



SUPREME COURT OF CANADA

CITATION: Reference re Pan-Canadian Securities
Regulation, 2018 SCC 48

APPEAL HEARD: March 22, 2018

JUDGMENT RENDERED: November 9, 2018

DOCKET: 37613

BETWEEN:

Attorney General of Canada
Appellant

and

Attorney General of Quebec
Respondent

and

**Attorney General of Ontario, Attorney General of Nova Scotia, Attorney
General of New Brunswick, Attorney General of Manitoba, Attorney General of
Prince Edward Island, Attorney General of Saskatchewan, Attorney General of
Alberta, Barreau du Québec and Institute for Governance of Private and Public
Organizations**
Intervenors

AND BETWEEN:

Attorney General of Quebec
Appellant

and

Attorney General of Canada and Attorney General of British Columbia
Respondents

and

**Attorney General of Ontario, Attorney General of Nova Scotia, Attorney
General of New Brunswick, Attorney General of Manitoba, Attorney General of
Prince Edward Island, Attorney General of Saskatchewan, Attorney General of
Alberta, Barreau du Québec and Institute for Governance of Private and Public
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AND BETWEEN:

Attorney General of British Columbia
Appellant

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Attorney General of Quebec
Respondent

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**Attorney General of Ontario, Attorney General of Nova Scotia, Attorney
General of New Brunswick, Attorney General of Prince Edward Island,
Attorney General of Saskatchewan, Attorney General of Alberta, Barreau du
Québec and Institute for Governance of Private and Public Organizations**
Intervenors

CORAM: Wagner C.J. and Abella, Moldaver, Karakatsanis, Gascon, Côté, Brown,
Rowe and Martin JJ.

REASONS FOR JUDGMENT: The Court
(paras. 1 to 132)

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REFERENCE RE PAN CANADIAN SECURITIES REGULATION

IN THE MATTER OF a Reference by the Government of Quebec to the Court of Appeal of Quebec for hearing and consideration of the questions set out in Order in Council 642-2015 concerning the constitutionality of the implementation of pan-Canadian securities regulation

Attorney General of Canada

Appellant

v.

Attorney General of Quebec

Respondent

and

**Attorney General of Ontario,
Attorney General of Nova Scotia,
Attorney General of New Brunswick,
Attorney General of Manitoba,
Attorney General of Prince Edward Island,
Attorney General of Saskatchewan,
Attorney General of Alberta,
Barreau du Québec and
Institute for Governance of Private and Public Organizations**

Interveners

-and-

Attorney General of Quebec

Appellant

v.

**Attorney General of Canada and
Attorney General of British Columbia**

Respondents

and

**Attorney General of Ontario,
Attorney General of Nova Scotia,
Attorney General of New Brunswick,
Attorney General of Manitoba,
Attorney General of Prince Edward Island,
Attorney General of Saskatchewan,
Attorney General of Alberta,
Barreau du Québec and
Institute for Governance of Private and Public Organizations**

Intervenors

-and-

Attorney General of British Columbia

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v.

Attorney General of Quebec

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and

**Attorney General of Ontario,
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Attorney General of New Brunswick,
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Attorney General of Saskatchewan,
Attorney General of Alberta,
Barreau du Québec and
Institute for Governance of Private and Public Organizations**

Intervenors

Indexed as: Reference re Pan-Canadian Securities Regulation

2018 SCC 48

File No.: 37613.

2018: March 22; 2018: November 9.

Present: Wagner C.J. and Abella, Moldaver, Karakatsanis, Gascon, Côté, Brown, Rowe and Martin JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR QUEBEC

Constitutional law — Division of powers — Trade and commerce — Securities — Proposal by federal government and some provincial and territorial governments to implement national cooperative capital markets regulatory system including model provincial and territorial statute, federal statute and national securities regulator overseen by federal and provincial ministers — Whether Constitution authorizes implementation of cooperative system — Whether draft federal statute exceeds authority of Parliament over general branch of trade and commerce power — Constitution Act, 1867, s. 91(2).

The federal government and the governments of Ontario, British Columbia, Saskatchewan, New Brunswick, Prince Edward Island and Yukon have proposed to implement a national cooperative system for the regulation of capital

markets in Canada (the “Cooperative System”). The framework of the Cooperative System is set out in an agreement between the federal government and the participating provincial and territorial governments (the “Memorandum”).

The main components of the Cooperative System include a model provincial and territorial statute (the “Model Provincial Act”) that deals primarily with the day-to-day aspects of the securities trade, a proposed federal statute (the “Draft Federal Act”) that is aimed at preventing and managing systemic risk and which establishes criminal offences relating to financial markets, and a national securities regulator (the “Authority”) charged with administering this coordinated regime. The Authority and its board of directors are to operate under the supervision of a Council of Ministers, which will comprise the ministers responsible for capital markets regulation in each participating province and the federal Minister of Finance.

Neither the Model Provincial Act nor the Draft Federal Act have the force of law unless and until they are properly enacted into legislation by the provincial legislatures and Parliament, respectively; the Memorandum provides that both remain “subject to legislative approval”. The Memorandum also contemplates that the Council of Ministers will have a role to play in making amendments to these proposed legislative enactments. With respect to the Model Provincial Act, s. 5.5 of the Memorandum provides that any proposals to amend the Model Provincial Act are subject to a vote and must be approved by at least 50 percent of the members of the

Council of Ministers, as well as by the members representing the “Major Capital Markets Jurisdictions” — which at present, are Ontario and British Columbia.

Another important aspect of the Cooperative System is the Authority’s power to make regulations. Both the Model Provincial Act and the Draft Federal Act provide that any regulations proposed by the Authority must be approved by the Council of Ministers before coming into force. Section 5.2 of the Memorandum lays out the voting requirements that apply to the approval of proposed regulations.

The Government of Quebec referred the following two questions pertaining to the Cooperative System to the Quebec Court of Appeal:

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”?
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*?

A majority of the Court of Appeal answered both questions in the negative. In response to the first question, the majority concluded that the Cooperative System was unconstitutional, because the process for amending the Model Provincial Act — and in particular, the requirement that any amendments thereto be approved by the Council of Ministers in accordance with s. 5.5 of the

Memorandum — has the effect of fettering the sovereignty of the participating provinces' and territories respective legislatures. The majority also opined that the process for making federal regulations, as set out in the Draft Federal Act and the Memorandum, is inconsistent with the principle of federalism because it allows certain provinces to effectively veto the adoption of a federal regulation. As to the second question, the majority concluded that the Draft Federal Act is not *ultra vires* Parliament under the general trade and commerce power, except with respect to the provisions (ss. 76 to 79) that set out the role of the Council of Ministers in the making of federal regulations. Again expressing the view that these provisions, when read alongside the Memorandum, have the effect of conferring on certain provinces a veto over federal regulations, the Majority concluded that they would render the entire Draft Federal Act unconstitutional if not removed.

The Attorney General of Canada appealed the Quebec Court of Appeal's opinion on both questions; the Attorney General of British Columbia appealed on the first question; and the Attorney General of Quebec appealed on the second question.

Held: The appeals brought by the Attorney General of Canada and the Attorney General of British Columbia should be allowed. The appeal brought by the Attorney General of Quebec should be dismissed. Question 1 should be answered in the affirmative. Question 2 should be answered in the negative.

Question #1: The Constitution authorizes the implementation of pan-Canadian securities regulation under the authority of a single regulator in accordance with the terms set out in the Memorandum.

First, the Cooperative System, as set out in the Memorandum, does not purport to — and in any event, cannot — improperly fetter the legislatures' sovereignty. Sections 4.2 and 5.5 of the Memorandum make clear that the Council of Ministers' role is limited to proposals for amendments to the Model Provincial Act. The Model Provincial Act is expressly subject to legislative approval, and thus lacks the force of law within a province unless and until it is enacted by that province's legislature. These provisions of the Memorandum do not contemplate that the Council of Ministers will have any formal involvement in the amendment of securities laws that have already been enacted by provincial legislatures. Nowhere does the Memorandum imply that the legislatures of the participating provinces are required to implement the amendments made to the Model Provincial Act that have been approved by the Council of Ministers, or that they are precluded from making any other amendments to their securities laws. The terms of the Memorandum do not even require that the provisions of the Model Provincial Act themselves be enacted into law by the legislatures of the participating provinces. Accordingly, the legislatures remain free to reject the proposed statutes, and any amendments made to them, if they so choose.

Even if the terms of the Memorandum actually purported to fetter the provincial legislatures' right to enact, amend and repeal their securities legislation, it would be ineffective in this regard in view of the principle of parliamentary sovereignty. Parliamentary sovereignty, a foundational principle of the Westminster model of government, means that the legislative branch of government has supremacy over the executive and the judiciary: both must act in accordance with statutory enactments and neither can usurp or interfere with the legislature's law-making function. An important corollary to parliamentary sovereignty is the rule that the executive is incapable of interfering with the legislature's power to enact, amend and repeal legislation. An executive agreement that purports to bind the parties' respective legislatures cannot, therefore, have that effect. In the case at hand, executive signatories would thus not actually be capable of either requiring that the legislatures of their respective jurisdictions implement any amendments dictated by the Council of Ministers, or of precluding those legislatures from amending their own securities laws without the approval of the Council of Ministers. When an action of the executive branch appears to clash with the legislature's law-making powers, parliamentary sovereignty can be invoked for the purpose of determining the legal effect of the impugned executive action, but not its underlying validity. Any executive agreement that purports to fetter the legislature is not inherently unconstitutional but will simply not have the desired effect.

