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## **A Return to Classical Federalism?**

**The Significance of the  
Securities Reference Decision**

**By Barry Cooper**



## About the author

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Cooper's other area of continuing interest has been Canadian politics and public policy. Here he has brought the insights of political philosophers to bear on contemporary issues, including the place of technology and the media in Canada, the on-going debate over the constitutional status of Quebec, and the status of Canadian defence and security.

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B.C.: I would like to thank Rainer Knopff, Brad Nemetz and Perry Mack for their comments on an earlier version of this paper. Thanks to them, I avoided several egregious errors. If any remain, blame them.



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# Executive Summary

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In a (surprisingly) unanimous decision just prior to Christmas 2011, the Supreme Court of Canada ruled that the proposal by the federal government as found in the *Securities Act* to regulate securities in Canada was unconstitutional. The Court ruling was based on the division of powers sections of the Constitution Act, 1867, originally a statute of Victorian Britain. This was only slightly less surprising. In this paper, Barry Cooper, Professor of Political Science at the University of Calgary, analyzes the historical context for this decision, the reasons for judgment and the politics that underlay both the attempt by Ottawa to take over an area of provincial jurisdiction and the implications of the failure in court.

In summary, he shows that the Court's decision conforms to the notion of classical federalism, whereby the central government and the provinces have reasonably clear areas of jurisdiction and responsibility. Given that classical federalism has been out of favour in Canada since at least the end of World War II, this is also a surprising development, Professor Cooper argues. Whether the Supreme Court of Canada (SCC) or the Government of Canada continues in this direction, of course, remains to be seen. Nevertheless, it is unquestionably a step in the right direction.

# I. Introduction

To understand the potential significance of the recent SCC decision in reference to the *Securities Act* (2011), a brief contextual history of the distribution of powers in Canada between Ottawa and the provinces is required.<sup>1</sup> These remarks will simplify a wonderfully complex and controversial jurisprudential and political history but without, one hopes, distorting it.

We begin with an uncontroversial observation: Many legal scholars, lawyers, judges and political scientists have argued that until the *Charter of Rights and Freedoms* became law in 1982, the SCC was, owing to the force and effect of precedent, or of stare decisis, largely subordinate to the rulings of the Judicial Committee of the Privy Council (JCPC), especially in matters relating to federalism, even though the JCPC ceased to be the court of final appeal in 1949. As Alan Cairns pointed out a generation ago, the hope, at least in English-speaking Canada, was that when the SCC became the final appeal court, it would reverse what critics of the JCPC saw as the debilitating consequences of a series of JCPC decisions that had effectively reduced and limited the aspirations of the Dominion government, as it was then still called.<sup>2</sup> In the view of the critics of the JCPC, the SCC would be an agent of centralization, thus restoring a measure of the original intent of the Fathers of Confederation. Criticism of such hopes was centered chiefly in the Quebec legal, political and academic communities.

The interpretation by the JCPC of the old *BNA Act, 1867*, now called the *Constitution Act, 1867*, stressed the importance of the division of powers in ss. 91 and 92 between the Dominion and the provincial governments. Specifically, critics argued that the colonies, now provinces, had not

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surrendered to the Dominion government nearly as much jurisdiction and power as critics thought was required by the plain meaning of the *Act* and unquestionably intended by its authors. Critics said the JCPC erred by giving a broad interpretation of provincial jurisdiction over property and civil rights in s. 92(13) and a narrow interpretation to the residual power of the Dominion government, “peace, order, and good government,” or POGG, found in s. 91. The JCPC did so despite the fact that the list of Dominion powers in s. 91 was merely illustrative; POGG is what mattered both within the logic of the document and according to Victorian legal conventions. The JCPC, however, interpreted the listed or enumerated federal powers as overshadowing POGG and, in effect, interpreted them as balancing the enumerated but exhaustive and thus non-illustrative powers accorded the provinces in s. 92. Agriculture and immigration were considered concurrent jurisdictions, but in case of conflict, the Dominion law would prevail.

By the early 20th century, the growing political conviction that governments should intervene in civil society to promote the social and economic welfare of the country encountered the problem that such areas of public policy were largely under provincial jurisdiction. However much the provinces might have welcomed, at least

abstractly, their constitutionally supported jurisdiction, they found it a doubtful privilege because of the great costs of exercising the responsibilities accorded them. This problem was especially acute during the serious and prolonged deflation of the 1930s, and it was largely because of widespread fear of a post-war depression that the provinces acquiesced in the continuation of wartime fiscal and political centralization. During the war, the country was effectively run from Ottawa under the authority of the *War Measures Act*, which was in many respects prolonged by the *National Emergency Transitional Powers Act* and the *Constitution of Transitional Measures Act* into the early 1950s.

