PROTECTING PARLIAMENTARY SOVEREIGNTY AND ACCOUNTABILITY IN A DUALIST FEDERATION

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I. INTRODUCTION

Over the last few years, the Supreme Court of the United Kingdom and the Supreme Court of Canada have offered diverging conceptions of parliamentary sovereignty. In *R. (on the Application of Miller) v. Secretary of State for Exiting the European Union*,[1] and especially in *R. (on the Application of Miller) v. The Prime Minister; Cherry v. Advocate General for Scotland*,[2] the UK Supreme Court sought to protect the principles of parliamentary sovereignty and accountability. In the *Reference re Pan-Canadian Securities Regulation*,[3] the Canadian Supreme Court ignored calls to protect parliamentary sovereignty and accountability, and ultimately upheld attempts to bypass these principles in the name of its conception of "cooperative" federalism.

No matter what position one adopts on the merits of the two cases decided by the UK Supreme Court,[4] it is fair to say that it adopted a more substantive conception of parliamentary sovereignty than did the Canadian Supreme Court. In *Miller (No. 2)*, a unanimous UK Supreme Court developed this principle further and concluded that the prorogation of the UK Parliament in the lead up to Brexit "had the effect of frustrating or preventing the constitutional role of Parliament,"[5] thus making it "unlawful, null and of no effect."[6] In coming to this conclusion, the Court rejected attempts by the executive to circumvent the principles of parliamentary sovereignty and accountability.[7]

The Canadian Supreme Court, operating in a federal context in which parliamentary sovereignty is and should be inherently more substantive in nature, has explicitly adopted traditional British constitutional law doctrine on this question, ultimately ignoring the federal structure of the Canadian state and its implications for the principle of parliamentary sovereignty. Arguably, the Supreme Court's failure to adequately consider this issue has led

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1 [2017] UKSC 5 [*Miller (No. 1)*].

2 [2019] UKSC 41 [*Miller (No. 2)*].

3 2018 SCC 48 [*Pan-Canadian Securities*].

4 Some scholars have argued that these decisions are inconsistent with traditional British public law doctrine: Richard Ekins, "Constitutional Practice and Principle in the Article 50 Litigation" (2017) 133 Law Q Rev 347; John Finnis, "The Unconstitutionality of the Supreme Court's Prorogation Judgment," online: <policyexchange.org.uk/publication/the-unconstitution ality-of-the-supreme-courts-prorogation-judgment/>.

5 *Supra* note 2 at para 55.

6 *Ibid* at para 69.

7 *Ibid* at paras 41–48.

to some of the doctrinal confusion that has been apparent in its federalism jurisprudence since appeals to the Judicial Committee of the Privy Council ended in 1949.[8]

II. BACKGROUND

The Canadian case, *Pan-Canadian Securities*, involved an attempt by the federal government and the governments of five provinces and one federal territory to implement a national cooperative scheme for the regulation of capital markets. In the 2011 *Reference re Securities Act*, the Supreme Court of Canada rejected an argument by the federal government that the regulation of the securities market had "evolved from a provincial matter to a national matter."[9] However, the Supreme Court noted that the federal Parliament could potentially intervene to regulate systemic risks. It also explicitly encouraged both orders of government to consider a "cooperative approach" in exercising their respective legislative powers.[10]

The five provinces and one territory consequently came together with the federal government to conclude an intergovernmental agreement that would respond to this invitation from the Supreme Court. This agreement was the subject of the 2018 case. The scheme involved a federal statute aimed at systemic risks, and a model law dealing with the provincial and territorial aspects of securities. The latter law must be transformed into substantive law through identical statutes in each sub-national entity.[11] Both the federal and sub-national laws would delegate administrative functions to a single national authority and a Council of Ministers.

Three aspects of this agreement are crucial for the analysis that follows. First, the national authority is overseen by a Council of Ministers composed of the federal and sub-national ministers responsible for securities regulation.[12] Second, a proposal to amend the model law must be approved by at least 50 percent of the members composing the Council of Ministers.[13] At a minimum, this must include the "major capital markets": Ontario and British Columbia. Third, all regulations proposed by the national authority pursuant to their enabling federal and sub-national statutes must be approved by the Council of Ministers.[14]

III. THE SUPREME COURT OF CANADA'S OPINION

The Canadian Supreme Court concluded that this scheme was constitutionally compliant. The Supreme Court noted that, per the agreement, the Council of Ministers can only adopt

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8 See e.g. Eugénie Brouillet, "The Supreme Court of Canada: The Concept of Cooperative Federalism and Its Effect on the Balance of Power" in Nicholas Aroney & John Kincaid, eds, *Courts in Federal Countries: Federalists or Unitarists?* (Toronto: University of Toronto Press, 2017) 135; Asher Honickman, "Watertight Compartments: Getting Back to the Constitutional Division of Powers" (2017) 55:1 Alta L Rev 225.