Second, the Cooperative System does not entail an impermissible delegation of law-making authority. Parliamentary sovereignty also means that the

legislature has the authority to enact laws on its own, as well as the authority to delegate to some other person or body certain administrative or regulatory powers, including the power to make binding but subordinate rules and regulations. One important restriction on delegation, however, is that Parliament or a provincial legislature is barred from transferring its primary legislative authority with respect to a particular matter, over which it has exclusive constitutional jurisdiction, to a legislature of the other level of government. In this case, neither the Memorandum nor the Model Provincial Act empowers the Council of Ministers to unilaterally amend the provinces' securities legislation and no part of the Cooperative System imposes any legal limit on the participating provinces' legislative authority to enact, amend or repeal their respective securities laws as they see fit. The Council of Minister's role in approving amendments to the Model Provincial Act — a model statute that has no force of law until a provincial enactment gives it such force — is therefore plainly distinguishable from the delegation of primary legislative authority. Because the Cooperative System does not allow the Council of Ministers to bypass the provincial legislatures at all, the proper implementation of the Cooperative System, in accordance with the terms of the Memorandum, will not result in any transfer or abdication of a participating province's primary legislative authority. The Council of Ministers is and remains subordinate to the sovereign will of the legislature.

Question #2: The proposed Draft Federal Act is *intra vires*; it falls within the general branch of Parliament’s trade and commerce power pursuant to s. 91(2) of the *Constitution Act, 1867*.

The two-stage analytical framework for the review of legislation on federalism grounds is well established. At the first stage (the “characterization stage”), the court considers the law’s purpose and its effect with a view to identifying the true subject matter — the pith and substance — of the law in question. Once the court has completed this exercise, it then moves on to the second stage (the “classification stage”) and determines whether the subject matter of the challenged legislation falls within the head of power being relied on to support the legislation’s validity. Where it does, the legislation will be upheld on the basis that it is *intra vires*.

On the question of characterization, the pith and substance of the Draft Federal Act is to control systemic risk having the potential to create material adverse effects on the Canadian economy. The Draft Federal Act’s preamble, its stated purposes (at s. 4) and the Authority’s statutory mandate (at s. 6) together suggest that the federal government’s role in regulating capital markets is limited to the detection, prevention and management of risk to the stability of the Canadian economy, as well as to the protection against financial crimes. The concept of systemic risk is specifically invoked throughout the Draft Federal Act as a means of limiting the scope of federal regulatory powers. Systemic risk can be understood as having three constituent elements: the risk must represent a threat to the stability of the country’s

financial system as a whole; it must be connected to the capital markets; and it must have the potential to have a material adverse effect on the Canadian economy. Moreover, the Draft Federal Act does not contain provisions that go to the day-to-day regulation of all aspects of securities trading. Properly understood, therefore, the intention is not that the Draft Federal Act will displace provincial and territorial securities legislation. It was instead designed to complement these statutes by addressing economic objectives that are considered to be national in character.

With respect to the classification of the Draft Federal Act, the ultimate question in this case is whether the Act, viewed in its entirety, addresses a matter of genuine national importance and scope going to trade as a whole, in a way that is distinct and different from provincial concerns. The application of the framework set out in *General Motors of Canada Ltd. v. City National Leasing*, [1989] 1 S.C.R. 641, leads to the conclusion that the Draft Federal Act does address a matter of genuine national importance and scope relating to trade as a whole, and it therefore falls within Parliament's general trade and commerce power under s. 91(2) of the *Constitution Act, 1867*. The preservation of the integrity and stability of the Canadian economy quite clearly has a national dimension, and one which lies beyond provincial competence. Moreover, the fact that the federal government's foray into securities regulation under the Draft Federal Act is limited to achieving these objectives supports the validity of this proposed statute.

Lastly, the manner in which the Draft Federal Act delegates the power to make regulations accords with Parliament's constitutional powers, meaning that ss. 76 to 79 of the Draft Federal Act have no impact on its constitutionality. There is nothing problematic about the way in which the Draft Federal Act delegates the power to make regulations to the Authority under the supervision of the Council of Ministers. The legislature has the broad authority to delegate administrative powers, including the power to make legally binding rules and regulations, to a subordinate body. In exercising its sovereign legislative powers, Parliament has the authority to confer on a statutory body — in this case, the Council of Ministers — the power to approve or reject proposed subordinate regulations, even if some members of that body are representatives of certain provinces. The delegation of administrative powers in a manner solicitous of (or even dependent upon) provincial input is in no way incompatible with the principle of federalism, provided that the delegating legislature has the constitutional authority to legislate in respect of the applicable subject matter in the first place.

Cases Cited

Applied: *Reference re Securities Act*, 2011 SCC 66, [2011] 3 S.C.R. 837; *General Motors of Canada Ltd. v. City National Leasing*, [1989] 1 S.C.R. 641; **referred to:** *R. v. Comeau*, 2018 SCC 15; *Rogers Communications Inc. v. Chateauguay (City)*, 2016 SCC 23, [2016] 1 S.C.R. 467; *Alberta (Attorney General) v. Moloney*, 2015 SCC 51, [2015] 3 S.C.R. 327; *Quebec (Attorney General) v. Canada (Attorney General)*,

2015 SCC 14, [2015] 1 S.C.R. 693; *Canada (Attorney General) v. PHS Community Services Society*, 2011 SCC 44, [2011] 3 S.C.R. 134; *Canadian Western Bank v. Alberta*, 2007 SCC 22, [2007] 2 S.C.R. 3; *Fédération des producteurs de volailles du Québec v. Pelland*, 2005 SCC 20, [2005] 1 S.C.R. 292; *Northrop Grumman Overseas Services Corp. v. Canada (Attorney General)*, 2009 SCC 50, [2009] 3 S.C.R. 309; *Reference Re Canada Assistance Plan (B.C.)*, [1991] 2 S.C.R. 525; *Canadian Taxpayers Federation v. Ontario (Minister of Finance)* (2004), 73 O.R. (3d) 621; *Jackson v. Her Majesty's Attorney General*, [2005] UKHL 56, [2006] 1 AC 262; *Hodge v. The Queen* (1883), 9 App. Cas.117; *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217; *Reference re Anti-Inflation Act*, [1976] 2 S.C.R. 373; *West Lakes Ltd. v. South Australia* (1980), 25 S.A.S.R. 389; *Wells v. Newfoundland*, [1999] 3 S.C.R. 199; *Attorney-General for Canada v. Attorney-General for Ontario*, [1937] A.C. 326; *Thomson v. Thomson*, [1994] 3 S.C.R. 551; *Canada (Auditor General) v. Canada (Minister of Energy, Mines and Resources)*, [1989] 2 S.C.R. 49; *A.G. of Nova Scotia v. A.G. of Canada*, [1951] S.C.R. 31; *Reference re Firearms Act (Can.)*, 2000 SCC 31, [2000] 1 S.C.R. 783; *Citizens Insurance Co. of Canada v. Parsons* (1881), 7 App. Cas. 96; *Attorney General of Canada v. Canadian National Transportation, Ltd.*, [1983] 2 S.C.R. 206; *MacDonald v. Vapor Canada Ltd.*, [1977] 2 S.C.R. 134; *Kirkbi AG v. Ritvik Holdings Inc.*, 2005 SCC 65, [2005] 3 S.C.R. 302; *Multiple Access Ltd. v. McCutcheon*, [1982] 2 S.C.R. 161; *Rio Hotel Ltd. v. New Brunswick (Liquor Licensing Board)*, [1987] 2 S.C.R. 59; *Law Society of British Columbia v. Mangat*, 2001 SCC 67, [2001] 3 S.R.C. 113; *R. v. Furtney*, [1991] 3 S.C.R. 89; *P.E.I. Potato Marketing Board v. Willis Inc.*, [1952] 2 S.C.R. 392; *Coughlin v. Ontario Highway*

Transport Board, [1968] S.C.R. 569; *Reference re Agricultural Products Marketing Association*, [1978] 2 S.C.R. 1198.

Statutes and Regulations Cited

Canadian Charter of Rights and Freedoms, ss. 1 to 34.

Constitution Act, 1867, Part VI, ss. 91, 92.

Constitution Act, 1982, ss. 35, 52(1).

Memorandum of Agreement, 2016, ss. 1, 2.2, 3(a)(i), (ii), (iii), (iv), 4.2, 5.2, 5.5, 5.6, 5.7, 8.1, 8.3, 9.2, 9.3, 10.1, 11(a), (b), 13.

Proposed Canadian Securities Act, Order in Council P.C. 2010-667, s. 9(a), (b), (c).

Proposed Capital Markets Act, Revised Consultation Draft, August 2015, ss. 202, 206.

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APPEALS from a judgment of the Quebec Court of Appeal (Duval Hesler C.J.Q. and Bouchard, Savard, Schragar and Mainville JJ.A.), 2017 QCCA 756, [2017] AZ-51390705, [2017] Q.J. No. 5583 (QL), 2017 CarswellQue 4199 (WL Can.), in the matter of a reference concerning the constitutionality of the implementation of pan-Canadian securities regulation. The appeals of the Attorney General of Canada and of the Attorney General of British Columbia are allowed. The appeal of the Attorney General of Quebec is dismissed.

Robert J. Frater, Q.C., and *Alexander Pless*, for the Attorney General of Canada.

Francis Demers and *Jean-François Beaupré*, for the Attorney General of Quebec.

J. Gareth Morley and *Alandra Harlingten*, for the Attorney General of British Columbia.

Robin K. Basu and *Emily Bala*, for the intervener the Attorney General of Ontario.

Isabel Lavoie Daigle, for the intervener the Attorney General of New Brunswick.

No one appeared for the intervener the Attorney General of Nova Scotia.

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Alan F. Jacobson, for the intervener the Attorney General of Saskatchewan.

L. Christine Enns, Q.C., for the intervener the Attorney General of Alberta.

Raymond Doray and *Guillaume Laberge*, for the intervener Barreau du Québec.