The central constitutional and fiscal problem was that the Dominion government could raise taxes from any source, but the provinces were restricted to direct taxation. When the *BNA Act* was drawn up, no one dreamt of direct taxation of personal or corporate income. In short, by the end of World War II, by the law of the constitution, the provinces had the responsibilities and Ottawa had the money. Even if the senior bureaucrats in Ottawa had not been, practically to a man, Keynesians, and thus eager to deploy what was later called the “spending power” to promote economic prosperity, the imbalance between jurisdictional responsibility and fiscal muscle would have remained a major problem. So far as I can see, their Keynesianism simply made matters worse.<sup>3</sup>

Even if one grants the exaggerated notion that the Fathers of Confederation desired a unitary, not a federal, state and that many of them would have agreed with remarks Sir John A. Macdonald occasionally made, that federalism was an American abomination, the evidence for which judgment could be found in the contemporaneous War Between the States, it also seems true that the Framers built

better than they knew or even intended. In the event, provincial premiers, starting with Oliver Mowat of Ontario, resisted the view that federalism meant provincial subordination. Gradually, the view that federalism was legitimate and that it meant two co-ordinate orders of government came to dominate Canadian discourse on the matter. Judicial interpretation of Canadian political reality, first by the JCPC and then by the SCC, would fill in the rules on how that co-ordination was to work.

It seems to me that the decentralizing consequences of the JCPC have been exaggerated, especially with respect to the period after 1945. The standard by which developments in post-war federalism have been judged is usually called classical federalism.<sup>4</sup> In Canada, it began with an early decision by the JCPC in *Citizens Insurance Co. v. Parsons*.<sup>5</sup> At issue, the Law Lords decided, was the relationship between s. 91(2), which gave Parliament control over trade and commerce, and s. 92(13), which gave the provincial legislatures control over property and civil rights. To avoid contradictory legislation, one or another power would have to be limited. The JCPC decided that s. 91(2) applied only to interprovincial and international trade and commerce or to trade “affecting the whole Dominion” but not to trade and commerce within any one province.

Over the next 15 years, the JCPC decided 18 additional cases, 15 of which favoured the provinces. In 1896, in *Attorney General for Ontario v. Attorney General for Canada*, Lord Watson wrote that POGG is confined “to matters as are unquestionably of Canadian interest and importance,” and its use must not encroach upon the enumerated powers of s. 92. “To attach any other construction of the general power which, in supplement of its enumerated powers, is conferred upon the Parliament of Canada, would not only be contrary to the



intendment of the Act, but would practically destroy the autonomy of the provinces.”<sup>6</sup> In other words, classical federalism, though not so named by the JCPC, amounted to a dual sovereignty. As Tom Flanagan recently pointed out, classical federalism draws if not a bright line, at least a discernable one between the responsibilities of the federal and provincial governments.<sup>7</sup> It is also true that classical federalism and the 1896 interpretation of POGG exactly contradict what the Framers intended. As a result of a century of growth of what we now call the welfare state, the context in 2012 is not that of 1896. We discuss the implications below.

The names given to the adjustments made to classical federalism in order to accommodate the post-war ambitions of Ottawa bureaucrats and the anxieties of politicians and to strengthen the welfare state have varied over the years. The first version is usually called fiscal federalism. There was no repudiation or reinterpretation of the decisions of the JCPC by the SCC so much as an astute use of the inherited wartime fiscal powers by the federal government. Starting in 1941, tax-rental agreements enhanced the central control of the federal Department of Finance by permitting Ottawa to collect what would otherwise be provincial taxes in exchange for an annual payment from the Dominion government. Post-war tax agreements continued to reinforce control of the “national” economy by Ottawa. There followed shared-cost programs—to build the trans-Canada highway, for example—then ongoing federal government grants to universities or to the provinces in support of social services. With or without attached conditions or strings, the federal government’s use of its “spending power” began to influence how provinces set their priorities in areas of public policy that, constitutionally speaking, were exclusively a provincial responsibility.<sup>8</sup> Despite being

**“...the federal government’s use of its “spending power” began to influence how provinces set their priorities in areas of public policy that, constitutionally speaking, were exclusively a provincial responsibility.”**

supplemented by other sorts of federalism, fiscal federalism lives on most prominently in the scheme of equalization payments, whereby taxpayers in productive provinces transfer (via Ottawa) money to the governments of the unproductive or have-not provinces.