9 2011 SCC 66 at para 4.

10 *Ibid* at para 130.

11 In the Canadian context, provinces and territories are referred to as sub-national entities for the purposes of this case comment.

12 *Memorandum of Agreement Regarding the Cooperative Capital Markets Regulatory System*, s 3(a)(iv), online: <www.fin.gov.on.ca/en/budget/ontariobudgets/2013/ccmr-moa.html>.

13 *Ibid*, s 5.5.

14 *Ibid*, ss 4.2, 5.2.

"proposed" modifications to the model law.[15] Thus, the Council of Ministers cannot *legally* bind the legislatures. In fact, the Supreme Court explained that, pursuant to the principle of parliamentary sovereignty as traditionally expounded by A.V. Dicey, each legislature technically remains free to act contrary to the agreement and the proposed model law.[16]

The Supreme Court nevertheless agreed with the provinces of Alberta and Quebec that, in practice, once the participating sub-national entities have signed on to this scheme and dismantled their own securities commissions, they will "likely find it necessary"[17] to implement all changes to the model law, whether they agree with these changes or not.[18] Despite this significant practical impact on the legislative autonomy of the participating sub-national entities, the Supreme Court saw no reason to protect parliamentary sovereignty and accountability.

Interestingly, the Supreme Court said nothing about the role of a majoritarian Council of Ministers in approving all proposed regulations pursuant to provincial legislation, nor the possibility that a province could have secondary legislation — in an area within its exclusive jurisdiction — imposed on it without its consent. The Supreme Court only expressed an opinion on the constitutionality of the ability of provincial Ministers to participate in the adoption of regulations pursuant to the federal law. In declaring that such a scheme was constitutionally compliant, it simply emphasized a traditional conception of parliamentary sovereignty, which grants legislatures the authority to delegate the administration of their laws as they see fit.[19]

IV. THE SHIFTING STRUCTURE OF THE CANADIAN FEDERATION

This unanimous opinion, while consistent with the traditional conception of parliamentary sovereignty, is inconsistent with that concept as it is understood in a federal state such as Canada. It is indisputable that there is an "internal contradiction in speaking of federalism in the light of the invariable principle of British parliamentary supremacy."[20] Dicey famously noted that the two concepts are incompatible.[21] This is the case because the division of executive and legislative powers places a substantive constraint on parliamentary sovereignty. There are limits to the powers of both orders of government imposed by the written Constitution. Neither order of government is subordinate to the other. They are instead coordinate, both being sovereign within their respective spheres of jurisdiction.

As a first proposition, therefore, one legislature cannot exercise the legislative powers of the other order of government, nor can it delegate its legislative authority to the other, absent constitutional authorization. If it does, courts are bound to conclude that such a law is invalid, inoperative, or inapplicable, in whole or in part.[22] In its 2018 *Pan-Canadian*

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15 *Pan-Canadian Securities*, *supra* note 3 at para 50.
16 *Ibid* at para 62.
17 *Ibid* at para 68.
18 *Ibid* at paras 68–71.
19 *Ibid* at paras 124–26.
20 *Re: Resolution to amend the Constitution*, [1981] 1 SCR 753 at 806.
21 AV Dicey, *Introduction to the Study of the Law of the Constitution*, 10th ed (London, UK: Macmillan & Co, 1959), ch III. See also Jesse Hartery, "Reforming the Federal Electoral System in Canada: The Road to Unilateral Amendment" (2020) 13:2 JPPL 341 at 362.
22 *Attorney General of Nova Scotia v Attorney General of Canada*, [1951] SCR 31.