François LeBel and *Annie Gallant*, for the intervener the Institute for Governance of Private and Public Organizations.

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The following is the judgment delivered by

THE COURT —

I. Introduction

[1] A number of attempts to develop and implement a national system for the regulation of Canadian capital markets in a manner that is compatible with the country's federal structure have been made since the 1930s. At issue in these appeals is the constitutionality of a recent proposal by the federal government and the governments of Ontario, British Columbia, Saskatchewan, New Brunswick, Prince Edward Island and Yukon to implement a national cooperative capital markets regulatory system (the "Cooperative System").

[2] The structure of the Cooperative System builds on the guidance provided by this Court in *Reference re Securities Act*, 2011 SCC 66, [2011] 3 S.C.R. 837. Its main components include a model provincial and territorial statute known as the *Capital Markets Act* (the "Model Provincial Act") that deals primarily with the day-to-day aspects of the securities trade, a federal statute known as the *Capital Markets Stability Act* (the "Draft Federal Act") that is aimed at preventing and managing systemic risk and which establishes criminal offences relating to financial markets, and a national securities regulator that is to be overseen by the federal Minister of

Finance and the ministers responsible for capital markets regulation in the participating provinces¹ (the “Authority”).

[3] On July 15, 2015, the Government of Quebec referred two questions pertaining to the Cooperative System to the Quebec Court of Appeal:

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”?
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*?

[4] A majority of the Quebec Court of Appeal (the “Majority”) answered both questions in the negative. In response to the first question, the Majority concluded that the Cooperative System was unconstitutional for two reasons: (a) because the process for amending the Model Provincial Act effectively fetters the sovereignty of the respective participating provinces’ legislatures and (b) because the process for making federal regulations is inconsistent with the principle of federalism. As to the second question, the Majority held that the Draft Federal Act is within Parliament’s jurisdiction over the general branch of the trade and commerce power under s. 91(2) of the *Constitution Act, 1867*, but took issue with the provisions of the Draft Federal Act (ss. 76 to 79) that pertain to the making of federal regulations. In

¹ In these reasons, references to “provinces” participating in the Cooperative System include participating territories.

the Majority's opinion, the provisions in question, if not removed, render the entire Draft Federal Act unconstitutional.

[5] The dissenting judge would have declined to answer the first question. In his view, it is not for courts to rule on the constitutional validity of intergovernmental agreements that are of a political nature and lack the force of law. Had the first question been limited to the two draft statutes, however, he would have answered in the affirmative; he saw no issues pertaining either to the delegation of law-making authority or to the principle of parliamentary sovereignty. Turning to the second question, the dissenting judge agreed with the Majority that the Draft Federal Act fell within the general branch of Parliament's trade and commerce power, but found nothing problematic about the manner by which federal regulations were to be made under ss. 76 to 79 of the Draft Federal Act.

[6] The Attorney General of Canada appeals the Quebec Court of Appeal's opinion on both questions. The Attorney General of British Columbia appeals only the opinion on the first question, while the Attorney General of Quebec appeals only the opinion on the second question.

[7] For the reasons that follow, the Attorney General of Canada's appeal is allowed, the Attorney General of British Columbia's appeal is allowed, and the Attorney General of Quebec's appeal is dismissed. With respect to the first question posed by the reference, we find that the Cooperative System does not improperly fetter the legislatures' sovereignty, nor does it entail an impermissible delegation of

law-making authority. We therefore answer that question in the affirmative. As to the second question, we answer it in the negative: our view is that the subject matter of the Draft Federal Act falls within the general branch of Parliament's trade and commerce power pursuant to s. 91(2) of the *Constitution Act, 1867*.

II. Background

[8] Canada is one of the only industrialized countries in the world that does not have a *national* securities regulator. This is largely attributable to the constitutional division of provincial and federal powers as set out in Part VI of the *Constitution Act, 1867*. As a result of their jurisdiction over property and civil rights (s. 92(13)) and matters of a merely local nature (s. 92(16)), the provincial legislatures — and not Parliament — have the authority to legislate in respect of the securities trade within their respective borders. The result is a nationwide patchwork of provincial regulatory schemes and the absence of a truly national approach to regulating capital markets.

[9] In spite of this constitutional impediment, however, various attempts to centralize or standardize the regulation of securities in Canada have been made for over 80 years (see: D. Johnston, K. Doyle Rockwell and C. Ford, *Canadian Securities Regulation* (5th ed. (2014)), at pp. 634-62). Although proposals aimed at establishing a national securities regulator have not succeeded, certain interprovincial initiatives aimed at coordinating regulatory functions have. These include the adoption by some provincial securities commissions of various national and multilateral instruments

(which are standardized rules and regulations respecting specific aspects of the securities trade), as well as the implementation of the “passport regime”, which allows market participants to have access to the capital markets of other participating jurisdictions while dealing with a single principal regulator and complying with harmonized legislative provisions (Johnston et al., at pp. 91-94). Detailed discussions about the impetus behind and response to the various proposals and initiatives that have been put forward over the past several decades can be found elsewhere (see: *Reference re Securities Act*, at paras. 11-28; A. D. Harris, *A Symposium on Canadian Securities Regulation: Harmonization or Neutralization? White Paper* (2002); Johnston et al., at pp. 634-62).

A. *Reference re Securities Act (2011)*

[10] In 2009, the federal government responded to recommendations from a body known as the Expert Panel on Securities Regulation by preparing draft federal legislation, the *Proposed Canadian Securities Act*, Order in Council P.C. 2010-667, which would establish a national scheme for the regulation of capital markets under the oversight of a national securities regulator. The stated purposes of the *Proposed Canadian Securities Act* were “to provide protection to investors” (s. 9(a)), “foster fair, efficient and competitive capital markets” (s. 9(b)) and “contribute . . . to the integrity and stability of Canada’s financial system” (s. 9(c)).

[11] The *Proposed Canadian Securities Act* was designed to regulate all aspects of capital markets, and it therefore dealt in large part with the day-to-day

aspects of the trade in securities (like registration requirements, prospectus filings and disclosure obligations). Although much of this scheme overlapped with provincial securities laws, it also contained provisions for the regulation of systemic risk in capital markets — risk that represents a threat to the stability of the country’s economy. It is important to note, as well, that this proposed national regulatory scheme was not intended to *immediately* displace provincial securities legislation once the federal legislation was enacted by Parliament. Rather, the scheme was designed to function on an “opt-in” basis, each province retaining the right to choose whether to participate in the scheme or instead to keep its existing regulatory framework in place.

[12] The constitutionality of the *Proposed Canadian Securities Act* was at issue before this Court in *Reference re Securities Act*. Specifically, the federal government sought from this Court an advisory opinion as to whether the enactment of the *Proposed Canadian Securities Act*, which this Court described as “a comprehensive foray by Parliament into the realm of securities regulation” (para. 2), would constitute a valid exercise of Parliament’s power over trade and commerce pursuant to s. 91(2) of the *Constitution Act, 1867*.

[13] This Court unanimously held that it would not, and rejected the federal government’s argument that the securities market had “evolved from a provincial matter to a national matter affecting the country as a whole” (para. 4). Having determined that the main thrust of the *Proposed Canadian Securities Act* was to

regulate *on an exclusive basis* all aspects of the trade in securities in Canada, this Court went on to conclude that the constitutionality of the draft statute could not be supported by Parliament's general trade and commerce power.

[14] This Court analyzed the s. 91(2) issue in accordance with the five indicia set out in *General Motors of Canada Ltd. v. City National Leasing*, [1989] 1 S.C.R. 641, and based its conclusion on the final three indicia: (a) the detailed regulation of capital markets is not a matter that engages trade *as a whole*, but instead relates to the securities trade *in particular*; (b) the provinces have the constitutional capacity to legislate in respect of most matters covered by the *Proposed Canadian Securities Act* and can delegate regulatory powers to a single national securities regulator if they so choose; and (c) the successful operation of this regulatory scheme would not be jeopardized should any one province decline to participate, especially given that this proposed scheme would function on an "opt-in" basis. In the end, this Court held that "the day-to-day regulation of all aspects of trading in securities and the conduct of those engaged in this field of activity . . . simply cannot be described as a matter that is truly national in importance and scope making it qualitatively different from provincial concerns" (*Reference re Securities Act*, at para. 125).

[15] Although this Court found that legislation purporting to regulate *all aspects* of the trade in securities was outside Parliament's sphere of legislative authority, it acknowledged that certain aspects of securities regulation may nevertheless fall within the federal sphere of jurisdiction, including the prevention

and management of systemic risk in Canadian capital markets. Indeed, it is clear from this Court's reasons that the preservation of capital markets and the maintenance of Canada's economic stability are matters that are beyond provincial concern, and therefore fall within Parliament's jurisdiction over trade and commerce.

B. *Securities Regulation and Cooperative Federalism*

[16] While it is true that this Court found the *Proposed Canadian Securities Act* to be unconstitutional, it nevertheless recognized that a scheme based on a cooperative approach to the regulation of securities in Canada — one under which the provinces would address issues falling within their powers over property and civil rights and matters of a local nature while also leaving room for Parliament to address genuinely national concerns — might be constitutional (*Reference re Securities Act*, at paras. 130-33; see also para. 9). Given that the Attorneys General of Canada and British Columbia, as well as several of the interveners, submit that the Cooperative System follows this cooperative approach, a word about cooperative federalism is in order here.