During the 1970s, Canadian politicians developed what political scientists called executive federalism and sociologists termed elite accommodation. This period of post-war politics developed in response to the consequences of the unprecedentedly rapid secularization and urbanization of the French-speaking population of Quebec. Here one finds, on the one hand, the quiet revolution that later grew into separatism, and on the other, the vision of Pierre Elliott Trudeau for constitutional change in the direction of greater centralization that, he hoped, would be accelerated by the *Charter of Rights and Freedoms*. Moreover, Bora Laskin, whom Trudeau appointed to the SCC in 1970 and to Chief Justice three years later, shared Trudeau’s vision regarding the power of Ottawa. During the early 1970s, the institutional focus of federalism was on federal-provincial conferences, later called First Ministers’ Conferences, where federal and provincial ministers and bureaucrats met to discuss any number of problems from pensions to official languages.<sup>9</sup>

**“...it was never clear whether Ottawa or the provinces could be held politically accountable for any given policy, especially if it was a failure.”**

During the later 1970s, and early 1980s, the preferred term was “co-operative federalism.” In many respects, it was a time when several other provinces copied the aspirations of the government of Quebec, though for different reasons than ethnic-centred nationalism. One measure of the new assertiveness of the provinces is reflected in the statistic that between 1975 and 1982 some 80 decisions on federal questions were handed down by the SCC, two more than were decided during the first quarter-century of its existence as the final court of appeal. The 1970s and 1980s were also decades of province-building during which time provincial politicians and bureaucrats increased the size and reach of what might be called the provincial state. The later phases of co-operative federalism coincided with the growth of “asymetric federalism,” which allocated powers and responsibilities to Quebec that were either withheld from the other provinces or not taken up by them. Culture would be an example of a policy area tailor-made for asymmetric treatment. Whether asymmetric or not, co-operative federalism had the consequence of maximizing flexibility. It also minimized lines of responsibility, since it was never clear whether Ottawa or the provinces could be held politically accountable for any given policy, especially if it was a failure.

After 1982, federal constitutional politics has been scrambled with Charter politics.<sup>10</sup> Alan Cairns has argued that the impact of the *Charter* on the self-understanding of Canadians meant that the constitution was no longer the exclusive concern of governments. Citizens also had a stake in the constitution, especially those whose rights and freedoms were explicitly named in it or whose rights and freedoms were soon enough “read in” by the courts: women, visible minorities, the disabled, Aboriginals and, more recently, gay men and lesbian women, all of whom Cairns called “Charter Canadians.”<sup>11</sup> Generally, the federal government saw the Charter as a nation-building document, and the provinces saw it as a province-weakening one.

Quebec was still the great federal problem after 1982. One reason for the failure of what Peter Russell called “mega constitutional change” from Meech Lake to Charlottetown was that the constitution that Brian Mulroney famously asked Quebec to join “with honour and enthusiasm” now included Cairns’ “Charter Canadians,” who had been galvanized by the *Charter* into a new self-awareness.<sup>12</sup> In other words, the *Charter* added an additional layer of complexity to the Canadian constitution. No longer does it resemble “a prosaic document that instrumentally only packages government jurisdictions in separate federal and provincial boxes.”<sup>13</sup> What makes the *Securities Act Reference* so remarkable given the context just outlined is that the old-fashioned concerns and questions constituting classical federalism are still present in the minds of the justices who make up the Supreme Court of Canada today.



## II. Preliminary skirmishes

In 2003, the Committee to Review the Structure of Securities Regulation in Canada published its *Final Report*.<sup>14</sup> This “wise persons” report, as it was conventionally called, summarized a number of studies from the 1935 Royal Commission on Price Spreads on through the Porter Commission (1964), the Ontario Securities Commission (1967), the 1979 Proposals for a Securities Market Law for Canada and the Royal Commission on Economic Union (1985). The wise persons, as did their predecessors, recommended a comprehensive regulatory agency with responsibilities for all capital markets in Canada. As part of the report, they asked the opinions of three major law firms about the constitutionality of such legislation and of a proposed declaration that although the provinces could still pass legislation regulating securities, the proposed federal law would include an explicit paramountcy clause stating that, in the event of conflict, the federal law would override provincial laws.

Ogilvy Renault of Montreal advised that Parliament could enact the proposed act and might be able to include a paramountcy clause, but it would be a “novel initiative” because “there is no binding precedent in the case law supporting the validity of such a clause.” Torys of Toronto advised that the federal government could regulate securities under s. 91(2), and saw no impediment to a paramountcy clause either. Faskin Martineau of Vancouver agreed with Torys regarding s. 91(2) but was doubtful about the paramountcy declaration.

In 2006, the Ontario government established the Crawford Panel on a Single Canadian Securities Regulator; in 2009, the Expert Panel on Securities Regulation,

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usually called the Hockin Panel, delivered its final report. Both recommended a single securities regulator. In response to the Hockin report, the federal government established the Canadian Securities Regulation Regime Transition Office. In November of that year, *Canadian Lawyer* magazine canvassed legal opinion on the constitutionality of a single federal regulator. Peter Hogg, former Dean of Law at Osgoode Hall Law School and author of *Constitutional Law of Canada* (“Hogg on Con”), said it was constitutional; Jean-François Gaudreault-DesBiens, Associate Dean, Research, and Canada Research Chair in North American and Comparative Juridical and Cultural Identities at the Faculty of Law of the Université de Montréal, said it was not. He mentioned that the provincial regulator in Quebec, the Autorité des marchés financiers, was considered in his province to be the economic arm of the quiet revolution.<sup>15</sup> On May 26, 2010, the federal government referred the draft law produced by the Hockin report to the SCC for an advisory opinion regarding its constitutionality.

