Most Negative Treatment: Application/Notice of Appeal
Most Recent Application/Notice of Appeal: Québec (Procureure générale) c. Canada (Procureure générale) | 2017 CarswellQue 4876 | (S.C.C., Jun 9, 2017)

2017 QCCA 756
Quebec Court of Appeal

Québec (Procureure générale) c. Canada (Procureure générale)

2017 CarswellQue 3488, 2017 CarswellQue 4199, 2017 QCCA 756, 281 A.C.W.S. (3d) 433, EYB 2017-279399

In the Matter of the Reference of the Gouvernment of quebec in vertue of Order in Council 642-2015 concerning the constitutionality of the implementation of pan-Canadian Securities Regularion Attorney General of Quebec, Appellant v. Attorney General of Canada, Respondent and Attorney General of British Columbia, Attorney General of Manitoba, Intervenors

Bouchard J.C.A., Duval Hesler Juge en chef du Québec, Savard J.C.A., Schrager J.C.A., Mainville J.C.A.

Heard: November 8, 2016 - November 10, 2016
Judgment: May 10, 2017
Docket: C.A. Qué. Montréal 500-09-025430-158

Counsel: *Mtre Francis Demers, Mtre Sébastien Grammond*, for the appellant
Mtre Alexander Pless, Mtre Michelle Kellam, Mtre Sara Gauthier Campbell, for the respondent
Mtre Nathaniel Carnegie, Mtre Audrey Boctor, for the intervenor, Attorney General of British Columbia
Mtre Michael Conner, Mtre Denis G. Guénette, for the intervenor, Attorney General of Manitoba

Subject: Constitutional; Securities

***Duval Hesler Juge en chef du Québec; Bouchard J.C.A.; Savard J.C.A.; Schrager J.C.A.; Mainville J.C.A.*:**
[UNOFFICIAL ENGLISH TRANSLATION]

1 Under Order in Council No. 642-2015, the Government of Quebec has referred two questions to this Court.

2 The first question is as follows:

> Does the Constitution of Canada authorize the implementation of pan-Canadian securities regulation under the authority of a single regulator, according to the model established by the most recent publication of the "Memorandum of Agreement regarding the Cooperative Capital Markets Regulatory System"?

3 For the joint reasons of the Chief Justice and of Justices Bouchard, Savard and Mainville, the Court answers the first question in the following manner:

> **NO**, the Constitution of Canada does not authorize it under that model.

4 The second question is as follows:

> Does the most recent version of the draft of the federal "Capital Markets Stability Act" exceed the authority of the Parliament of Canada over the general branch of the trade and commerce power under subsection 91(2) of the *Constitution Act, 1867*?

5 For the joint reasons of the Chief Justice and of Justices Bouchard, Savard and Mainville, the Court answers the second question in the following manner:

> **NO**, the most recent version of the draft of the federal act entitled *Capital Markets Stability Act* is not beyond the jurisdiction of the Parliament of Canada under subsection 91(2) of the *Constitution Act, 1867*, except with respect to its sections 76 to 79 concerning the role and powers of the Council of Ministers which, if not removed, render the act unconstitutional as a whole.

6 For the reasons he sets out, Justice Schrager declines to answer the first question and answers *NO* to the second question.

6 NICOLE DUVAL HESLER, C.J.Q.

***Duval Hesler Juge en chef du Québec; Bouchard J.C.A.; Savard, J.C.A.; Mainville, J.C.A.*:**

7 On July 15, 2015, by Order in Council No. 642-2015, adopted in accordance with s. 1 of the *Court of Appeal Reference Act*,[1] the government of Quebec referred two questions to this Court, one regarding the constitutional validity of a proposal to institute a new regulatory regime for Canadian capital markets, and the other regarding a proposed federal law entitled the *Capital Markets Stability Act*.

8 According to a memorandum of agreement signed by the federal government, five provinces and one territory ("*the MOA*"), a new regulatory regime for capital markets would be put in place, including a Capital Markets Regulatory Authority ("*the CMRA*"), a uniform act adopted by each participating province and territory ("*the Uniform Act*") and a federal act regarding the stability of capital markets ("*the Federal Act*"). Throughout these reasons, we refer to this arrangement as "*the Regime*".

9 At the head of the Regime sits a *Council of Ministers*, composed of the ministers charged with regulating capital markets in the participating provinces and territory as well as the Minister of Finance of Canada. This Council of Ministers would supervise the CMRA, a national regulatory authority charged with administrating the Regime as a whole.

10 The Uniform Act addresses all aspects of the general regulation of capital markets. The participating provinces and territory have undertaken to adopt this Act and to delegate its administration to the CMRA. A voting mechanism within the Council of Ministers is provided for all amendments to this Act, for the adoption of regulations, and for any fundamental changes to the Regime.

11 The Federal Act provides for the collection of data on a national scale, the management of systemic risks related to capital markets, and criminal offences. The administration of the Federal Act is delegated to the CMRA. The Council of Ministers also plays a decisive role in the Federal Act and is responsible for, amongst other things, approving any regulations adopted pursuant to the Federal Act.

12 The first question in this Reference concerns the constitutionality of the proposed Regime as a whole. The Attorney General of Quebec submits that the novel structure which would be put in place by the Regime undermines basic principles of Canadian federalism through the abandonment of provincial parliamentary sovereignty with respect to a head of jurisdiction attributed to the provinces by the *Constitution Act, 1867*. The Attorney General of Quebec is also of the opinion

that the Regime amounts to a disguised constitutional amendment.

13 The first question is drafted as follows:

> Does the Constitution of Canada authorize the implementation of pan-Canadian securities regulation under the authority of a single regulator, according to the model established by the most recent publication of the "Memorandum of Agreement regarding the Cooperative Capital Markets Regulatory System?

14 The Attorney General of Quebec further submits that the Federal Act, taken alone, is beyond the jurisdiction of the Canadian Parliament. This submission is the subject of the second question raised before this Court, which reads as follows:

> Does the most recent version of the draft of the "federal Capital Markets Stability Act" exceed the authority of the Parliament of Canada over the general branch of the trade and commerce power under subsection 91(2) of the *Constitution Act, 1867*?

PRELIMINARY EXCEPTION

15 The Attorney General of British Columbia challenges the jurisdiction of the Court to hear the first of the two reference questions. This question would hold no real interest for the government of Quebec because the MOA binds only the federal government and the participating provinces. Since the government of Quebec is not a signatory to the MOA, the Attorney General of British Columbia characterizes as speculative the concerns of the Attorney General of Quebec regarding the impact of the Regime on non-participating provinces.

16 As a subsidiary argument, the Attorney General of British Columbia invites the Court to exercise its discretion not to answer the first question, given that the Uniform Act, the Federal Act and their regulations are neither finalized nor formally adopted. The Attorney General of British Columbia submits, therefore, that any judicial ruling on the first question would amount to judicial interference in an ongoing political process.

The "Real Interest" Test

17 It bears noting that the Regime includes a Federal Act of national application. It also establishes a Council of Ministers which would wield considerable powers under this law of national scope. Moreover, the Attorney General of Quebec submits that the Regime as a whole amounts to a disguised constitutional amendment. The national impact of the proposed Regime is therefore quite clear, and its constitutional ramifications significant. In these circumstances, the real interest of the Attorney General of Quebec seems obvious to us.

18 With respect to the Uniform Act, which is an integral component of the Regime, we note that in *Hunt v. T&N plc*[2] the Supreme Court of Canada held that the courts of British Columbia had jurisdiction to rule on the constitutionality of a law of another province, in that case a law adopted by Quebec's National Assembly. There, Justice La Forest underlined that a court may rule on the constitutionality of a law of another province where the law is otherwise unlikely to be contested.[3] This is clearly the case here.

19 Furthermore, the position taken by the Attorney General of British Columbia is paradoxical, to say the least. The submission that the government of Quebec does not have sufficient interest in the question because it is not a signatory to the MOA leads ineluctably to the conclusion that in order to challenge the constitutionality of the Regime, Quebec would first have to join in. Yet, s. 11 of the MOA invites the governments of non-participating provinces, including Quebec, to join the Regime. In this context, it is entirely appropriate for the government of Quebec to seek the opinion of this Court in order to determine the constitutional validity of a regime to which it has been invited to participate. For this reason alone, the arguments of the Attorney General of British Columbia regarding the absence of a "real interest" cannot be maintained.

Discretion to refuse to hear a reference

20 The jurisdiction of the Court over this Reference flows from s. 1 of the *Court of Appeal Reference Act*:

> **1.** The Government may refer to the Court of Appeal, for hearing and consideration, any question which it deems expedient, and thereupon the court shall hear and consider the same.
>
> **1.** Le gouvernement peut soumettre à la Cour d'appel, pour audition et examen, toutes questions quelconques qu'il juge à propos, et, sur ce, la cour les entend et les examine.

21 Despite the compulsory wording of this provision, the Court has the discretion not to answer such questions.[4] The Court must refuse to hear a reference question that is purely political in nature,[5] and may refuse to answer a question where doing so would serve no useful purpose.[6] The Court may also refuse to answer a question where the parties have not provided sufficient information to allow a complete or accurate answer.[7] This case, however, does not fall into these exceptions.

22 The Attorney General of British Columbia's primary submission is that the Regime is still embryonic, and it would be premature for this Court to rule on the first question of the Reference. But, it is by no means unusual for a government to seek a judicial opinion, through a reference, on the validity of a bill which is not necessarily finalized and has not yet been adopted by Parliament or a provincial legislature. In this case, the Regime, as a whole, has been presented in concrete and precise terms. The MOA clearly sets out the principal components of the Regime as well as its objectives. Moreover, the Uniform Act and the Federal Act have both reached an advanced stage of development. The Regime as a whole and the two laws which are its essential components have clearly reached a stage that allows us to consider the questions submitted in this Reference.

23 Consequently, the preliminary exception raised by the Attorney General of British Columbia is dismissed.

BACKGROUND

The current regime

24 This Reference does not take place in a vacuum.

25 The power of the Canadian provinces to regulate securities within their respective borders, as a matter of property and civil rights has long been recognized and is beyond dispute.[8]

26 Federal jurisdiction over securities thus remains subsidiary. As the Supreme Court noted in *Reference re Securities Act*[9] (the "*2011 Reference*"), pursuant to Parliament's authority to promulgate laws relating to criminal law, banks, bankruptcy, and telecommunications, as well as peace, order and good government, federal jurisdiction may extend to aspects of securities regulation which promote the integrity and stability of the Canadian financial system. Canada may also regulate certain aspects of securities pursuant to its general trade and commerce power, notably with respect to preventing systemic risks in order to promote the stability and integrity of Canada's financial markets and to accomplish nationwide data collection.[10]

27 It is necessary, however, to keep in mind "the essentially provincial nature of securities regulation".[11]

28 Each of the Canadian provinces and the three territories have their own securities legislation.[12] In Quebec, for example, the *Securities Act*,[13] along with other provincial laws such as the *Civil Code of Quebec*, forms a complete regulatory code for securities within the province. These provincial regulatory regimes are governed by individual provincial authorities such as, in Quebec, the Autorité des Marchés Financiers, established by *An Act Respecting the Autorité des Marchés Financiers*.[14]

29 Moreover, for several decades, provincial securities regulators have joined together to pursue regulatory

harmonization. Since 2004, all of the provincial regulatory authorities (with the exception of Ontario), have signed the Provincial/Territorial Memorandum of Understanding Regarding Securities Regulation, adopting the so-called "passport system" which creates a single window of access for securities issuers. Under this system, decisions emanating from the issuer's provincial regulatory authority, the "principal regulator" for that issuer, are automatically applicable to other participating regulatory authorities.[15]

30 As for Ontario, that province participates along with the others in the "Mutual Reliance Review System" established in 1999. That system allows provincial authorities to rely upon the analyses and inquiries undertaken by another authority with respect to a market participant. What distinguishes the 1999 regime from the passport system is that the acknowledgement of findings by one authority is not automatic.

31 Although the current system has not enjoyed universal approval, it is nevertheless the result of multiple reforms proposed and undertaken over the years within a framework of efficient interprovincial cooperation.

Proposed changes to the current system

32 Since the 1930s,[16] various actors have argued, without success, for the implementation of a national system of securities regulation. A useful historical overview of these proposals can be found in the reference cases of 2011.[17]

33 The MOA at hand seems to take inspiration from the proposals of the Porter Commission of 1964,[18] the Ontario Securities Commission proposal of 1967,[19] the study undertaken by the Comité d'étude sur les institutions financières du Québec of 1969,[20] and the proposal of the Atlantic provinces of 1994,[21] each of which envisioned the creation of a federal regulatory body to which the provinces would delegate their regulatory powers.

34 It is distinct from the proposals of the federal Department of Consumer and Corporate Affairs of 1979,[22] the Wise Persons' Committee of 2003[23] and the Crawford Panel of 2006,[24] which would have instead proposed comprehensive federal regulation.

The proposed Canadian Securities Act of 2009

35 In 2009, the Hockin Group published a report that would inspire the federal *Securities Act* considered in the *2011 Reference* ("*the 2009 Securities Act*"). This federal proposal was, amongst other things, a federal response to the global financial crisis that occurred between 2007 and 2010.

36 In the context of this Reference, the Attorney General of Canada filed four expert reports which address the nature and consequences of this crisis. For our purposes, it is sufficient to underline the following common observations:

> (1) the crisis caused significant downturns in the world economy engendering losses as serious as they are well-known;
>
> (2) the causes of the crisis in Canada and in the United States were similar but not identical; in Canada it was related to a crisis of confidence in the asset-backed commercial paper market; in the United States, the crisis was set off by defaults on subprime mortgages;
>
> (3) the regulatory system in place in Canada at the time of the crisis allowed for rapid mitigation of its impacts, such as, for example, the Ontario ban on short-selling adopted by the other provincial regulatory authorities the same day it was announced; and
>
> (4) after the crisis, many governments and international organizations recognized the importance of putting into place mechanisms for macroprudential surveillance and the prevention of systemic risks.

37 In this context, the stated purpose of the 2009 *Securities Act* was the creation of a single Canadian securities regulator with a mandate to protect investors, foster fair, efficient and competitive capital markets, and contribute to the integrity and stability of Canada's financial system (s. 9).

38 This act would have created a council of ministers charged with facilitating consultations and the exchange of information regarding its application (ss. 11-13), as well as a Canadian Securities Regulatory Authority (ss. 14-63). This new body would have applied a single act regulating the industry across the nation, in order to foster the integrity and stability of Canadian capital markets on a national scale.