[17] Cooperative federalism is an interpretative aid that is used when “interpreting constitutional texts to consider how different interpretations impact the balance between federal and provincial interests” (*R. v. Comeau*, 2018 SCC 15, para. 78). Where possible, courts should favour a harmonious reading of statutes enacted by the federal and provincial governments which allows for them to operate concurrently (*Rogers Communications Inc. v. Chateauguay (City)*, 2016 SCC 23,

[2016] 1 S.C.R. 467, at para. 38). This principle is based on the presumption that “Parliament intends its laws to co-exist with provincial laws” (*Alberta (Attorney General) v. Moloney*, 2015 SCC 51, [2015] 3 S.C.R. 327, at para. 27).

[18] Cooperative federalism is often applied “to facilitate interlocking federal and provincial legislative schemes and to avoid unnecessary constraints on provincial legislative action” (*Quebec (Attorney General) v. Canada (Attorney General)*, 2015 SCC 14, [2015] 1 S.C.R. 693, at paras. 17-19). Broadly speaking, it “accommodates overlapping jurisdiction and encourages intergovernmental cooperation”, and therefore discourages courts from interfering with cooperative regulatory schemes so long as they are not incompatible with the boundaries dictated by the *Constitution Act, 1867* (*Reference re Securities Act*, at para. 57, citing *OPSEU v. Ontario (Attorney General)*, [1987] 2 S.C.R. 2, at p. 18; *Canada (Attorney General) v. PHS Community Services Society*, 2011 SCC 44, [2011] 3 S.C.R. 134, at para. 63; *Reference re Securities Act*, at paras. 61-62). We stress that cooperative federalism may be used neither to “override nor [to] modify the division of powers itself” (*Rogers Communications Inc. v. Chateauguay (City)*, at para. 39), nor to impose “limits on the otherwise valid exercise of legislative competence” (*Quebec (Attorney General) v. Canada (Attorney General)*, at para. 19; *Reference re Securities Act*, at paras. 61-62). It cannot, therefore, be used to make *ultra vires* legislation *intra vires*. By fostering cooperation between Parliament and the legislatures within the existing constitutional boundaries, however, cooperative federalism works to support, rather

than supplant, the division of legislative powers (see: *Canadian Western Bank v. Alberta*, 2007 SCC 22, [2007] 2 S.C.R. 3, at para. 22).

[19] This modern view of federalism sees Part VI of the *Constitution Act, 1867* as a set of boundaries within which provinces and the federal government are free to give full effect to “Canadian federalism’s constitutional creativity and cooperative flexibility” (*Fédération des producteurs de volailles du Québec v. Pelland*, 2005 SCC 20, [2005] 1 S.C.R. 292, at para. 15). In short, cooperative federalism allows “different levels of government [to] work together on the ground to leverage their unique constitutional powers in tandem to establish a regulatory regime that may be *ultra vires* the jurisdiction of one legislature on its own” (*R. v. Comeau*, at para. 87).

[20] Among the issues in the present case is whether the Cooperative System is consistent with this cooperative approach to the constitutional division of federal and provincial powers.

C. *The Cooperative System*

[21] The framework of the Cooperative System is set out in an agreement between the federal government and the governments of Ontario, British Columbia, Saskatchewan, New Brunswick, Prince Edward Island and Yukon (together the “Participating Jurisdictions”) which is known as the “Memorandum of Agreement

regarding the Cooperative Capital Markets Regulatory Scheme” (the “Memorandum”). This system has four primary components, which are as follows:

(1) *Uniform Provincial and Territorial Legislation:* The Cooperative System’s first component involves the standardization of provincial and territorial legislation respecting the day-to-day aspects of the securities trade. To this end, the Memorandum provides that each participating province is to enact a statute that mirrors the Model Provincial Act. The Model Provincial Act purports to address all matters respecting capital markets that fall within provincial or territorial jurisdiction (Memorandum, s. 3(a)(i)), including the registration of dealers and certain other market participants, prospectus requirements, disclosure and proxies, takeover and issuer bids, derivatives trading, and civil liability. Importantly, the Model Provincial Act does not have legal force within any participating province unless the province’s legislature enacts it into law.

(2) *Complementary Federal Legislation:* The uniform provincial and territorial securities legislation is to be complemented by a federal statute, that is, the Draft Federal Act. The Draft Federal Act is more limited in scope, as it addresses only criminal matters, matters relating to systemic risk in Canada’s capital markets, and national data collection (Memorandum, s. 3(a)(ii)). The federal government

undertakes to seek the enactment by Parliament of legislation that mirrors this draft statute (s. 8.3).

(3) *A National Regulator:* The Memorandum contemplates a delegation by the federal government (pursuant to s. 73 of the Draft Federal Act) and the participating provinces (pursuant to s. 202 of the Model Provincial Act) of certain regulatory powers to a single operationally independent capital markets regulatory authority (the Authority). The intention is that the Authority will become the sole entity responsible for administering both the federal and provincial cooperative system legislation, and will fulfill all relevant regulatory, enforcement and adjudicative functions relating to the trade in securities under these statutes as enacted (Memorandum, s. 3(a)(iii)). As of now, a draft of the Authority's enabling legislation has not yet been published.

(4) *The Council of Ministers:* Finally, the Authority and its Board of Directors are to operate under the supervision of a Council of Ministers, which will comprise the ministers responsible for capital markets regulation in each participating province and the federal Minister of Finance (Memorandum, s. 3(a)(iv)).

[22] Each of these components is integral to the Cooperative System's ultimate objective: to establish a unified and cooperative system for the regulation of

capital markets in Canada *in a manner that accords with the constitutional division of powers*. This objective is expressed in s. 2.2 of the Memorandum, which reads as follows:

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

[23] The parties to the agreement are the executive branches of the governments of the Participating Jurisdictions. By signing the Memorandum, each undertakes to establish the Cooperative System on the basis set out in the Memorandum (s. 10.1(a)).

[24] The Memorandum makes clear that the two proposed statutes — the Draft Federal Act and the Model Provincial Act — remain subject to legislative approval (ss. 3(a)(i) and (ii)). What this means is that neither has any legal effect unless and until the applicable legislatures enact them into law. It is for this reason that the executive signatories of the Participating Jurisdictions have agreed, in s. 10.1(b) of the Memorandum, “to use their best efforts to cause their respective legislatures to enact or approve” legislation that is substantially the same as the proposed statutes (see also ss. 8.1 and 8.3).

[25] The Council of Ministers plays an important role in the overall operation of the Cooperative System. Its duties, which are listed in s. 4.2 of the Memorandum,

include proposing amendments to the Draft Federal Act and the Model Provincial Act. Section 5.6 of the Memorandum provides that proposed amendments to the Draft Federal Act require consultation between the federal Minister of Finance and the other members of the Council of Ministers. Proposals to amend the Model Provincial Act, by contrast, are subject to a vote and must be approved by (a) at least 50 percent of all members of the Council of Ministers, and (b) the members of the Council of Ministers from each “Major Capital Markets Jurisdiction” — which, at present, are Ontario and British Columbia (s. 5.5). It must be observed, however, that those voting requirements apply only to proposals to amend the Model Provincial Act, which provides content to the commitments of the executive signatories, *but which remains subject to legislative approval*. We also note that s. 5.7 of the Memorandum — which requires enhanced majority approval from the Council of Ministers for certain listed fundamental changes — does not apply to proposals to amend the Model Provincial Act. Put simply, s. 5.5 does not purport to apply to the amendment of legislation after it has been enacted into law in a participating province. As we will explain below, the power to enact, amend and repeal legislation lies exclusively in the hands of the legislatures, and cannot be subject to the approval of the Council of Ministers.

[26] The Memorandum contemplates the possibility that other provinces and territories will join the Cooperative System at a later date: s. 11(a) requires that Participating Jurisdictions “use their best efforts and work together to secure the agreement of the government of each non-Participating Jurisdiction of Canada to

participate in the Cooperative System on the basis of the terms of [the Memorandum]”. Accession by a non-Participating Jurisdiction remains subject to the approval of the Council of Ministers (ss. 5.7(b) and 11(b)). The Memorandum also sets out a mechanism by which Participating Jurisdictions can withdraw from the Cooperative System. Section 13 reads as follows:

A Participating Jurisdiction may withdraw from the Cooperative System by providing at least six months’ written notice to the other Participating Jurisdictions. A Minister of a Participating Jurisdiction that has provided written notice to any other Participating Jurisdiction of its intention to withdraw from the Cooperative System will no longer be entitled to vote as a member of the Council of Ministers.

The [Authority] shall use all reasonable efforts to facilitate an expeditious withdrawal and the transfer and/or assignment of employees, assets and contracts relating to capital markets regulation in a withdrawing Participating Jurisdiction as of the effective withdrawal date.

[27] Another important aspect of the Cooperative System is the Authority’s power to make regulations pursuant to both the Draft Federal Act and the Model Provincial Act. Both statutes provide that any regulations proposed by the Authority must be approved by the Council of Ministers before they come into force (Model Provincial Act, s. 206; Draft Federal Act, s. 76). Section 5.2 of the Memorandum, which sets out the mechanism by which the Council of Ministers approves or rejects regulations submitted by the Authority’s Board of Directors, reads 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 [percent] 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 [percent] 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.

[28] The Council of Ministers is thus required to request that the Board of Directors reconsider a proposed regulation before it can reject the regulation outright. Moreover, any decision to request the reconsideration of a proposed regulation must be approved by at least half of the members of the Council of Ministers *and* by any one member from the Major Capital Markets Jurisdictions and the federal government. A decision to reject a regulation that has been reconsidered by the Board of Directors must be approved by at least half of the former and by a majority of the latter. A proposed regulation that the Council of Ministers has not rejected or

requested that it be reconsidered will be deemed to have been approved (Memorandum, s. 5.2(a)).

III. Opinion of the Quebec Court of Appeal — 2017 QCCA 756

[29] As mentioned above, the following two questions were referred to the Quebec Court of Appeal:

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”?
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*?