Two days later, on May 28, 2010, the then Alberta Finance Minister, Ted Morton, called the draft legislation an “unprecedented federal power grab” and published a defence of the existing regime in the *Financial Post*. The “passport

**“...the future of the national securities regulator was shaping up as a familiar conflict of interest between the central government and the provinces, a tension nearly as old as the country.”**

system” as it is called, “provides market participants with a single window of access to Canadian capital markets.” The passport system ensured that once a registrant or issuer receives approval from their home province, all other participating jurisdictions in the country automatically grant access to their markets. It was, Morton said, a system of “mutual recognition,” and it was being advocated on the international stage by Canada as a way of seamlessly integrating American markets with those of other G8 countries. “[S]o why isn’t it good enough to use inside Canada?” he asked. The Organisation for Economic Co-operation and Development and the World Bank have consistently ranked the Canadian regulatory system ahead of the United Kingdom and the United States; the global financial crisis proved that the Canadian regulatory system was working well, so don’t fix what ain’t broke. “Ontario,” Morton said, “is the only province that does not grant automatic approval, but Ontario market participants continue to have access to markets in other jurisdictions.” Ontario was also the home of almost all the reports and legal advisories that supported a single regulator.

On June 6, 2010, Philip Anisman, who had written the 1979 report for the federal government, replied in the *Financial Post* criticizing the passport system because it “applies only to prospectus clearance, discretionary exemptions and registration.” Then, four days later, Bill Rice, chairman of the Alberta Securities Commission, responded and pointed out that the enumerated functions “are, in fact, the key processes that participants typically encounter in multiple jurisdictions.” He added that a national regulator would simply add “a layer of bureaucracy.”

Anisman and Rice again exchanged views in the *Financial Post* on June 24. In July, Morton pointed out in the *Calgary Herald* that the federal move would have the effect of locating the head office of any national regulator in Toronto and imposing the usual requirements of bilingualism on senior management, neither of which seemed to serve the interests of capital markets located in the West, especially those of Alberta and British Columbia. Morton and Raymond Bachand, the Quebec Minister of Finance, then undertook a two-person speaking tour during the summer of 2010 and urged their provincial counterparts not to support the federal initiative. In the fall, Jim Flaherty, the federal Minister of Finance, told the Calgary Chamber of Commerce that it was “embarrassing” not to have a Canadian securities regulator.<sup>16</sup> In short, the future of the national securities regulator was shaping up as a familiar conflict of interest between the central government and the provinces, a tension nearly as old as the country.

The Alberta Court of Appeal (March 8, 2011) and the Quebec Court of Appeal (March 31, 2011) ruled that the proposed law was unconstitutional and not a valid exercise of the general federal trade and commerce power. Two weeks after the Quebec court handed down its ruling, on April 12 and 13, 2011, the SCC heard arguments.

Notwithstanding the views of the distinguished constitutional lawyer Peter Hogg and many other legal minds, there were good reasons to expect, as Jeffrey MacIntosh, a law professor at the University of Toronto, put it, “The feds are going down. Big time.”<sup>17</sup> His reasoning was a model of common sense. The proposed law was voluntary, which meant the coercive federal trade and commerce clause did not apply. Moreover, in a 1989 case *General Motors of Canada Ltd v. City National Leasing*,<sup>18</sup> the SCC indicated five factors or “indicia” to determine whether the general branch of the trade and commerce power applied. They are:

1. The impugned legislation must be part of a general regulatory scheme;
2. The scheme must be monitored by the continuing oversight of a regulator agency;
3. The legislation must be concerned with trade and commerce as a whole rather than with a particular industry;
4. The legislation should be of a nature that the provinces jointly or severally would be constitutionally incapable of enacting; and
5. The failure to include one or more provinces or localities in a legislative scheme would jeopardize the successful operation of the scheme in other parts of the country.

