes whereby orders of government could delegate, by legislation, executive and regulatory powers to another order.[11] The Supreme Court imposed basically one limit to this pragmatic deviation from the dualist structure: a legislative assembly may not abdicate its actual legislative power in favour of another one[12] (or possibly to another organ).[13] This, it reasoned, would amount to a modification of the division of powers without due regard to

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[8] Peter W. Hogg, *Constitutional Law of Canada*, 2018 Student ed. (Toronto: Carswell, 2018) s. 5.3(c) [hereinafter Hogg, '*Constitutional Law of Canada*'"]; Noura Karazivan, "Le fédéralisme coopératif entre territorialité et fonctionnalité: le cas des valeurs mobilières" (2016) 46: 2 *Revue générale de droit* 419, at 423-26. The author contrasts a "territorial" approach with a "functional" one, a distinction that partly corresponds to the one drawn here, although it deals more with the interpretation of the division of powers than a structural description of the federal regime.

[9] *Hodge v. The Queen* (1883) A.C. 117 (P.C.).

[10] Marc-Antoine Adam, Josée Bergeron & Marianne Bonnard, "Intergovernmental Relations in Canada: Competing Visions and Diverse Dynamics" in Johanne Poirier, Cheryl Saunders & John Kincaid, eds., *Intergovernmental Relations in Federal Systems: Comparative Structures and Dynamics* (Oxford: Oxford University Press, 2015), 135-73.

[11] *P.E.I. Potato Marketing Board v. Willis*, [1952] S.C.J. No. 31, [1952] 2 S.C.R. 392 (S.C.C.); *Reference re Agricultural Products Marketing Association*, [1978] S.C.J. No. 58, [1978] 2 S.C.R. 1198 (S.C.C.); *Peralta v. Ontario*, [1988] S.C.J. No. 92, [1988] 2 S.C.R. 1045 (S.C.C.); *R. v. Furtney*, [1991] S.C.J. No. 70, [1991] 3 S.C.R. 89 (S.C.C.) [hereinafter "*Furtney*"]; *Fédération des producteurs de volailles du Québec v. Pelland*, [2005] S.C.J. No. 19, [2005] 1 S.C.R. 292, 2005 SCC 20 (S.C.C.) [hereinafter "*Pelland*"]. For a general discussion, see Hogg, *Constitutional Law of Canada*, s. 14.3.

[12] *A.G. of Nova Scotia v. A.G. of Canada*, [1950] S.C.J. No. 32, [1951] S.C.R. 31 (S.C.C.) [hereinafter "*Nova Scotia*"].

[13] *R. v. Furtney*, [1991] S.C.J. No. 70, [1991] 3 S.C.R. 89 (S.C.C.).

formal amending procedures, as "legislative jurisdiction cannot be assumed or given by consent".[14] The result of this intergovernmentalism — sometimes reductively called "executive federalism"[15]— has been a partial, informal and largely opaque transformation of the dualist regime into an *ad hoc* partially integrated one.[16]

Moreover, particularly since the mid-2000s, the Supreme Court has enthusiastically endorsed a somewhat idealized vision of "cooperative federalism", allegedly to soften the impact of certain interpretive doctrines of the division of powers.[17] "Cooperative federalism" is mobilized to facilitate intergovernmental action so that distinct orders of government may collaborate "to leverage their unique constitutional powers in tandem to establish a regulatory regime that may be *ultra vires* the jurisdiction of one legislature on its own".[18] The assumed virtues of

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[14] *Nova Scotia*, *per* Fauteux J., at 58 (see almost identical statement by Taschereau J. at 40; see also Kerwin J. at 38, Rand at 47ff.)

[15] Reductive because while cooperation is dominated by the executive branches, it is not their sole purview. "Inter*governmental* relations" may thus have an under-inclusive scope. Meanwhile, "cooperative federalism" suggests a more harmonious state of affairs in a given federation than might be the case. On these semantic challenges, see Poirier & Saunders, "Introduction", at 5-7. This said, Noura Karazivan aptly distinguishes between two meanings of cooperative federalism. The first is an interpretive principle which alters traditional doctrines of division of powers, so as to allow for a greater degree of legislative overlap. The second, she describes as "executive" federalism, refers to the actual practice of intergovernmental relations: Noura Karazivan, "Cooperative Federalism in Canada and Québec's Changing Attitudes" in Richard Albert, Paul Daly & Vanessa MacDonnell, eds., *The Canadian Constitution in Transition* (Toronto: University of Toronto Press, 2019), 136-66 [hereinafter "Karazivan, 'Cooperative Federalism'"].

[16] "Partially" because the delegation of executive functions from one order to another is not accompanied — by contrast to constitutionally integrated federal systems — by measures of participation into the other order's decision-making process: see Poirier & Saunders, "Introduction", at 6-7 and "Conclusions", at 445-47.

[17] See notably the discussion in *Québec (Attorney General) v. Canada (Attorney General)*, [2015] S.C.J. No. 14, [2015] 1 S.C.R. 693, 2015 SCC 14, at paras. 17-19 (S.C.C.) [hereinafter "*Long-Gun Registry Decision*"] (Cromwell & Karakatsanis JJ. for the majority).

[18] *R. v. Comeau*, [2018] S.C.J. No. 15, [2018] 1 S.C.R 342, 2018 SCC 15, at para. 87 (S.C.C.). For a discussion of the impact of "cooperative federalism" on the interpretation of the division of powers see: Jean-François Gaudreault-Desbiens & Johanne Poirier, "From Dualism to Cooperative Federalism and Back?: Evolving and Competing Conceptions of Canadian Federalism", in Peter Oliver, Patrick Macklem & Nathalie Des Rosiers, eds., *The Oxford Handbook of the Canadian Constitution* (Oxford: Oxford University Press, 2017), 391-413; Karazivan, "Cooperative Federalism"Québec,136-66; Wade K. Wright, "Facilitating Intergovernmental Dialogue: Judicial Review of the Division of Powers in the Supreme Court of Canada" (2010) 51 S.C.L.R. 625; Johanne Poirier, "Souveraineté parlementaire et armes à feu: le fédéralisme coopératif dans la ligne de mire?" (2015) 45 R.D.U.S. 47 [hereinafter "Poirier, 'Armes à feu'"]; Johanne Poirier, "Le fédéralisme coopératif au Canada: quand les registre juridique et politique jouent au chat et à la souris" in Johanne Poirier & Nicolas Levrat, eds., *Le fédéralisme coopératif comme terrain de jeu du droit, Special Issue of* (2018) 18 Fédéralisme et Régionalisme, online: <https://popups.uliege.be/1374-3864/index.php?id=1772>; Bruce Ryder, "Equal Autonomy in Canadian Federalism: The Continuing

cooperation have also justified significant judicial deference to existing cooperative schemes, even, in some cases, at the cost of administrative transparency[19] or in the face of arrangements that affect the rights of third parties in ways that are constitutionally dubious.[20]

But the story is not so simple. While constitutional interpretation has largely — but not univocally — abandoned the "watertight compartment" metaphor, the very structure of the federation remains undeniably dualist. Hence, all the "control mechanisms" of state action follow a dualist pattern. Parliamentary oversight of executive action, including committee work and control by Auditors General, follows this "pillarized" structure. So does ministerial responsibility which is not envisaged to respond to action taken by executives acting in concert. To a large extent, this is also the case of judicial review of administrative action, which takes place in parallel before distinct tribunals and courts, depending on which federal or provincial public actor made a decision or took an action whose legality is being challenged. Despite significant evolution in the practice of federalism, and the interpretation of the division of powers, this structure has formally remained unchanged.

Moreover, while courts encourage — or even, exhort — the political branches to cooperate, they have resisted the invitation to judicially condemn uncooperative behaviour, and have implicitly rejected anything

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Search for Balance in the Interpretation of the Division of Powers" (2011) 54 S.C.L.R. 565; Eugénie Brouillet & Bruce Ryder, "Key Doctrines in Canadian Legal Federalism" in Peter Oliver, Patrick Macklem & Nathalie Des Rosiers, eds., *The Oxford Handbook of the Canadian Constitution* (Oxford: Oxford University Press, 2017), 415-32; Peter Oliver, "The Busy Harbours of Canadian Federalism: The Division of Powers and Its Doctrines in the McLachlin Court" in David A. Wright & Adam M. Dodek, eds., *Public Law at the McLachlin Court: The First Decade* (Toronto: Irwin Law, 2011), 167-99; Hugo Cyr, "Autonomy, Subsidiarity, Solidarity" (2014) 23 *Constitutional Forum* 20; Kate Glover, "Structural Cooperative Federalism" (2016) 76:2 S.C.L.R. 45; Warren J. Newman, "The Promise and Limits of Cooperative Federalism as a Constitutional Principle" (2016) 76:2 S.C.L.R. 67.

[19] See Laforest J. in *British Columbia (Milk Board) v. Grisnich,* [1995] S.C.J. No. 35, [1995] 2 S.C.R. 895, at para. 30 (S.C.C.) [hereinafter "*Grisnich*"], and discussion in Poirier, "Armes à feu", *id.*., at 77-78 and in Johanne Poirier, "Une source paradoxale du droit constitutionnel canadien: les ententes intergouvernementales" (2009) 1 R.Q.D.I. 1, at 26-27 [hereinafter "Poirier, 'Source paradoxale'"].

[20] Dubious because intergovernmental agreements which were not properly incorporated by statute were nevertheless treated as if they were laws of general application (*erga omnes*). See discussion of *Boucher v. Stelco*, [2005] S.C.J. No. 35, [2005] 3 S.C.R. 279, 2005 SCC 64 (S.C.C.) and of *Fédération des producteurs de volailles du Québec v. Pelland*, [2005] S.C.J. No. 19, [2005] 1 S.C.R. 292, 2005 SCC 20 (S.C.C.), in Poirier, "Source paradoxale", *id.*, at 23 ff. and in Poirier, "Armes à feu", at 76-78; Johanne Poirier, "Intergovernmental Agreements in Canada: At the Crossroads Between Law and Politics" in Peter Meekison, Harvey Telford & Harvey Lazar, eds., *Canada: The State of the Federation: Reconsidering the Institutions of Canadian Federalism* (Montreal: McGill-Queen's University Press, 2004), 425-62, at 443 [hereinafter "Poirier, 'Crossroads'"]. The question of the proper incorporation of an agreement is central to the *2018 Securities Reference*: see *infra*, Part II.

resembling federal loyalty or comity.[21] In other words, legal barriers to cooperation that partly flow from the dualist conception of federalism are being judicially lowered. However, when federal partners do not wish to cooperate, or no longer wish to do so, courts refrain from intervention and reassert the autonomy of each federal partner to determine the nature of its relations with the other members of the federation in a way that reinforces the dualist nature of the federation.

It is in this conceptual waltz between dualist and cooperative federalism that the most recent chapters of the constitutional saga surrounding securities regulation unfolds.

2. The *2011 Securities Reference*: An Invitation to Collaborate

For over 80 years, Ottawa has sought ways to regulate securities so as to develop a "pan-Canadian" approach to the management of capital markets.[22] First the Judicial Committee of the Privy Council, then the Supreme Court of Canada, have consistently responded that securities are — predominantly — under the constitutional jurisdiction of provinces.[23] The last time was in 2011, when Parliament had drafted a bill which basically purported to legislate all aspects of securities regulations, including investors' protection, the registration of issuers of actions, *etc*. It provided for the creation of a national regulator and a process whereby provinces could opt-in the federal scheme or maintain their own.[24] This generated renewed provincial resistance and led to advisory opinions by the Alberta and the Québec Courts of Appeal, which both unanimously concluded that the bill exceeded federal jurisdiction over "Trade and

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[21] See *Québec (Attorney General) v. Canada (Attorney General)*, [2015] S.C.J. No. 14, [2015] 1 S.C.R. 693, 2015 SCC 14 (S.C.C.); Jean-François Gaudreault-DesBiens, "Cooperative Federalism in Search of a Normative Justification: Considering the Principle of Federal Loyalty" (2014) 23:4 *Constitutional Forum* 1; Poirier, "Armes à feu", Parts I.2 and IV.3; Jan Nato, "Development of Duties of Federal Loyalty: Lessons to be Learned, Conversations to be Had" First Prize, Baxter Family Competition in Federalism, 2019, online: <https://www.mcgill.ca/law/files/law/2019-baxter_federal-loyalty-lessons-discussions_jan-nato.pdf> (accessed June 10, 2019). *Reference re Pan-Canadian Securities Regulation*, [2018] S.C.J. No. 48, 2018 SCC 48 (S.C.C.).