The reference was heard by a panel of five judges.

[30] With respect to the first question, the Majority — composed of Duval Hesler C.J.Q. and Bouchard, Savard and Mainville JJ.A. — found the Cooperative System to be unconstitutional, for two main reasons.

[31] First, the Majority held that the mechanism for amending the Model Provincial Act, as set out in the Memorandum, effectively subjects the legislative jurisdiction of the participating provinces to the approval of an external entity: the Council of Ministers. In the Majority’s view, the terms of the Memorandum had to

be understood as *prohibiting* all participating provinces from amending their securities legislation without the consent of the Council of Ministers, while also *requiring* the legislative implementation of all amendments dictated by the Council of Ministers. This, it held, conflicts with the principle of parliamentary sovereignty, which protects a legislature's freedom to enact, amend and repeal legislation as it sees fit.

[32] Second, the Majority held that the involvement of the Council of Ministers in the making of regulations pursuant to the Draft 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” (para. 56). On this point, the Majority expressed the opinion that a provincial veto is incompatible with the general branch of the trade and commerce power and accordingly calls the constitutional validity of the Draft Federal Act into question, as it “negates the very necessity of pan-Canadian federal legislation to counter systemic risks on a national scale” (para. 90; see also para. 95). The Majority added that the involvement of the Council of Ministers in the making of regulations under the Draft Federal Act amounts to an abdication of federal jurisdiction.

[33] Schragger J.A. (the “Dissenting Judge”) took the position that the analysis of the scheme’s constitutional validity should be limited to the two draft statutes — the Model Provincial Act and the Draft Federal Act — and should not encompass the

terms of the Memorandum, given that the Memorandum is an intergovernmental agreement that lacks the force of law. He would have answered this first question posed by the reference, amended accordingly, in the affirmative. In his view, both of the statutes are constitutional, as they entail neither the delegation of legislative authority nor the abdication of parliamentary sovereignty. Although he found that s. 5.5 of the Memorandum does have the effect of limiting a provincial legislature's authority to amend its legislation, he observed that such a limitation is not incorporated into either the Draft Federal Act or the Model Provincial Act.

[34] To the extent that he was bound to consider the first question with reference to the terms of the Memorandum, the Dissenting Judge would have declined to do so because, in his view, it is not for the courts to pronounce on the constitutional validity of intergovernmental agreements. He also found it problematic that the Court of Appeal did not have before it a draft of the Authority's enabling legislation.

[35] In response to the second question, the Majority concluded that the Draft Federal Act is not *ultra vires* Parliament under s. 91(2) of the *Constitution Act, 1867*, except with respect to ss. 76 to 79, which set out the role of the Council of Ministers in the making of regulations. Given the stated purposes of the Draft Federal Act, the definition of "systemic risk" provided therein, and the limitations imposed on the scope of the Authority's delegated regulatory powers, the Majority found that the pith and substance of the Draft Federal Act is to promote the stability of the Canadian

economy by managing systemic risk in capital markets — risk which could have material adverse effects on the economy as a whole. Following this Court’s guidance in *Reference re Securities Act*, the Majority had little trouble concluding that this is a subject matter that falls within Parliament’s jurisdiction over trade and commerce.

[36] However, the Majority took issue with ss. 76 to 79 of the Draft Federal Act, which require that all regulations made by the Authority pursuant to the Draft Federal Act be approved by the Council of Ministers. In the Majority’s view, these provisions have the effect of conferring on certain provinces a veto over federal regulations, and therefore “negates the very necessity of pan-Canadian federal legislation to counter systemic risks on a national scale” (para. 90). The Majority concluded on this basis that ss. 76 to 79 would render the Draft Federal Act unconstitutional as a whole if they are not removed from it.

[37] The Dissenting Judge would have found the Draft Federal Act *in its entirety* to represent a valid exercise of Parliament’s general trade and commerce power. Although he agreed that the subject matter of the draft legislation falls within Parliament’s jurisdiction under s. 91(2) of the *Constitution Act, 1867*, he did not find that ss. 76 to 79 render the Draft Federal Act unconstitutional. He noted that Parliament has the power to delegate regulatory authority as it sees fit and to structure the body to which it delegates authority in any manner that is deemed appropriate to the task. In the Dissenting Judge’s view, therefore, the fact that such a body may be populated by ministers of provincial governments does not invalidate the delegation

of any such regulatory authority or undermine the inherently federal nature of the statute.

IV. Positions of the Parties

[38] With respect to the first question posed by the reference, the Attorneys General of Canada and British Columbia, supported by those of Ontario, Prince Edward Island, Saskatchewan and New Brunswick, submit that the proposed Cooperative System is constitutional. They argue that the Majority erred in interpreting the Memorandum, taking the position that it neither *purports to* nor *has the effect of* binding the legislatures of the participating provinces, and does not require them to abdicate their legislative authority either. In particular, the Attorneys General of Canada and British Columbia dispute the Majority's understanding of the principle of parliamentary sovereignty: in their submission, the executive is simply *incapable* of binding the legislature by way of cooperative agreements. Their opinion is that the Majority's conception of parliamentary sovereignty would, if accepted, limit the ability of provinces and the federal government to cooperate in the pursuit of common objectives, and would ultimately frustrate the application of cooperative federalism.

[39] The Attorneys General of Canada and British Columbia (as well as the interveners that support their position) agree with the Court of Appeal that the Draft Federal Act is *intra vires* Parliament, but disagree with the Majority's conclusion that the Council of Ministers' involvement in reviewing federal regulations renders the

Draft Federal Act unconstitutional. They submit that the existence of a “provincial veto” is factually inaccurate, and add that the manner in which a statute delegates regulatory powers cannot affect that statute’s constitutionality, since the legislature remains free to delegate such regulatory powers as it sees fit.

[40] The Attorneys General of Quebec and Alberta, together with the Barreau du Québec and the Institute for Governance of Private and Public Organizations — agree with the Majority that the Cooperative System is unconstitutional. They submit that the proposed scheme requires participating provinces to surrender their legislative jurisdiction by undertaking to enact the Model Provincial Act and to refrain from unilaterally amending that legislation, the result being a violation of the principle of parliamentary sovereignty. They also argue that this transfer of legislative authority to the Council of Ministers effectively creates a legislative body that is not contemplated by the Constitution. This, they contend, represents a colourable attempt to amend the Constitution and is incompatible with the rule respecting legislative delegation.

[41] Turning to the second question, the Attorneys General of Canada, Ontario and New Brunswick submit that the Draft Federal Act falls within Parliament’s general trade and commerce power. In their view, the proposed Act relates, in pith and substance, to the promotion and protection of the stability of the country’s financial system by managing systemic risk in capital markets. This, they argue, falls

squarely within the general branch of the trade and commerce power, in accordance with this Court's decision in *Reference re Securities Act*.

[42] The Attorney General of Quebec, together with the Attorney General of Alberta, the Barreau du Québec and the Institute for Governance of Private and Public Organizations, submits that the Draft Federal Act is beyond Parliament's general trade and commerce power. As the management of systemic risk is a purpose that animates the regulation of securities generally, it is not helpful in drawing a line between provincial and federal jurisdiction. Moreover, and even assuming the Draft Federal Act's pith and substance can be characterized as the management of systemic risk, the Attorney General of Quebec takes the view that the constitutionality of this proposed legislation still cannot be supported under the general trade and commerce power on the basis of the *General Motors* indicia: the Draft Federal Act is concerned solely with the securities industry, there is no evidence that the provinces are incapable of enacting and enforcing similar measures, and given the realities of the trade in securities, one province's failure to regulate will not jeopardize the regulation of securities in other jurisdictions.

[43] The Attorney General of Manitoba agrees with the Attorney General of Quebec that the Draft Federal Act is *ultra vires*, but takes a slightly different approach. Manitoba accepts that Parliament has the authority to legislate for the purpose of managing systemic risk, as this Court held in *Reference re Securities Act*. Given that the provinces also have the authority to legislate for this purpose, and in

light of the inherently amorphous nature of the concept of “systemic risk”, Manitoba instead argues that federal authority over systemic risk must be confined to urgent circumstances that demonstrably require uniform national action. Manitoba submits that the Draft Federal Act fails to meet this standard and would simply duplicate provincial regulation of the same risks for the same purposes without employing a qualitatively different approach.

V. Analysis

- A. *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”?*

[44] This first question requires this Court to consider whether the Cooperative System, as set out in the Memorandum, is constitutional. As noted above, the Majority answered this question in the negative, for two reasons. First, it held that the involvement of the Council of Ministers in the proposal of amendments to the Model Provincial Act (as set out in ss. 4.2 and 5.5 of the Memorandum) fetters the law-making powers of the provincial legislatures, and therefore contravenes the principle of parliamentary sovereignty (paras. 57-81). Second, it found the requirement that proposed regulations under the Draft Federal Act be approved by the Council of Ministers (Draft Federal Act, ss. 76 to 79), coupled with the mechanism by which the Council of Ministers approves or rejects such proposed regulations (Memorandum, s. 5.2), has the effect of giving certain provinces a “veto” over federal

intervention in capital markets (para. 87). This, in the Majority's view, is incompatible with the constitutional foundation for federal jurisdiction under the general trade and commerce power (para. 95).

[45] The arguments advanced by the Attorney General of Quebec in this Court are consistent with the Majority's conclusions. Quebec contends that the effect of s. 5.5 of the Memorandum is to bind the legislatures of the respective participating provinces by (a) prohibiting them from amending their securities legislation without the consent of the Council of Ministers, and by (b) requiring that they enact all amendments to the Model Provincial Act that are approved by the Council of Ministers. In Quebec's submission, this amounts to an impermissible fettering of the legislatures' sovereign authority.