MacIntosh argued that the first three factors were present but the last two were not. The voluntary nature of the proposed law and the fact that the provinces actually were already regulating securities transactions, in his view, doomed the federal initiative.<sup>19</sup>

***His [J. MacIntosh’s] reasoning was a model of common sense.***

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### III. The Decision

Just before Christmas 2011, the SCC published its unanimous decision.<sup>20</sup> The summary judgment held that the draft *Securities Act* “is not valid” under s. 91(2) because it “is not chiefly aimed at genuine federal concerns” but at provincial ones. The reasons for judgment rejected entirely the argument advanced by Ottawa and Ontario.<sup>21</sup>

The old legal adage, if you don’t have the law, you argue the facts, seems to have informed the Ottawa-Ontario strategy. They did not argue the proposed law was *prima facie* valid but advanced an alleged factual contention “that the securities market has evolved from a provincial matter to a national matter” so that, today, the general trade and commerce power applied even though it never did before (¶ 4). Today, those who supported the *Act* declared that the “systemic risk” is so great that only the federal government is equipped to regulate markets (¶ 33). The “propriety” of such a change cannot be declared or assumed, the Court said; it has to be proved. To be sure, “aspects” of the securities market may be national in scope, but these are hardly addressed in the *Securities Act* (¶ 5). Rather, the *Act* proposed “the day-to-day regulation” of participants, which has long been considered a matter of local concern (¶ 6). That is, the federal government did not establish the alleged facts. Accordingly, the long-established division of responsibilities cannot be undermined simply because Ottawa wants to assert its power (¶ 7). This was a polite judicial and judicious way to confirm Morton’s words, that Ottawa was attempting an unprecedented power grab that presumably would save Flaherty some embarrassment in the future when he bestrode the international stage.

The “Overview” from which the above quotations were drawn was followed by seven sections dealing with (1) provisions of the proposed *Act* and the parties’ positions (¶ 11-35); (2) the decisions of the Alberta and Quebec Courts of Appeal (¶ 36-39); (3) the jurisprudence on securities regulation in Canada and other federal states (¶ 40-52); (4) the constitutional principles involved (¶ 53-67); (5) the significance of s. 91(2) in light of those principles (¶ 68-90); (6) the application of s. 91(2) to the *Securities Act* in light of the constitutional principles (¶ 91-133); and (7) the conclusions to be drawn (¶ 134).

The arguments advanced in Part VII (number 6 above) are of the greatest interest in the present context. The Court began by reviewing the initial 1881 decision by the JCPC in the *Parsons* case noted above along with the “modern” trade and commerce cases that culminated in the indicia articulated first in the *Attorney General of Canada v. Canadian National Transportation Ltd.*,<sup>22</sup> and then in the *General Motors* case noted above and so strongly emphasized by MacIntosh (¶ 76). Specifically, in *Canadian National Transportation*, the Court held that to be valid under s. 91(2) federal legislation must be “qualitatively different from anything that could practically or constitutionally be enacted by the individual provinces either separately or in combination” (quoted at ¶ 79). Combining the arguments and indicia of these two cases, along with a 2005 case *Kirkbi AG v. Ritvik Holdings Inc.*,<sup>23</sup> the *Securities Act* in its present form did not meet the test. The Court added that it was not concerned with what might be “optimum as a matter of policy” but with “what is constitutionally permissible” (¶ 90). We will return to the question of policy below.

Not surprisingly the Act was held by the SCC to “duplicate and displace the existing provincial and territorial securities regimes” (¶ 106) and so did not meet the last three indicia of the *General Motors* test. It clearly did not aim to regulate all aspects of capital markets or “the industry as a whole,” because some capital markets were entirely provincial (¶ 115). Moreover, the factual argument that the federal government made, that the securities market had been transformed, was merely asserted without evidentiary support. The argument was further weakened by the fact that the proposed Act largely copied “existing provincial schemes,” which would, of course, indicate the absence of any transformation of securities markets (¶ 115). The Court added that while “systemic risk” and “national data collection” may be legitimate concerns of the federal government, “they do not ... justify a complete takeover of provincial regulation” (¶ 117).

Elements of the fourth indicium are present (¶ 118), but because the provinces are sovereign, they can “resile from an interprovincial scheme” (¶ 119-120) so that “there can be no assurance that they could effectively address issues of national systemic risk and competitive national capital markets on a sustained basis” (¶ 120). Accordingly, the fourth *General Motors* indicium “must be answered, at least partially, in the negative” (¶ 121).

The fifth *General Motors* indicium was not met at all: “We note that the opt-in feature of the scheme, on its face, contemplates the possibility that not all provinces will participate. This weighs against Canada’s argument that the success of its proposed legislation requires the participation of all the provinces” (¶ 123). In other words, you can’t have it both ways: Success requires all provinces participate *and* that provincial regulation under the proposed Securities Law be voluntary.<sup>24</sup>

***The Court added that while “systemic risk” and “national data collection” may be legitimate concerns of the federal government, “they do not ... justify a complete takeover of provincial regulation”...***

Accordingly, neither the facts nor the law can justify the “wholesale takeover” by the federal government of the regulation of securities nationwide (¶ 126-128).