39 To this end, the 2009 *Securities Act* provided:

- A means of designating "recognized entities" (self-regulatory organizations, exchanges, oversight organizations, etc.) (ss. 64-72) and "designated entities" (credit rating organizations, compensation funds, dispute resolution services, etc.) (ss. 73-75);
- A registration regime for individuals acting as dealers, advisors or investment fund managers (ss. 76-79);
- Rules relating to the filing of prospectuses (ss. 80-88) and disclosure (ss. 93-108);
- Various obligations relating to "market conduct" (ss. 109-130); and
- Provisions related to secondary markets (ss. 194-219) and derivatives (ss. 89-92).

40 The 2009 *Securities Act* also proposed a comprehensive scheme for administering and enforcing the act, including reviews, inquiries and orders, in addition to civil (ss. 169-219) and penal sanctions (ss. 158-167).

41 The proposed 2009 *Securities Act* gave rise to three references: one before this Court,[25] another before the Alberta Court of Appeal[26] and the *2011 Reference* before the Supreme Court of Canada. All three courts concluded that the 2009 *Securities Act* was unconstitutional.

42 In the *2011 Reference*, a unanimous Supreme Court of Canada saw in the 2009 *Securities Act* "a comprehensive foray by Parliament into the realm of securities regulation"[27] seeking "comprehensive national securities regulation".[28] According to the Supreme Court of Canada, the presence of systemic risks did not justify the "complete takeover" of what was always considered an area of provincial jurisdiction.

43 The Supreme Court of Canada did recognize, however, that systemic risks are an emerging reality capable of transcending provincial boundaries and poorly suited to local legislation.[29] Thus, it opened the door to national control measures by Parliament aimed at preventing and counteracting these risks.[30]

Overview of the proposed Regime

44 The MOA at hand was signed by the governments of British Columbia, Ontario, Saskatchewan, New Brunswick, Prince Edward Island, the Yukon and Canada ("*the Participating Jurisdictions*"). It provides for the implementation of a regulatory regime comprised of the following primary components:

The *Capital Markets Act* ("the Uniform Act"):[31] a law of provincial and territorial application addressing all questions related to the regulation of capital markets. Each participating province and territory undertakes to enact this Uniform Act and to delegate its administration to the CMRA. This act covers virtually all of the content of the 2009 *Securities Act*.

The *Capital Markets Stability Act* ("the Federal Act"):[32] a federal law of national application addressing questions of data collection, systemic risk and criminal law. This act includes several provisions from the 2009 *Securities Act*. The administration of the Federal Act is delegated to the CMRA.

The Capital Markets Regulatory Authority ("CMRA"): a national regulatory body charged with administering the two acts. The CMRA would include a board of directors and a regulatory division. A new tribunal would also be created. The CMRA's enabling legislation, the *Capital Markets Regulatory Authority Act*, has yet to be published.

The Council of Ministers: a council composed of the ministers responsible for capital markets regulation in each Participating Jurisdiction, including the Minister of Finance of Canada. The Council of Ministers will supervise the CMRA and approve any regulations made pursuant to the Uniform Act or the Federal Act. Any amendment to the Uniform Act and any fundamental change to the Regime is also subject to the approval of the Council of Ministers. The voting mechanisms of the Council of Ministers are set out in the MOA and vary depending on the nature of the decision it must take.

ANALYSIS OF THE FIRST QUESTION

45 We begin by stating again the first Reference question:

> Does the Constitution of Canada authorize the implementation of pan-Canadian securities regulation under the authority of a single regulator, according to the model established by the most recent publication of the "Memorandum of Agreement regarding the Cooperative Capital Markets Regulatory System"?

Submissions of the parties

The Attorney General of Quebec

46 The Attorney General of Quebec submits that the Court should answer this question in the negative. Three primary arguments are raised for this purpose.

47 First, the Regime provided for in the MOA does not respect the constitutional limits for a valid delegation between federal and provincial authorities. In this respect, the Attorney General of Quebec advances that several conditions are essential to conclude that a delegation is valid, namely: (1) that the two orders of government, acting alone, are incapable of instituting the proposed regulatory framework, (2) that existing provincial laws and bodies be preserved, and (3) that the power of the provinces to amend their own laws be unrestrained.

48 The Attorney General of Quebec further asserts that the proposed Regime amounts to a disguised constitutional amendment. In the Attorney General of Quebec's opinion, the MOA constitutes a massive transfer of provincial jurisdiction to a federal body without respecting the amending formula provided for in the Constitution. Even if this transfer concerns only certain provinces, it will nevertheless have important impacts on all the non-participating provinces.

49 Finally, the Attorney General of Quebec submits that the Regime unconstitutionally restricts the parliamentary sovereignty of the participating provinces.

The Attorney General of Canada

50 The Attorney General of Canada submits that the MOA is merely a political agreement. As such, the decision-making structure of the Council of Ministers with respect to amendments to the Uniform Act does not impact the constitutionality of the Regime since the provinces would not be formally deprived of their jurisdiction to legislate with respect to securities. Moreover, the MOA and the voting mechanisms it contains would not be subject to judicial review.

51 The Attorney General of Canada adds that the delegation of regulatory powers to the CMRA is permissible, as the delegation is not legislative but administrative.

The Attorney General of British Columbia

52 The Attorney General of British Columbia supports the position taken by the Attorney General of Canada and adds that the decision-making role of the Council of Ministers with respect to amendments to the Uniform Act is no more than a "manner and form" requirement, and is valid as such.

The Attorney General of Manitoba

53 The Attorney General of Manitoba made no submissions with respect to the first question.

Overview

54 In our opinion, the Regime is unconstitutional in several respects.

55 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 province's legislative jurisdiction to the approval of an external entity (the Council of Ministers), which is impermissible.

56 Moreover, the Council of Ministers' voting mechanisms with respect to the adoption of regulations pursuant to the Federal Act undermines the validity of that Act by permitting certain provinces to exercise what amounts to a veto over federal initiatives that seek to guard against systemic risks related to capital markets which would have material adverse effects on the Canadian economy as a whole.

The Regime fetters the parliamentary sovereignty of the participating provinces

57 Since *Attorney General of Nova Scotia v. Attorney General of Canada*,[33] it has been well-established that a direct transfer of legislative power from one level of government to the other is unconstitutional. This decision of the Supreme Court of Canada dealt with a bill that proposed (1) a delegation of provincial jurisdiction over employment to the federal government and (2) a delegation of federal jurisdiction over indirect taxation to the province.[34]

58 Justice Kerwin succinctly set out the reasoning of the Court:[35]

> The *British North America Act* divides legislative jurisdiction between the Parliament of Canada and the Legislatures of the Provinces and there is no way in which these bodies may agree to a different division.
>
> [Emphasis added]

59 The constitutional principle of parliamentary sovereignty holds that federal and provincial legislators must be free to legislate as they please, such as to adopt new laws, amend existing laws or to repeal such laws.[36] The principle of parliamentary sovereignty is closely linked to that of democracy.

60 In the *Reference re Secession of Quebec*, the Supreme Court of Canada specified, moreover, that the Constitution as a whole, including the division of powers, binds all governments:[37]

> The Constitution binds all governments, both federal and provincial, including the executive branch (*Operation Dismantle Inc. v. The Queen*, [1985] 1 S.C.R. 441, at p. 455). They may not transgress its provisions: indeed, their sole

claim to exercise lawful authority rests in the powers allocated to them under the Constitution, and can come from no other source.

61 The proposed Regime delegates legislative powers to the Council of Ministers and imposes real limits on the parliamentary sovereignty of the participating provinces. It subjects an amendment to the Uniform Act to the consent of a majority of the members of the Council of Ministers, as well as that of the members from each major capital markets jurisdiction as defined in the MOA, currently Ontario and British Columbia. In fact, no amendment to the Uniform Act can be undertaken without the approval of the Council of Ministers and every participating province must adopt amendments to the Act that are approved by the Council of Ministers. The text of the MOA could not be more clear :

4.2 **Responsibilities of the Council of Ministers**

The Council of Ministers will be responsible for :

[. . .]

c) proposing amendments to the Cooperative System Legislation;

[. . .]

5.5 **Voting on a Proposal to amend Provincial and Territorial Legislation**

A proposal to amend the Capital Markets Act must be approved by:

a) at least 50 per cent of all members of the Council of Ministers; and

b) the members of the Council of Ministers from each Major Capital Markets Jurisdiction.

4.2 Responsabilités du Conseil des ministres

Le Conseil des ministres sera responsable de ce qui suit :

[. . .]

c) proposer des modifications à la législation sur le régime coopératif;

[. . .]

5.5 Vote à propos d'une proposition visant à modifier la législation provinciale et territoriale

Une proposition visant à modifier la loi sur les marchés des capitaux doit être approuvée par :

a) au moins 50 % des membres du Conseil des ministres;

b) les membres du Conseil des ministres de chaque partie ayant de grands marchés de capitaux.

62 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.

63 Section 5.7 of the MOA is even more revealing. After three years, any fundamental change to the Regime can only be accomplished with the agreement of two thirds of the members of the Council of Ministers, plus that of the ministers from each major capital markets jurisdiction, and the Minister of Finance of Canada - a formula that closely resembles the amending formula provided for in section 38 of the *Constitution Act, 1982*:[38]

> **5.7 Fundamental Changes**
>
> A decision to approve any of the following matters during the three-year period after the date on which the CMRA commences operations will require the unanimous approval of the Council of Ministers. Thereafter, a decision to approve any of the following matters will require the approval by (A) at least two-thirds of all members of the Council of Ministers; (B) the members of the Council of Ministers from each Major Capital Markets Jurisdiction; and (C) the Minister of Finance of Canada :
>
> a) an amendment to this MOA and any subsequent agreements relating hereto;
>
> b) the accession by any provincial or territorial jurisdiction to this MOA or the Cooperative System;
>
> c) a fundamental change to the governance or operational structure of the CMRA; and
>
> d) any relocation of geographic-specific elements and functions addressed in this MOA.
>
> **5.7 Modifications fondamentales**
>
> Toute décision d'approuver l'une des mesures suivantes au cours de la période de trois ans suivant la date à laquelle l'ARMC commence ses activités devra être approuvée à l'unanimité par le Conseil des ministres. Par la suite, la décision d'approuver l'une de ces mesures devra être approuvée par (A) au moins les deux tiers des membres du Conseil des ministres ainsi que (B) par les membres du Conseil des ministres de chaque partie ayant de grands marchés de capitaux et (C) par le ministre des Finances du canada :
>
> a) une modification au présent PA et toute entente subséquente relative à celui-ci;
>
> b) l'adhésion d'une partie au présent PA ou au régime coopératif;
>
> c) une modification fondamentale à la structure de gouvernance ou opérationnelle de l'ARMC;
>
> d) toute relocalisation d'éléments ou de fonctions liés à un lieu géographique précis mentionné dans le présent PA.

64 One of the foundational pillars of British constitutional law, itself reflected in the Canadian constitution, is the principle that ministerial powers (that is to say, the powers of the executive branch of government) must be compatible with the legislation in force and the common law. The corollary of that principle is that the executive branch of government cannot prescribe, impede or alter legislation that is in force. A classic statement of that principle was given by Lord Parker of Waddington in *The Zamora*:[39]

> The idea that the King in Council, or indeed any branch of the Executive, has power to prescribe or alter the law to be administered by Courts of law in this country is out of harmony with the principles of our Constitution. It is true that,

> under a number of modern statutes, various branches of the Executive have power to make rules having the force of statutes, but all such rules derive their validity from the statute which creates the power, and not from the executive body by which they are made. No one would contend that the prerogative involves any power to prescribe or alter the law administered in Courts of Common Law or Equity.

65 The proposed Regime aims to put aside this fundamental principle by empowering the Council of Ministers to dictate amendments to the Uniform Act to reluctant participating provinces.

66 The Attorneys General of Canada and of British Columbia recognize that these are fundamental components of the Regime but, fully aware of the constitutional difficulties posed by the Council of Ministers and the voting mechanisms in the Regime, they affirm that these are mere political undertakings. Consequently, the courts have no authority to review the MOA and the provincial legislatures would, in theory, be free to adopt contrary legislation.

67 This argument does not withstand scrutiny.

68 The position advanced by the Attorneys General of Canada and British Columbia would open the door to a new form of administrative federalism under which the division of powers provided for in the Constitution could be modified and manipulated at will by the executive branch of the federal government, working in concert with one or more provincial executive branches, and without the possibility of judicial review by Canadian courts. This contravenes basic constitutional principles, including the rule of law. In the long term, it could lead to the dislocation of the delicate constitutional balance upon which Canada was founded and upon which it has thrived to date.

69 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. Through the MOA, the executive branch of each participating province undertakes to carry out the decisions made by the Council of Ministers respecting the Uniform Act. In light of the basic realities of Canada's constitutional architecture - which require that the executive branch have *de facto* control over the legislature - the constraints outlined in the MOA are, in fact, restraints on the legislatures of the participating provinces. As the Supreme Court noted in the *Reference re Canada Assistance Plan (B.C.)*, "a restraint on the Executive in the introduction of legislation is a fetter on the sovereignty of Parliament itself."[40]

70 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. In the *Reference re Senate Reform*, the Supreme Court of Canada held that consultative elections in order to name senators was unconstitutional, even though the Prime Minister could opt to ignore the voice of the electorate and name senators of his own choosing. To this end, the Supreme Court of Canada wrote:[41]

> [62] The Attorney General of Canada counters that this broad structural change would not occur because the Prime Minister would retain the ability to ignore the results of the consultative elections and to name whomever he or she wishes to the Senate. We cannot accept this argument. Bills C-20 and C-7 are designed to result in the appointment to the Senate of nominees selected by the population of the provinces and territories. Bill C-7 is the more explicit of the two bills, as it provides that the Prime Minister "must" consider the names on the lists of elected candidates. 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.
>
> [Emphasis added; internal citations omitted]

71 This observation is relevant here, since any amendment to the Uniform Act made without respecting the Council of Ministers' voting mechanism would go against the objectives and internal logic of the Regime. In fact, *legislative uniformity is the principal foundational purpose of the Regime*.

72 Moreover, there is nothing permissive in the articulation of the voting mechanism: a proposal to amend the Uniform Act *must* be approved by 50% of the members of the Council and by the members representing the major capital markets jurisdictions. The same is true of any fundamental changes to the Regime.

73 The Regime is indeed an indivisible whole. The role of the Council of Ministers and its internal voting mechanisms cannot be disembodied from the Regime, but rather constitute its essential and inseparable components.

74 Since s. 2 of the Uniform Act defines the Council of Ministers as "the Council of Ministers established in accordance with the Memorandum of Agreement", which MOA is also identified and defined in the Act, it requires no stretch of the imagination to conclude that the legislative assemblies which adopt it will be perfectly aware of the content of the MOA, including both the voting mechanisms and the preponderant role of the Council of Ministers with respect to amending the Uniform Act. The Federal Act contains identical definitions and the same inference can be drawn there.