[22] D. Johnston, K. Doyle Rockwell & C. Ford, *Canadian Securities Regulation*, 5th ed. (Markham: LexisNexis Canada, 2014), at 634-62 cited in *2018 Securities Reference*, at para. 9, and in *2011 Securities Reference*, at paras. 11-28.

[23] *Id*.

[24] The regime was broadly inspired by proposals elaborated in 1964, 1967, 1969 and 1994: see *2011 Securities Reference*, at paras. 11-28.

Commerce".[25] Ottawa then requested an advisory opinion from the Supreme Court of Canada.

In the *2011 Securities Reference*, the Supreme Court held that the federal bill constituted a "wholesale takeover of the regulation of the securities industry"[26] and of provincial powers over securities. Most of the bill dealt with, in pith and substance, the regulation of a specific industry, that of local capitals market, rather than addressing a Canada-wide economic problem. The Court recognized that local economic matters have often taken a pan-Canadian or global dimension, but it rejected the argument that the domain had "evolved from a provincial matter to a national matter affecting the country as a whole" so as to put it within the "Trade and Commerce" power.[27]

Nevertheless, while not explicitly pre-judging the issue, the Court strongly suggested that while provinces had jurisdiction over the "day to day" regulation of capital markets, the federal order could have some legislative power to adopt measures designed to protect macro-economic stability and counter "systemic risk" in Canada's capital markets. This was in 2011, only four years after the *Canadian Western Bank* decision in which the Supreme Court hailed "cooperative federalism" as the "modern" and "flexible" conception of the Canadian federation.[28] Consequently, the Court ended the *2011 Securities Reference* by inviting the various orders of government, each acting within its respective sphere of jurisdiction, to cooperate.[29] It emphasized that "each can work in collaboration with the other to carry out its responsibilities",[30] concluding that:

> 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.

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[25] *Reference Re Securities Act (Canada)*, [2011] A.J. No. 228, 41 Alta. L.R. (5th) 145, 2011 ABCA 77 (Alta. C.A.); *Québec (Procureure générale) v. Canada (Procureure générale)*, [2011] J.Q. no 2940, 2011 QCCA 591, at paras. 75-89 (Que. C.A.).

[26] *2011 Securities Reference*, at para. 128.

[27] *Id.*, at paras. 4, 116 and 128.

[28] *Canadian Western Bank v. Alberta*, [2007] S.C.J. No. 22, [2007] 2 S.C.R. 3, 2007 SCC 22, at paras. 31 and 42 (S.C.C.); *Fédération des producteurs de volailles du Québec v. Pelland*, [2005] S.C.J. No. 19, [2005] 1 S.C.R. 292, 2005 SCC 20, at para. 15 (S.C.C.).

[29] *2011 Securities Reference*, at paras. 130-134.

[30] *Id.*, at para. 131.

> The federalism principle upon which Canada's constitutional framework rests demands nothing less.[31]

The Court even mentioned the possibility of the adoption of a "uniform" provincial act, and the delegation of regulatory powers to a single pan-Canadian regulator.[32] In a nutshell, to paraphrase, the not-so-subtle message was: "All of you, members of the federation, have powers that are relevant to the proper regulation of securities. Cooperation is the 'modern', 'flexible' way to deal with the issue. So, go away, and sort it out!" The federal order, as well as some provinces (notably Ontario and British Columbia) proceeded to do just that.[33] They went back to the drawing board, partly split the unconstitutional federal bill into a federal Act and a provincial "model" Act, and elaborated a complex cooperation scheme to bring about a "pan-Canadian" seamless regulation of securities, which other provinces would be invited to join.[34]

3. The *2018 Securities Reference*: You're Back Again? (And Why Are You Complaining)?

Québec, Alberta and Manitoba, again, resisted this new attempt to restructure securities regulation in Canada. Québec seized its Court of Appeal once more, seeking an advisory opinion on two issues. Four of the five judges on the Québec Court of Appeal's bench found the federal bill to be *ultra vires* Parliament, unless a problematic aspect were severed from it.[35] The majority considered that the draft Federal Act dealt with matters that fell within federal jurisdiction under section 91(2). However, federal regulations adopted by the Authority are (like provincial ones) subject to the approval (or rejection) of a Council of Ministers in which provinces held a majority, and some provinces (those with "major"

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[31] *Id.*, at para. 133.

[32] *Id.*, at para. 118.

[33] At the time of the Reference, Ontario, British Columbia, Prince-Edward Island, New Brunswick and the Yukon were part of the regime. Since then, Nova Scotia has decided to join: Cooperative Capital Market Regulatory System, online: <http://ccmr-ocrmc.ca/news/> (accessed June 14, 2019).

[34] While the Supreme Court basically surveys four (or five) components, I have identified at least ten: the scheme is described at some length in Part II.1, *infra*.

[35] *Reference concerning the constitutionality of the implementation of pan-Canadian Securities Regulation*, [2017] J.Q. no 5583, 2017 QCCA 756, at para. 44 (Que. C.A.) [hereinafter "*Québec Securities Reference*"].

capital markets), a decisive vote.[36] This, for the majority, contradicted the fourth and fifth criteria of the *GM Motors*' test grounding federal jurisdiction over the national dimension of trade and commerce.[37] "By granting veto rights to certain participating provinces with respect to the federal regulations, the Regime negates the very necessity of pan-Canadian federal legislation to counter systemic risks on a national scale."[38]

By contrast, the Supreme Court found no objection with this form of delegation. It held the entire federal bill — which is mostly aimed at countering "systemic risk" with a potential domino effect on the Canadian economy — to be valid without condition. Delegation of regulatory and administrative powers to a joint organ is not problematic in Canadian law, as we saw. The fact that this delegation occurs in the context of the Trade and Commerce clause is no different. If Parliament has jurisdiction over a part of securities regulation (which the Court found it had), then it can choose if — and to whom — it delegates regulatory powers. The fact that the delegates are provinces is no impediment.[39]

Turning to the core concern of the present article, the majority of the Québec Court of Appeal also considered that a major portion of the cooperative scheme was unconstitutional as it involved inadmissible constraints on provincial parliamentary sovereignty. Agreeing with the dissenting judge, partly for distinct reasons, a unanimous Supreme Court found no constitutional obstacle to the cooperative system.

Between the lines of the *2018 Securities Reference,* one hears: "We've already told you that you all have distinct but complementary roles to play. We've invited you to cooperate. Some of you have. Others

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[36] Sections 76-79*, Capital Markets Stability Act — Revised Draft for Consultation*, January 2016, online (pdf): *Cooperative Capital Markets Regulatory System*, online: <http://ccmr-ocrmc.ca/wp-content/uploads/cmsa-consultation-draft-revised-en.pdf> (accessed June 1, 2019) [hereinafter "Federal Act"]; Section 5.2 *Memorandum of Agreement Regarding the Cooperative Capital Market Regulatory System*, signed between July 20 and August 4, 2016, online (pdf): *Cooperative Capital Markets Regulatory System*, online: <http://ccmr-ocrmc.ca/wp-content/ uploads/moa-23092016-en.pdf> (accessed June 20, 2019) [hereinafter "MOA"]. In French, it is called a "Protocole d'accord". The title given to an intergovernmental agreement has little relevance to its status. Terms (and their translation) often seem to be chosen almost randomly.

[37] *General Motors of Canada Ltd. v. City National Leasing*, [1989] S.C.J. No. 28, [1989] 1 S.C.R. 641 (S.C.C.), as discussed in *Québec Securities Reference*, at paras. 137 and 82-102.

[38] *Id.*, at para. 90.

[39] *2018 Securities Reference*, at paras. 117-127. The Court also added that given the MOA, *Québec Securities Reference*, s. 5.2, only groups of provinces could prevent the adoption of regulation. Consequently, no single province had a "veto".

prefer not to, as is their prerogative, given that adhering to the collaborative regime is not even *legally* mandatory. So, what is the matter … again!? Why are Québec and Alberta seeking to *prevent* other provinces from exercising, in collaboration with Ottawa, their own competences as they see fit?"[40]

Indeed, in an era of enthusiastic endorsement of "cooperative federalism", who could be against cooperation? The Supreme Court undoubtedly assumes that cooperation is positive. It certainly reflects a significant practice elaborated by the various executive (and sometimes legislative) branches. Lowering jurisdictional barriers to multiply possible policy action — preferably a coordinated one — is, in the Court's own terms, "flexible" and "modern". So why should constitutional law be mustered to hinder cooperation that federal partners are at pains to elaborate in the name of harmonized policy-development?

The *2018 Securities Reference* confirms that the centralization of powers (notably over economic matters) is not a foregone conclusion. That both orders of government have a constitutional role to play and should coordinate the exercise of their own jurisdiction. It is also a significant addition to a rather consistent jurisprudential trend that lifts constitutional impediments to complex intergovernmental schemes, at least when governments *want* to cooperate. This new addition to the trend is analyzed in Part II of the paper. This requires, however, a prior foray into the contours of parliamentary sovereignty and of its impact on cooperative federalism.

4. Parliamentary Sovereignty: The Essentials

Given the centrality of parliamentary sovereignty to the assessment of the conformity of complex cooperative schemes with the Constitution, this section briefly summarizes some essential elements of the principle which will be relevant to the discussion in Part II.

Parliamentary sovereignty is part of the heritage of British constitutional law which has known some adaptation on Canadian soil (including the Charter, section 35, division of powers provisions, and possibly one or more unwritten principles of the Constitution).[41]

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[40] Manitoba intervened solely to challenge the validity of the Federal Act.

[41] John Lovell, "Parliamentary Sovereignty in Canada" in Peter Oliver, Patrick Macklem, Nathalie Des Rosiers, eds., *The Oxford Handbook of the Canadian Constitution* (New York: Oxford University Press, 2017), at 189-207; Jeffrey Goldsworthy, *Parliamentary Sovereignty: Contemporary Debates* (Cambridge: Cambridge University Press, 2010); Han-Ru Zhou, "Revisiting

The scope of this paper does not allow for an examination of the nature of parliamentary sovereignty nor of its complex relationship with other unwritten principles of the Constitution.[42] For our purposes, it suffices to point out that this "foundational" principle of the Westminster model of government"[43] has emerged "unscathed" despite the (sometimes erratic) evolution from dualist to cooperative dominant conceptions of Canadian federalism.[44]

Reduced to its core meaning, captured by Dicey, parliamentary sovereignty basically means that in a Westminster model parliamentary regime, legislators may adopt, amend and abrogate any law they see fit.[45] Staying within the realm of Westminster parliamentarianism, the only true (and somewhat paradoxical) limit to parliamentary sovereignty is that sovereign assemblies may not relinquish their sovereignty. This general axiom gives rise to a number of rules, five of which are relevant to the *2018 Securities Reference* in particular, and to the constitutionality of cooperative arrangements more generally.

First, and this may simply be another iteration of the axiom itself, a parliament cannot bind itself for the future, nor may it bind its successors — that is, at least, not in matters of substance. In other words, in a Westminster-style democracy, an elected assembly may always change its mind.