[46] The Attorney General of Quebec also submits that this aspect of the Cooperative System is contrary to the prohibition against legislative delegation, as it effectively requires each of the participating provinces to "surrender their jurisdiction over securities in order to hand it over to a composite body which none of them controls" (R.F., at para. 77). As a final point, Quebec adds that the effect of the Memorandum is to create a legislative body that is not contemplated in the Constitution.

[47] For the reasons that follow, we respectfully disagree with the Majority's conclusion and are unable to accept the position advanced by Quebec.

(1) Parliamentary Sovereignty and the Fettering of Provincial Legislative Authority

[48] The proposition that the Council of Ministers' involvement in amending the Model Provincial Act is inconsistent with the principle of parliamentary sovereignty rests on two erroneous premises: first, that the Memorandum *purports* to bind the legislatures of the participating provinces and second, that it is *actually capable* of doing so. As we will explain, the terms of the Memorandum do not and cannot fetter the legislatures' primary law-making authority.

(a) *Terms of the Memorandum*

[49] Section 4.2 of the Memorandum provides that the Council of Ministers will be responsible for, among other things, proposing amendments to the Model Provincial Act, the Draft Federal Act, and the Authority's charter documentation. The voting rules applicable to approval by the Council of Ministers of a proposal to amend the Model Provincial Act are set out in s. 5.5, which reads as follows:

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 [percent] of all members of the Council of Ministers; and
- (b) the members of the Council of Ministers from each Major Capital Markets Jurisdiction.

[50] It is clear from these sections that the Council of Ministers' role is limited to proposals for amendments to the Model Provincial Act — a model statute which, by definition, remains “subject to legislative approval” (s. 3(a)(i)). Sections 4.2 and 5.5 refer exclusively to the proposed legislation on which this Cooperative System is based, and do not contemplate that the Council of Ministers will have any formal involvement in the amendment of legislation that has already been enacted by provincial legislatures. This is key: nowhere does the Memorandum imply that the legislatures of the participating provinces are *required* to implement the amendments made to the Model Provincial Act that have been approved by the Council of Ministers, or that they are *precluded* from making any other amendments to their securities laws. Indeed, the terms of the Memorandum do not even require that the provisions of the Model Provincial Act themselves be enacted into law by the legislatures of the participating provinces: the fact that the executive signatories are bound to “use their best efforts to cause their respective legislatures to enact or approve the Cooperative System Legislation” (s. 10.1; see also s. 8.1) shows that these legislatures remain free to reject the proposed statutes (as amended) if they so choose.

[51] We also note that neither of ss. 4.2 and 5.5 was incorporated into the Model Provincial Act. In our view, this further undermines the submission that the Council of Ministers has a formal role to play in the legislative process. And the fact that the Model Provincial Act's definition of “Council of Ministers” refers to the Memorandum cannot be understood as incorporating the voting rules of s. 5.5 into the

statutory scheme (see: C.A. reasons, at para. 75). Incorporation by reference requires clear language (*Northrop Grumman Overseas Services Corp. v. Canada (Attorney General)*, 2009 SCC 50, [2009] 3 S.C.R. 309, at paras. 11 and 12; citing with approval *UL Canada Inc. v. Québec (Procureur général)*, [1999] R.J.Q. 1720 (Sup. Ct.), at p. 1741, citing N. Bankes, “Co-operative Federalism: Third Parties and Intergovernmental Agreements and Arrangements in Canada and Australia” (1991), 29 *Alta. L. Rev.* 792, at p. 832). Similarly, a legislature intending to bind itself to rules respecting the manner and form by which the statute is to be amended *must* do so in clear terms (see: *Reference Re Canada Assistance Plan (B.C.)*, [1991] 2 S.C.R. 525, at pp. 561-64; *Canadian Taxpayers Federation v. Ontario (Minister of Finance)* (2004), 73 O.R. (3d) 621 (S.C.J.), at para. 49).

[52] We therefore reject the proposition that the Cooperative System, as set out in the Memorandum, purports to fetter the law-making powers of the participating provinces’ legislatures.

(b) *Parliamentary Sovereignty*

[53] At a broader level, the Majority’s reasoning reflects a misunderstanding of the principle of parliamentary sovereignty. In short, the executive is incapable of interfering with the legislature’s power to enact, amend and repeal legislation. An executive agreement that purports to bind the parties’ respective legislatures cannot, therefore, have any such effect.

[54] Parliamentary sovereignty is a foundational principle of the Westminster model of government, and it is based on a recognition that the legislature's power to make laws exists without any legal limits or constraints (P. J. Monahan, B. Shaw and P. Ryan, *Constitutional Law* (5th ed. 2017), at p. 85). In its traditional form, parliamentary sovereignty means that the legislature has the *exclusive* authority to enact, amend, and repeal any law as it sees fit, and that there is no matter in respect of which it may not make laws. As explained by A.V. Dicey:

The principle of Parliamentary sovereignty means neither more nor less than this, namely that Parliament thus defined has, under the English constitution, the right to make or unmake any law whatever; and, further, that no person or body is recognized by the law of England as having a right to override or set aside the legislation of Parliament. [Emphasis added.]

(A.V. Dicey, *Introduction to the Study of the Law of the Constitution*, (10th ed. 1959), at pp. 39-40.

[55] The sovereignty of the legislature is central to the United Kingdom's uncodified constitutional structure (*Jackson v. Her Majesty's Attorney General*, [2005] UKHL 56, [2006] 1 A.C. 262, at para. 9 (per Lord Bingham)). Because there are no constituent instruments that either restrict the U.K. Parliament's jurisdiction over certain subject matters or enshrine certain civil rights and liberties, "[a]ny law, upon any subject matter, is within Parliament's competence" (P.W. Hogg, *Constitutional Law of Canada* (5th ed. (loose-leaf)), vol. 7, at p. 12-1). Parliamentary sovereignty therefore means that the legislative branch of government has supremacy over the executive and the judiciary: both must act in accordance with statutory

enactments, and neither can usurp or interfere with the legislature's law-making function.

[56] While the principle of parliamentary sovereignty is an equally important feature of Canadian law, various aspects of our written Constitution have qualified the basic Diceyan rule that Parliament has the power "to make or unmake any law whatever". One such qualification lies in the federal structure of the Canadian state, which restricts the subject matters over which each legislature has jurisdiction. The distribution of legislative power between Parliament and the provincial legislatures is set out in Part VI of the *Constitution Act, 1867*. Since neither level of government has the power to legislate in respect of matters that fall within the exclusive competence of the other, the sovereignty of Parliament and of the provincial legislatures has been limited in Canada since Confederation. This was explained by the Judicial Committee of the Privy Council in *Hodge v. The Queen* (1883), 9 App Cas 117, (P.C.), as follows:

When the British North America Act [now known as the *Constitution Act, 1867*] enacted that there should be a legislature for Ontario, and that its legislative assembly should have exclusive authority to make laws for the Province and for provincial purposes in relation to matters enumerated in sect. 92, it conferred . . . authority as plenary and as ample within the limits prescribed by sect. 92 as the Imperial Parliament in the plenitude of its power possessed and could bestow. Within these limits of subjects and area the local legislature is supreme, and has the same authority as the Imperial Parliament, or the Parliament of the Dominion, would have had under like circumstances. . . . [Emphasis added; p. 132.]

Given this constitutional division of powers, therefore, neither Parliament nor the provincial legislatures have the authority to enact laws that touch on all subject matters. Rather, the effect of parliamentary sovereignty in the context of Canadian federalism is that Parliament and the provincial legislatures are supreme with respect only to matters that fall within their respective spheres of jurisdiction.

[57] Further limits were placed upon parliamentary sovereignty in Canada following the enactment of the *Constitution Act, 1982*, a constitutional document which (among other things) protects the various civil rights and freedoms enshrined in the *Canadian Charter of Rights and Freedoms* (ss. 1 to 34), recognizes and affirms existing Aboriginal and treaty rights (s. 35), and provides that any laws which are inconsistent with the provisions of the Constitution are, “to the extent of the inconsistency, of no force or effect” (s. 52(1)). Not only does this constitutional instrument impose substantive limits on the content of statutory enactments, but it also codifies the authority of superior courts to review legislation for constitutional compliance (an authority that had previously been only assumed to exist). Professor Monahan et al. had the following to say about the effect of the *Constitution Act, 1982* on the principles of parliamentary supremacy and of the rule of law:

All laws, regardless of the subject matter, are subject to review on the basis that they offend fundamental rights of individuals or groups under the *Charter*, or Indigenous rights [under s. 35]. . . . In this sense, the principle of constitutionalism and the rule of law — which requires that all actions of the state must be authorized by law and consistent with constitutional requirements — has now significantly narrowed the principle of parliamentary supremacy in Canada. (p. 86).

[58] In *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, this Court observed that, “with the adoption of the *Charter*, the Canadian system of government was transformed to a significant extent from a system of parliamentary supremacy to one of constitutional supremacy” (para. 72). This is of course true, insofar as the Constitution places limits on the law-making powers of Parliament and the provincial legislatures. However, the principle of parliamentary sovereignty remains foundational to the structure of the Canadian state: aside from these constitutional limits, the legislative branch of government remains supreme over both the judiciary and the executive.