75 The necessary implication is thus a legislative incorporation by reference of the decision-making process of the Council of Ministers and of the voting mechanisms set out in s. 5 of the MOA, in both the Uniform Act and the Federal Act. It 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.

76 Finally, the fact that a participating jurisdiction may withdraw from the Regime upon six months' notice, pursuant to s. 13 of the MOA, does not render constitutional the legislative delegation to the Council of Ministers. To this end, we note that in *Attorney General of Nova Scotia v. Attorney General of Canada*,[42] the proposed legislative delegation there contemplated could be withdrawn at any time through an order in council.[43] This did not impede the Supreme Court of Canada from declaring that delegation unconstitutional, even if either of the participating governments could have withdrawn at will at any time.

77 The submission made by the Attorney General of British Columbia holding that the role of the Council of Ministers with respect to legislative amendments is nothing but a requirement of "manner and form" must also be dismissed.

78 The Attorney General of British Columbia erroneously relies upon the *Reference re Canada Assistance Plan (B.C.)*. In that case, the federal government had entered into agreements with each provincial government to share the cost of their expenditures on social assistance and welfare. When it was adopted, the federal law that enabled the federal government to conclude these agreements provided for the amendment of any *agreement* subject to the mutual consent of the federal government and the province in question.[44] However, no mechanism was articulated with respect to amending the federal law itself. This an important distinction with the Regime under review here, which grants the Council of Ministers a determinant role in modifying the essential components of the Regime *and* the Uniform Act itself.

79 Relevant jurisprudence must therefore be considered.

80 In *West Lakes Limited v. South Australia*,[45] an Australian decision that has been favourably received in Canada,[46] the court was asked to consider an agreement between the state in question and a developer which contained a provision capable of being interpreted as giving the developer a veto over any amendment to the legislation that ratified the agreement. In rejecting this interpretation, the Australian court also concluded that requiring the prior consent of a third party prior to a legislative amendment was not a simply procedural requirement, but rather a renunciation of legislative power:[47]

> A provision requiring the consent to legislation of a certain kind, of an entity not forming part of the legislative structure (including in that structure the people whom the members of the legislature represent), does not, to my mind, prescribe a manner or form of lawmaking, but rather amounts to a renunciation *pro tanto* of the lawmaking power. Such a provision relates to the substance of the lawmaking power, not the manner and form of its exercise. The point becomes clearer if one considers hypothetical (albeit extreme) examples such as provisions that legislation of a certain character might not be enacted without the consent of the governing body of a political party, or of an organization of employers or

employees, or of an officer of the armed forces, or of any other individual, office holder, or body which does not form part of the representative legislative structure.

[Emphasis added]

81 The parties to this Reference have not shared with us any decision that would allow us to conclude that a procedural requirement involving the consent of a group which is not a part of the legislature prior to amending legislation would be constitutional. Thus, we also dismiss the arguments of the Attorney General of British Columbia with respect to "manner and form".

The voting mechanisms of the Council of Ministers with respect to regulations adopted pursuant to the Federal Act undermine the constitutional validity of that Act

82 The constitutional difficulties are not limited to amendments to the Uniform Act. They also extend to the Federal Act when considered with the proposed Regime taken as a whole.

83 Indeed, the Federal Act creates a legislative framework allowing the CMRA to use regulatory channels to combat systemic risks related to capital markets. The CMRA regulations are the key proposed federal intervention mechanism to mitigate threats to the stability of the Canadian financial system that flow from or spread through capital markets and which have potential material adverse effects on the Canadian economy.

84 Sections 19 to 23 of the Federal Act are thus at the heart of this legislation and are the very essence of the federal intervention in capital markets :

19. The regulations may, in order to address a systemic risk related to capital markets, prescribe requirements, prohibitions and restrictions respecting systemically important benchmarks (. . .)

19. Pour parer à un risque systémique lié aux marchés des capitaux, les règlements peuvent prévoir des exigences, interdictions et restrictions concernant les indices de référence d'importance systémique [. . .]

20. (1) The regulations may prescribe a class of securities or derivatives to be systemically important if, in the Authority's opinion, the trading in, the holding of positions in or the direct or indirect dealing with securities or derivatives within the class could pose a systemic risk related to capital markets.

(. . .)

20. (1) Les règlements peuvent désigner toute catégorie de valeurs mobilières ou d'instruments dérivés comme étant d'importance systémique si l'Autorité estime que le fait d'effectuer des opérations ou de détenir des positions sur des valeurs mobilières ou des instruments dérivés appartenant à la catégorie ou encore, même indirectement, d'en utiliser pourrait poser un risque systémique lié aux marchés des capitaux.

[. . .]

21. The regulations may, in order to address a systemic risk related to capital markets, prescribe requirements, prohibitions and restrictions respecting systemically important securities and derivatives (. . .)

21. Pour parer à un risque systémique lié aux marchés des capitaux, les règlements peuvent prévoir des exigences, interdictions et restrictions concernant les valeurs mobilières et les instruments dérivés d'importance systémique [. . .]

22. (1) The regulations may prescribe a practice to be systemically risky if, in the Authority's opinion, the practice could

pose a systemic risk related to capital markets.

(. . .)

22. (1) Les règlements peuvent désigner une pratique comme comportant des risques systémiques si l'Autorité estime que la pratique pourrait poser un risque systémique lié aux marchés des capitaux.

[. . .]

23. The regulations may, in order to address a systemic risk related to capital markets, prescribe requirements, prohibitions and restrictions respecting practices that are prescribed to be systemically risky (. . .)

23. Pour parer à un risque systémique lié aux marchés des capitaux, les règlements peuvent prévoir des exigences, interdictions et restrictions concernant les pratiques désignées comme comportant des risques systémiques [. . .]

85 Thus, it is the powers of the CMRA to adopt regulations pursuant to ss. 19 to 23 of the Federal Act that must be scrutinized, from a constitutional perspective, to determine if they meet the criteria that allow for federal intervention under the general trade and commerce branch of s. 91(2) of the *Constitution Act, 1867*.

86 The combined effect of sections 76 to 79 of the Federal Act and of section 5.2 of the MOA is to subject to the approval of the Council of Ministers all regulations made by the CMRA pursuant to the Federal Act. Section 5.2 of the MOA provides as follows:

5.2 Voting on a Regulation made by the Board of Directors

(a) A regulation made by the Board of Directors subsequent to the Initial Regulations will be put before the Council of Ministers before it comes into force, Unless the Council of Ministers has asked that the Board of Directors reconsider the regulation or the Council of Ministers has decided to reject the regulation within a specified period, the regulation will be considered to have been approved by the Council of Ministers.

(b) The Council of Ministers must request that the Board of Directors reconsider a regulation before the Council of Ministers makes a decision to reject the regulation.

(c) A request by the Council of Ministers to the Board of Directors to reconsider a regulation must be approved by:

(i) at least 50 per cent of all members of the Council of Ministers; and

(ii) any one of the members of the Council of Ministers from the Major Capital Markets Jurisdictions and from Canada taken together.

(d) A decision to reject a regulation that has been reconsidered by the Board of Directors at the request of the Council of Ministers and once again put before the Council of Ministers before it comes into force must be approved by:

(i) at least 50 per cent of all members of the Council of Ministers; and

(ii) a majority of the members of the Council of Ministers from the Major Capital Markets Jurisdictions and from Canada taken together.

5.2 Vote à propos d'un règlement pris par le conseil d'administration

a) Un règlement pris par le conseil d'administration une fois les règlements initiaux pris sera soumis au Conseil des

ministres avant d'entrer en vigueur. À moins que le Conseil des ministres ne demande au conseil d'administration de réexaminer le règlement ou que le Conseil des ministres ne décide de le refuser dans un délai précisé, le règlement sera réputé avoir été approuvé par le Conseil des ministres.

86

b) Le Conseil des ministres doit demander au conseil d'administration de réexaminer un règlement avant de rejeter ce dernier.

c) Une telle demande de réexamen doit être approuvée par :

86

86

(i) au moins 50 % des membres du Conseil des ministres;

(ii) l'une ou l'autre des ministres représentant les parties ayant de grands marchés de capitaux ou représentant le Canada.

86

d) La décision de rejeter un règlement que le conseil d'administration a réexaminé à la demande du Conseil des ministres et présenté à nouveau devant ce dernier avant son entrée en vigueur doit être approuvée par :

86

86

(i) au moins 50% des membres du Conseil des Ministres;

(ii) la majorité des membres du Conseil des ministres représentant les parties ayant de grands marchés de capitaux ou représentant le Canada.

86

87 This means that a majority of ministers responsible for regulating capital markets in the participating provinces, or a majority of ministers representing major capital markets jurisdictions (currently Ontario and British Columbia) can effectively veto a federal regulation.

88 As a result, the regulations made pursuant to sections 19 to 23 of the Federal Act to counter systemic risks to Canadian capital markets will be subject to the veto of certain participating provinces. This calls into question the constitutional validity of the Federal Act.

89 Indeed, federal jurisdiction over securities pursuant to the general trade and commerce branch is closely linked to the fourth and fifth indicia of the *General Motors* test,[48] that is to say the constitutional incapacity of the provinces to work together to enact a pan-Canadian regime to address systemic risks in capital markets, and the impact of failing to include one or more provinces in the pan-Canadian regime protecting against these risks.

90 In granting veto rights over federal regulation of systemic risks, veto rights which can be exercised by participating provinces, the Regime compromises the very purpose of the Federal Act and, thus, the constitutional foundations upon which rests federal jurisdiction over systemic risks of a national scale. By granting veto rights to certain participating provinces with respect to federal regulations, the Regime effectively negates the very necessity of pan-Canadian federal legislation to counter systemic risks on a national scale.

91 As the Supreme Court of Canada has specified, the following indicia must be considered in order to invoke federal jurisdiction under the general trade and commerce branch:[49] (1) whether the impugned law is part of a general regulatory scheme; (2) whether the scheme is under the oversight of a regulatory agency; (3) whether the legislation is concerned with trade as a whole rather than with a particular industry; (4) whether it is of such a nature that provinces, acting alone or in concert, would be constitutionally incapable of enacting it; and (5) whether the legislative scheme is such that the failure to include one or more provinces or localities in the scheme would jeopardize its successful operation in other parts of the country.

92 Federal jurisdiction over the general trade and commerce branch thus rests upon the idea that federal intervention is required where one or more provinces would be incapable of adopting a system that would allow the question to be addressed on a national scale and where the failure to include one province would jeopardize the successful operation of the system in other parts of the country. Consequently, federal intervention is justified where national issues cannot be resolved because of the exercise of a provincial veto or the failure of a province to participate.

93 For example, regulations regarding competition satisfies these indicia because competition is not a question of purely local interest, but rather one of "crucial importance for the national economy."[50] If Parliament was unable to legislate to this end, there would, in fact, be a gap in the division of legislative powers.[51]

94 In other words, the circumstances must be such that a constitutional gap would arise from the incapacity of Parliament to legislate in a given area.[52] Federal legislation is thus constitutional under the general trade and commerce branch only if its purposes and effects concern questions of truly national scope and importance.

95 This constitutional foundation for federal jurisdiction under the general trade and commerce branch is absolutely incompatible with the idea of a provincial veto. Indeed, to ground its constitutional jurisdiction, Canada must demonstrate that its legislative intervention "read as a whole, addresses concerns that transcend local, provincial interests."[53] In other words, if a federal intervention is required to resolve an issue related to trade and commerce, how can this intervention also be subject to the veto of one or more provinces? Such a veto would negate the very purpose of a federal intervention.

96 As the Supreme Court noted in the *2011 Reference*,[54] the maintenance of capital markets that feed the Canadian economy and ensure the financial stability of the country is a question that goes well beyond a single industry and engages trade as a whole under the general trade and commerce power as defined by the *General Motors* test. A federal law that would aim to establish minimal requirements applicable throughout the nation so as to ensure the stability and integrity of Canada's financial markets could certainly concern trade as a whole. But still, Canada must establish that such a law, taken as a whole, relates to matters that transcend interests of a purely local and provincial nature. How can this be the case where one or more provinces can veto a federal intervention? Can such a federal law then be viewed as transcending interests of a "purely local or provincial nature"? Of course not.

97 Yet this is precisely what the Federal Act proposes to do.

98 For example, subsection 20(1) of the Federal Act allows the CMRA to adopt regulations in order to designate a category of securities or derivatives as being of systemic importance if it is of the view that the trading or the holding of positions within the class could pose a systemic risk related to capital markets, that is to say could threaten the stability of the Canadian financial system and potentially have material adverse effects on the Canadian economy.

99 However, such a regulation is subject to the approval of the Council of Ministers. A majority of the members of the Council, or a majority of the members representing the major capital markets jurisdictions, can reject such a regulation. Thus, certain provinces could exercise a veto right with respect to pan-Canadian federal interventions aimed at countering a threat

to the stability of the Canadian financial system potentially having material adverse effects on the Canadian economy as a whole. Such veto rights obviously do not transcend interests of a purely local or provincial nature.

100 We note, moreover, that (with the exception of the Minister of Finance of Canada), the members of the Council of Ministers are not federally appointed. They are members of the Council by virtue of their appointment by a participating province as ministers responsible for regulating capital markets. Moreover, as the MOA unambiguously states (par. 5.2(c)(ii) and (d)(ii)), they sit on the Council of Ministers as representatives of their respective provinces.

101 In addition to the fact that the powers conferred upon the Council of Ministers undermine the constitutional validity of the Federal Act, we also see here an abdication, in favour of certain provinces, of federal jurisdiction and responsibilities with respect to systemic risks related to capital markets.

102 Indeed, in the shuffle of voting rights exercised within the Council of Ministers, the participating provinces representing major capital markets jurisdictions will decide upon the adoption or rejection of pan-Canadian federal regulations aimed at countering threats to the stability of the Canadian financial system with the potential to have material adverse effects on the Canadian economy as a whole. These provinces will be able to exercise their rights within the Council of Ministers, including their right to block federal regulations governing systemic risks, in favour of their own regional interests. Such an abdication of jurisdiction in favour of certain provinces is questionable on a constitutional level and appears to be contrary to the principle of federalism, one of the foundations of the Canadian constitutional order.

Conclusion on the first question

103 For these reasons, we answer the first Reference question in the negative.

ANALYSIS OF THE SECOND QUESTION

104 As we turn to the second question, it is useful to reproduce again its text:

> Does the most recent version of the draft of the federal "Capital Markets Stability Act" exceed the authority of the Parliament of Canada over the general branch of the trade and commerce power under subsection 91(2) of the *Constitution Act, 1867*?

105 This second question asks us to consider the constitutional validity of the Federal Act separate from the Regime as a whole.