Securities opinion, the Canadian Supreme Court explicitly accepted this proposition in theory by noting that "neither level of government has the power to legislate in respect of matters that fall within the exclusive competence of the other."[23]

The second proposition is that both the central and sub-national legislatures cannot delegate law-making authority to new bodies. Historically, the principle of parliamentary sovereignty has allowed the UK Parliament to delegate law-making authority to its various colonies and dominions, thus gradually giving them more autonomy.[24] In a federation, such an approach is constitutionally impossible because legislative authority is granted by the written Constitution. An exception, at least in Canada, can be found in the legislative assemblies created in the federal territories, which are considered devolved entities of the central Parliament. With regard to these lands granted by the British Crown, the federal Parliament is fully sovereign,[25] absent a constraint imposed by the *Canadian Charter of Rights and Freedoms*.[26] Beyond this, only a formal constitutional change can modify legislative functions. As a result, the Judicial Committee of the Privy Council concluded in *Re the Initiative and Referendum Act* that a legislature created by a written Constitution cannot create "a new legislative power not created by the Act to which it owes its own existence."[27] Again, in its opinion in *Pan-Canadian Securities*, the Canadian Supreme Court accepted this proposition in theory.[28]

As a third proposition, in a federal system such as Canada, both legislative *and* executive authority are divided. The Judicial Committee of the Privy Council famously explained this basic feature of Canadian federalism in *Liquidators of the Maritime Bank of Canada v. Receiver General of New Brunswick*.[29] In other words, when it does decide to delegate administrative functions, the federal legislative branch is bound to delegate them to the federal executive. It cannot delegate such authority to the provincial executive, absent a derogation in the written Constitution.[30] The same principle applies to the provincial legislative branches vis-à-vis the federal government (and other provincial governments for

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23 *Pan-Canadian Securities*, *supra* note 3 at para 56.

24 *Madzimbamuto v Lardner-Burke*, [1968] UKPC 18. Of interest, see also Peter C Oliver, "Parliamentary Sovereignty, Federalism and the Commonwealth" in Robert Schütze & Stephen Tierney, eds, *The United Kingdom and the Federal Idea* (Oxford: Hart, 2018) 49.

25 *Rupert's Land and North-Western Territory Order* (UK) 1870, reprinted in RSC 1985, Appendix II, No 9; *Constitution Act, 1871* (UK), 34-35 Vict, c 28, s 4.

26 Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

27 [1919] 48 DLR 18 at 25 (PC). See also *Re: Authority of Parliament in relation to the Upper House*, [1980] 1 SCR 54 at 72.

28 *Pan-Canadian Securities*, *supra* note 3 at paras 78–80.

29 [1892] UKPC 34 at 3–4 [*Liquidators*]. See also *Bonanza Creek Gold Mining Co v The King*, [1916] 26 DLR 273 at 281 (PC): "The distribution under the new grant of executive authority in substance follows the distribution under the new grant of legislative powers."

30 For an interesting analysis of such a derogation in Canada, see Wade K Wright, "Canada's 'Constitution outside the Courts': Provincial Non-enforcement of Constitutionally Suspect Federal Criminal Laws as Case Study" in Richard Albert, Paul Daly & Vanessa MacDonnell, eds, *The Canadian Constitution in Transition* (Toronto: University of Toronto Press, 2019) 103.

that matter).[31] This is especially the case when the statutes at issue include Henry VIII clauses, which permit the modification of primary legislation by the executive.[32]

From a comparative perspective, this structure is what makes Canada a dualist federation, as opposed to an integrated federation like Germany.[33] At a minimum, if a form of administrative inter-delegation is permitted to derogate from this structure, it must be optional and cannot be imposed on another order of government.[34] This also implies, at a minimum, that one government cannot require another government to implement secondary legislation or administer a statute that falls within its own sphere of jurisdiction without its consent. Put simply, if the judiciary is inclined to endorse such derogations, it should limit their impact on the lines of accountability which underlie a dualist federal structure.[35]

In other words, the principle of federalism is the dominant constitutional principle of federal societies, not the traditional conception of parliamentary sovereignty.[36] The constitutional text grants each order of government a portion of that sovereignty by placing limits on each legislature it creates. Within their respective spheres, the legislature's duly enacted laws take precedence over executive action and judicial decisions, subject to constitutional limits. Each legislature also has its own executive branch, which is accountable to it and can be tasked with administering its laws, absent a derogation in the written Constitution. Neither order of government can go beyond the limits imposed by the Constitution, and courts are duty bound to protect the constitutional contract. A substantive conception of parliamentary sovereignty is therefore inherent to federal states like Canada.

Despite the propositions outlined above, however, the Canadian Supreme Court has long held that administrative inter-delegation is permissible, thus introducing "an exception to the

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31 See also *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, ss 11–12, 63–65 reprinted in RSC 1985, Appendix II, No 5. Of course, a provincial legislature can create municipal institutions: *Hodge v The Queen*, [1883] UKPC 59 at 10–12. The ability to establish such institutions is provided by section 92(8) of the *Constitution Act, 1867*. In such a case, the delegation is made to a subordinate body (as opposed to a sovereign coordinate body), with the province evidently retaining the power to "destroy the agency it has created": *ibid* at 12.