On the other hand, “a cooperative approach that permits a scheme that recognizes the essentially provincial nature of securities regulation while allowing Parliament to deal with genuinely national concerns remains available” (¶ 130). There are plenty of models from other federations to choose from (¶ 131), and, although it is not for the Court to suggest “the way forward,” yet the justices may properly note the growing practice of resolving complex governance problems “by seeking cooperative solutions” rather than by the “bare logic of either/or” (¶ 132). One might add that this co-operative option was just what was achieved by the passport system, even if Ontario did not participate. This is not to say that the passport model was perfect or that the provinces could not improve on it by establishing a more comprehensive multi-jurisdiction regulator. However, it does mean that any viable improvements<sup>25</sup> would be based not on the old and ambiguous model of co-operative federalism but precisely on the either/or logic of classical federalism that, on this occasion, the SCC unanimously upheld.



## IV. Responses

The response from the losing side, namely those who supported the federal government, the government of Ontario, and, not to put too fine a point on it, Bay Street, was entirely predictable. The headline in *The Globe and Mail's* Report on Business was "Bay Street Pans Court's Ruling." The story quoted, among others, Stephen MacPhail, CEO of CI Financial Corporation of Toronto: "Prince Edward Island isn't that much bigger than the city of Barrie [Ontario], and yet it has its own securities regulator." Clearly, MacPhail considered the notion of a securities regulator in PEI absurd even though PEI is a province and Barrie is a municipality. *The Globe's* editorial board declared the SCC was "overcautious," failed to grasp the importance of a single capital market and consequently created "a nuisance and a hindrance to the flow of capital."<sup>27</sup> A former Dean of Osgoode Hall Law School, Patrick Monahan, a raft of Toronto lawyers and the current and former CEOs of the Ontario Securities Commission agreed. "The only realistic option left to the federal government," Monahan declared, "is to try to establish a national regulator whose responsibility is limited to interprovincial and international capital markets."<sup>28</sup> Since capital markets, practically speaking, can be international, national or provincial (or all three at once), it is not clear what Monahan had in mind or even what he meant.

A few days later in the *Financial Post*, Anisman, who had earlier exchanged views with Morton and Rice, announced that the SCC decision "does not preclude the creation of a single national securities regulatory regime in Canada." The federal government relied on the general trade and commerce clause of s. 91(2), he said, and

the SCC ruled that such jurisdiction does not apply. "Nevertheless, various elements of the proposed act may come within general trade and commerce, if addressed from a national perspective." Specifically, he had in mind the systemic risk problem.<sup>28</sup>

"Systemic risk" has surfaced a number of times in the discussion. In ¶ 102-103, the SCC followed the definition of M.J. Trebilcock in his 2010 report in favour of a national securities regulator: Systemic risks are "risks that occasion a 'domino effect' whereby the risk of default by one market participant will impact the ability of others to fulfill their legal obligations, setting off a chain of negative economic consequences that pervade an entire financial system." The problem with such a broad definition is, as Ariel Katz remarked, that it is too vague to be useful in specifying a potential problem standing in need of regulation.<sup>29</sup>

Granted that nothing in the proposed *Securities Act* addressed the problem of systemic risk for the obvious reason that the language of the *Act* almost exactly duplicated existing provincial regulations, the SCC left open the possibility that a properly crafted *Securities Act* might be constitutionally valid if it genuinely did address the danger of systemic risk. The first step in such an argument, however, would be to come up with an adequate description of the problem. The parties in favour of the national regulator never raised this issue, which gives credence to the observation by MacIntosh that systemic risk "was never more than an adventitiously concocted flying buttress cooked up in the wake of the credit meltdown to support an inherently unsupportable case."<sup>30</sup>

In short, the very vagueness of the concept of systemic risk suggests that it was little more than an add-on based on the moral panic that accompanied the existing problems in credit markets. This is probably why Anisman alluded to unnamed “market developments” that would make it “inevitable that the government of Canada will feel compelled to regulate aspects of Canada’s securities market. The only questions are when and how.”<sup>31</sup> Historical inevitability is a very slim reed upon which to stake future federal initiatives. In any event, surely the “when” will depend upon the “how” because Ottawa’s proposal massively to invade provincial jurisdiction with a voluntary proposal, the “how” that the SCC properly rejected, has indefinitely postponed the “when.”