106 Determining whether the Federal Act, taken alone, falls under the federal head of power over the general trade and commerce branch, requires us to apply the test established by the Supreme Court of Canada in *General Motors*.[55] The analysis is twofold. First, the Court must determine the pith and substance of the impugned legislation. Next, the Court must determine whether the matter falls under the general trade and commerce branch under s. 91(2) of the *Constitution Act, 1867*.

Submissions of the parties

The Attorney General of Quebec

107 The Attorney General of Quebec submits that the Federal Act is *ultra vires* Parliament's jurisdiction. According to the Attorney General of Quebec, the pith and substance of the Act is the regulation of securities, as was the 2009 *Securities Act* declared invalid by the Supreme Court of Canada in the *2011 Reference*. From this perspective, the pith and substance of the federal initiative remains unchanged in substance if not in form. The proposed Federal Act would do no more than target a body of rules already set out in existing provincial legislation.

108 In addition, the Attorney General of Quebec submits that the Federal Act does not respect the three last indicia of the *General Motors* test. First, the Federal Act targets a specific industry, namely securities trade, and thus, fails the third indicia of the test. With respect to the fourth indicia, the provinces have the ability to enact the regulations contemplated by the Federal Act, given that it merely contemplates a subset of rules already provided for in existing provincial regulations. Thus, the provinces are not only capable of adopting rules similar to those contemplated in the Federal Act, but indeed, they already have. Consequently, the provinces are therefore capable, acting alone or together, of adopting legislation equivalent to that proposed by Canada. With respect to the fifth indicia of the test, the purposes of the Federal Act can be met even if only some of the provinces adopt similar legislation, as each province could require that its legislation be respected within its borders. Consequently, a corporation that does business across Canada must, in practical terms, act in conformity with whichever provincial regulations are most restrictive.

The Attorney General of Canada

109 The Attorney General of Canada submits that the pith and substance of the Federal Act is the regulation of systemic risks related to capital markets. The Federal Act confers three principle powers related to this objective, namely (1) to collect data on a national scale in order to detect systemic risks; (2) to designate a product, practice or benchmark as posing a systemic risk related to capital markets and then adopt regulations to stymie that risk; and (3) to issue emergency orders with respect to serious and immediate systemic risks. The effects of the Federal Act would thus be to allow the CMRA to exercise macroprudential oversight of capital markets. According to the Attorney General of Canada, the Federal Act focuses on the stability of the economy as a whole, and does nothing to diminish the jurisdiction of the provinces to adopt microeconomic policies that are local in nature.

110 The Attorney General of Canada also submits that the *General Motors* test demonstrates that the Federal Act falls under the federal general trade and commerce power. With respect to the third indicia of the *General Motors* test, the Federal Act does not target a single industry, since the regulatory powers are limited to situations posing systemic risks to the financial system potentially having negative impacts on the Canadian economy as a whole. As for the fourth indicia, the provinces, acting alone or together, would not be able to meet the objectives of the Federal Act because no province has the constitutional jurisdiction to effect oversight of the national economy as a whole. With regards to the fifth indicia, inadequate regulation by even one province would undermine the objective of protecting the stability of the Canadian financial system.

The Attorney General of Manitoba

111 The Attorney General of Manitoba submits that the Federal Act exceeds the legislative authority of the Parliament of Canada. First, the concept of systemic risk is too nebulous to serve as a meaningful boundary between federal and provincial jurisdictions. Second, the effect of the Federal Act is simply to impose federal rules that encroach upon existing provincial legislation. The Attorney General of Manitoba thus proposes to limit the jurisdiction of the federal government over systemic risks to enacting uniform provisional measures respecting urgent situations which cannot be addressed other than at a national level.

112 With respect to the *General Motors* test, the Attorney General of Manitoba generally adopts the arguments of the Attorney General of Quebec.

The Attorney General of British Columbia

113 The Attorney General of British Columbia takes no position on the constitutionality of the Federal Act.

Overview

114 Save with respect to the role and powers of the Council of Ministers, it appears that the pith and substance of the Federal Act, examined apart from the Regime, is to promote the stability of the Canadian economy through the management of systemic risks related to capital markets. Following the holdings of the Supreme Court of Canada in the *2011 Reference*,

we conclude that the Parliament of Canada has the necessary jurisdiction to adopt the Federal Act, with the exception of its provisions relating to the role and powers of the Council of Ministers.

The pith and substance of the Federal Act

115 The purpose of the Federal Act is to manage systemic risk. The preamble also mentions this purpose. Section 4 of the Federal Act reads as follows:

> **4.** The purposes of this Act are, as part of the Canadian capital markets regulatory framework,
>
> **(a) to promote and protect the stability of Canada's financial system through the management of systemic risk related to capital markets; and**
>
> **(b) to protect capital markets, investors and others from financial crimes.**
>
> **4.** La présente loi a pour objet, dans le cadre du régime canadien de réglementation des marchés des capitaux :
>
> **a) de promouvoir et de protéger la stabilité du système financier canadien par la gestion des risques systémiques liés à ces marchés;**
>
> **b) protéger notamment ces marchés et les investisseurs contre les crimes financiers.**

116 The stated purpose of the Federal Act is, thus, to manage systemic risk on a national level and protect against financial crimes. To fully carry out the *General Motors* test, however, we cannot limit our analysis to the declared purpose: we must review the structure of the Act as a whole.

117 Part 1 of the Federal Act empowers the CMRA to collect data in order to (1) monitor capital market activities, (2) detect, identify or mitigate systemic risk related to capital markets and (3) conduct policy analysis related to the Federal Act and the CMRA. This part of the Federal Act also establishes the framework allowing the CMRA to implement a system for gathering, holding and sharing this data (ss. 9-17).

118 Part 2 of the Act allows the CMRA to designate a benchmark (ss. 18-19), a class of securities or derivatives (ss. 20-21), or a practice (ss. 22-23) as being of systemic importance. Such a designation then allows the CMRA to adopt regulations respecting the designated object. The Federal Act specifies that such a designation is only permitted where, in the view of the CMRA, the targeted practice could pose a systemic risk related to capital markets, that is to say a threat to the stability of the Canadian financial system with the potential to have a material adverse effect on the Canadian economy (ss. 3, 18(1), 20(1) and 22(1)).

119 Part 2 also allows the CMRA to make urgent orders if it considers this to be necessary to address a serious and immediate systemic risk related to capital markets (ss. 24-25). Such an order may remain in effect for a maximum of 30 days (ss. 24(3) and (4)).

120 Part 3 establishes the framework allowing the CMRA to conduct inquiries (ss. 26-32) and impose pecuniary administrative sanctions (ss. 33-38), and endows the relevant tribunal with the power to make orders concerning the application of the Federal Act (ss. 39-47).

121 Parts 4 and 5 address incarceration sentences and fines resulting from breaches of the Federal Act (ss. 48-51) and criminal offences related to financial markets (ss. 52-68).

122 Part 6 consists of general provisions, including the duty to comply with decisions of the CMRA and any undertakings made to it (ss. 69-72). This part also addresses the CMRA's procedures for making regulations, including the role of the Council of Ministers (ss. 72-82). We will come back to this point. This part further provides for orders exempting specified entities from the application of the Act and its regulations, and for extending time periods provided for therein (ss. 85-86).

This part also contains specific provisions concerning the decisions of the CMRA and of the new tribunal (ss. 87-91), as well as various other matters (ss. 92-98).

123 Finally, Parts 7 and 8 contain the transitional provisions (s. 99) and consequential amendments (ss. 100 to 107).

124 The structure and content of the Federal Act suggest that its pith and substance is to control systemic risks having the potential to create material adverse effects on the Canadian economy.

125 In the *2011 Reference*, the Supreme Court of Canada highlighted the following general definition of systemic risks:[56]

> [103] Systemic risks have been defined as "risks that occasion a 'domino effect' whereby the risk of default by one market participant will impact the ability of others to fulfil their legal obligations, setting off a chain of negative economic consequences that pervade an entire financial system" (M. J. Trebilcock, National Securities Regulator Report (2010), [. . .]). By definition, such risks can be evasive of provincial boundaries and usual methods of control. [. . .]

126 Section 3 of the Federal Act fits nicely into this definition, adding the nuance that the systemic risks it targets are those with the potential to have a material adverse effect on the Canadian economy:

> **3.** In this Act, systemic risk related to capital markets means a threat to the stability of Canada's financial system that originates in, is transmitted through or impairs capital markets and that has the potential to have a material adverse effect on the Canadian economy.
>
> **3.** Dans la présente loi, risque systémique lié aux marchés des capitaux s'entend d'une menace à la stabilité du système financier canadien qui, d'une part, émane des marchés des capitaux, est propagée au sein ou par l'entremise de ceux-ci ou les entrave et, d'autre part, est susceptible d'avoir des conséquences négatives importantes sur l'économie canadienne.

127 What's more, the Federal Act imposes upon the CMRA the obligation to consider existing legislation prior to designating a benchmark, a product or a practice as posing a systemic risk (ss. 18(1)(g), 20(1)(h), 22(1)(f)). The goal of doing so seems to be to avoid useless overlap with provincial legislation; this offers some degree of protection against unjustified encroachments on provincial jurisdiction.

128 Taking into account the stated purposes of the Federal Act, the definition of systemic risk provided therein and the mechanisms set out to restrain the scope of the regulations made pursuant to the Act, the pith and substance of the Federal Act seems to be to promote the stability of the Canadian economy by managing systemic risks related to capital markets having the potential to have material adverse effects on the Canadian economy.

Application of the General Motors Test

129 Having established the pith and substance of the Act, we now turn to determining whether it falls within the federal general trade and commerce power in accordance with the five indicia of the *General Motors* test, namely:

1. Whether the impugned law is part of a general regulatory scheme;
2. Whether the scheme is under the oversight of a regulatory agency;
3. Whether the legislation is concerned with trade as a whole rather than with a particular industry;
4. Whether it is of such a nature that provinces, acting alone or in concert, would be constitutionally incapable of

> enacting it; and
>
> 5. Whether the legislative scheme is such that the failure to include one or more provinces or localities in the scheme would jeopardize its successful operation in other parts of the country.

130 The Attorney General of Quebec recognizes outright that the first two indicia are met, that is to say, the Federal Act is part of a general regulatory scheme and is subject to the oversight of a regulatory agency.

131 With respect to the third indicia, the Supreme Court of Canada clearly pronounced itself on this matter in the *2011 Reference*. In light of our conclusion with respect to the pith and substance of the Federal Act, we defer to the following comments of the Supreme Court:[57]

> [114] We accept that preservation of capital markets to fuel Canada's economy and maintain Canada's financial stability is a matter that goes beyond a particular "industry" and engages "trade as a whole" within the general trade and commerce power as contemplated by the *General Motors* test. Legislation aimed at imposing minimum standards applicable throughout the country and preserving the stability and integrity of Canada's financial markets might well relate to trade as a whole. [. . .]

132 Regarding the fourth indicia, it is also appropriate to defer to the comments of the Supreme Court of Canada in the *2011 Reference*. Indeed, in that case, the Supreme Court explains that federal legislation devoted to reducing systemic risks on a *national* scale could be valid:[58]

> [121] It follows that the fourth General Motors question must be answered, at least partially, in the negative. The provinces, acting in concert, lack the constitutional capacity to sustain a viable national scheme aimed at genuine national goals such as management of systemic risk or Canada-wide data collection. This supports the view that a federal scheme aimed at such matters might well be qualitatively different from what the provinces, acting alone or in concert, could achieve.
>
> [Emphasis added]

133 In the *2011 Reference*, the Supreme Court of Canada also noted that satisfying the fourth requirement is related to the fifth. According to the Supreme Court, the collection of data and the prevention of systemic risks can satisfy the fifth criteria where these are truly national goals:[59]

> [123] The fifth and final *General Motors* inquiry is whether the absence of a province from the scheme would prevent its effective operation. On lesser regulatory matters the answer might well be no. However, when it comes to genuine national goals, related to fair, efficient and competitive markets and the integrity and stability of Canada's financial system, including national data collection and prevention of and response to systemic risks, the answer must be yes — much for the reasons discussed under the fourth question. [. . .]
>
> [Emphasis added]

134 In light of our conclusion with respect to the pith and substance of the Federal Act, we can only conclude that the definition of systemic risk limits federal intervention to Canadian, that is to say national, matters especially because the statutory definition of systemic risk must be interpreted in accordance with the Constitution and the holdings of the Supreme Court of Canada in the *2011 Reference*.

135 We conclude, therefore, that, with the exception of the role and powers conferred to the Council of Ministers, the

Federal Act falls within the federal general trade and commerce power.

The role and powers of the Council of Ministers

136 As we highlighted above, the Participating Jurisdictions, through the Council of Ministers, will vote on the adoption of any regulation taken pursuant to the Federal Act. Sections 76 to 79 of the Federal Act specifically provide for this.

137 In our analysis of the first question posed by this Reference, we concluded that the provisions empowering the Council of Ministers to approve federal regulations undermine the constitutional foundation of the Federal Act and are completely irreconcilable with the purposes of the proposed federal legislation. The same conclusion applies to the second Reference question.

138 The provisions of the Federal Act relating to the Council of Ministers set out in sections 76 to 79 are therefore unconstitutional for the same reasons expressed in the analysis to the first Reference question. There is no need to repeat those reasons here since they may be referred to above. The effect of these provisions is to render the Federal Act unconstitutional as a whole if they are not removed. The Federal Act could probably stand independently of this aspect of the MOA, but that is not the draft legislation that has been placed before us.

139 Furthermore, it is useful to note that the federal regulations approved by the Council of Ministers will apply equally to non-participating provinces without providing those provinces with the right to vote within the Council. This also creates a serious asymmetry that undermines the balance of the Canadian federation: certain provinces would be voting on federal regulations that apply to other provinces. We note the asymmetry that arises from giving provincial representative bodies powers to adopt federal regulations that apply even in non-participating provinces. This asymmetry is discordant with the principle of federalism, a fundamental component of the Constitution.[60]

Conclusion on the second question

140 For these reasons, we reply "no" to the second question, except with respect to sections 76 to 79 of the Federal Act respecting the role and powers of the Council of Ministers which, unless removed from the legislation, render the Federal Act unconstitutional as a whole.

CONCLUSIONS

141 To the first question,

> Does the Constitution of Canada authorize the implementation of pan-Canadian securities regulation under the authority of a single regulator, according to the model established by the most recent publication of the "Memorandum of Agreement regarding the Cooperative Capital Markets Regulatory System"?

141 we answer :

> **NO**, the Constitution of Canada does not authorize it under that model.

142 To the second question,

> Does the most recent version of the draft of the federal "Capital Markets Stability Act" exceed the authority of the Parliament of Canada over the general branch of the trade and commerce power under subsection 91(2) of the *Constitution Act, 1867*?