Second, while an assembly may not bind itself and its successors with regards to the substance of legislation or delegate its "primary" legislative power, it may limit itself in "manner and form"[46] to the extent

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the 'Manner and Form' Theory of Parliamentary Sovereignty" (2013) 129 L.Q.R. 610; François Chevrette & Herbert Marx, *Principes fondamentaux: notes et jurisprudence*, 2d ed. by Han-Ru Zhou (Montreal: Thémis, 2016), at 241-411; Vanessa MacDonnell, "The New Parliamentary Sovereignty" (2016) 21 Rev. Const. Stud. 13.

[42] See Poirier, "Armes à feu", at 80-92. See also Lovell, *id.*, at 198. Jean Leclair and Yves-Marie Morissette have outlined how only the principle of judicial independence seems to have taken precedence over this structural principle: "L'indépendance judiciaire et la Cour suprême: reconstruction historique douteuse et théorie constitutionnelle de complaisance" (1998) 36:3 Osgoode Hall L.J. 486.

[43] *2018 Securities Reference*, at para. 54.

[44] See Poirier, "Armes à feu".

[45] Parliament has "the right to make or unmake any law whatever; and, further, that no person or body is recognised by the law of England as having the right to override or set aside legislation of Parliament": A.V. Dicey, *Introduction to the Study of the Law of the Constitution*, 8th ed., by Roger Michener (Indianapolis: Liberty Fund, 1982) at 3-4. Ironically, Dicey himself doubted the applicability of parliamentary sovereignty in the federal context, given the division of powers. See: "Parliamentary Sovereignty and Federalism" in *id.*, at 73-104.

[46] See Han-Ru Zhou, "Revisiting the 'Manner and Form' Theory of Parliamentary Sovereignty" (2013) 129 L.Q.R. 610.

that it does so "in clear terms".[47] Hence, an assembly may adopt decision-making processes, and be bound by them, until it amends or repeals those procedures. Procedures may, however, amount to inadmissible substantive limitations if they are so constraining as to basically paralyze the ability of an assembly to change its mind. It has been understood that these procedural limits may only be introduced by norms adopted by the Assembly itself, primarily statutes.[48] A key issue in the *2018 Securities Reference* is to what extent — and under what conditions — may an intergovernmental agreement constrain the sovereignty of legislatures.[49]

Third, a legislature may delegate its secondary (regulatory) law-making powers to the extent that it can control the law-maker and (eventually) revoke the delegation. In Canada, this power of delegation has been given a very broad scope.[50] For instance, an assembly may adopt the legislation of another order "by reference", including future amendments to be brought by the delegate.[51]

Fourth, the executive branch cannot bind the legislative one. The sovereignty of parliament combined with the convention of responsible government means that the executive is always subordinate to the legislative. Of course, when a government enjoys a parliamentary majority, its initiatives will almost invariably be honoured by the assembly. In Canada, this has been held to be a function of the political process rather than of constitutional law.[52]

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[47] See *Reference Re Canada Assistance Plan (B.C.)*, [1991] S.C.J. No. 60, [1991] 2 S.C.R. 525, at 562 S.C.R. (S.C.C.) [hereinafter "*CAP Reference*"]. There is some academic debate, partly reflected in an *obiter* statement in that same Reference (at 563) that only statutes of a "constitutional nature" may actually introduce admissible manner and form limitations. This need not retain us in the present context. In the U.K., manner and form limitations introduced by legislation have been found to constitutionally limit the powers of the House of Lords: see *Jackson v. Her Majesty's Attorney General*, [2005] U.K.H.L. 56, [2006] 1 A.C. 262; Han-Ru Zhou, "Revisiting the 'Manner and Form' Theory of Parliamentary Sovereignty" (2013) 129 L.Q.R. 610, at 622 ff.

[48] *British Columbia v. Imperial Tobacco Canada Ltd.*, [2005] S.C.J. No. 50, [2005] 2 S.C.R. 473, 2005 SCC 49, at para. 60 (S.C.C.).

[49] See *infra*, section 3.

[50] Hogg, "*Constitutional Law of Canada*", ss. 14.1-14.3.

[51] *Coughlin v. Ontario Highway Transport Board*, [1968] S.C.J. No. 38, [1968] S.C.R. 569 (S.C.C.). For a critique that this is an indirect way of circumventing the ruling in *A.G. of Nova Scotia v. A.G. of Canada*, [1951] S.C.R. 31 (S.C.C.), see: Hogg, "*Constitutional Law of Canada*", at s. 14.4(b). However, the technique has now been normalized.

[52] *2018 Securities Reference*, at para. 69: "Any *de facto* control that the executive may be said to have over the legislature is irrelevant to our analysis", citing *Canada (Auditor General) v. Minister of Energy, Mines and Resources*, [1989] S.C.J. No. 80, [1989] 2 S.C.R. 49, at 103 S.C.R. (S.C.C.).

Finally, given the parliamentary nature of the regime, the assembly may not "abdicate" its primary legislative functions in favour of a person or a body that is not an integral part of the assembly.[53] In concrete situations — as with the Securities Cooperative Scheme — the border between acceptable delegation and abdication may be contentious.

5. Parliamentary Sovereignty: A Dualist "Sword" in the Cooperative Federalism Context

Parliamentary sovereignty has remained unadulterated from the enthusiastic judicial endorsement of "cooperative federalism". This is illustrated by the 1991 *Canada Assistance Plan Reference* and the 2015 *Long-Gun Registry Decision*.[54] In both cases, the Supreme Court showed remarkable judicial indulgence in the face of unilateral *un*cooperative action.

In the *CAP Reference*, the Supreme Court expounded a maximalist conception of parliamentary sovereignty — maximalist in the sense of basically ousting any substantial discussion of its impact on the federal equilibrium. The Court took the position that uncooperative behaviour, if it is "within powers", may have political consequences but cannot be sanctioned by courts. Individual orders of government remain free to legislate as they please, without any obligation to pay attention to the interests of other federal "partners". Interestingly, for our discussion, in the *CAP Reference*, the Court summarily rejected Manitoba's argument that the "overriding principle of federalism" should restrict the freedom of a federal partner to unilaterally withdraw from a cooperative agreement that had been in place for years.[55] This is strong dualism,

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[53] *West Lakes Limited v. The State of South Australia* (1980), 25 S.A.S.R. 389, 397-398 (S.A.S.C.), cited in *Reference Re Canada Assistance Plan (B.C.)*, [1991] S.C.J. No. 60, [1991] 2 S.C.R. 525, at 564 and in *Reference re Pan-Canadian Securities Regulation*, [2018] S.C.J. No. 48, 2018 SCC 48 (S.C.C.), at para. 60. The QCCA also referred to the case but to reach an opposite conclusion to that of the Supreme Court: *Québec Securities Reference* at para. 80. See also *Canada (Attorney General) v. Friends of the Canadian Wheat Board*, [2012] F.C.J. No. 706, 1 F.C.R. 518, 2012 FCA 183 (F.C.A.).

[54] *Reference Re Canada Assistance Plan (B.C.)*, [1991] S.C.J. No. 60, [1991] 2 S.C.R. 525 (S.C.C.); *Québec (Attorney General) v. Canada (Attorney General)*, [2015] S.C.J. No. 14, [2015] 1 S.C.R. 693, 2015 SCC 14 (S.C.C.).

[55] Justice Sopinka interpreted Manitoba's question very narrowly: *Reference Re Canada Assistance Plan (B.C.)*, [1991] S.C.J. No. 60, [1991] 2 S.C.R. 525, at 567 S.C.R. (S.C.C.).

favouring not only the autonomy of federal partners (and their respective democratic polities) but of an egalitarian conception of Canadian federalism.

Some 25 years later, after the *Secession Reference* shed light on unwritten constitutional principles, including the principle of federalism, the Long-Gun Registry decision by-and-large reasserted the *CAP Reference* approach in a case regarding the abolition of the long-gun registry. For the bare five-judge majority of the Court, the principle of cooperative federalism does not impose limits on "otherwise valid" exercise of legislative power. It cannot "limit the scope of legislative authority or […] impose a positive obligation to facilitate cooperation where the constitutional division of powers authorizes unilateral action".[56] Moreover, insofar as registration falls under federal power, it is immaterial that the "federal government's ultimate goal may well have been to prevent Quebec from creating its own long-gun registry".[57] In other words, the purpose for which the legislative measure was adopted — even if actually to hinder cooperation — is irrelevant if it fits within the sphere of jurisdiction of the law-maker, cooperative federalism or not. The ruling clearly reinforced the dualist dimension of Canadian federalism.

These two leading cases illustrate that, where orders of government refuse to cooperate, or no longer wish to cooperate and renege on existing collaborative schemes, judges have shied away from finding any obligation to act in good faith, to take other partners' interests into consideration and even less to enforce any duty to cooperate. Components of the federation — holders of constitutional powers and of a parcel of state sovereignty — can always legislate in a way that counters existing cooperative schemes, or even to unilaterally denounce them altogether. Indeed, armed with their "parliamentary sovereignty", the various legislative assemblies may free their respective legal orders from "having to keep their promises", implicitly in the name of democracy.

In other words, in Canada, the power of an assembly to change its mind lies higher in the hierarchy of constitutional values than the imperative of abiding by one's commitments to other partners in the

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[56] *Id.*, at para. 20.

[57] Even if this power (registration) is "ancillary" to the principal jurisdiction over criminal law, see: *id.*, at para. 38.

federation, or of other forms of federal solidarity.[58] In Karazivan's sagacious summary: "if you respect the division of powers, you do not need to be nice".[59] The principle of parliamentary sovereignty was read in "symbiosis" with the principle of (dualist) federalism but remained unaffected by the principle of (cooperative) federalism.

By allowing members of the federation to "go at it alone" so long as they are doing so within their (even overlapping) spheres of jurisdiction, and so long as they are doing so through legislation, the Supreme Court actually reinforces parliamentary sovereignty as an instrument of dualist federalism. Each pillar can act in full autonomy, as sovereign, without much consideration for the system in which it partakes. To put it bluntly (!), parliamentary sovereignty is a dualist "sword", a weapon which any order of government can brandish to withdraw from cooperative schemes.

III. THE *2018 SECURITIES REFERENCE: DE JURE* VERSUS *DE FACTO* SOVEREIGNTY IN THE FACE OF COOPERATIVE ARRANGEMENTS

This part of the paper critically explores the judicial interpretation of the conformity of the cooperative scheme regarding securities regulation with parliamentary sovereignty. It starts by expounding the complex normative framework on which the securities cooperative scheme rests (1.), as well as a contested decision-making mechanism (2.). This is followed by a reflection on its compatibility with the conditions of admissible manner and form limitations (3.) and on whether it amounts to an abdication of sovereignty by participating provinces (4.). It concludes that with the *2018 Securities Reference*, the "sword" of dualist federalism remains sharp, while it simultaneously becomes a "shield" behind which the other branches can creatively restructure the federation, largely protected from judicial oversight (5.).

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[58] Other federations give precedence to "*pacta sunt servanda*" above legislative autonomy. On the impact of "legal cultures" and of the monist/dualist dichotomy with regards to the relation between domestic and international law on the resolution of this intergovernmental tension, see Kevin Mununguu & Johanne Poirier, Les accords de coopération entre partenaires fédéraux: entre 'sources du droit' et '*soft law*'" in Isabelle Hachez, Hugues Dumon, François Ost, Michel Vandekerchove, eds., *Les sources du droit revisitées* (Brussels: Anthémis, 2013) 887, at 909-11 [hereinafter "Mununguu & Poirier"].

[59] Karazivan, "Cooperative Federalism", at 163.