Anisman was also of the opinion that the Court’s advocacy of co-operation provided an opening for federal action. In this respect he was joined by Justin Dharamdial, who was under the impression that the SCC was advocating “cooperative federalism.”<sup>32</sup> It seems to me this is a misreading of what the Court intended. Co-operation, as was noted above, was what the passport scheme entailed. Moreover, the passport scheme directly addressed the concerns of Quebec, which likely were uppermost in the minds of the justices. Apart from the oral interventions of Abella J., noted above, and of the centrality of the Quebec securities regulator in the economic strategy of that province, in ¶ 73, the SCC drew attention to an important “facet of federalism—the recognition of the diversity and autonomy of provincial governments in developing their societies within their respective spheres of jurisdiction.” In case the allusion to Quebec was not immediately apparent, in the next sentence, the Court mentioned the *Secession Reference*.<sup>33</sup>

Those who opposed the proposed federal regulator drew attention to what they considered the nefarious incremental

strategy of the federal government. Had Ottawa been able to gain recognition for concurrent jurisdiction over the regulation of securities, this would have been a first step in delegitimizing provincial securities regulation acts. This is what made the voluntary opt-in provision a kind of Trojan horse. Once any prospective federal power over securities regulation was recognized, the argument went, it could be expanded to compel compliance with the federal law. This was the whole purpose of the proposed paramountcy clause discussed above. That is, if the SCC recognized concurrent federal jurisdiction, it may have opened the door to significant future changes in the division of powers. Opponents to such a dramatic increase in the trade and commerce power and the concomitant reduction in provincial jurisdiction likely had something like the American Interstate Commerce Commission in mind, though far as I can tell, it never was mentioned. Perhaps it was just an invisible elephant.

The limitation on trade and commerce objected to by proponents of a national securities regulator introduces a symmetrical limitation on the side of the opponents. As Terence Corcoran pointed out, by declaring the federal government’s efforts *ultra vires*, the SCC made it clear that it takes more than a declaration by Ottawa that urgent national and international claims are involved for Ottawa to usurp provincial responsibilities. This statement by the SCC “may have jeopardized its [Ottawa’s] plans to regulate greenhouse gas emissions,”<sup>34</sup> Corcoran observed. However that may be, it seems undoubtedly correct that, as Anisman said, “The issues to be addressed ... are not just legal; they are primarily political.”<sup>35</sup>

# Conclusions

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Let us conclude by indicating the political issues that need to be addressed. It seems to me the most important one has already been settled by the either/or logic of classical federalism: Securities regulation is primarily or essentially a provincial responsibility. Any multi-jurisdictional regulation, which may or may not involve the federal government, must begin from that position so that co-operative interaction preserves classical federalism.

Second, and almost equally important, the SCC reminded the federal government that one of the implications of constitutional democracy is that governments in such regimes are limited. In plain language, they do not do all that they could do or might want to do. In very practical terms, the senior bureaucrats in the Department of Finance have for generations sought to control and regulate securities. No doubt, they still harbor secret (or not-so-secret) desires in that direction.

The Supreme Court of Canada has firmly told them, “Think again.” Those instructions, which prohibit the federal government from expanding the trade and commerce power or turning the Department of Finance or one of its creatures into a Canadian version of the Interstate Commerce Commission, may turn out to have the longest lasting implications. Classical federalism initially affirmed by the JCPC in *Parsons* and partly restored by the SCC in *General Motors* was, it seems to me, reaffirmed in the *Securities Act Reference*.