142 we answer :

> **NO**, the most recent version of the draft of the federal act entitled *Capital Markets Stability Act* is not beyond the jurisdiction of the Parliament of Canada under subsection 91(2) of the *Constitution Act, 1867*, except with respect to its sections 76 to 79 concerning the role and powers of the Council of Ministers which, if not removed, render the act unconstitutional as a whole.

142 NICOLE DUVAL HESLER, C.J.Q.

***Schrager J.C.A.*:**

INTRODUCTION

143 I respectfully disagree with the conclusions and answers to the two reference questions tabled by my colleagues. I do however agree with their reasons that the Court can adjudicate these questions.

144 I offer these reasons in reply to the two questions submitted to this Court by the Government of Quebec:[61]

Question 1:

> Does the Constitution of Canada authorize the implementation of pan-Canadian securities regulation under the authority of a single regulator, according to the model established by the most recent publication of the "Memorandum of Agreement regarding the Cooperative Capital Markets Regulatory System"?

Question 2:

> Does the most recent version of the draft of the federal "Capital Markets Stability Act" exceed the authority of the Parliament of Canada over the general branch of the trade and commerce power under subsection 91(2) of *The Constitution Act, 1867*?

I have attempted not to repeat matters set forth in detail by my colleagues in their reasons[62] and to limit my remarks to that which I consider essential to the different answer to the questions which I propose.

145 Quebec and Manitoba urge a negative answer to the First Question and a positive reply to the second, since it is their position that the whole legislative scheme is unconstitutional. The Government of Canada obviously contends that the model is constitutionally valid, and would answer the questions accordingly. British Columbia supports Canada's answer to the Second Question, while maintaining that this Court has no jurisdiction over the First Question. As stated, I defer to the reasons of my colleagues on that issue.

SUMMARY RESPONSE

146 I view the two laws submitted to us to be *intra vires* of the provincial legislatures and the federal Parliament respectively. In my opinion, none of the content illegally delegates legislative authority nor abdicates parliamentary sovereignty. However, there are aspects of the "Memorandum of Agreement Regarding the Cooperative Capital Markets Regulatory System" (hereinafter the "Protocol") which may constitute illegal delegation of legislative power or an abandonment of legislative sovereignty. This Court's opinion on constitutional validity should be limited to the legislative

instruments (the two statutes submitted) and should not encompass any agreement between governments, - i.e. the Protocol. However, to the extent we are bound by the framing of the questions and given some of the content of the Protocol and the absence of the statute creating the regulatory agency, I will propose that the Court decline to answer the First Question.

147 I believe that the draft *Capital Markets Stability Act* (hereinafter the "*Federal Act*") is *intra vires* of the powers of Parliament under Section 91(2) of *The Constitution Act, 1867*,[63] so that I propose a negative reply to the Second Question. I qualify my reply with the caveat that regulations to be made may, or may not be *intra vires* based on their content, wording and the circumstances existing when and if such regulations are enacted. I differ with the conclusion of my colleagues because I do not think that Sections 76-79 of the *Federal Act* render the legislation unconstitutional.

FACTS

148 Attempts have been made since the 1930's to regulate securities on a uniform national basis[64] while respecting the division of powers under Sections 91 and 92 of *The Constitution Act, 1867*.

149 The financial crisis experienced between 2007 and 2010 globally - including Canada - again brought the matter to the fore, and draft federal legislation was tabled with a view to creating a single Canadian securities regulator.[65] The legislation proposed in 2009 was based on the premise that the evolution of securities markets was such as to bring all aspects of its regulation from provincial jurisdiction under property and civil rights (pursuant to Section 92(13) of *The Constitution Act, 1867*) to trade and commerce (pursuant to Section 91(2) of *The Constitution Act, 1867*). Yet, the proposed unified system was voluntary in the sense that provinces could "opt in" if and when they chose to do so.[66] Nevertheless, the Supreme Court, in a unanimous decision, held that the proposed legislation was *ultra vires* of the Parliament of Canada. Whatever be the ambit of the concepts of cooperative and flexible federalism, these notions cannot be used contrary to the division of powers in Sections 91 and 92 of *The Constitution Act, 1867*.[67] More specifically, the Supreme Court found that the pith and substance of the proposed law was the regulation of a particular business or trade - i.e. the securities industry - and as such did not meet one of the sub-questions of the test laid out in the jurisprudence[68] in order to qualify as legislation essentially national in scope, qualitatively different from legislation directed to local matters and property and civil rights. As such, it was held that the statute did not fall within Section 91(2), and was *ultra vires* of the Parliament of Canada.

150 The judgment of the Supreme Court is equally noteworthy for present purposes in the *dicta* offered by the Supreme Court of what subjects pertaining to trading in securities could have a sufficiently national dimension to be legislated by Parliament in virtue of its Section 91(2) jurisdiction. I will draw on those statements of principle below in developing these reasons. First, however, I attempt a brief summary of the legislative scheme now laid before us.

151 The draft uniform provincial law, the *Capital Markets Act* (hereinafter the "*CMA*"), is a comprehensive act dealing with various aspects of the securities industry and not substantially at variance with provincial laws in the domain as presently existing.[69] The law foresees vast power to be exercised by the enactment of regulations, again not radically different from existing provincial statutes.[70] This regulatory power is to be exercised through the Capital Markets Regulatory Authority (hereinafter the "Authority") to be created by legislation which we are told is not yet available. In any event, no such statute has been submitted to us, and so is not encompassed by the questions in the reference, and thus, not by these reasons.

152 With one possible exception, the Provinces of Quebec and Manitoba do not source their objections to the overall scheme in the *CMA* as such. This legislation will be adopted by each province deciding to participate in the uniform national scheme. It is not argued that the content of the *CMA* taken in isolation is *ultra vires* or otherwise unconstitutional. Moreover, pan-Canadian uniformity in securities regulations is not only accepted as a meritorious goal by Quebec and Manitoba, but they point to the existing interprovincial cooperative mechanisms, such as the "passport system", which, in their view, adequately achieve such end.[71]

153 The *Federal Act*, which Quebec and Manitoba find encroaches on provincial legislative jurisdiction, seeks on its face to address data collection, systemic risk and crimes relating to the securities industry. The latter is not contested as a valid exercise of federal legislative power.

154 The two laws are bound together by the Protocol which is a multi-lateral agreement between the federal government

and each participating provincial and territorial government - presently Ontario, British Columbia, Saskatchewan, New Brunswick, Prince Edward Island and the Yukon.

155 As mentioned, the Protocol provides for a single regulator - the Authority - to administer and enact the regulations under both the provincial and federal statutes. The provincial regulations of the participating jurisdictions will thus be uniform, like the *CMA*. Until such time as the Authority is established, the *Federal Act* foresees the possibility of its administration by the Minister of Finance.[72]

156 The Authority is to be governed by a board of directors to be composed of independent experts appointed by the Council of Ministers (hereinafter the "Council"). The latter is comprised of the Minister of Finance of the federal government and Ministers responsible for capital markets regulation in each participating province and territory. The Council will have input into the regulations. Specifically (and it is the only reference to the Council in the federal and provincial draft statutes) the Council will have approval power over provincial and federal regulations made by the Authority under each statute.[73] A regulation proposed by the board of directors can ultimately be rejected by a majority vote of the Council which must include a majority of ministers from the participating provinces with Major Capital Markets - now British Columbia and Ontario.

157 Also of significance regarding the decision-making process is clause 5.5 of the Protocol which requires that the same majority of votes be reached before a participating province may amend the *CMA*:

> **5.5 Voting on Proposal to amend Provincial and Territorial Legislation**
>
> **5.5 Vote à propos d'une proposition visant à modifier la législation provinciale et territoriale**
>
> A proposal to amend the *Capital Markets Act* must be approved by :
>
> Une proposition visant à modifier la loi sur les marchés des capitaux doit être approuvée par :
>
> **(a) at least 50 per cent of all members of the Council of Ministers; and**
>
> a) au moins 50 % des membres du Conseil des ministres;
>
> **(b) the members of the Council of Ministers from each Major Capital Markets Jurisdiction.**
>
> b) les membres du Conseil des ministres de chaque partie ayant de grands marchés des capitaux.

158 Lastly, of importance for present purposes is Section 13 of the Protocol providing for the withdrawal of any participating party from the cooperative scheme on six months' notice.

159 Significantly, as mentioned, we do not have before us the draft legislation creating the Authority, nor draft regulations under the *Federal Act*. We have some draft regulations under the *CMA* but they are incomplete and limited to derivatives and "obligations détachées" and the "répertoires des opérations et déclarations de données sur les dérivés".

BASIC PRINCIPLES

160 It is fundamental to the present analysis to summarize principles recognized in the *2011 Reference*, since the legislative scheme before us is a renewed attempt by the federal government, in concert with some of the provinces, to bring uniformity to the regulation and enforcement of security laws in Canada within the framework drawn from the principles laid down in that judgment.

161 The Supreme Court established that where the purpose of legislation is to regulate trading in securities in order to protect investors, promote fair, efficient and competitive capital markets, and insure in general the stability and integrity of securities trading, then the legislation will pertain, in its pith and substance, to property and civil rights, and will, accordingly, fall within provincial jurisdiction in virtue of Section 92(13) of *The Constitution Act, 1867*.[74]

162 In order to validly exercise its general trade and commerce jurisdiction in virtue of Section 91(2) of *The Constitution Act, 1867*, the federal Parliament must address matters of genuine national importance and scope pertaining to trade as a whole in a way that is distinct from provincial concerns. Provincial jurisdiction would be encroached upon by federal legislation which seeks to regulate day-to-day aspects of trading in securities to protect the public by imposing regulations relating to such matters as disclosure, and the qualification and competence of the individuals involved in the trading of securities, to cite but two examples.[75]

163 An instance of the valid exercise by the federal government of its general jurisdiction to "regulate trade and commerce" would include management of systemic risk in the Canadian economy and national data collection aimed at preventing such a risk.[76] The Supreme Court left no doubt that the management of systemic risk would be a foundation for the valid exercise of this legislative jurisdiction under Section 91(2) of *The Constitution Act, 1867*. The Supreme Court went so far as to proffer a definition of systemic risk,[77] although Quebec and Manitoba invoke their expert's opinion that the concept is incapable of precise definition.[78] I thus take as a premise that addressing systemic risk is a valid exercise of federal power under Section 91(2) of *The Constitution Act, 1867*, and have not discussed the voluminous expert evidence offered to us by Quebec and Manitoba questioning the usefulness of the concept to ground jurisdiction[79] and the necessity of pan-Canadian regulations when individual provincial regulatory schemes adequately protect the integrity and stability of financial markets.[80] In examining a question pertaining to the division of powers under *The Constitution*, courts must refrain from considering arguments of efficiency and relevance of the proposed regulation.[81]

164 The analytical criteria enunciated in the *General Motors* case are indicia only and not exhaustive of the aspects of the proposed legislative scheme to be considered in determining whether a proposed law or regulation falls within Section 91(2) of *The Constitution Act, 1867*.[82] The Supreme Court applied an analysis based on the *General Motors*' test to conclude that the draft federal legislation before it in 2011 did not satisfy those criteria.[83] More specifically, the proposed legislation addressed *all* aspects of trading in securities, including day-to-day regulation of the practice, and, as such, was considered as legislation directed at a particular industry and not to trade as a whole.[84] Accordingly, the Supreme Court concluded that the draft legislation failed to satisfy the three last elements of the *General Motors* test.

165 The Supreme Court specifically foresaw the possibility of the provinces delegating their regulatory powers to a single pan-Canadian regulator which could in turn, enact uniform regulations adding that:

> . . . inherently sovereign, the provinces will always retain the ability to resile from an interprovincial scheme and withdraw an initial delegation to a single regulator.[85]

165 This is a reiteration of the principles of the validity of delegation of regulatory (but not legislative) power between the federal Parliament and provincial legislatures discussed by the Supreme Court in the last century.[86] It is noteworthy that this power to withdraw from any cooperative scheme led the Supreme Court, in the *2011 Reference*, to conclude that the fourth sub-question of the *General Motors* test was satisfied with regard to the regulation of systemic risk (i.e. the provinces could not create and maintain a national systemic risk prevention scheme because for such a scheme to be valid, any province would have to retain the right to withdraw at any time, thus making the system inherently ineffective).[87]

166 The Supreme Court concluded its remarks by observing that there exist cooperative schemes in other federations where each level of government has jurisdiction over some aspect of the regulation of securities. In such regard, the Supreme Court lauded:

> . . . the growing practice of resolving the complex governance problems that arise in federations, not by the bare logic of either/or, but by seeking cooperative solutions that meet the needs of the country as a whole as well as its constituent parts.
>
> Such an approach is supported by the Canadian constitutional principles and by the practice adopted by the federal and provincial governments in other fields of activities. The backbone of these schemes is the respect that each level of government has for each other's own sphere of jurisdiction. Cooperation is the animating force. The federalism principle upon which Canada's constitutional framework rests demands nothing less.[88]

167 This guidance offered by the Supreme Court is rooted in its own previous judgments. The combination in one regulatory body of a scheme where each of the federal and provincial governments enact laws and regulations within their respective spheres of jurisdiction in a coordinated or "dovetail" fashion has been held a valid example of constitutional creativity and cooperative flexibility.[89] Specifically, delegating regulatory power to a single agency does not offend the prohibition of interdelegation of federal-provincial legislative power set forth in *A. G. Nova Scotia v. A. G. Canada*.[90] In *Milk Board of British Columbia v. Grisnich*,[91] it was laid clear that the delegation by Parliament and a provincial legislature to one and the same regulator is not offensive to any constitutional principle. The Supreme Court added in *Milk Board* that:

> . . . there is a certain simplicity and indeed a form of accountability that results from Parliament and the provincial legislatures having empowered one expert body with authority derived from both sources, to regulate a particular complicated technical area of the law.[92]

168 Similarly in *Coughlin v. Ontario Highway Transport Board*,[93] the Supreme Court held that Parliament could validly delegate its powers to licence interprovincial transport to a provincial body created by the legislature of Ontario. Sovereignty is maintained since Parliament can at any time terminate the delegated powers.[94]

169 Moreover, the extent of the delegation of regulatory powers is not a reason to question the constitutional validity of the statute[95] as long as the legislature can withdraw the delegated powers at any time. The scope of the regulations to be introduced by the Authority under the *CMA* is broad, but no more extensive than those presently existing in provincial regulations, and this is not a matter of contention for the parties opposing the validity of the draft legislation before us. The breadth of regulations that could be passed under the *Federal Act* is not *per se* a matter underpinning the objections of Quebec and Manitoba. It is rather the subject matter of these regulations set forth in the *Federal Act* which is contended to be an encroachment on provincial jurisdiction.