1. The Pan-Canadian Securities Scheme: A Complex Normative Network

The "mechanics" of cooperation often rest on an intermingled web of legislative, regulatory, contractual and soft-law instruments, a phenomenon that is surprisingly under-studied, particularly from a legal perspective. The collaborative scheme elaborated by Ottawa and (some) provinces and territories following the *2011 Securities Reference* is particularly complex. While in its 2018 opinion, the Supreme Court only explicitly lists four elements in its initial description of the system,[60] the normative puzzle is comprised of a far greater number of pieces. Drawing a more complete picture provides a better understanding of the complex "network normativity" at play.[61]

First, the *Capital Markets Stability Act*[62] is a proposed federal statute designed to prevent and manage systemic risk and to structure data collection of national scope. It also creates criminal offences related to financial markets.

Second, the *Capital Markets Act*[63] is a "uniform" provincial statute that addresses the provincial ("day-to-day") dimension of securities regulation. This "Model Provincial Act"[64] is inspired by existing

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[60] *2018 Securities Reference*, at para. 21.

[61] François Ost & Michel van de Kerchove in *De la pyramide au réseau: pour une théorie dialectique du droit* (Brussels: Presses des Facultés universitaires St-Louis, 2002) defend this change of paradigm, which is better suited to the complexity of norm-making in contemporary states than Kelsen's pyramid: *Pure Theory of Law* (Berkley University Press, 1967). See also Dave Guénette, "L'architecture constitutionnelle: dimensions artistiques d'une construction juridique" (2017) 58:1-2 Cahiers de droit 33, at 40-43 [hereinafter "Guénette"]. For a metaphor of cooperative federalism as complex games, including "Institutional Mikado", see Johanne Poirier & Nicolas Levrat, "Le fédéralisme coopératif comme terrain de jeu du droit: une introduction", in Johanne Poirier & Nicolas Levrat, eds., *Le fédéralisme comme terrain de jeu du droit,* Numéro Spécial de *Fédéralisme et Régionalisme*, vol. 18, 2018, online: <https://popups.uliege.be/1374-3864/index.php?id=1736> (accessed June 1, 2019).

[62] *Capital Markets Stability Act — Revised Draft for Consultation*, January 2016, online (pdf): *Cooperative Capital Markets Regulatory System*, online: <http://ccmr-ocrmc.ca/wp-content/uploads/cmsa-consultation-draft-revised-en.pdf > (accessed June 1, 2019).

[63] *Capital Markets Act: A Revised Consultation Draft*, August 2015, online (pdf): *Cooperative Capital Markets Regulatory System*, online: <http://ccmr-ocrmc.ca/wp-content/uploads/CMA-Consultation-Draft-English-August-2015.pdf> (accessed June 1, 2019) [hereinafter "MPA"].

[64] The Québec Court of Appeal [hereinafter "QCCA"] described it as a "uniform" Act. For its part, the Supreme Court uses the term "uniform" twice in its initial description of the "cooperative system" (at para. 21), but it mostly refers to it as the "provincial model act" (MPA). The terms "uniform" and "model" are, in this context, interchangeable.

provincial legislation on securities and actually contains a large part of the previous federal bill that the SCC had declared *ultra vires* in 2011.

Third are all the individual provincial and territorial statutes that will have to be adopted following the model provided for by the MPA. To adhere to the scheme, provinces must first abolish their own existing legislation and regulations on securities, then adopt new statutes all identical to the MPA. Under Canadian law, the MPA is not a statute at all: it is a non-binding "mold" to which every participating province and territory is to give legislative force either through a simple clause and the annexation of the model, or by reproducing the model word for word. Participants in the scheme commit to "use their best efforts to cause their respective legislatures to enact or approve" the federal and model provincial legislation.[65]

Fourth, a Memorandum of Agreement acts as the "fulcrum" around which this normative network is structured. It is co-signed by ministers and engages the executive branches of all participating entities.[66] Withdrawal is possible with six months' notice.[67] Interestingly, in its description of the "primary components" of the scheme, the SCC does not list the MOA.[68] It simply says that the "system" is "set out" in an agreement. Arguably, the uncertain status of intergovernmental agreements in Canadian law always makes their inclusion alongside

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[65] See ss. 10.1(b) and 8.1 and 8.3 of S. 5.2 *Memorandum of Agreement Regarding the Cooperative Capital Market Regulatory System*, signed between July 20 and August 4, 2016, online (pdf): *Cooperative Capital Markets Regulatory System*, online: <http://ccmr-ocrmc.ca/wp-content/uploads/-23092016-en.pdf> (accessed June 20, 2019). This also applies to enactment by Parliament of the federal statute.

[66] Certain clauses may engage them in law — through some form of contractual undertakings, while others will be mere political commitments. On the "scale of contractuality" regarding intergovernmental agreements, see Johanne Poirier, "Intergovernmental Agreements in Canada: At the Crossroads Between Law and Politics" in Peter Meekison, Harvey Telford & Harvey Lazar, eds., *Canada: The State of the Federation: Reconsidering the Institutions of Canadian Federalism* (Montreal: McGill-Queen's University Press, 2004), 425-62, at 431-34. Courts have recognized that (some) agreements may give rise to legally-binding obligations between the executives who conclude them: *Northrop Grunman Overseas Services Corp. v. Canada (Attorney General)*, [2009] S.C.J. No. 50, [2009] 3 S.C.R. 309, 2009 SCC 50, at para. 11 (S.C.C.); *Reference re Anti-Inflation Act*, [1976] S.C.J. No. 12, [1976] 2 S.C.R. 373, at 433 (S.C.C.) [hereinafter "*Re Anti-Inflation Act*"]; *Reference Re Canada Assistance Plan (B.C.)*, [1991] S.C.J. No. 60, [1991] 2 S.C.R. 525, at 551 (S.C.C.).

[67] Section 5.2 *Memorandum of Agreement Regarding the Cooperative Capital Market Regulatory System*, signed between July 20 and August 4, 2016, online (pdf): *Cooperative Capital Markets Regulatory System*, online: <http://ccmr-ocrmc.ca/wp-content/uploads/moa-23092016-en.pdf> (accessed June 20, 2019), s. 13.

[68] *2018 Securities Reference*, at para. 21.

more traditional legal norms problematic.[69] Yet, it is simply impossible to understand the arrangement without the MOA. Indeed, the Court implicitly admits that the arrangement cannot be accounted for — nor actually function — without this agreement and it amply cites its content throughout the *2018 Securities Reference*.[70]

Fifth, the MOA anticipates the conclusion of sub-agreements first for the secondment of provincial personnel to the pan-Canadian regulator, then for the permanent transfer of staff, assets and contracts from participating provinces to the pan-Canadian regulator.[71]

Sixth, the MOA also specifies that pre-existing "transition funding agreements" between Ottawa and several provinces — to ease their transition into the regime — are to be maintained.[72]

Seventh, the scheme establishes a "Capital Markets Regulatory Authority" [hereinafter, the "Authority"],[73] a multilateral agency mandated to implement both federal and provincial legislation and adopt regulations in both the federal and the provincial domains related to securities. The creation of the Authority entails the dismantling of the securities regulator of each participating province and territory. The Authority is to be based in Toronto, with satellite "offices" in participating provinces.[74]

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[69] To give but two contrasting examples in *Société des Acadiens et Acadiennes du Nouveau-Brunswick Inc. v. Canada*, [2008] S.C.J. No. 15, [2008] 1 S.C.R. 383, 2008 SCC 15 (S.C.C.) [hereinafter "*Paulin*"], the Supreme Court cites an intergovernmental agreement (through which New-Brunswick "rents" the services of the RCMP to exercise provincial police functions) to bolster its conclusion, without referencing it or citing it amongst normative texts. By contrast, in *Fédération des producteurs de volailles du Québec v. Pelland*, [2005] S.C.J. No. 19, [2005] 1 S.C.R. 292, 2005 SCC 20 (S.C.C.), the agreement was included in the list of Acts and Regulations cited by the Court, as was the MOA in the *2018 Securities Reference*.

[70] The MOA is referred to 83 times in the *2018 Securities Reference*.

[71] Section 5.2 *Memorandum of Agreement Regarding the Cooperative Capital Market Regulatory System*, signed between July 20 and August 4, 2016, online (pdf): *Cooperative Capital Markets Regulatory System*, online: <http://ccmr-ocrmc.ca/wp-content/uploads/moa-23092016-en.pdf> (accessed June 20, 2019), s. 10.1. Presumably those will have to specify which employment law (federal, provincial, which one?) is to apply to both staff of the central office and the regional ones. The MOA is silent on the issue.

[72] *Id.*, final clause not numbered.

[73] The Authority's website states that it was "incorporated" as a non-profit organization in 2015 as an "interim body": <https://www.cmaio.ca> (accessed June 20, 2019). Even at the time of oral pleadings before the Supreme Court, the Authority seemed to be in place, without an enabling statute. Currently, the Cooperative Capital Markets Cooperative System (CCMCS) website does not provide a postal address and the phone contacts refer to existing provincial regulatory commissions or to a number in Ottawa: <http://ccmr-ocrmc.ca/contact-us/> (accessed June 20, 2019).

[74] The MOA stipulates that "regulatory offices" will be placed in every participating province. Since the Authority will also make regulations pursuant to federal law, its "territorial"

Eighth, the Authority and its Board of Directors are to report to a multilateral Council of Ministers [hereinafter "CoM"], composed of every minister "responsible for capital markets regulation" of the participating provinces and territories, as well as the federal Minister of Finance. The Council is to be co-chaired by the latter, and, on a "two year [sic] rotational basis, the responsible Minister from each "Major Capital Markets Jurisdiction".[75] The CoM is an intergovernmental mechanism *par excellence*, the very incarnation of high-level *executive* diplomacy.[76]

Ninth, a range of regulations are to be adopted by the Authority pursuant to the Federal Act, as well as the provincial ones, with final approval by the CoM.

Tenth, the Authority is also to have adjudicative powers, through a Tribunal to be set up by an eventual *Capital Markets Regulatory Authority Act*.[77] This Tribunal has the authority to make orders deemed "necessary to address a systemic risk related to capital markets" (under federal jurisdiction)[78] or to ensure that individuals "comply with capital markets law" (pursuant to provincial competences).[79] It is to function in

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reach will also extend to non-participating provinces. At this stage, we can only presume that this will be handled from the head-office in Toronto.

[75] *Id.*, s. 4.1. Those "major markets" refer to provinces in which at least 10% of the gross domestic product is composed of financial services: *Ibid.*, s. 2.1(k).

[76] To use the very apt analogy and analysis of Richard Simeon in *Federal-Provincial Diplomacy: the Making of Recent Policy in Canada* (Toronto: University of Toronto Press, 1972, new ed. 2006). Note that there are no specific rules regarding the accountability of the multilateral CoM: ministers presumably remain responsible before their respective assemblies, through their collective executive responsibility: Henri Brun, Guy Tremblay & Eugénie Brouillet, *Droit constitutionnel*, 6th ed. (Cowansville: Yvon Blais, 2014) at 383-89.

[77] See *Capital Markets Stability Act — Revised Draft for Consultation*, January 2016, online (pdf): *Cooperative Capital Markets Regulatory System*, online: <http://ccmr-ocrmc.ca/wp-content/uploads/cmsa-consultation-draft-revised-en.pdf> (accessed June 1, 2019), s. 2 and *Capital Markets Act: A Revised Consultation Draft*, August 2015, online (pdf): *Cooperative Capital Markets Regulatory System*, online: <http://ccmr-ocrmc.ca/wp-content/uploads/ CMA-Consultation-Draft-English-August-2015.pdf> (accessed June 1, 2019), s. 2. Up to now, it is unclear whether this is meant to be a federal statute or a provincial legislation, though it is likely to be federal. All other participants would have to delegate powers to the Tribunal, and likely incorporate its legislative creation by reference (on this, see Hogg, "*Constitutional Law of Canada*", s. 14.4). As of the House rising on June 20, 2019, no draft bill bearing that title had been filed in Parliament.