32 On Henry VIII clauses, see Lord Rippon of Hexham, "Henry VIII Clauses" (1989) 10:3 Stat L Rev 205; FW Maitland, *The Constitutional History of England* (Cambridge, UK: Cambridge University Press, 2007) at 256.

33 See e.g. Jean-François Gaudreault-DesBiens & Johanne Poirier, "From Dualism to Cooperative Federalism and Back?: Evolving and Competing Conceptions of Canadian Federalism" in Peter Oliver, Patrick Macklem & Nathalie Des Rosiers, eds, *The Oxford Handbook of the Canadian Constitution*, (Oxford: Oxford University Press, 2017) 391 at 394–95; Johanne Poirier & Cheryl Saunders, "Conclusion: Comparative Experiences of Intergovernmental Relations in Federal Systems" in Johanne Poirier, Cheryl Saunders & John Kincaid, eds, *Intergovernmental Relations in Federal Systems: Comparative Structures and Dynamics*, (Oxford: Oxford University Press, 2015) 440 at 445–47. Of note, as these authors explain, "integrated federations" are also known as "cooperative federations."

34 See *Printz v United States*, 521 US 898 (1997) at 922–23:

> We have thus far discussed the effect that federal control of state officers would have upon ... the division of power.... It would also have an effect upon ... the separation and equilibration of powers between the three branches of the Federal Government itself.... [T]he power of the President would be subject to reduction, if Congress could act as effectively without the President as with him, by simply requiring state officers to execute its laws.

The Supreme Court of the United States therefore held that the "Federal Government may neither issue directives requiring the States to address particular problems, nor command the States' officers, or those of their political subdivisions, to administer or enforce a federal regulatory program.... [S]uch commands are fundamentally incompatible with our constitutional system of dual sovereignty" (*ibid* at 935).

35 Indeed, derogations from the dualist architecture can have an impact on the overall coherence of the system: Poirier & Saunders, *supra* note 33 at 490–94.

36 See also *Reference re Secession of Quebec*, [1998] 2 SCR 217 at para 57 [*Secession Reference*].

rule of dualism."[37] All this is done in the name of its conception of "cooperative" federalism. The 2018 *Pan-Canadian Securities* opinion has consolidated this vision of parliamentary sovereignty as it relates to administrative inter-delegation. The Supreme Court of Canada has not explicitly endorsed the notion that the sub-national entities can have a scheme imposed on them without their consent. Once they have signed on to the scheme, however, the purpose and effect of this particular agreement is to create a mechanism by which secondary legislation can be imposed on some of the sub-national entities without their consent.[38]

This scheme also has the important purpose and practical effect of permitting the transfer of legislative authority to a majoritarian Council of Ministers composed of federal and sub-national ministers, with particular importance placed on the authority of the provinces of Ontario and British Columbia. The egalitarian structure of the federation is therefore affected because some provinces are effectively deprived of their legislative autonomy, and some are given a greater role in modifying the model law. Put simply, the entire scheme has "the effect of frustrating or preventing the constitutional role" of the provincial legislatures.[39]

V. CONCLUSION

In sum, despite the Canadian Supreme Court's attempts to prevent changes to the "constitutional architecture,"[40] even when such changes do not explicitly contradict the text of the Constitution,[41] it has been content, in this case, to continue its transformation of Canada's federal structure, even when the proposed changes contradict the text and the spirit of the Constitution. The Supreme Court's approach has attracted the ire of the province of Quebec in particular, which has never abandoned its defence of Canada's dualist federal structure,[42] and is understandably concerned with protecting its autonomy.[43]

This is not to say that the Canadian Supreme Court has completely dispensed with the Constitution. The Supreme Court notably expounded the principle of federalism in the *Secession Reference* — an opinion in which it even confirmed the continued relevance of the Judicial Committee of the Privy Council's decision in *Liquidators*,[44] thus giving voice to the letter and the spirit of Canada's constitutional contract. Moreover, in its 2011 *Reference re Securities Act*, the Supreme Court suggested that "[t]he 'dominant tide' of flexible federalism, however strong its pull may be, cannot sweep designated powers out to sea, nor

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37 Gaudreault-DesBiens & Poirier, *supra* note 33 at 396.