[59] An important corollary to parliamentary sovereignty is the rule that the executive cannot unilaterally fetter the legislature’s law-making power. This rule was illustrated in *Reference re Anti-Inflation Act*, [1976] 2 S.C.R. 373, in which this Court was called upon to decide, among other things, whether an intergovernmental agreement between the governments of Canada and Ontario that purported to render certain portions of the federal *Anti-Inflation Act*, S.C. 1974-75-76, c. 75, applicable to that province’s public sector could in fact achieve this end. Writing for a Court that was unanimous on this point, Laskin C.J. answered this question in the negative, reasoning as follows:

If the agreement alone has the effect contended for, it imposes the Guidelines and accompanying sanctions on the provincial public sector, thereby altering the existing law of Ontario and precluding changes in that law that are inconsistent with the Guidelines: see s. 4(1) of the *Anti-Inflation Act*. I am unable to appreciate how the provincial executive, *suo motu*, can accomplish such a change. I agree, of course, that the

Executive or a Minister authorized by it may be the proper signatory to an agreement to which the Government of Ontario is a party. That, however, is merely a formality of execution; and even 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 part of the law of Ontario binding upon persons purportedly affected by it. [Emphasis added; pp. 432-33]

[60] The rule that the executive cannot bind the legislature is perhaps more clearly exemplified by the decision of Supreme Court of South Australia in *West Lakes Ltd. v. South Australia* (1980), 25 S.A.S.R. 389 — a decision that was cited by the Majority of the Quebec Court of Appeal in its reasons. At issue in *West Lakes* was a provision in an agreement between the State of South Australia and a land developer, which could be interpreted as giving the developer a veto over any amendment to the statute that enacted the agreement into law. When a bill to amend that statute was later introduced into the Parliament of South Australia, the developer sought a declaration that the covenants contained in the agreement were binding upon the State and an injunction restraining the State from taking any step or being party to any step to further the bill. The Supreme Court of South Australia unanimously held that the developer was not entitled to such relief, relying in part on the principle of parliamentary sovereignty. Of particular note for the purpose of these appeals, King C.J. stated that ministers of the State, as members of parliament, were “free to propose, to consider, to discuss, and to vote for any bill unconstrained by a contract entered into on behalf of the State” (pp. 390-91).

[61] Returning to the case at hand, the Majority of the Quebec Court of Appeal took issue with ss. 4.2 and 5.5 of the Memorandum, concluding that the combined effect of these sections is to fetter the sovereignty of the legislatures of the participating provinces (at para. 62). Not only does this represent a misunderstanding of the terms of the Memorandum themselves, but it also rests on the flawed premise that the executive signatories are *actually capable* of binding the legislatures of their respective jurisdictions to implement any amendments dictated by the Council of Ministers, and of precluding those legislatures from amending their own securities laws without the approval of the Council of Ministers. In light of the principle of parliamentary sovereignty, this cannot in fact be the case.

[62] When an action of the executive branch appears to clash with the legislature's law-making powers, parliamentary sovereignty can be invoked for the purpose of determining the legal *effect* of the impugned executive action, but not its underlying *validity*. For example, the executive of one province may act within the confines of its constitutional authority when entering into an intergovernmental agreement with that of another province. If a term in such an agreement purports to bind the province's legislature, the result is not that the agreement itself is constitutionally invalid; the principle of parliamentary sovereignty simply means that the legislature's hands cannot be tied, and therefore that the impugned term is ineffective. In other words, because the legislature's law-making powers are supreme over the executive, the latter cannot bind the former. The result is that any executive

agreement that purports to fetter the legislature is not inherently unconstitutional, but will quite simply not have the desired effect.

[63] This understanding of the principle of parliamentary sovereignty is firmly established in this Court's jurisprudence. The advisory opinion in *Reference Re Canada Assistance Plan* is particularly illustrative in this regard. At the centre of that case was an agreement entered into in 1967 between the governments of Canada and British Columbia, pursuant to the *Canada Assistance Plan*, S.C. 1966-67, c. 45 (the "*Plan*"). Section 4 of the *Plan* authorized the federal government to enter into agreements with individual provinces to share the cost of expenditures on social assistance and welfare, and s. 5 authorized payments to each contracting province of roughly 50 percent of that province's eligible expenditures. The *Plan* also provided that any such agreement would continue in force so long as the relevant provincial law remained in operation (s. 8(1)), and could be amended or terminated only by mutual consent or by giving one year's notice (s. 8(2)). In response to a budget deficit, however, the federal government introduced legislation into Parliament that would limit the growth of payments to financially stronger provinces — including British Columbia — to less than 50 percent. This Court rejected the Government of British Columbia's challenge to the bill (which was eventually passed into law). Sopinka J., writing for a unanimous Court, held on the basis of the principle of parliamentary sovereignty that Parliament was free to amend the *Plan* as it did, and that the terms of the agreement could not restrict its power to effect such change. On this, he specifically acknowledged that the federal executive "could not bind

Parliament from exercising its powers to legislate amendments to the *Plan*” (p. 548), and that parliamentary sovereignty “prevents a legislative body from binding itself as to the substance of its future legislation” (p. 563).

[64] A similar issue arose in *Wells v. Newfoundland*, [1999] 3 S.C.R. 199, in which this Court considered a claim for damages brought by Mr. Wells, a member of the Public Utilities Board, after amendments made to the *Public Utilities Act*, R.S.N. 1970, c. 322, by the Newfoundland House of Assembly had led to his position being abolished. As per the terms of his appointment, he was entitled to serve as a commissioner of the Board during good behaviour until the age of 70. This Court found that these terms were part of an enforceable contract of employment with the Crown and could thus form the basis of a claim for breach of contract. Relying on the opinion in *Reference re Canada Assistance Plan*, however, it unanimously affirmed that this employment contract did not in any way fetter the House of Assembly’s authority to restructure or eliminate the Public Utilities Board pursuant to its constitutionally protected law-making powers. Although this Court found that Mr. Wells was still entitled to pursue a claim for breach of contract against the Government of Newfoundland, it relied on the principle of parliamentary sovereignty in affirming the primacy of the legislature’s will over acts of the executive.

[65] Interestingly, in both *Reference Re Canada Assistance Plan* and *Wells*, this Court supported its decision by quoting the following passage from the Supreme Court of South Australia in *West Lakes*:

Ministers of State cannot, however, by means of contractual obligations entered into on behalf of the State fetter their own freedom, or the freedom of their successors or the freedom of other members of parliament, to propose, consider and, if they think fit, vote for laws, even laws which are inconsistent with the contractual obligations (p. 390).

[66] Parallels can be drawn between the effect of executive agreements and that of international treaties. As the Privy Council explained in the *Labour Conventions Case (Attorney-General for Canada v. Attorney-General for Ontario*, [1937] A.C. 326 (P.C.)), at p. 348, the valid exercise of the federal government's treaty-making power is distinct from the legislative enactment of such agreements into domestic law. Though the federal government may have the authority to enter into international agreements upon subjects falling within the legislative competence of the provinces, the individual provinces will only be bound by the terms of such an agreement once their respective legislatures enact them into law (*Thomson v. Thomson*, [1994] 3 S.C.R. 551 at pp. 611-12 citing P. W. Hogg, *Constitutional Law of Canada* (3rd ed. 1992), at p. 294).

[67] In short, the foregoing makes clear that the principle of parliamentary sovereignty is precisely what preserves the provincial legislatures' right to enact, amend and repeal their securities legislation *independently* of the Council of Ministers' approval. Therefore, even if the Memorandum actually purported to fetter this legislative power, it would be merely *ineffective* in this regard (since it cannot bind the legislature), and not *constitutionally invalid*.

[68] We would pause at this juncture to distinguish the Memorandum's *political* effects from its *legal* effects. While the Memorandum does not and cannot legally bind the participating provinces' respective legislatures, its political objective is nevertheless to achieve uniformity in provincial securities laws across Canada (Memorandum, s. 1). Achieving such uniformity will effectively require that the legislatures of the participating provinces enact a statute that mirrors the Model Provincial Act, as amended from time to time. The Memorandum therefore envisages an important role for the Council of Ministers; provinces that wish to participate in this coordinated approach to the regulation of capital markets will likely find it necessary to implement any amendments to the Model Provincial Act that may be proposed and approved by the Council of Ministers. Practically speaking, therefore, the Council of Ministers may well play an important political role in the area of securities regulation if the Cooperative System operates as planned.

[69] The Majority below went one step further. It rejected the proposition that the Memorandum is merely a political undertaking that is not legally enforceable, and instead found it necessary to *assume* that the mechanisms set out in the Memorandum — including the involvement of the Council of Ministers in proposing and approving legislative amendments — will have their intended effect (para. 70). With this, we do not agree: the principle of parliamentary sovereignty is precisely the reason why we cannot rely on such an assumption. Any *de facto* control that the executive may be said to have over the legislature is irrelevant to our analysis:

It is of no avail to point to the fusion of powers which characterizes the Westminster system of government. That the executive through its control of a House of Commons majority may in practice dictate the position the House of Commons takes on the scope of Parliament's auditing function is not, with all respect to the contrary position taken by Jerome A.C.J., constitutionally cognizable by the judiciary.

(Canada (Auditor General) v. Canada (Minister of Energy, Mines and Resources), [1989] 2 S.C.R. 49, at p. 103)

Although the executive signatories may *at present* view uniformity in securities laws as a desirable goal, the sovereign and democratic will of their respective legislatures entitles the latter to disagree, or to change their mind at some point in the future.

[70] We also recognize that the operation of the Cooperative System will require a significant commitment from its participants. For example, the participating provinces will be required to effectively dissolve their existing securities commissions, and to merge the administration of those commissions into the Authority's organizational structure (as contemplated in ss. 9.2 and 9.3 of the Memorandum). Once this has been done, it would undoubtedly be impractical for those provinces to extricate themselves from the Cooperative System at a later date. Although these practical considerations are of no consequence to this Court's analysis, they are likely to weigh heavily in the exercise of each jurisdiction's sovereign will—especially given that, at present, no draft of the Authority's enabling legislation has yet been published.