[78] *Capital Markets Stability Act — Revised Draft for Consultation*, January 2016, online (pdf): *Cooperative Capital Markets Regulatory System*, online: <http://ccmr-ocrmc.ca/wp-content/uploads/cmsa-consultation-draft-revised-en.pdf> (accessed June 1, 2019), s. 39.

[79] *Capital Markets Act: A Revised Consultation Draft*, August 2015, online (pdf): *Cooperative Capital Markets Regulatory System*, online: <http://ccmr-ocrmc.ca/wp-content/uploads/CMA-Consultation-Draft-English-August-2015.pdf> (accessed June 1, 2019), ss. 89 and 52.

French and in English, across Canada.[80] The Tribunal will share its jurisdiction with "regular courts", in a complex way that cannot be addressed within the scope of the present article, but which confirms the "dualist" nature of the Canadian courts and review system.[81]

These various components are intricately woven together: federal and provincial legislation refer to an agreement and to other legislation, the main agreement refers to sub-agreements, the system creates multiple and intersecting bodies, which are themselves further described in the main agreement which acts as pivot to the entire regime. Even identifying the "ingredients" of such a complex cooperative "machinery" is a challenge.[82] This detailed (and likely not exhaustive) enumeration illustrates how pragmatic "network normativity" stands in contrast to the pyramidal conception of law-making (and grounds of judicial and constitutional review) that is fundamental to formal public law.[83]

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[80] Section 5.2 *Memorandum of Agreement Regarding the Cooperative Capital Market Regulatory System*, signed between July 20 and August 4, 2016, online (pdf): *Cooperative Capital Markets Regulatory System*, online: <http://ccmr-ocrmc.ca/wp-content/uploads/moa-23092016-en.pdf> (accessed June 20, 2019), s. 9.4.

[81] Hence, *Capital Markets Act: A Revised Consultation Draft*, August 2015, online (pdf): *Cooperative Capital Markets Regulatory System*, online: <http://ccmr-ocrmc.ca/wp-content/uploads/CMA-Consultation-Draft-English-August-2015.pdf> (accessed June 1, 2019), s. 176, anticipates judicial review of the Authority's decisions. A previous version of the Federal Act excluded the jurisdiction of the Federal Court to review decisions by the Authority, see: *Capital Markets Stability Act — Draft for Consultation*, January 2016, at s. 99 (removed), online (pdf): *Cooperative Capital Markets Regulatory System*, online: <http://ccmr-ocrmc.ca/wp-content/uploads/cmsa-consultation-draft-blackline-en.pdf> (accessed June 1, 2019). The current version simply omits any reference to judicial review in the *Federal Courts Act*. Hence, the determination of which court will have jurisdiction to judicially review a decision taken by the Authority is likely to be rather complex. In principle, judicial review could always proceed before a provincial Superior Court (as court of plenary jurisdiction, *per* s. 96, *Constitution Act, 1867*). But *which* provincial Superior Court would have jurisdiction for a decision taken by a multilateral body remains unclear. On the labyrinthine search for a court in the context of complex cooperative regime, see Poirier, "Crossroads", at 425-62 (text accompanying notes 49-50); Poirier, "Source paradoxale", at 27 and accompanying note 117.

[82] Like the Supreme Court, the QCCA only refers to four of the 10 components identified here, *Québec Securities Reference* at para. 44.

[83] In each of the provincial, territorial and federal orders, the "pyramid" is topped by the Canadian Constitution, underneath which are located, in "descending order", parallel provincial/territorial constitutions and quasi-constitutional norms, legislation and finally, regulations, directives, *etc*. The validity of each norm depends on it being consistent with the instrument located at a higher echelon in the hierarchy. This conception is, of course, highly formalistic and has been challenged in the Canadian context, see Guénette, at 40-43. This said, while the "network" paradigm better describes the complexity of both the emergence of norms and their interrelation, the fact remains that their validity largely continues to be assessed on a hierarchical basis, as do other forms of parliamentary and judicial accountability to which norms are subjected to: Poirier, "Source paradoxale", at 30-32.

The system rather evokes a drawing by M.C. Escher in which ladders simultaneously move up and down.[84] The different ways of decoding these interconnections and of identifying which components have legal status and which do not partly explain divergent understanding of the overall constitutionality of the system.[85]

2. The Role of the Multilateral Council of Ministers in Altering Provincial Legislation

In this complex normative scheme, the multilateral regulatory Authority will be overseen by a CoM composed of the federal Minister of Finance and the ministers responsible for capital markets of each participating province and territory.

Pursuant to section 4.2 of the MOA, the Council will "notably" be responsible for "[…] proposing amendments to the Cooperative System Legislation",[86] that is the Federal Act, the MPA, and the Authority's "Charter documentation".[87] It is also responsible for "approving regulations" made by the Authority's Board of Directors.[88] While members of the intergovernmental CoM are likely to prefer acting by consensus, various voting mechanisms have been anticipated regarding modifications of different aspects of the regime. The one that particularly troubled the majority of the QCCA is set out by section 5.5 of the MOA which concerned modifications to the MPA:

> 5.5 Voting on a Proposal to Amend Provincial and Territorial Legislation
>
> A *proposal* to amend the Capital Markets Act [the model provincial act] must be *approved* by:

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[84] M.C. Escher, "Relativity", online: <https://www.mcescher.com/gallery/back-in-holland/relativity> (accessed 1 June, 2019). I am indebted to Nicolas Levrat for suggesting long, long ago, in my queries about the many paradoxes surrounding intergovernmental agreements, this very apt image.

[85] This, in my view, also explained the divergent conclusions in the 5-4 split of the Supreme Court in the *Québec (Attorney General) v. Canada (Attorney General)*, [2015] S.C.J. No. 14, [2015] 1 S.C.R. 693, 2015 SCC 14 (S.C.C.): Poirier, "Armes à feu", at 101-14.

[86] Section 5.2 *Memorandum of Agreement Regarding the Cooperative Capital Market Regulatory System*, signed between July 20 and August 4, 2016, online (pdf): *Cooperative Capital Markets Regulatory System*, online: <http://ccmr-ocrmc.ca/wp-content/uploads/moa-23092016-en.pdf> (accessed June 20, 2019), s. 4.2(c).

[87] *Id.*, ss. 2.1(e), 2.1(g) and 3(b). This "Charter documentation" (which should normally take the form of an enabling statute) has not been made public yet.

[88] *Id.*, s. 4.2(d).

> (a) at least *50 [percent] of all members* of the Council of Ministers; *and*
> *(b) the members of the Council of Ministers from each Major Capital Markets* Jurisdiction.[89]

This arrangement may be contrasted with section 5.6 of the MOA which provides that the federal minister of Finance "will *consult* with the other members of the Council of Ministers prior to any federal proposal to amend" the Federal Act.[90] It can also be contrasted with section 5.7, which stipulates that "a decision to approve" certain "fundamental" changes to the system "will require the unanimous approval" of the CoM during the first three years, and thereafter of two-thirds of its members (including Ottawa and the major markets).[91] It is noteworthy that in this context, the CoM is not called upon to vote on "proposals" to amend, but directly to approve the changes.

The voting mechanism outlined in section5.5, its concrete impact and legal significance received three distinct interpretations from the majority of the QCCA, the dissenting judge and the Supreme Court. For the majority of QCCA, the combined effect of sections 4.2 and 5.5 of the MOA is that:

> [a] participating province *may not amend* its own securities legislation without the consent of the Council of Ministers; such a province *is also required to implement amendments* dictated by the other members of the Council. Since the minister of Finance of Canada is also a member of the Council, we can even contemplate a scenario in which the deciding vote regarding the amendment of the provincial Uniform Act would belong to a member of the federal executive.[92]

In other words, for the majority, amendments to the MPA (and thus to the individual statutes modelled on it) actually requires the approval of half of the participating entities. The federal Minister of Finance is included in this tally. Any one of the provinces with "major markets" could block amendments to the MPA that all other participating entities think are warranted, in an area of exclusive provincial competence. Conversely, provinces with "small markets" may be forced to adopt an

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89 *Id.*, s. 5.5 (emphasis added).
90 *Id.*, s. 5.6 (emphasis added).
91 *Id.*, s. 5.7 (emphasis added).
92 *Québec Securities Reference* at para. 62 (emphasis added).

amendment to their own legislation, even if they disagree with them, to the extent that the required majority within the CoM (including all "major markets") is attained.

Considering the purpose of the scheme as a whole, the interaction between its various components and its overall practical effect, the majority of the QCCA concludes that:

> The admitted objective and uncontestable *effect* of the Regime are to allow the Council of Ministers to control the amendments to the Uniform Act, to impose such amendments on all participating provinces and to impede any amendment from occurring without its approval.[93]

The dissenting judge and the Supreme Court rejected this conclusion for reasons which deal both with the more formal aspects of procedural limitations to parliamentary sovereignty and with the determination of whether the voting scheme amounts to an abdication of legislative authority in favour of a multilateral intergovernmental body. These questions are examined in turn.

3. Is the Voting Scheme an Admissible Manner and Form Limitation?

We saw earlier that manner and form limitation must be expressed in clear terms, and must, *a priori*, emanate from the legislatures themselves.[94] Both criteria posed challenges in the *2018 Securities Reference*.

For the QCCA's majority, understood in a contextualised fashion, the overall scheme "delegates legislative powers to the Council of Ministers and imposes real limits on the parliamentary sovereignty of the participating provinces. […] The text of the MOA [in this regard] *could not be more clear*."[95]

The Supreme Court's opinion on this issue is rather laconic. Its rationale did not rest on any manner and form analysis,[96] because the

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[93] *Id.*, at para. 69.

[94] See Section II, subsection 5, Parliamentary Sovereignty: a Dualist "Sword" in the Cooperative Federalism Context.

[95] *Québec Securities Reference*, at para. 61 (emphasis added).

[96] Although it does state that "a legislature intending to bind itself to rules respecting the manner and form by which the statute is to be amended *must* do so in clear terms": *2018 Securities Reference*, at para. 51 (emphasis in the original) citing *Reference Re Canada Assistance Plan (B.C.)*, [1991] S.C.J. No. 60, [1991] 2 S.C.R. 525, at 561-64 S.C.R. (S.C.C.).

Court considered that the QCCA had actually misread the terms of the MOA. Read closely and with a textual approach, section 5.5 does not actually require the CoM to approve *amendments* to the MPA. It outlines a voting procedure to approve *proposals* to amend it. Given that the adoption of the MPA itself is explicitly "subject to legislative approval",[97] the Court concludes that the drafters understood that the amendments themselves were the prerogative of the various provincial legislatures.[98] In short, there are two avenues here. If the MOA is clear, it is in its recognition that legislatures "remain free to reject the proposed statutes (as amended) if they so choose."[99] And if it is not clear, then the first formal condition of "manner and form" requirements is not met.

But not only must admissible procedural limitations be very clear, it is generally understood that they need to be introduced through a statute, or at least an instrument having statutory value.

Schrager J.A.'s dissent draws the clearest conclusion from this tenet. He shared the majority's view that section 5.5. constituted "an abdication of parliamentary sovereignty"[100] of the participating provinces' legislatures. Had it been included in a statute, it would have gone "beyond allowable manner and form requirements".[101] There are limited references to the CoM in both the Federal Act and the MPA: both provide that the CoM is to be understood as it is defined in the MOA.[102] While both also refer to the role of the CoM in the adoption of *regulations*,[103]

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[97] Section 5.2 *Memorandum of Agreement Regarding the Cooperative Capital Market Regulatory System*, signed between July 20 and August 4, 2016, online (pdf): *Cooperative Capital Markets Regulatory System*, online: <http://ccmr-ocrmc.ca/wp-content/uploads/moa-23092016-en.pdf> (accessed June 20, 2019), s. 3(a)(ii). Note, however, that paragraph only relates to the initial MPA; it says nothing about future amendments.