38 See also Mark Mancini, "The Non-Abdication Rule in Canadian Constitutional Law" (2020) 83:1 Sask L Rev 45 at 81–82, who agrees that the adoption of regulations by the national authority is problematic, but accepts that the legislative acts proposed by the Council of Ministers are not. In my view, Mancini does not fully appreciate the federalism issues the scheme as whole raises in this case given that the focus of his article is on lateral delegation. Overall, his core argument that the Canadian Constitution sets limits on who can receive delegated power is sound and finds support in federalism scholarship.

39 *Miller (No. 2)*, *supra* note 2 at para 55.

40 *Reference re Senate Reform*, 2014 SCC 32.

41 See Christa Scholtz, "The Architectural Metaphor and the Decline of Political Conventions in the Supreme Court of Canada's *Senate Reform Reference*" (2018) 68:4 UTLJ 661.

42 See Marc-Antoine Adam, Josée Bergeron & Marianne Bonnard, "Intergovernmental Relations in Canada: Competing Visions and Diverse Dynamics" in Poirier, Saunders & Kincaid, eds, *supra* note 33, 135 at 164–65; Poirier & Saunders, *supra* note 33 at 493.

43 See *Secession Reference*, *supra* note 36 at paras 59, 126, 134. See also Samuel V LaSelva, *The Moral Foundations of Canadian Federalism: Paradoxes, Achievements, and Tragedies of Nationhood* (Montreal: McGill-Queen's University Press, 1996).

44 *Secession Reference*, *ibid* at paras 56, 68.

erode the constitutional balance inherent in the Canadian federal state."[45] At times, therefore, it will not hesitate to enforce the Constitution. However, this should not obscure the fact that the Supreme Court of Canada has often eschewed its role as guardian of the Constitution in federalism cases. Indeed, its dominant approach is characterized by the notion that "[t]he task of maintaining the balance between federal and provincial powers falls primarily to governments."[46] The 2018 case discussed here is but another example of this trend.

This case comment has only addressed some of the most important tensions between the traditional conception of parliamentary sovereignty and Canada's constitutional structure. It must be noted that other debates surrounding the principle of parliamentary sovereignty exist and have not been the object of close scrutiny by the Canadian Supreme Court.[47] Moreover, the propositions outlined above admittedly raise other issues that have not been explored here.[48] It is regrettable that the Supreme Court of Canada has been particularly timid in its protection of federalism. It is very odd indeed to witness the UK Supreme Court departing from the traditional conception of parliamentary sovereignty, while seeing the Canadian Supreme Court embracing such a traditional conception without regard for the federal constitution it is tasked with enforcing. If federalism "demands respect for the constitutional division of powers,"[49] *Pan-Canadian Securities* simply does not live up to that ideal.

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45 *Reference re Securities Act*, *supra* note 9 at para 62.

46 *Reference re Employment Insurance Act (Can), ss 22 and 23*, 2005 SCC 56 at para 10; *Canadian Western Bank v Alberta*, 2007 SCC 22 at para 24. For further discussion of the dominant approach and its effect on the federal-provincial balance, see e.g. Eugénie Brouillet, *La Négation de la nation: L'identité culturelle québécoise et le fédéralisme canadien* (Sillery: Septentrion, 2005); Bruce Ryder, "The End of Umpire?: Federalism and Judicial Restraint" (2006) 34:1 SCLR 345; Jean Leclair, "The Supreme Court of Canada's Understanding of Federalism: Efficiency at the Expense of Diversity" (2003) 28:2 Queen's LJ 411.

47 See e.g. Mancini, *supra* note 38; NW Barber, "The Afterlife of Parliamentary Sovereignty" (2011) 9:1 NYU Intl J Cont L 144; Han-Ru Zhou, "Revisiting the 'Manner and Form' Theory of Parliamentary Sovereignty" (2013) 129 Law Q Rev 610.

48 See e.g. Andrew Petter, "Federalism and the Myth of the Federal Spending Power" (1989) 68:3 Can Bar Rev 448; Andrée Lajoie, "Current Exercises of the 'Federal Spending Power': What Does the Constitution Say about Them?" (2008) 34:1 Queen's LJ 141. On a legal theory of federalism more broadly, see also Jean-François Gaudreault-DesBiens, "Towards a Deontic-Axiomatic Theory of Federal Adjudication" in Amnon Lev, ed, *The Federal Idea: Public Law Between Governance and Political Life* (Oxford: Hart, 2017) 75.

49 *Reference re Securities Act*, *supra* note 9 at para 61.

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