170 Neither do I see any useful distinction where the agreement to delegate is made on a bilateral basis (i.e. between the federal government and one province as in *Coughlin*) or on a multilateral basis such as the Protocol. The legal concept is the same and the characteristics of the phenomenon to be regulated dictate the participants who should be involved.

171 Thus, in applying these principles to the *Federal Act* and the *CMA* before us, there is nothing constitutionally offensive in each legislature delegating to one and the same body - the Authority - its powers to regulate in matters pertaining to securities, within its sphere of jurisdiction - i.e. Sections 91(2) and 92(13) of *The Constitution Act, 1867* respectively. Moreover, there is nothing in either draft statute overstepping these principles. Indeed, the only instance of delegation becoming an abdication of parliamentary sovereignty is found in the Protocol which I will address after discussing the legal status of intergovernmental agreements and the power of the courts to examine the validity of such agreements from a constitutional perspective.

INTERGOVERNMENTAL AGREEMENTS

172 The power of a court to pronounce on the constitutionality of a matter, such as the one before us, derives from or is confirmed by Section 52(1) of *The Constitution Act, 1982* which provides that:

> The Constitution of Canada is the Supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.

173 The Protocol is not a law, but rather an agreement between governments which sets out the road map for the adoption of the *CMA* and the *Federal Act*, and their application through the Authority. I recognize that the Protocol is an integral part of the matter pending before us, and useful to interpret the draft laws and understand the working of the proposed scheme, but it is not for a court to pronounce on the constitutional validity of the Protocol. It is only such provisions of the Protocol that may be directly and explicitly incorporated by reference into the *CMA* or the *Federal Act* which may be scrutinized.[96] In my opinion, the only provision of the Protocol which is problematic for constitutional validity is Section 5.5 which limits the power of participating provinces to amend the *CMA* once initially adopted by them. However, that restriction is not reflected in the legislation. On the face of the *CMA*, there is no limitation in the power of any province adopting it to amend or repeal

the statute without restriction or interference by the legislature of another province or Parliament.

174 A review of the case law convinces me that the Protocol is not subject to judicial scrutiny on the basis of constitutional validity.

175 In the *Anti-Inflation Reference*,[97] the effect of the agreement made between the government of Canada and the government of Ontario pursuant to Section 4(3) of the (Federal) *Anti-Inflation Act* was examined by the Supreme Court. That provision enabled the federal government to enter into agreements with provinces "providing for the application of this *Act* and the [*Anti-Inflation*] guidelines [made pursuant thereto] to" the provinces and persons and entities subject to the legislative authority of the provinces (e.g. its employees). Speaking through Laskin C.J., the Supreme Court first made it clear that governments are free to enter into agreements (with other governments or persons) and they are, in principle, bound by those agreements. However,

> . . . [e]ven if the agreement is binding upon the Government of Ontario as such, on the analogy of treaties which may bind the contracting parties but yet be without domestic force, that would not make the agreement (in this case) part of the law of Ontario binding upon persons purportedly affected by it.[98]

175 The government cannot . . .

> . . . bind its subjects in the province to laws not enacted by the legislature nor made applicable to such subjects by adoption under authorizing legislation.[99]

175 The government cannot through agreement "have certain legislative enactments [of the federal Parliament] become operative as provincial law".[100] A government cannot seek "to legislate in the guise of a contract".[101]

176 Following its judgment in the *Anti-Inflation* case, the Supreme Court was called upon to decide whether the Manitoba provincial civil servants were bound by the legislation to the detriment of their advantages under the collective agreement with their employer, the Government of Manitoba.[102] The Supreme Court split 5 to 4 on whether the provisions of Section 16 of the *Executive Government Organization Act*[103] of Manitoba and the order in council adopted thereunder were sufficient for the *Anti-Inflation Act* to be binding in the province of Manitoba. The majority, speaking through Ritchie, J., considered that the general language of the order in council made pursuant to the provisions of Section 16 was not sufficient to effectively change the law in Manitoba in a manner inconsistent with specific legislation. Section 16 was viewed as general in scope and merely authorizing the Lieutenant Governor in Council to enter into agreements with the Government of Canada. The minority, while observing that other provinces had enacted into law the federal *Anti-Inflation Act* provisions by specific, explicit legislative provisions, and while such may have been a preferable course of action, disagreed that general legislation such as Section 16 of the *Executive Government Organization Act* was ineffective to reach that end. There was, it should be emphasized, no disagreement between the nine judges that legislation and not mere intergovernmental agreement is required for a provision to have force of law.

177 In *Re Canada Assistance Plan (B.C.)*, the validity of a bill introduced into Parliament in apparent contradiction of an agreement between the governments of Canada and British Columbia was at issue. The Supreme Court observed as follows:

> It is conceded that the government could not bind Parliament from exercising its powers to legislate amendments to the *Plan*. To assert the contrary would be to negate the sovereignty of Parliament.[104]

178 The Supreme Court observed that the agreement reflected the common intent of the signatory governments in putting the legislative scheme (consisting of laws passed by each of the federal and provincial legislatures) in place.[105] However, Parliament could not be bound since the general principles of parliamentary sovereignty, as well as Section 42 of the *Interpretation Act*,[106] dictate that the legislature can amend a law at will notwithstanding any restriction in an intergovernmental agreement. The government of the day or even Parliament may bear the risk of the potential political price to pay for not respecting the deal. However, there is no legal impediment to legislating in a manner contrary to the terms of such an agreement.

179 The *Canada Assistance* case was applied by the Federal Court of Appeal in *Friends of the Canadian Wheat Board*,[107] where Mainville J.A., speaking for the Federal Court of Appeal, observed that the sovereignty of Parliament is fettered by an

agreement of the government requiring that legislation be introduced (or, I would add, not introduced) before Parliament. Therefore, such an agreement of the government is not binding on Parliament.

180 In 2009, the Supreme Court speaking through Rothstein J. summed up the law succinctly in referring to intergovernmental agreements:

> It is not a piece of legislation. The executive cannot displace existing law by entering into agreements, though the agreements may bind it. Of course, the legislature can choose to adopt an agreement in whole or in part and give it force of law.[108]

180 (References omitted)

180 Rothstein J. refers with approval to *UL Canada inc. c. Québec (Procureur général)*,[109] citing Nigel Bankes (*Co-operative Federalism: Third Parties and Intergovernmental Agreements and Arrangements in Canada and Australia*)[110] where the author states that some form of statutory approval is required for the agreement to become part of the law of the land; specific language is required.

181 Rothstein J. went on to discuss and apply the nine articles of the agreement on internal trade alluded to in the regulations examined by him[111] which referred to the said agreement for purposes of defining a "designated contract" over which the statutory tribunal would have jurisdiction to resolve disputes. His exercise was specific and targeted and nowhere does he suggest that the whole agreement (comprising hundreds of articles) is incorporated by reference into the regulations. I find here no authority for the proposition that reference to the Protocol in the *Federal Act* or *CMA* for purposes of defining the Council incorporates the Protocol into the statutes by reference and gives it the force of law so as to make the Protocol justiciable.

182 Section 78 of the *Federal Act* and Section 207 *CMA*, each provide that regulations made under the statute be approved by the Council. The Council is defined in Section 2 of each statute by reference to the Protocol.[112] The voting mechanism of the Council is set forth as I have stated elsewhere in these reasons, in the Protocol. Such state of affairs does not incorporate the whole Protocol into either statute to make it justiciable. The content of an intergovernmental or political agreement such as the Protocol may become justiciable if incorporated by reference into a statute in whole or in part as Rothstein J. noted. As stated above some form of approval of an agreement in a statute is required to make it law. Reference to an agreement for purposes of definition of a term does not constitute such approval. Neither does such a reference incorporate the whole agreement into the statute any more than specific reference to one section of a law would incorporate the whole of such enactment.[113] Incorporation by reference cannot be an accident; it must be purposeful so that the legislature's intent to incorporate and that which is incorporated, be clear and not ambiguous. The legislature is capable of stating that "the Protocol shall have force of law" or using words like "ratified" or "confirmed" if such was the intent.[114] In my view, the mere reference to the Protocol to provide the definition of "Council of Ministers" does not incorporate all (or even part of) the provisions of the Protocol by reference and make that agreement justiciable. The Protocol touches on a number of subjects concerning the workings of the cooperative scheme. It is drafted as a contract, not legislation.[115] I cannot agree that reference to it for the purposes of defining a term in the legislation incorporates the provisions of the Protocol into the statute giving them force of law and making them justiciable. This is simply not what Section 78 of the *Federal Act* or Section 207 *CMA* state. At most, the definition of "Council of Ministers", only, is incorporated by reference.

183 In summary, despite suggestions of some academics based on certain oblique references by the Supreme Court to intergovernmental agreements,[116] wherever the Supreme Court has pronounced directly on the issue, it has consistently and unambiguously stated that intergovernmental agreements are not laws and do not bind the legislature unless somehow adopted by the legislative body.[117] Such agreements are not justiciable unless made part of the law by specific language. It is not sufficient that the agreement be part of a cooperative legislative scheme. It must be specifically enacted by law to be justiciable.

184 Thus, to the extent that there is anything objectional in constitutional terms in the Protocol, but which is not reflected in the legislation, our judicial scrutiny is not required nor permitted. As stated, the only such provision, in my view, is Section 5.5 which limits provincial legislative sovereignty, because amendment of the law requires approval of half the Council of Ministers including the ministers from Ontario and British Columbia (i.e. the major capital markets). This restriction is not found in the legislation and, to the extent there is any doubt, Section 2.3 of the Protocol provides that, in the event of

inconsistency, the legislation takes precedence over the Protocol. Section 2.2 adds by way of statement of intent that each signatory is not surrendering or impairing its jurisdiction.

185 Because the restriction on amendment is not contained in a piece of legislation, I maintain that there is no need to enter into an analysis as to whether the content of Section 5.5 of the Protocol dictates the manner and form of amending the *CMA* and could then be valid. The voting structure in Section 5.5 goes beyond allowable manner and form requirements since the vote of other provinces is required in order to amend the law of another province.[118] Whether the contents of Section 5.5 of the Protocol will be incorporated into the law (or laws) creating the Authority, I do not know.

186 Indeed, the only direct reference to the Protocol in the legislation, to my knowledge, is with respect to the definition of the Council which finds its way into Sections 76 to 79 of the *Federal Act* and Sections 206 and 207 of the *CMA*. These provisions give the Council approval power over regulations made under each statute. It could be argued that this is an abandonment of sovereignty since provincial ministers have a say on federal regulations and the federal minister have input on provincial regulations. To the extent that this is the case, it is limited to regulations or delegated legislation. This is permissible under the *Nova Scotia v. Canada* and *P.E.I. v. Willis* jurisprudence. Moreover, the coordination of regulatory power within the respective jurisdictional spheres as part of the overall scheme is to me an example of the type of cooperation praised by the Supreme Court in 2011. Aside from affinity for cooperation as a general principle, the coordination of the exercise of regulatory power between the provinces makes obvious sense for uniformity's sake in an area with a double aspect. As between the provincial and the federal governments the cooperation makes sense in order to avoid encroachment from regulations addressing systemic risk to the economy as a whole (federal jurisdiction) to regulations targeting day-to-day practices (provincial jurisdictions).

THE FIRST QUESTION

187 The First Question should be modified because the provinces could not validly pass laws strictly in conformity with the Protocol because of Section 5.5 thereof. It will be recalled that this provision is an undertaking not to amend the law without the consent of a panel comprised of the federal minister and the ministers of the participating provinces and territories. This would be an illegal delegation of parliamentary sovereignty, indeed an abdication, the prohibition of which is articulated in *Nova Scotia v. Canada*. However, Section 5.5 is not reflected in the *CMA*. No provision of the law incorporates or reiterates the content of Section 5.5 or any other restriction on the sovereignty of the provincial legislatures to amend or repeal the law as they wish. Accordingly, in my view, the question requires a nuance[119] which could be achieved by striking the words "according to the model established by the most recent publication of the 'Memorandum of Agreement regarding the Cooperative Markets Regulatory system'" and replacing them with "according to the most recent publication of the *Capital Markets Act* of August 2016 and the *Capital Markets Stability Act* of June 2016". To such question:

> Does the Constitution of Canada authorize the implementation of pan-Canadian securities regulations under the authority of a single regulator, according to the most recent publication of the *Capital Markets Act* of August 2016 and the *Capital Markets Stability Act* of June 2016?,

187 I would answer "yes".

188 Unilateral action by any province in amending *its* uniform Act could lead to stress in the intergovernmental relationship; this would run contrary to the deal agreed to in the Protocol, but the principle of parliamentary sovereignty[120] permits amendment or repeal without Parliament or a provincial legislature seeking approval of an external body. Properly, the government should first give the six months' notice to withdraw from the scheme (under Section 13 of the Protocol) and then repeal or amend the uniform provincial law in its province. However, it is not for the courts to pronounce on this. I agree with the submissions of the federal government that the Protocol is not subject to judicial scrutiny as to its constitutional validity as set out above.

189 Neither do I think that it is for a court to opine on the practicality of withdrawal from the scheme. Our comments should be limited to constitutional legality. Thus, as the Supreme Court has noted, as long as a province can "resile" from the scheme, its legislative sovereignty is preserved.[121] If I were to comment on the practicality of a province withdrawing from

the Protocol, I would add that exiting a complex system of cooperative regulation cannot, by definition, be simple nor should it be, as the considerations for putting an end to the cooperative system should be as profound as the reasons for putting it in place at the outset. A cooperative system, to function, requires patience and compromise.[122] Withdrawal should be the last alternative to dispute resolution. Will it be more complicated for a province to withdraw from the uniform regulation of securities foreseen by the Protocol than for the federal government to withdraw from a transport licensing arrangement[123] or for an adherent to terminate a milk marketing scheme?[124] The answer did not preoccupy the Supreme Court in determining that such schemes were constitutionally valid.

190 Inspired by the *General Motors* case, Quebec takes the position that a valid cooperative regime could only exist where neither the provincial nor federal levels of government could put the regime in place on their own. In my opinion, the *CMA* and *Federal Act*, read against the *2011 Reference*, pass such a test. The *CMA* addresses day-to-day and the *Federal Act* addresses macroprudential concerns of systemic risk; each level acts within its sphere of jurisdiction. There is an understandable concern that regulations under the *Federal Act* could over-reach into the day-to-day, but this is controlled through the joint administration of both regimes through a single agency, the Authority, and the fact that adoption of regulations passes through the Council.[125] Also the obligation of the federal government to consult with the provincial ministers on the Council prior to amending the *Federal Act*,[126] and the special majority needed to amend the *CMA* inject further cooperative mechanics to avoid encroachment into the others' sphere of legislative jurisdiction.[127] There is no abandonment of legislative sovereignty because any delegation of power regards the enactment of regulation, and not legislation.