[98] *2018 Securities Reference*, at para. 25.

[99] *Id.*, at para. 50.

[100] *Québec Securities Reference*, at para. 171.

[101] *Id.*, at para. 185.

[102] See *Capital Markets Stability Act — Revised Draft for Consultation*, January 2016, online (pdf): *Cooperative Capital Markets Regulatory System*, online: <http://ccmr-ocrmc.ca/wp-content/uploads/cmsa-consultation-draft-revised-en.pdf> (accessed June 1, 2019), s. 2; *Capital Markets Act: A Revised Consultation Draft*, August 2015, online (pdf): *Cooperative Capital Markets Regulatory System*, online: <http://ccmr-ocrmc.ca/wp-content/uploads/CMA-Consultation-Draft-English-August-2015.pdf> (accessed June 1, 2019), s. 2.

[103] See *Capital Markets Stability Act — Revised Draft for Consultation*, January 2016, online (pdf): *Cooperative Capital Markets Regulatory System*, online: <http://ccmr-ocrmc.ca/wp-content/uploads/cmsa-consultation-draft-revised-en.pdf> (accessed June 1, 2019), ss. 76-79; *Capital Markets Act: A Revised Consultation Draft*, August 2015, online (pdf): *Cooperative Capital Markets Regulatory System*, online: <http://ccmr-ocrmc.ca/wp-content/uploads/ CMA-Consultation-Draft-English-August-2015.pdf> (accessed June 1, 2019), ss. 206-207.

they are silent regarding its role in the legislative process. The latter is only directly addressed in the MOA. For the dissenting judge, these references are too oblique to constitute proper incorporation.

In contrast, the QCCA's majority examined the system as a whole, in a contextual manner, and considered that these legislative references were, by "necessary implication" a form of legislative incorporation of the CoM's decision-making process. It adds that "[i]t is this legislative incorporation that gives rise to judicial review in this case, and which allows us to put aside the theoretical question of whether an intergovernmental agreement is subject to judicial review".[104] In other words, the majority took the view that the MPA (*i.e.*, the future statutes that any given province would enact based on the MPA) incorporated by reference the MOA's manner and form provisions. It was then able to review those provisions and conclude that the content of section 5.5, once indirectly enacted, would be constitutionally invalid as it would amount to an abdication of provincial legislative power to an external entity, a multilateral executive body.

Considering the overall interlocked scheme, the QCCA majority concluded that:

> the mechanism for amending the Uniform Act set out under the Regime fetters the parliamentary sovereignty of the participating provinces and is consequently unconstitutional. It subjects the provinces' legislative jurisdiction to the approval of an external entity (the Council of Ministers), which is impermissible.[105]

To return to our earlier metaphor, in taking part in the scheme, for the QCCA's majority, provinces were relinquishing their "dualist sword" to a multilateral organ in a way that unconstitutionally limits their own legislative sovereignty.

In a sense, the Supreme Court did not fundamentally disagree with this analysis. A legislature may not abdicate its legislative power by subjecting it to the consent of an external body. However, for the highest court, section 5.5 of the MOA (and the entire scheme) does not — in clear terms — intend to limit provincial legislative authority through an instrument having statutory value.

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[104] *Québec Securities Reference*, at para. 75.

[105] *Id.*, at para. 55.

4. Abdicating Sovereignty by Contract?: A Formalist *vs.* a Contextualized Approach

The Supreme Court recognized that in practice, participating provinces would likely follow the CoM's decision regarding proposals to alter the MPA (and, in its wake, the various parallel provincial statutes that constitute the official legal norms).[106] This said, the Court adds that even if the MOA purported to impose amendments to the MPA unto provinces, or, in some cases, to prohibit such amendment, it could not — in law — actually have that effect. For the Supreme Court, the majority of the Court of Appeal's reasoning:

> rests on the flawed premise that the executive signatories are *actually capable* of binding the legislatures of their respective jurisdictions to implement any amendments dictated by the Council of Ministers, and of precluding those legislatures from amending their own securities laws without the approval of the Council of Ministers. In light of the principle of parliamentary sovereignty, this cannot in fact be the case […T]he principle of parliamentary sovereignty is precisely what preserves the provincial legislatures' right to enact, amend and repeal their securities legislation *independently* of the Council of Ministers' approval.[107]

In other words, political effects were found to be irrelevant by the Court since provincial legislatures formally retained full legal sovereignty to revolt against those effects, however unlikely such revolt might be. In strong contrast, the idea that the system must be considered constitutionally valid because, pursuant to parliamentary sovereignty, partners are free *not* to respect their undertakings, seemed incongruous for the majority of the QCCA in view of the combination of executive control of the legislature and the practical consequences of having abolished their own legislation and administrative apparatus to join the interwoven pan-Canadian scheme:

> It should not be presumed that the Council of Ministers will be ineffective with respect to the role it plays in regard to the Uniform Act, or that the governments of the participating provinces, including their legislatures, will not bend to the will of the Council of Ministers. On the contrary, it must be presumed that Participating Jurisdictions in the Regime will realize their intended purpose.[108]

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106 *Id.*, at para. 68 (emphasis added).
107 *2018 Securities Reference*, at paras. 61 and 67.
108 *Québec Securities Reference*, at paras. 69 and 70.

With respect to a presumption of effectiveness, the QCCA majority drew an analogy with the 2014 *Senate Reference* in which the Supreme Court held that consultative elections of senatorial candidates altered Canada's constitutional architecture, despite their lack of formally-binding character:

> […] It is true that, in theory, prime ministers could ignore the election results and rarely, or indeed never, recommend to the Governor General the winners of the consultative elections. However, the purpose of the bills is clear: to bring about a Senate with a popular mandate. We cannot assume that future prime ministers will defeat this purpose by ignoring the results of costly and hard-fought consultative elections. A legal analysis of the constitutional nature and effects of proposed legislation cannot be premised on the assumption that the legislation will fail to bring about the changes it seeks to achieve.[109]

The Supreme Court circumvents this aspect of the QCCA's reasons by not even referring to the *Senate Reference*. It rejects what it qualified as an assumption that the legislatures would follow their respective executive's lead and thus that the voting mechanisms would "have their intended effect":[110]

> […] the principle of parliamentary sovereignty is precisely the reason why we cannot rely on such an assumption. Any *de facto* control that the executive may be said to have over the legislature is irrelevant to our analysis.[111]

In other words, the actual workings of the Westminster-style parliamentary system, with a frequent (but not necessary) *in concreto* control of the chambers by the executive that holds a majority of seats is a political matter, not a legal one. What matters, for the Court, is one of the "sub-rules" of the maximalist conception of parliamentary sovereignty, pursuant to which assemblies are always *legally* supreme irrespective of intergovernmental commitments or executive dominance.[112]

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[109] *Reference Re Senate Reform*, [2014] S.C.J. No. 32, [2014] 1 S.C.R. 704, 2014 S.C.C. 32 (S.C.C.), at para. 62, cited with approval in *Québec Securities Reference*, at para. 42 (emphasis by the QCCA majority).

[110] *Québec Securities Reference*, at para. 70, cited in *2018 Securities Reference*, at para. 69.

[111] *2018 Securities Reference*, at para. 69.

[112] The Court also likely wanted to be consistent with its assertion in *2011 Securities Reference* that it was because provinces could always unilaterally withdraw from intergovernmental cooperative schemes, that the *General Motors* provincial incapacity test was met, and thus that the federal order had jurisdiction regarding the prevention of "systemic risk": at paras. 118-119.

The Court then insists that "even if the Memorandum actually purported to fetter this legislative power, it would be merely *ineffective* in this regard (since it cannot bind the legislature), and not *constitutionally invalid*".[113] At this stage, I would just like to underline that this "ineffective/unconstitutional" dichotomy should not be given broader scope than was intended (or is warranted). It should not become a postulate or a catchphrase. There is a risk that the Court's pronouncement could be understood to mean that any clause contained in an intergovernmental agreement may, at worst, be "without legal effect" rather than unconstitutional. The distinction — if it were to be retained — should really be limited to the strict manner and form context.

The dissenting judge of the QCCA rightly observed that while intergovernmental agreements may bind the executives who sign them,[114] they are not a source of "law" of general application, unless they are correctly incorporated into — or by — statute.[115] He went one step further, however, and would have excluded all intergovernmental agreements from the scope of norms which may be held to violate the Constitution.[116] In his view, intergovernmental agreements are not "law" within the meaning of section 52 of the *Constitution Act*, *1982*.[117] Consequently, courts should simply refuse to assess their constitutionality.[118] This assimilation between law of general application in the context of agreements and the term "law" in section 52 of the *Constitution Act 1982* is questionable. An agreement does not have the

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[113] *Id.*, at para. 67 (emphasis in the original).

[114] For example: *Northrop Grumman Overseas Services Corp. v. Canada (Attorney General)*, [2009] S.C.J. No. 50, [2009] 3 S.C.R. 309, 2009 S.C.C. 50, at para. 11 (S.C.C.), cited in *Québec Securities Reference*, at para. 180.

[115] Notably *Reference re Anti-Inflation Act*, [1976] S.C.J. No. 12, [1976] 2 S.C.R. 373, at 433 (S.C.C.); *Manitoba Government Employees Association v. Government of Manitoba*, [1977] S.C.J. No. 108, [1978] 1 S.C.R. 1123, 79 D.L.R. (3d) 1 (S.C.C.), both cited in *Québec Securities Reference*, at para. 173. In reality, proper incorporation is what shifts the "contractual" dimension of an intergovernmental agreement (binding *inter partes*) to its becoming a source of law (*erga omnes*). It is frequent, however, for agreements that are not incorporated by statutes to nevertheless be applied to third parties "as if they were laws": Poirier, "Source paradoxale".

[116] As the MOA and its content were not law, Shraeger opined that the Court should either rewrite the question or decline to answer it: *Québec Securities Reference*, at paras. 187 and 193.

[117] This is so, he adds at para. 173 and accompanying note, even if the Supreme Court has ruled that the term "law" in s. 52 of the *Constitution Act, 1982* is not limited to "statutes, regulations and the common law" as Dickson J. suggested, *obiter*, in *Operation Dismantle v. The Queen*, [1985] S.C.J. No. 22, [1985] 1 S.C.R. 441, at para. 39 (S.C.C.) [hereinafter "*Operation Dismantle*"].

[118] *Québec Securities Reference*, at para. 174.

force of the law of general application without a *statute*.[119] A number of legal sources other than statutes have been held to come under the purview of section 52.[120]

Immunising intergovernmental agreements from constitutional review or concluding that if they run counter to constitutional norms they are simply "ineffective" but not unconstitutional could have serious implications, notably for third parties. One need only think of intergovernmental agreements which directly or indirectly affect Charter rights (deliberately or by inadvertence) or which circumvent other parts of the written constitution (or even legislative norms). There have been cases in the past where language rights have been significantly affected by intergovernmental agreements.[121] Imagine clauses in an agreement that might violate Charter rights (an agreement on funding a social program that is alleged to violate equality or section 7 rights for instance).[122] Surely, courts should not be prevented from scrutinizing these instruments. A blanket immunization of the latter from judicial review could allow unconstitutional practices to simply go unexamined by courts.[123]

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[119] *Reference re Anti-Inflation Act*, [1976] S.C.J. No. 12, [1976] 2 S.C.R. 373, at 433 (S.C.C.), discussed in Poirier, "Source paradoxale", at 19-20 and Poirier, "Crossroads", 425-62, at 442-43.