# Endnotes

1. *Reference re Securities Act*, [2011] SCC 66. We refer to it in the text as the *Securities Act Reference*.
2. Cairns, "The Judicial Committee and its Critics," in *Constitution, Government and Society in Canada: Selected Essays by Alan C. Cairns*, ed. Douglas E. Williams, (Toronto: McClelland & Stewart, 1988), pp. 43-85.
3. See Cooper, *It's the Regime, Stupid! A Report from the Cowboy West on Why Steven Harper Matters*, (Toronto: Key Porter Books, 2009), Ch. 5.
4. See K.C. Wheare, *Federal Government*, 4th ed., (Oxford: Oxford University Press, 1963) for the classical statement regarding classical federalism.
5. [1881] 7 App. Cas. 96.
6. [1896] A.C. 348.
7. Flanagan, *The Globe and Mail*, January 17, 2012, A13.
8. For the record, the term "spending power" does not appear in the law of the Constitution though it has been used several times in decisions of the SCC. It is a convenient convention that has never been challenged or tested in court, largely as a consequence of a 1935 JCPC decision in the *Employment and Social Insurance Reference*, where Lord Atkin argued that the unlimited power of the Dominion government to collect taxes did not imply an equally unlimited power to spend. [1937] A.C. 355 at 366-370. See also Cooper, *It's the Regime, Stupid!*, 181ff and references.
9. See Donald Smiley, *Canada in Question: Federalism in the Seventies*, 2nd ed., (Toronto: McGraw-Hill Ryerson, 1976). These conferences were subsequently expanded to include territorial leaders, Aboriginal leaders and occasionally leaders of communities Cairns called "Charter Canadians," as is discussed below.
10. Rainer Knopff and F.L. Morton, *Charter Politics*, (Toronto: Nelson Canada, 1992).
11. Cairns, *Disruptions: Constitutional Struggles from the Charter to Meech Lake*, ed. Douglas E. Williams, (Toronto: McClelland & Stewart, 1991).
12. Russell, *Constitutional Odyssey: Can Canadians Become a Sovereign People*, 3rd ed., (Toronto: University of Toronto Press, 2004).
13. Cairns, *Disruptions*, p. 31.
14. Available online at: [http://www.wise-averties.ca/finalreport\\_en.html](http://www.wise-averties.ca/finalreport_en.html). Accessed on January 18, 2012.
15. Kelly Harris, "Constitutional Law Heavyweights Spar over Single National Securities Regulator," *Canadian Lawyer*, November 16, 2009. Available at: <http://canadianlawyermag.com/Constitutional-law-heavyweights-spar-over-single-national-securities-regulator.html>. Accessed January 17, 2012. For a detailed history of the development of proposals for a single securities law, see the University of Toronto Canadian Securities Law Portal available online at: <http://www.securitieslawportal.ca/>. Accessed January 17, 2012. See also Jacob Ziegel, "Who can Regulate Canadian Securities?" University of Toronto Law School Faculty Blog, July 25, 2011. Available online at [http://utorontolaw.typepad.com/faculty\\_blog/2011/07/prof-jacob-ziegel-who-can-regulate-canadian-securities.html](http://utorontolaw.typepad.com/faculty_blog/2011/07/prof-jacob-ziegel-who-can-regulate-canadian-securities.html). Accessed January 17, 2012. See also the relevant postings on the York University, Osgoode Hall website, The Court. Available online at: <http://www.thecourt.ca>. Accessed January 17, 2012.
16. *Calgary Herald*, July 14, 2010; September 17, 2010.
17. *Financial Post*, June 1, 2011.
18. [1989], 1 SCR, 641.
19. See also MacIntosh, *Financial Post*, November 23, 2010.
20. [2011] SCC, 66. References to the paragraphs are given in the text. The text of the *Securities Act Reference* is available at: <http://scc.lexum.org/en/2011/2011scc66/2011scc66.html>.
21. According to Lawyers Weekly (January 27, 2012), of 64 judgments handed down in 2011, in slightly over half (56 per cent), the Court issued unanimous reasons; they compiled a unanimity record of 73 per cent on results. Agreeing on reasons as well as outcomes sends a significantly stronger message to litigants. Available online at: <http://www.lawyersweekly.ca/index.php?section=article&articleid=1579>. Accessed January 31, 2012.

22. [1983] 2 SCR, 206.
23. [2005] 3 SCR, 302.
24. During oral argument heard by the SCC some eight months earlier, Abella J. raised this question along with the observation that Quebec would never likely opt in, so the *Act* cannot possibly constitute an exercise of the general trade and commerce power. The federal government then made the weak response that General Motors only supplied indicia, not a test, so that the *Act* need not meet all the indicia to pass the test. See Justin Dharamdial, "A Primer to the National Securities Regulation Reference, The Court, November 11, 2011. Available online at: <http://www.thecourt.ca/2011/11/11/a-primer-to-the-national-securities-regulator-reference/>. Accessed January 17, 2012. Even so, Dharamdial still concluded that the Court would likely find the *Act* "a valid exercise of the federal government's powers." Given Dharamdial's view that the General Motors' indicia were not clear, this looks like very wishful thinking.
25. For some suggestions, see MacIntosh's column in the *Financial Post*, January 27, 2012.
26. *The Globe and Mail*, December 22, 2011, B4, A14.
27. *The Globe and Mail*, December 23, 2011, A8
28. *Financial Post*, December 28, 2011, FP 11.
29. Katz, "Should Securities Regulators Care about Systemic Risk?" University of Toronto Law School Faculty Blog, January 20, 2010. Available online at: [http://utorontolaw.typepad.com/faculty\\_blog/2010/01/should-securities-regulators-care-about-systemic-risk.html](http://utorontolaw.typepad.com/faculty_blog/2010/01/should-securities-regulators-care-about-systemic-risk.html). Accessed January 17, 2012.
30. *Financial Post*, December 23, 2011, FP 11. One must admire Professor MacIntosh's ability to mix his metaphors with systemic effect.
31. *Financial Post*, December 29, 2011, FP 11.
32. Dharamdial, "Prospects for Cooperation in the Reference Re Securities Act, 2011 SCC 66," in *The Court*, January 13, 2012. Available online at: <http://www.thecourt.ca/2012/01/13/cooperative-federalism-in-reference-re-securities-act-2011-scc-66/>. Accessed January 17, 2012.
33. [1998] 2 SCR, 217.
34. Corcoran, *Financial Post*, December 22, 2011, FP 11.
35. *Financial Post*, December 29, 2011, FP 11.



## Further Reading

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