191 I see no parallel between the mechanisms for amendment of the *CMA* in the Protocol (Section 5.5) nor in the manner of delegating regulatory power with the system of consultative referendums examined in *Reference re Senate Reform*.[128] In that case, the proposal to consult the public through a referendum on possible appointments to the Senate was seen as a change to the fundamental fabric of *The Constitution*, and thus, a hidden amendment given the express provision in Sections 24 and 32 of *The Constitution Act, 1867* that senators be appointed by the Governor General. The Supreme Court was unimpressed by the argument that the Prime Minister would ultimately not be bound by the results of the referendum vote.[129] The Attorney General of Canada pleaded before us in reply to objections to the amendment formula in Section 5.5 of the Protocol that provincial legislatures are not bound. Some might consider this an equally cynical interpretation of the scheme. However, my understanding is that a participating province which cannot abide by an amendment to the *CMA* approved or rejected pursuant to Section 5.5, would necessarily withdraw from the scheme, as foreseen under Section 13 of the Protocol and go its own way and amend (or not) the *CMA*, or even repeal and replace it. It is inconceivable that a participant who dissented from uniformity in the *CMA* would "remain at the table" with its minister continuing to participate in the workings of the Council while not adhering to the results of a vote on amending the *CMA*. Ultimately and at the risk of repetition, the Protocol does not bind the legislatures (unless incorporated or adopted by law) and sovereignty is not abdicated as long as there remains a possibility to withdraw, which would occur should a participant no longer be able to agree with an ingredient of the scheme, such as a newly amended provision of the *CMA*. Moreover, withdrawal by a province from a federal-provincial arrangement does not alter the Canadian constitutional architecture as did the popular consultation for senate appointments analyzed in *Reference re Senate Reform*. Rather, the formation (and dissolution) of federal-provincial cooperative schemes is an integral part of the Canadian constitutional architecture.

192 I trust that my opinion on the subject matter of the First Question is clear. However, to the extent that I am bound to answer the question asked without modification, I would decline to answer. This is recognized as an option for a court tasked with a reference where the question is ambiguous, or where a "yes" or "no" without qualification would be misleading.[130] Such is the case here. There are two reasons for this. The first, as expressed throughout these reasons, is that the courts should not (and do not) opine on the constitutional validity of intergovernmental agreements. The First Question as framed requires just that.

193 The second reason to decline a response is, as alluded to, we do not have for consideration any draft legislation that will create the Authority. The questions that I have raised (such as the delegation of legislative power in Section 5.5 of the Protocol), as well as other potential questions that may impact provincial or federal sovereignty in their respective spheres of legislative jurisdiction through the powers of the Authority and its governance through the Council, make the content of that legislation fundamental to the equation. Without such draft legislation, a definitive answer to the First Question as framed is not possible.[131] Accordingly, I propose that the Court decline to answer the First Question.

SECOND QUESTION

194 I believe that the pith and substance of the *Federal Act* is legislation addressing issues national in scope and potentially of crucial importance to the national economy.[132] Such issues can only be effectively regulated at the national level[133] and thus, fall within Section 91(2) of *The Constitution Act, 1867*. Moreover, application of the five indicia laid out in the *General Motors* case indicate a valid exercise of federal legislative power. In such result, I am in agreement with the conclusions of my colleagues on these issues, though ultimately I disagree on the answer to the Second Question.

195 I take as a given from the Supreme Court in *General Motors* and in the *2011 Reference* that an event or phenomenon truly giving rise to a systemic risk may, by definition, only be regulated effectively if regulated nationally.

196 Any provincial concern of a "power grab" is based on the extensive potential regulatory power under the *Federal Act* encroaching on provincial jurisdiction. I can see that there may be at any given time an honest debate about whether a set of circumstances has given rise to a risk which is systematic according to the definition in Section 3 of the *Federal Act*[134] and thus, whether the federal regulatory power has been triggered. However, this is not the debate presently before us and there is no limit on the power of a province to contest, in the future, if necessary, the *intra vires* of any regulation made by the Authority under the *Federal Act*. Fortunately, the cooperative mechanisms put in place to control the Authority would, hopefully (and I would venture probably) obviate any such debate. It may happen that the uniform regulation on a day-to-day basis under the *CMA* will in the future be so effective and the enforcement so vigorous as to eliminate any potential source of risk for the economy as a whole so that no regulation will be passed under the *Federal Act*. However, there may arise a crisis, as in 2008, in the trading of a class of securities, the underlying problems associated with which "slipped through the cracks" and were not eliminated by application of day-to-day securities regulations so that some measures, perhaps on an urgent basis, would be required nationally. That such a hypothetical scenario falls validly within Section 91(2) of *The Constitution Act, 1867* is not offensive to any constitutional principle.

197 I agree with the expert opinions that the subject matter (or much of it) of provincial regulation has the potential to be at the source of a risk of such magnitude as to be systemic.[135] That does not mean however that any given subject remains immutably provincial (because they are also day-to-day matters - e.g. margin requirements) nor that they are necessarily federal (because at some level such issues could potentially give rise to a risk to the economy as a whole). For example, the content of provincial regulations aimed at protecting investors from unscrupulous stock promotors may also protect the economy from the magnified effect of such practices mutating into a risk for the economy. However, where, for whatever reason, something "slips through the cracks" and becomes a risk to the economic system (beyond the concerns of individual investors), the federal jurisdiction to address this risk is validly exercised under Section 91(2) of *The Constitution Act, 1867*. The double aspect of legislation in securities has already been observed in the *2011 Reference*.[136]

198 Each of the provincial and the federal legislatures have jurisdiction over some aspects of the regulation of securities.[137] The recognition of this principle by the Supreme Court in 2011 undermines the attack on the validity of the federal legislation before us. By analogy, vaccination programs are administered and regulated as part of a provincial health system but should a virus present a national crisis then the exercise of federal legislative jurisdiction to address the crisis would not be invalid.[138]

199 The analysis of the structure of the draft legislation from the constitutional point of view in light of the *General Motors* and *2011 Reference* cases, leads to the conclusion that the *Federal Act* falls within Section 91(2) without encroaching on the jurisdiction of the provinces under Section 92(13) of *The Constitution Act, 1867*.

200 With regard to the indicia of the *General Motors* case, points number 1[139] and 2[140] are not in issue. With respect to points number 4[141] and 5,[142] I believe that there is no longer any debate after the *2011 Reference* where the Supreme Court decided that because of the very ability to withdraw from any cooperative legislative program by the provinces, they are not able to guarantee a national scheme.[143]

201 Consequently, I think that the only debate revolves around criterion number 3 from the *General Motors* case. Regarding this point - i.e. whether the legislation seeks to regulate a single industry - the source of the risk which the legislation seeks to control may originate in the securities trading industry but that does not make the federal regulations directed at regulating an industry. The risk to the economy may find its source in the industry (although the banking and

insurance industries are other potential sources), but it is the economy that the federal legislation aims to regulate, not an industry. The industry, as such, is regulated under the *CMA*. This becomes clear when looking at the scheme as a whole - i.e. the federal government has legislated its power to collect data and deal with phenomena causing a risk to the economy nationally while the provinces are to regulate the day-to-day of securities trading. This remains constant even for provinces not joining the national scheme.

202 In 2008, in the United States, mortgage-backed securities debacle brought down one investment bank (Lehman Brothers), almost caused the bankruptcy of an insurance company (AIG), and had ripple effects causing the greatest financial crisis to the economy since 1929.[144] One could safely say that the risk was systemic. However, the risk grew out of local trading and failings in disclosure. In Canada, the liquidity of several financial institutions was brought into question in the asset-backed commercial paper crisis that arose following the mortgage-backed securities crisis in the United States.[145] The provincial securities regulators came together to freeze the maturities of the instruments issued by the institutions,[146] but, had one of the provincial regulators refused to participate, what would the effect have been? An urgent order issued by a body with national jurisdiction could have immediately and effectively addressed a problem which everybody agrees posed a systemic risk.[147]

203 I cannot assume the factual circumstances nor the content or wording of any eventual regulations made under the federal draft legislation and whether they will be limited to addressing problems of systemic risk. Any such determination will of necessity be made at the appropriate time. For now, one can only comment on the subject matter of the objects sought to be regulated under the draft federal legislation. They are in my opinion *intra vires* of the federal Parliament.

204 It is at this juncture that I part company with the opinion of my colleagues who find that Sections 76-79 of the *Federal Act* invalidate the Act because they create a situation where ministers of a province have, through their seats on the Council, a say on regulations to be adopted under the *Federal Act*. In fact, the Council votes to approve the regulations in virtue of Section 78 of the *Federal Act*. These regulations will necessarily apply throughout Canada - i.e. including provinces that have not opted to participate in the cooperative scheme. I disagree that this state of affairs violates any constitutional principle.

205 As I stated earlier in these reasons,[148] Parliament is free to delegate in the aforesaid manner as elaborated in *Nova Scotia v. Canada* and *P.E.I. v. Willis* and in such regard to constitute the body (the Authority) to whom it delegates regulatory functions. Parliament may determine the internal workings of such body and the process of approval of the regulations it proposes. The fact that the body approving the regulations (i.e. the Council) is populated with ministers of provincial governments does not invalidate the delegation. Parliament can choose to structure the internal mechanics and approval process of the regulatory body in such manner deemed appropriate to the task.[149]

206 I do not subscribe to the reasoning which flows from the fourth branch of the *General Motors* test,[150] that Section 78 of the *Federal Act* impedes the federal government from effectively regulating, because provinces acting through their ministers on the Council could block any regulation proposed under the *Federal Act*. Section 5.2 of the Protocol provides that regulations be approved by Council acting through a weighted majority (similar to Section 5.5 for amendments to the *CMA*) - i.e. 50% of members including the representatives of the major capital markets (presently Ontario and British Columbia). Under the existing situation (i.e. purely voluntary provincial cooperation), should countrywide regulation be required, unanimity amongst provinces is required *de facto*. Thus, any one province has, in effect, a veto. Section 5.2 gives, in effect, a veto to each of Ontario and British Columbia, only, for the obvious reason that they are the *situs* of the major activities in the securities industry. Again, and to repeat, Parliament has the power to delegate in the manner it chooses, to whom it chooses. It could delegate the power to adopt regulations to a body comprised solely of representatives of one province as was the case in *Coughlin*.[151] There, the regulation of interprovincial transport provided by companies located in Ontario was validly delegated by Parliament to a provincial body. This too creates, in effect, a veto. Again, Parliament retains its sovereignty because it could resile from such delegation. So too, it could amend Section 78 so that regulations under the *Federal Act* be adopted in a manner where provincial ministers would have no say.

207 The weighted majority is not contrary to any constitutional or other legal principle. Indeed, the amending formula in Section 38 of *The Constitution Act, 1982* provides for a weighted majority to recognize the population concentrations in certain provinces just as Section 5.2 of the Protocol requires a majority of the votes on Council to include the ministers from provinces where the securities business is concentrated. Parliament has the power to dictate the type of majority vote required

to approve delegated legislation. It is not for the courts to question the wisdom of granting more weight to the vote of a province with a higher stake in the securities industry.

208 The fact that regulations made under the Federal Act apply across Canada (i.e. including provinces not participating in the uniform scheme) is self-evident and normal. The fact that regulations which apply across Canada were approved by or with the participation of some but not all provinces is a matter for Parliament to decide in its wisdom to the exclusion of the courts.

209 For the above reasons, I would propose that the Second Question be answered in the negative.

CONCLUSION

210 I think the draftsperson of the *CMA* and *Federal Act* took careful account of the decided cases on delegation and abdication of legislative power including, particularly, the *2011 Reference* case. The result is the creation of an innovative regime that brings a new dimension to cooperative federalism able to meet 21st century challenges in securities matters while respecting the division of powers of the living tree[152] planted in the 19th century. Unfortunately, the legislation constituting the Authority is missing. Its potential content given some of the provisions of the Protocol, make it impossible to issue an unqualified opinion as I have indicated in my answer to the First Question. Thus, while the *Federal Act* is, in my opinion, valid federal legislation, it is not possible to rule, one way or the other, regarding the *CMA*.

Footnotes

1 CQLR, c. R-23.

2 *Hunt v. T&N plc*, [1993] 4 S.C.R. 289.

3 *Id*., p. 315.

4 *Reference re Resolution to amend the Constitution*, [1981] 1 S.C.R. 753, p. 768. See also: *Re: Attorney General of Quebec and Attorney General of Canada*, [1982] C.A. 33 (C.A.) citing *Ontario v. Canada*, [1896] A.C. 348 (P.C.); *Ontario v. Hamilton Street Railway*, [1903] A.C. 524 (P.C.).

5 *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, par. 26; *Reference re Canada Assistance Plan (B.C.)*, [1991] 2 S.C.R. 525, p. 545.

6 *Re: Attorney General of Quebec and Attorney General of Canada*, *supra*, note 4.

7 *Reference re Secession of Quebec*, *supra*, note 5, par. 30; *Reference re Remuneration of Judges of the Provincial Court (P.E.I.)*, [1997] 3 S.C.R. 3, par. 257; *Reference re Resolution to amend the Constitution*, *supra*, note 4, p. 773.

8 *Lumburn v. Mayland*, [1932] A.C. 318 (P.C.); *Multiple Access Ltd. v. McCutcheon*, [1982] 2 S.C.R. 161; *Global Securities Corp. v. British Columbia (Securities Commission)*, 2000 SCC 21, [2000] 1 S.C.R. 494; *R. v. W. McKenzie Securities Ltd.* (1966), 56 D.L.R. (2d) 56 (Man. C.A.), leave to appeal refused, [1966] S.C.R. ix; *Québec (Sa Majesté du Chef) v. Ontario Securities Commission* (1992), 10 O.R. (3d) 577 (Ont. C.A.), leave to appeal refused, [1993] 2 S.C.R. x.

9 *Reference re Securities Act*, 2011 SCC 66, [2011] 3 S.C.R. 837, par. 46.

10 *Ibid*., par. 114, 121.

11 *Ibid.*, par. 130.

12 David Johnston, Kathleen Rockwell and Cristie Ford, *Canadian Securities Regulation*, 5th ed., Markham, Ont., Butterworths, 2014, p. 48, par. 2.47.

13 CQLR, c. V-1.1.

14 CQLR, c. R-33.2.

15 David Johnston, Kathleen Rockwell and Cristie Ford, *supra*, note 12, p. 93, par. 4.29.

16 In 1935, the Royal Commission on Price Spreads recommended that a Securities Board be created to supervise the issuance of securities by federally constituted corporations. See: *Report of the Royal Commission on Price Spreads*.