[120] For example, it includes collective agreements concluded by public authorities as well as decisions taken pursuant to the royal prerogative, see: *Lavigne v. Ontario Public Service Employees Union*, [1991] S.C.J. No. 52, [1991] 2 S.C.R. 211 (S.C.C.) and *Operation Dismantle v. The Queen*, [1985] S.C.J. No. 22, [1985] 1 S.C.R. 441 (S.C.C.). See also Noura Karazivan, "Cooperative Federalism v. Parliamentary Sovereignty: Revisiting the Role of Courts, Parliaments and Governments" in Alain G. Gagnon & Johanne Poirier, eds., *Canadian Federalism and its Future: Actors and Institutions* (Montreal: McGill-Queen's University Press, forthcoming 2020), at 29-30 of the manuscript.

[121] *Société des Acadiens et Acadiennes du Nouveau-Brunswick Inc. v. Canada*, [2008] S.C.J. No. 15, [2008] 1 S.C.R. 383, 2008 SCC 15 (S.C.C.); *Canada (Commissioner of Official Languages) v. Canada (Department of Justice)*, [2001] F.C.J. No. 431, 194 F.T.R. 181, 2001 FCT 239 (F.C.). See Johanne Poirier, "Fédéralisme coopératif et droits linguistiques au Canada: peut-on 'contractualiser' le droit des minorités ?" in Alain-G. Gagnon & Pierre Noreau, eds., *Constitutionnalisme, droits et diversité: Mélanges en l'honneur de José Woehrling* (Montréal: Thémis, 2017) 317. In some cases, the fact that minorities are not part of the "contract" concluded between executives leaves them without a remedy if governmental parties modify programs and funding that affect them and which were structured through intergovernmental agreements: see *Fédération des francophones de la Colombie-Britannique v. Canada (Employment and Social Development)*, [2018] F.C.J. No. 534, [2019] 1 F.C.R. 243 (F.C.) (leave to appeal to F.C.A. granted).

[122] See, for instance, *Pineview Poultry Products Ltd. v. Canada*, [1994] F.C.J. No. 78, [1994] 2 F.C. 475 (F.C.).

[123] Currently, the Supreme Court is confronted with a bilateral agreement between British Columbia and the federal order through which they respectively accept to submit to taxation from each other in terms that seem to contradict s. 125 of the *Constitution Act, 1982*. The question — raised by a third party — was whether the agreement actually applied to it. This is a case of "properly incorporated" agreement (and of the status of Crown corporations). But fundamentally, it

5. The Dualist Sword Doubles Up as a Shield for Para-Constitutional Creativity

The prefix "para" has two distinct etymological origins. In Latin, "*para*" or "*paro*" means "against" or "counter" (as in "*para*sol") while in Greek "*pará*" signifies "on the side", "on the margin" (as in "*para*llel").[124] Both are relevant in the present context. Para-constitutional engineering may allow both the development of policies and governance structures that run alongside the official one, in the "non-legal" world of politics (Greek *pará*). Or this institutional creativity may actually give rise to arrangements that contradict constitutional norms (Latin *para*).

It is a banal truism that the Canadian Constitution, at least in its institutional dimensions, is outdated, and that modifying it by following proper amendment procedures is so arduous as to become illusory. The 2014 Senate reform and *Supreme Court Act* references have emphasized the importance of the formal amending formula for the constitutional order and the stability of the federation. They "outlawed" legislative attempts (by definition, unilateral) to modify fundamental federal institutions.[125] This, paradoxically, has led the federal order to adopt informal means regarding the selection process in both the Senate[126] and the Supreme Court,[127] and more recently, to the conclusion of an

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also raises the question of the intrinsic validity of such an executive agreement: see *British Columbia Investment Management Corporation*, [2018] B.C.J. No. 190, 2018 BCCA 47 (B.C.C.A.). The case was heard by the Supreme Court on May 13, 2019.

[124] See Anne-Emmanuelle Bourgaux, "La Belgique, État failli ou fédération… para-fédérale? Le comité de concertation comme illustration des jeux du droit" in Johanne Poirier & Nicolas Levrat, eds., *Le fédéralisme coopératif comme terrain de jeu du droit, Special Issue*, *(2018) 18 Fédéralisme et Régionalisme,* online: <https://popups.uliege.be/1374-3864/index.php?id=1768#tocto1n1>; Munungu & Poirier, at 920-21 and 928-31.

[125] Catherine Mathieu & Patrick Taillon, "Aux frontières de la modification constitutionnelle: le caractère para-constitutionnel de la réforme du Sénat canadien" (2013) 5 R.Q.D.C. 7; Kate Glover, "Hard Amendment Cases in Canada", in Richard Albert, Xenophon Contiades & Alkmene Fotiadu, eds., *The Foundations and Traditions of Constitutional Amendment* (Oxford: Hart Publishing, 2017), 285-91.

[126] An advisory Board was set up to recommend candidates. While instituted by an order in council, it is an "informal" process: Senate of Canada, *First Report on the Senate Nomination Advisory Board* (December 2016); The Advisory Committee was instituted by an order-in-council: *Mandate of the Independent Advisory Board for Senate Appointments and terms and conditions of appointment of members*, Order in Council PC 2016-0011, January 19, 2016, online (html): <https://orders-in-council.canada.ca/attachment.php?attach=31695&lang=en>.

[127] An Advisory Committee was also set up to recommend candidates. While also instituted by order-in-council (*Mandate of the Independent Advisory Board for Supreme Court of Canada Advisory Board*, Order in Council PC 2016-0693, July 29, 2016, online (html): <https://orders-in-

intergovernmental agreement between Ottawa and Québec about the selection process for Québec judges on the Court.[128]

In short, "hard" constitutional orthodoxy has led to "soft" para-constitutional engineering. The point here is not to canvass all the means through which actors engage in "para-constitutional" ingenuity (or to criticize the result of this institutional dexterity). In various guises, this happens in other political regimes, particularly federal ones, where "negotiated" norms are intuitively more frequent.[129] Nor is it to survey in detail different means through which agreements may contribute to this phenomenon in Canada.[130] The objective is to reflect on how the *2018 Securities Reference* uses parliamentary sovereignty to protect at least some of these collaborative innovations.

Section 2.2. of the MOA provides that:

> In entering into this MOA and participating in the Cooperative System, each of the Participating Jurisdictions is addressing matters within its constitutional jurisdiction and is neither surrendering nor impairing any of its jurisdiction, with respect to which it remains sovereign.

For the Supreme Court, this section indicated that the intention of the parties was "to establish a unified and cooperative system for the regulation of capital markets in Canada *in a manner that accords with the constitutional division of powers*".[131] While this may be their intention, the inclusion of such a clause in an intergovernmental agreement has no bearing on an eventual ruling on the division of

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council.canada.ca/attachment.php?attach=32437&lang=en>), the qualification criteria (notably the controversial "Functional bilingualism" requirement) were all established informally: see https://pm.gc.ca/en/news/backgrounders/2016/08/04/mandate-letter-members-independent-advisory-board-supreme-court).

[128] *Arrangement concerning the appointment process to fill the seat that will be left vacant on the Supreme Court of Canada following the departure of Justice Clément Gascon*, March 15 2019, online (pdf): <https://pm.gc.ca/en/news/backgrounders/2019/05/15/arrangement-concerning-appointment-process-fill-seat-will-be-left> (accessed June 25, 2019).

[129] On the "para-constitutional" function of intergovernmental relations in federal systems, see Poirier & Saunders, "Conclusions", at 490-94. On the myriads of ways of altering constitutional orders: see Xenophon Contiades & Alkmene Fotiadou, "Models of constitutional change" in Xenophon Contiades, ed., *Engineering Constitutional Change: A Comparative Perspective on Europe, Canada and the USA* (Abingdon: Routledge, 2013) 438; Arthur Benz & César Colino, "Constitutional Change in Federations — A Framework for Analysis" (2011) 21 *Regional & Federal Studies* 381.

[130] See Johanne Poirier & Jesse Hartery, "Modifier la constitution par la bande — et par contrat: la fonction para-constitutionnelle des ententes intergouvernementales", forthcoming in Patrick Taillon & Marc Verdussen, eds., *La modification constitutionnelle dans tous ses états — Expériences belge, canadienne et européenne* (Brussels: Bruylant, 2020).

[131] *2018 Securities Reference*, at para. 22.

powers: "Legislative jurisdiction cannot be assumed or be given by consent."[132] Nor can federal partners decide, between themselves, whether what they are doing is consistent with the division of powers, or their "sovereignty" in particular. This is truly the domain of courts. This type of clause is not unusual in intergovernmental agreements and may actually indicate that parties are conscious that what they are doing is constitutionally, if not dubious, at least "creative".

We saw earlier that "cooperative federalism" has hardly touched the "maximalist" conception of parliamentary sovereignty in the Supreme Court's jurisprudence. In the *CAP Reference* and in the *Long-Gun registry decision*, parliamentary sovereignty was used as a "sword" which reinstated the full autonomy of federal partners, who could act in a unilateral fashion. The fall-out of uncooperative action was held to be of a political nature, not one for courts to take into consideration. In the *2018 Securities Reference*, the Supreme Court turned its maximalist conception of parliamentary sovereignty — this mighty weapon of dualist federalism — into a "shield" to protect cooperative arrangements.[133]

Clearly, the "pan-Canadian" securities regulation scheme was ably drafted. Astutely, parties did not incorporate the voting scheme into the respective legal orders of the various participants. At this stage, we are left with a complex scheme which transforms the constitutional landscape in relation to capital markets, which will only be without "legal" effect if the parties choose to call it into question. Some "rich" provinces will influence the legislative action of other provinces, with Ottawa as an actor in the plot. This might very well be a positive outcome from a policy perspective. And a realistic solution, given the huge resource discrepancies between provinces. But it is problematic from a constitutional perspective.

The message sent by the *2018 Securities Reference* is that cooperative arrangements which may temper with formal constitutional norms or architecture should be outlined in a non-incorporated intergovernmental agreement, rather than in legislation. Such agreements are not subject to three readings, parliamentary committee review, simultaneous drafting

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[132] *Nova Scotia*, *per* Fauteux J., at 58; see also Taschereau J., at 39-40.

[133] This was also the reasoning of the B.C. Court of Appeal in response to the argument that the Nisga'a Final Agreement was introducing a third order of government through a treaty implemented through parallel legislation. This, it was argued by opponents of the agreement, amounted to an abdication of power by both the province and the federal order: *House of Sga'snism v. Canada (Attorney General)*, [2013] B.C.J. No. 179, 2013 BCCA 49 (B.C.C.A.).

into both French and English (in the case of federal and several provincial cases) or publication. In addition, any problematic content might — at worse — be found to be "without effect" in law, while being undoubtedly highly effective in practice.[134] This is an invitation to — *de facto* — do indirectly what cannot be done directly: use an intergovernmental agreement (rather than legislation) and remain vague in the legislation that is part of the "normative network". The concrete result will be the same.

In sum, the *2018 Securities Reference* is an invitation for the legislative — and mostly executive — branches to engage in para-constitutional engineering behind the screen of parliamentary sovereignty.

IV. Conclusion

The Canadian federal structure remains fundamentally dualist, even as, over time, the practice of federalism has given way to a multitude of intergovernmental arrangements. This evolution is supported by a strong judicial trend which has put very few restraints on the way federal partners structure their relations, including through executive inter-delegation, legislation by reference, the creation of agencies, or the adoption of intergovernmental agreements. More recently, "cooperative federalism" has also been mobilized by courts to revisit — not in a systematic way — interpretive doctrines of the division of powers to encourage legislative overlap in order to facilitate coordinated, executive-level policy-making in the country.