17 *2011 Reference*, par. 11-28; *Québec (Procureure générale) v. Canada (Procureure générale)*, 2011 QCCA 591, par. 75-89.

18 Report of the Royal Commission on Banking and Finance, 1964.

19 Ontario Securities Commission, "CANSEC: Legal and administrative concepts", November 1967.

20 Government of Quebec, "Rapport du Comité d'étude sur les institutions financières", June 1969.

21 Memorandum of Understanding Regarding the Regulation of Securities in Canada, June 1994.

22 Avant-propos concernant l'avant-projet d'une loi canadienne sur le marché des valeurs mobilières (« Foreword to the Proposal for a Securities Market Law in Canada »), 1979.

23 Wise Persons' Committee, "It's Time", 2003.

24 The Crawford Panel, "Blueprint for a Canadian Securities Commission", June 2006.

25 *Québec (Procureure générale) v. Canada (Procureure générale)*, *supra*, note 17.

26 *Reference Re Securities Act (Canada)*, 2011 ABCA 77.

27 *2011 Reference*, par. 2.

28 *Ibid.*, par. 30.

29 *Ibid.*, par. 104-105.

30 *Ibid.*, par. 125.

31 *The Capital Markets Act*, revised consultation draft, August 25, 2015.

32 *The Capital Markets Stability Act*, consultation draft, January 2016.

33 *Attorney General of Nova Scotia v. Attorney General of Canada*, [1951] S.C.R. 31.

34 *Id.*, p. 32-33.

35 *Id.*, p. 38, see also p. 40, 47-48, 54, 58.

36 Peter Hogg, *Constitutional Law of Canada*, 5th ed., vol. 1, Toronto, Carswell, 2013 (looseleaf, updated 2015), No. 12.1, p. 12-1; Johanne Poirier, « Souveraineté parlementaire et armes à feu : le fédéralisme coopératif dans la ligne de mire? » (2015) 45 *RDUS* 47, p. 85.

37 *Reference re Secession of Quebec*, *supra*, note 5, par. 72.

38 The Attorney General of Canada invokes the *Canada Pension Plan* to justify this voting mechanism. The provisions governing this regime outline the duty of the federal government to obtain the approval of two-thirds of the participating provinces accounting for at least two-thirds of the population prior to adopting or amending a legislative or regulatory provision of the Canada Pension Plan: *Canada Pension Plan Investment Board Act*, S.C. 1997, ch. 40, s. 53(2) and *Canada Pension Plan*, R.S.C. 1985, ch. C-8 ss. 46(8), 113(15) et 114(4). These provisions must be read in light of s. 94A of the *Constitution Act, 1867* which provides for provincial paramountcy in matters respecting pensions. In this respect, the provisions under review in this Reference only serve to further highlight the entirely exceptional nature of the approach proposed by the Regime we have been asked to consider.

39 *In the Matter of Part Cargo* ex *Steamship "Zamora"*, [1916] 2 A.C. 77, p. 90.

40 *Reference re Canada Assistance Plan (B.C.)*, *supra*, note 5, p. 560.

41 *Reference re Senate Reform*, 2014 SCC 32, [2014] 1 S.C.R. 704, par. 62.

42 *Attorney General of Nova Scotia v. Attorney General of Canada*, *supra*, note 33.

43 For a description of the regime reviewed in this case, see: *Attorney General of Nova Scotia v. Attorney General of Canada*, *supra*, note 33, p. 32-33.

44 *Reference re Canada Assistance Plan (B.C.)*, *supra*, note 5, p. 536.

45 *West Lakes Limited v. The State of South Australia* (1980), 25 S.A.S.R. 389.

46 *Reference re Canada Assistance Plan (B.C.)*, *supra*, note 5, p. 564; *Canada (Attorney General) v. Friends of the Canadian Wheat Board*, 2012 CAF 183, par. 86; *Greater Vancouver Regional District v. British Columbia (Attorney General)*, 2011 BCCA 345, par. 36, 37 and 42.

47 *West Lakes Limited v. The State of South Australia* (1980), *supra*, note 45, p. 398.

48 *General Motors of Canada Ltd. v. City National Leasing*, [1989] 1 S.C.R. 641.

49 *Ibid*., p. 661-662.

50 *Id.*, p. 678.

51 *2011 Reference*, par. 81.

52 *Id.*, par. 83.

53 *Id.*, par. 116.

54 *Id.*, par. 114.

55 *General Motors of Canada Ltd. v. City National Leasing*, *supra*, note 48.

56 *2011 Reference*, par. 103.

57 *Id.*, par. 114.

58 *Id.*, par. 120.

59 *Id.*, par. 123.

60 *Reference re Secession of Quebec*, *supra*, note 5, par. 49-60.

61 In virtue of the reference under the *Court of Appeal Reference Act*, CQLR, c. R-23.

62 Particularly by way of description of the legislative regimes under scrutiny or respective positions of the parties.

63 *The Constitution Act, 1867*, 30 & 31 Vict., c. 3, s. 91(2).

64 For a historical overview of the process, see *Reference Re: Securities Act*, [2011] 3 S.C.R. 837, 2011 SCC 66 [*2011 Reference*].

65 *Securities Act*, Order in Council P.C. 2010-667.

66 *2011 Reference*, *supra*, note 4, paras. 31-32.

67 *2011 Reference*, *supra*, note 4, para. 62.

68 *General Motors of Canada v. City National Leasing*, [1989] 1 S.C.R. 641 [*General Motors*].

69 Affidavit of Heather Wood, Assistant Deputy Minister of Finance, Government of British Columbia, May 5, 2016, paras. 85-86 and see for example the *Securities Act*, CQLR, c. V-1.1, ss. 331-331.1.

70 *Ibid*.

71 *Provincial/Territorial Memorandum of Understanding Regarding Securities Regulation; Regulation 11-102 re Passport*. The "passport system" provides, amongst its provincial participants, for the recognition of decisions of one authority (except Ontario) for the sale of an issuer's securities throughout Canada.

72 *Capital Markets Stability Act*, s. 99 [*Federal Act*].

73 *Federal Act*, *supra*, note 12, ss. 76-79; *Capital Markets Act*, ss. 206-207 [*CMA*].

74 *2011 Reference*, *supra*, note 4, paras. 44-45.

75 *Id.*, paras. 46, 70 and 71.

76 *Id.*, para. 117.

77 *2011 Reference*, *supra*, note 4, para. 103.

78 Report of Eric Spink, Director, Alberta Securities Commission, *Securities Regulations and Systemic Risk*, February 11, 2016, p. 777 & fol. [Spink].

79 *Ibid*.

80 *2011 Reference*, *supra*, note 4, para. 103.

81 *Reference re Firearms Act (Can.)*, [2000] 1 S.C.R. 783, 2000 SCC 31, para. 57.

82 *2011 Reference*, *supra*, note 4, para. 84.

83 *Id.*, paras. 108-123.

84 *Id.*, paras. 106, 114, 116 and 122.

85 *Id.*, para. 119.

86 *A. G. Nova Scotia v. A. G. Canada*, [1951] S.C.R. 31 [*Nova Scotia v. Canada*]; *P.E.I. Potato Marketing v. Willis*, [1952] 2 S.C.R. 392 [*P.E.I. v. Willis*]; *(Re) Gray*, (1918) 57 S.C.R. 150.

87 *2011 Reference*, *supra*, note 4, para. 120.

88 *Id.*, paras. 132-133.

89 *Fédération des producteurs de volailles du Québec v. Pelland*, [2005] 1 S.C.R. 292, 2005 SCC 20, paras. 10 and 38 [*Pelland*].

90 *Nova Scotia v. Canada*, *supra*, note 26.

91 *Milk Board of British Columbia v. Grisnich*, [1995] 2 S.C.R. 895, para. 29 [*Milk Board*].

92 *Id.*, para. 27.

93 *Coughlin v. The Ontario Highway Transport Board*, , [1968] S.C.R. 569 [*Coughlin*].

94 *Id.*, para. 575.

95 *Reference re Agricultural Products Marketing*, [1978] 2 S.C.R. 1198, pp.1225-1226.

96 Even if "law" in Section 52 *Constitution Act*, 1982 (U.K.) c. 11 [*Constitution Act, 1982*], is not limited to "statutes, regulations and the common law" as Dickson, J. suggested in *obiter* in *Operation Dismantle v. The Queen*, [1985] 1 S.C.R. 441, at para. 39, in a wholly different context, the Protocol does not have the force of law.

97 *Re: Anti-Inflation Act*, [1976] 2 S.C.R. 373 [*Anti-Inflation*].

98 *Id.*, pp. 432-433.

99 *Id.*, p. 433.

100 *Anti-Inflation*, *supra*, *note 37*, p. 433.

101 *Id.*, p. 435.

102 *Manitoba Government Employees Association v. Government of Manitoba et al.*, [1978] 1 S.C.R. 1123.

103 *Executive Government Organization Act*, C.C.S.M., c. E170.

104 *Re Canada Assistance Plan (B.C.)*, [1991] 2 S.C.R. 525, at p. 548 [*Re Canada Assistance*]; applied in a provincial context, *Greater Vancouver Regional District v. British Columbia (Attorney General)*, 2011 BCCA 345, paras. 36-42.

105 *Re Canada Assistance*, *supra*, note 44, p. 552.

106 *Interpretation Act*, R.C.S., 1985, c. I-21.

107 *Canada (Attorney General) v. Friends of the Canadian Wheat Board*, 2012 FCA 183.

108 *Northrop Grumman Overseas Services Corp. v. Canada (Attorney General)*, [2009] 3 S.C.R. 309, 2009 SCC 50, para. 11 [*Northrop Grumman*].

109 *UL Canada inc. c. Québec (Procureur général)*, 1999 R.J.Q. 1720 (QC CS), p. 1741.

110 Nigel Bankes, "*Co-operative Federalism: Third Parties and Intergovernmental Agreements and Arrangements in Canada and Australia*" (1991) 29 Alberta L. Rev. 792 at p. 832.

111 *Canadian International Trade Tribunal Procurement Inquiry Regulations*, S.O.R. 193 - 602, Section 3.

112 "Council of Ministers" in each Act means "as established in accordance with the" Protocol.

113 *Interpretation Act*, *supra*, note 46, s. 41(5). Regarding international relations, it is recognized that direct implementation may be limited to particular provisions of an agreement, see John Mark Keyes and Ruth Sullivan, "A Legislative Perspective on the Interaction of International and Domestic Law" in Oonagh E. Fitzgerald (ed.), *The Globalized Rule of Law*, Toronto, Irwin Law, 2006, p. 314.

114 *British Columbia (Attorney General) v. Canada (Attorney General); An Act respecting the Vancouver Island Railway (Re)*, [1994] 2 S.C.R. 41, pp. 52-54.

115 *Northrop Grumman*, *supra*, note 48, para. 12, citing with approval Katherine Swinton, "*Getting there: An Assessment of the Agreement on Internal Trade* (1995)" in "*Law, Politics and the Enforcement of the Agreement on Internal Trade*", M.J. Trebilcock and D. Schwanen, eds., 196, at p. 201.

116 Johanne Poirier, "Une source paradoxale du droit constitutionnel canadien: les ententes intergouvernementales", (2009) Revue québécoise de droit constitutionnel 1, pp. 23-24.

117 *Id.*, pp. 28-29.

118 In *Re Canada Assistance*, *supra*, note 44, pp. 563-564; see also *West Lakes Limited v. State of South Australia*, (1980) 25 S.A.S.R. 389.

119 *Reference: Resolution to amend the Constitution*, [1981] 1 S.C.R. 753, pp. 875-876 [*Reference: Resolution to amend*].

120 Reflected in *Interpretation Act*, RSC 1985, c. I-21, *supra*, note 46, s. 42; *Interpretation Act*, CQLR, c. I-16.

121 *2011 Reference*, *supra*, note 4, para. 119.

122 Section 12 of the Protocol specifically requires that disagreement regarding its interpretation be resolved by consultation amongst the signatories.

123 *Coughlin*, *supra*, note 33.

124 *Milk Board*, *supra*, note 31.

125 *Federal Act*, *supra*, note 12, ss. 76-79; *CMA*, *supra*, note 12, ss. 206-207.

126 Protocol, s. 5.6.

127 Protocol, s. 5.5.

128 *Reference re Senate Reform*, [2014] 1 S.C.R. 704, 2014 SCC 32.

129 *Id.*, para. 62.

130 *Reference: Resolution to amend*, *supra*, note 59, pp. 875-876.

131 *Reference re Secession of Québec*, [1998] 2 S.C.R. 217, para. 30.

132 *General Motors*, *supra*, note 8, p. 678.

133 *Id.*, p. 680.

134 ”In this Act, systemic risk related to capital markets means a threat to the stability of Canada’s financial system that originates in, is transmitted through or impairs capital markets and that has the potential to have a material adverse effect on the Canadian economy.”

135 Spink, *supra*, note 18, p. 917; Affidavit of Donald G. Murray, Chief Executive Officer, Manitoba Securities Commission, February 23, 2016, paras. 35 & fol.

136 *2011 Reference*, *supra*, note 4, para. 66.

137 *2011 Reference*, *supra*, note 4, paras. 132-133.

138 *Toronto Electric v. Snyder*, [1925] A.C. 316, 412.

139 Whether the impugned law is part of a general regulatory scheme.

140 Whether the scheme is under the oversight of a regulatory agency.

141 Whether the legislation is of such a nature that provinces, acting alone or in concert, would be constitutionally incapable of enacting it.

142 Whether the legislative scheme is such that the failure to include one or more provinces or localities in the scheme would jeopardize its successful operation in other parts of the country.

143 *2011 Reference*, *supra*, note 4, paras. 90, 123.

144 Spink, *supra*, note 18, pp. 77-78.

145 Report of Jean-Marc Suret, "Une analyse de l'ébauche du projet fédéral de *Loi sur la stabilité des marchés de capitaux* sous l'angle du risque systémique", February 2, 2016, pp. 1025-1026.

146 *Id.*, pp. 1026-1029.

147 Report of Darrel Duffie, professor, Stanford University, "Systemic Risk in Financial Systems and Capital Markets in Relationship with the Proposed Draft *Capital Markets Stability Act*", May 3, 2016, pp. 35-38.

148 See paras. [171] and [185].

149 Subject however to certain mandatory verification procedures set forth in the *Statutory Instruments Act*, R.S.C. 1985, c. S-22, s.3 but which are not relevant to the present discussion.

150 Whether the legislation is of such a nature that provinces, acting alone or in concert, would be constitutionally incapable of enacting it.

151 *Coughlin*, *supra*, note 33.

152 *2011 Reference*, *supra*, note 4, para. 56. See also, *Reference re: Same Sex Marriage*, [2004] 3 S.C.R. 698, 2004 CSC 79, para. 22.

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