There is no denying that the judicial endorsement of cooperative federalism has contributed to the incremental — and often implicit — transformation of the dominant conception of federalism. A structurally dualistic federal system has, in a gradual and *ad hoc* manner, become a partially pan-Canadian administrative regime. Yet, while the Supreme Court has encouraged cooperation, it has resisted imposing on federal partners any duty to cooperate or to act in good faith in their intergovernmental dealings. It hails cooperation but does not castigate non-cooperation. Whatever collaborative scheme is elaborated by the executive branch of the different orders of government — sometimes with the input of their respective legislatures — the Court has

[134] And, for some, even be entirely immunized from judicial and constitutional review, as we saw above.

conceptualized parliamentary sovereignty as always allowing legislatures to unilaterally put an end to the arrangement or legislate in contradiction with it.

Parliamentary sovereignty as a "sword" is not as bad as it sounds. It is an important instrument of representative democracy. Beyond a certain number of constitutional limits, elected assemblies may legislate in a way that reflects the electorate's presumed preferences. Moreover, it clearly protects the autonomy of federal partners, their capacity to adopt their "own" (*auto*) "laws" ("*nomos*") without interference from other orders. As such, it is not antithetical to federalism. But it is clearly an instrument of dualist federalism.

The *2018 Securities Reference* offered another opportunity to revisit the interplay between parliamentary sovereignty and federalism. The Court relied on its "maximalist" conception of parliamentary sovereignty to salvage part of a cooperative arrangement that — paradoxically — seemed to fetter the sovereignty of participating provinces. Individual legislatures may always autonomously legislate in a fashion that contradicts commitments made by the executive branches, even when "legislating oneself out" has become highly impracticable and improbable as a result of those commitments. In ruling that the potential *de jure* use of the "sword" allows for constitutional tolerance of *de facto* limitations in legislative autonomy, the Court crafted a "shield" for interlocking pan-Canadian schemes. Such a result was accomplished without reference to a caveat raised by the majority in the *Long-Gun Registry Decision* that such a maximalist conception of parliamentary sovereignty might not apply in the case of a "truly interlocking federal-provincial legislative framework".[135] Yet it would be difficult to find a more closely interwoven partnership than the regime which gave rise to the *2018 Securities Reference*.

Is parliamentary sovereignty as a (shield) such a bad thing? The Court's approach partakes of a long-standing judicial trend that minimizes constitutional impediments to cooperative arrangements in the formally dualist federation. To the extent that some members of the federation agree to coordinate the exercise of their respective competences, why should others resist? And mostly, why should courts object?

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[135] *Québec (Attorney General) v. Canada (Attorney General)*, [2015] S.C.J. No. 14, [2015] 1 S.C.R. 693, 2015 SCC 14 at para. 4 (S.C.C.). The four-judge minority had considered the arrangement relating to the Long-Gun Registry to constitute such an integrated partnership.

The Supreme Court has suggested that efficiency may somewhat compensate for more traditional modes of administrative accountability and transparency.[136] Writing about the *2018 Securities Reference*, Paul Daly salutes the fact that, at least by validating this type of scheme, the Court may encourage political actors to publicize their agreements, thus limiting their opacity.[137] This may be so. There are indisputable advantages to collaborative action between federal partners. In this context, we can understand — and even support — judicial tolerance to schemes which informally alter the dualist federal architecture.

Additionally, from a political perspective, Alain-G. Gagnon argues — somewhat counter-intuitively — that "executive federalism" may actually promote democracy since it grants a voice to the diversity of polities that make up a federation, particularly a pluri-national one.[138] This argument is compelling. But again, it does not detract from the fact that the executive-heavy dimensions of cooperative federalism have the effect of reinforcing the executive branches. Should executives acting together escape various forms of oversight to which they are — constitutionally and legitimately — subject in their respective, autonomous, orders?

Indeed, without denying the reality and advantages of a very dense practice of intergovernmental relations and institutions or the undeniable advantages of coordinated action, protecting cooperation at all costs (while not condemning non-cooperation) does raise a number of concerns.

First, it contributes to the phenomenon of para-constitutional engineering in place of open constitutional reform. One of the messages of the *2018 Securities Reference* is essentially that federal partners may reshape the federation as they see fit, on the margins of amendment procedures. This may not be so negative given the difficulty of proceeding with formal constitutional reforms. We may, however, query whether enabling the executives to act jointly but "informally", through

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[136] *British Columbia (Milk Board) v. Grisnich,* [1995] S.C.J. No. 35, [1995] 2 S.C.R. 895 at para. 30 (S.C.C.), at para. 30.

[137] Paul Daly, "Parliamentary Sovereignty and Intergovernmental Agreements: Reference re Pan-Canadian Securities Regulation, 2018 SCC 48", Nov. 13, 2018; available at: *Administrative Law Matters*: www.administrativelawmatters.com/blog/2018/11/13/parliamentary-sovereignty-and-intergovernmental-agreements-reference-re-pan%E2%80%91canadian-securities-regulation-2018-scc-48.

[138] A.-G. Gagnon, "Executive Federalism and the Exercise of Democracy" in *The Case for Multinational Federalism: Beyond the All-Encompassing Nation* (London: Routledge, 2010) at 67-87.

"contract-like" instruments, does not contribute to the self-fulfilling dogma that constitutional reforms are, for the most part, elusive.

Second, the cooperative scheme at issue in the *2018 Securities Reference* encouraged the elaboration of asymmetrical arrangements, which, again, deviate from the formal equality between provinces. As such, asymmetry can be rather healthy in a diverse federation, particularly a pluri-national one. Generally, in Canadian practice, asymmetrical solutions have been developed in a "vertical" and "bilateral" fashion: Ottawa adapting programs, funding, *etc*., to the particular situation of distinct provinces. This time, some provinces agree to have other ones — those with "major capital markets" — to have a dominant voice in the way provincial jurisdiction over securities will be managed. This may be simple *realpolitik*, given huge disparities in capacity between provinces. But it is cause for reflection if such power-based asymmetry is to inspire other complex intergovernmental machinery.[139]

Third, complex intergovernmental schemes, which derogate from the formal dualist architecture, raise accountability issues. The securities regime is no different. This may be an inevitable consequence of cooperation. The price to pay for coordinated action. Parliamentary scrutiny is designed in a parallel, dualist mode. It is ill-adapted to joint executive decision-making.[140] Ministerial responsibility is not designed

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[139] Provinces with "major markets" play a decisive role in the decision-making process (see Part II.1 The Pan-Canadian Securities Scheme: A Complex Normative Network and Part II.2 The Role of the Multilateral Council of Ministers in Altering Provincial Legislation). The same goes for their participation in governance. Hence, the "Implementation team" is composed of a federal representative, as well as one from each of the "major markets": Section 5.2 *Memorandum of Agreement Regarding the Cooperative Capital Market Regulatory System*, signed between July 20 and August 4, 2016, online (pdf): *Cooperative Capital Markets Regulatory System*, online: <http://ccmr-ocrmc.ca/wp-content/uploads/moa-23092016-en.pdf> (accessed June 20, 2019), s. 10.2. The same goes for the institution of "deputy regulators" which only some participating provinces will have a chance to have: *id.*, s. 9.2(b). While this may well be efficient, it does reinforce the idea (and practice) that some are more equal than others.

[140] Peter Hogg, who acted as counsel in *Reference re Agricultural Products Marketing Association*, [1978] S.C.J. No. 58, [1978] 2 S.C.R. 1198 (S.C.C.), candidly attests that in that case — and many arrangements elaborated since — it is impossible to trace "the lines of responsibility" for the decisions taken by the cooperative organ: Hogg, "*Constitutional Law of Canada*", s. 14.4(b). On the challenges that intergovernmental relations pose to accountability, see Donald V. Smiley, "An Outsider's Observations of Federal-Provincial Relations Among Consenting Adults" in Richard Simeon, ed., *Confrontation and Collaboration: Intergovernmental Relations in Canada Today* (Toronto: Institute of Public Administration of Canada, 1979), at 105-106; Richard Simeon & Amy Nugent, "Parliamentary Canada and Intergovernmental Canada: Exploring the Tensions" in Herman Bakvis & Grace Skogstad, eds., *Canadian Federalism: Performance, Effectiveness and Legitimacy*, 3d ed. (Don Mills: Oxford University Press, 2012) 59; Gordon DiGiacomo, "The Democratic

for interlocked executive decision-making.[141] Access-to-Information legislation and budgetary controls by Auditors-General, for example, are all designed along dualist modes and are ill-suited to labyrinthine, multilateral arrangements. Similarly, complex jurisdictional issues arise regarding the judicial review of joint administrative action or decision by intergovernmental agencies.[142] There is — quite simply — a clash between intertwined practice and formal institutions on the democratic accountability front. There can be "collateral damage" when institutions which constrain and control executive action — so central to the modern rule of law in the "administrative state" — are not adapted to the "intergovernmental administrative state".

In sum, the complex, polycentric, fluid and fundamentally political character of intergovernmental relations likely explains "benevolent constitutional scrutiny".[143] A "robust federation" does require a strong judicial branch, but this is not the only important safeguard.[144]

Content of Intergovernmental Agreements in Canada" (Regina: Saskatchewan Institute of Public Policy, Public Policy Paper No. 38, 2005); Poirier & Saunders, "Conclusions", at 483-84.

[141] In some cases, delegating legislation will clarify lines of ministerial responsibilities (the question of whether this can be altered by law remains open). The "delegating" minister retains ministerial responsibility for actions taken in the context of administrative delegation: *Ricken Leroux inc. v. Québec (ministère du Revenu)*, [1997] J.Q. no 2953, [1997] R.D.F.Q. 77, at para. 69 (Que. C.A.). The situation is less clear when it is a "Council of ministers" that make joint decisions. Is every minister to be responsible in his or her own jurisdiction for collective decision-making?

[142] In theory, all could be submitted to provincial Superior Courts, which have plenary jurisdiction. But third parties affected by what may seem to be a federal decision may wish to turn to the Federal Court, be it only to have one ruling applicable across the country: this jurisdictional tug-of-war has given rise to mind-boggling jurisprudence. See Hence, *Capital Markets Act: A Revised Consultation Draft*, August 2015, online (pdf): *Cooperative Capital Markets Regulatory System*, online <http://ccmr-ocrmc.ca/wp-content/uploads/CMA-Consultation-Draft-English-August-2015.pdf> (accessed June 1, 2019), s. 176, anticipates judicial review of the Authority's decisions. A previous version of the Federal Act excluded the jurisdiction of the Federal Court to review decisions by the Authority, see: *Capital Markets Stability Act — Draft for Consultation*, January 2016, at s. 99 (removed), online (pdf): *Cooperative Capital Markets Regulatory System*, online: <http://ccmr-ocrmc.ca/wp-content/uploads/cmsa-consultation-draft-blackline-en.pdf> (accessed June 1, 2019); Poirier, "Crossroads", 425-62 (text accompanying notes 49-50); Poirier, "Source paradoxale", at 27 and accompanying note 117.

[143] Jean-François Gaudreault-DesBiens, "The 'Principle of Federalism' and the Legacy of the Patriation and Québec Veto References" (2017) 54 S.C.L.R. 77, at 96-97.

[144] Jenna Bednar, *The Robust Federation: Principles of Design* (New York: Cambridge University Press, 2009); Wade K. Wright, "The Political Safeguards of Canadian Federalism: The Intergovernmental Safeguards" (2014) 36 N.J.C.L. 1; Jean-François Gaudreault-DesBiens, "The Role of Apex Courts in Federal Systems: Beyond the Law/Politics Dichotomy" (2017) 1 *JusPoliticum* 171.

In this context, "shielding" intergovernmental arrangements from "constitutional attacks" may be warranted. However, such a deference bulwark should be kept within bounds. It should not, for instance, lead to the immunization of intergovernmental agreements from constitutional review. Not because parties to the agreements may not be able to defend themselves in the political arena, but because of their impact on third parties, notably citizens, and on the overall federal architecture.