[71] To conclude on this point, we are of the view that neither the principle of parliamentary sovereignty nor the terms of the Memorandum themselves allow us to

conclude, as did the Majority of the Court of Appeal, that this cooperative agreement either is *capable* of binding, or *purports* to bind, the legislatures of the various participating provinces. As is clear from the foregoing, legislatures in Canada are constrained only by the Constitution — and are otherwise free to enact laws that they consider desirable and politically appropriate.

(2) Delegation of Law-Making Powers

[72] A second (and related) basis upon which the Attorney General of Quebec claims that the Cooperative System is unconstitutional pertains to the limits on a legislature's authority to delegate law-making powers to some separate person or body. Quebec submits that the Memorandum effectively requires that each participating province transfer the power to unilaterally amend its securities legislation to the Council of Ministers. This is because, on Quebec's interpretation of the Memorandum, the legislature of each participating province (a) will be *obliged* to enact the provisions of the Model Provincial Act into law and to implement any amendments to those provisions that are approved by the Council of Ministers, and (b) will be otherwise *prohibited* from amending that legislation. Quebec claims that this amounts to a direct transfer of legislative authority from the legislatures of the participating provinces to the Council of Ministers, the result being that those provinces will effectively surrender their ability to legislate in respect of the regulation of capital markets.

[73] Before we address this issue, it is necessary to briefly explain the concept of delegation. Parliamentary sovereignty means that the legislature has the authority to enact laws on its own *and* the authority to delegate to some other person or body certain administrative or regulatory powers, including the power to make binding but subordinate rules and regulations. Accordingly, the power to make such rules and regulations is sometimes referred to as a “subordinate law-making power”. This kind of delegation occurs quite frequently in the administrative state, where statutory schemes often merely “set out the legislature’s basic objects”, such that “most of the heavy lifting [gets] done by regulations, adopted by the executive branch of government under orders-in-council” (B. McLachlin, P.C., *Administrative Tribunals and the Courts: An Evolutionary Relationship* (27 May 2013 (online)), see also Hogg (5th ed.), pp. 14-1 and 14-2).

[74] It should be noted that a delegated power is rooted in and limited by the governing statute, which of course takes precedence over every exercise of that power. More importantly, the sovereign legislature always ultimately retains the complete authority to revoke any such delegated power (*Hodge*, at p. 132; R. Tuck, “Delegation — A Way Over the Constitutional Hurdle” (1945), 23 *Can. Bar. Rev.* 79, at p. 89).

[75] While it is true that a legislature has broad authority to delegate *subordinate* law-making powers to a person or administrative body, Canadian courts have nevertheless espoused the principle that a legislature of one level of government

may not delegate to a legislature of the other level its *primary* authority to legislate — that is, its authority to enact, amend and repeal statutes — in respect of matters that fall within its exclusive jurisdiction under Part VI of the *Constitution Act, 1867*. This was made clear in *A.G. of Nova Scotia v. A.G. of Canada* (1950), [1951] S.C.R. 31, which concerned a bill that provided for the delegation of Nova Scotia’s jurisdiction over employment in certain industries to Parliament, and the delegation of federal jurisdiction over indirect taxation to the legislature of Nova Scotia. At issue was whether Parliament and a provincial legislature could, by statutory enactment, delegate or transfer their exclusive jurisdiction to legislate in respect of particular subject matters to one another. This Court held that they could not, reasoning that the bill had the effect of redistributing jurisdiction over these heads of power in a way that would be fundamentally incompatible with the division of federal and provincial powers as set out in ss. 91 and 92 of the *Constitution Act, 1867*. It was on this basis that the proposed bill was deemed unconstitutional.

[76] To put it simply: while Parliament or a provincial legislature may delegate the regulatory authority to make *subordinate* laws (like binding rules and regulations) in respect of matters over which it has jurisdiction to another person or body, it is nevertheless barred from transferring its *primary* legislative authority — that is, its authority to enact, amend and repeal statutes — with respect to a particular matter over which it has exclusive constitutional jurisdiction to a legislature of the other level of government.

[77] Before this Court, the Attorney General of Quebec contends that the Memorandum is designed to implement the very type of scheme that this Court prohibited in *Nova Scotia*:

Even though the delegation will not be made to a traditional legislature, it will be made to a body that, for all intents and purposes, will exercise legislative powers. The decisive criterion is that each participating province will surrender its jurisdiction over securities. [R.F., at para. 78]

In Quebec's submission, therefore, *Nova Scotia* should be understood as prohibiting both the direct transfer of power from one legislature to another *and* "any scheme resulting in substantially similar effects, namely, the centralization, transfer, abdication or delegation of provincial legislative powers" (R.F. at para. 72). Underlying this submission is the principle that a provincial legislature lacks the power to transfer its *primary* legislative authority to any other person or body — in this case, the Council of Ministers — so as to bypass the legislative process altogether.

[78] We respectfully reject this argument on the basis that it rests on a misunderstanding of how the Cooperative System was designed to operate. Neither the Memorandum nor the Model Provincial Act empowers the Council of Ministers to unilaterally amend the provinces' securities legislation. Further, no part of the Cooperative System imposes any *legal* limit on the participating provinces' legislative authority to enact, amend and repeal their respective securities laws as they see fit.

[79] What this means is that the Council of Ministers' role in approving amendments to the Model Provincial Act is plainly distinguishable from the delegation of *primary* legislative authority that was prohibited in *Nova Scotia*. Whereas in *Nova Scotia* the impugned bill would have permitted Parliament to legislate *directly* in respect of certain provincial matters and the legislature of Nova Scotia to legislate *directly* in respect of certain federal matters, the Cooperative System does not allow the Council of Ministers to bypass the provincial legislatures at all; its role is instead to make amendments to a model statute that has no force of law *until a provincial legislature gives it such force*. For this reason, the proper implementation of the Cooperative System in accordance with the terms of the Memorandum will not result in any abdication of a participating province's primary legislative authority.

[80] We similarly reject the proposition that the terms of the Memorandum (s. 5.5 in particular) have the effect of creating "an unprecedented legislative body" — i.e. the Council of Ministers — "whose establishment is incompatible with the current architecture of the Constitution" (R.F., at para. 95). Again, because the provisions of the Model Provincial Act (as amended from time to time by the Council of Ministers) will only have the force of law if and when they are properly enacted by the legislature of a participating province, the Council of Ministers is and remains subordinate to the sovereign will of the legislature.

(3) Conclusion With Respect to the First Reference Question

[81] In light of the arguments presented before us, we thus see no constitutional impediment to the implementation of the Cooperative System in accordance with the terms set out in the Memorandum. Our answer to the first question posed by the reference is therefore: “Yes”.

B. *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?*

[82] The second question posed by this reference raises the same issue as the one considered in *Reference re Securities Act*: whether proposed federal securities legislation falls within Parliament’s jurisdiction over trade and commerce, pursuant to s. 91(2) of the *Constitution Act, 1867*. Before proceeding, however, we wish to reaffirm that policy considerations and practical effects are irrelevant to the question before this Court (see: *Reference re Securities Act*, at para. 90; *Reference re Firearms Act (Can.)*, 2000 SCC 31, [2000] 1 S.C.R. 783, at para. 18). Our concern is with *legislative competence*, not with *policy*.

[83] In the Court of Appeal, the Majority concluded that Parliament has the constitutional authority to enact the Draft Federal Act, with the exception of the provisions relating to the role and powers of the Council of Ministers in the making of federal regulations. It found that the pith and substance of the Draft Federal Act is “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” (para. 128). Characterizing the legislation in this manner, the Majority relied on this Court’s advisory opinion in *Reference re Securities Act* to conclude that the Draft Federal Act is *intra vires* Parliament pursuant to the general branch of the trade and commerce power (paras. 129-35). But the Majority then held that ss. 76 to 79 of the Draft Federal Act, which require that the Council of Ministers approve all federal regulations, were irreconcilable with the purposes of the proposed federal legislation (paras. 137-38). Its conclusion was therefore that these provisions, unless removed from the legislation, would render the Draft Federal Act unconstitutional as a whole.

[84] The Dissenting Judge, while in substantial agreement with the Majority, would not have concluded that ss. 76 to 79 invalidate the Draft Federal Act. In his view, Parliament has the power to delegate the authority to make rules and regulations “in the manner it chooses, to whom it chooses” (para. 206). He therefore did not consider the involvement of the Council of Ministers in the making of federal regulations to be problematic.

[85] We agree with the Dissenting Judge, and therefore answer the second question posed by the reference in the negative. Applying the principles developed by this Court in *Reference re Securities Act*, we conclude that the Draft Federal Act falls within Parliament’s general trade and commerce power. Moreover, the manner in which the Draft Federal Act delegates the power to make regulations accords with

Parliament's constitutional powers, which means that ss. 76 to 79 of the Draft Federal Act have no impact on its constitutionality.

(1) Constitutional Validity of the Draft Federal Act

[86] The two-stage analytical framework for the review of legislation on federalism grounds is well established in the jurisprudence: *Quebec (Attorney General) v. Canada (Attorney General)*, at para. 28; *Reference re Securities Act*, at paras. 63-65; *Reference re Firearms Act (Can.)*, at para. 15. At the first stage (the “characterization stage”), the court considers the law’s purpose and its effect with a view to identifying the true subject matter — the *pith and substance* — of the law in question. Once the court has completed this exercise, it then moves on to the second stage (the “classification stage”) and determines whether the subject matter of the challenged legislation falls within the head of power being relied on to support the legislation’s validity. Where it does, the legislation will be upheld on the basis that it is *intra vires*, and therefore valid.

(a) *Characterization of the Draft Federal Act*

[87] On the question of characterization, we agree with the Majority of the Court of Appeal that the pith and substance of the Draft Federal Act is “to control systemic risks having the potential to create material adverse effects on the Canadian economy” (para. 124). Indeed, we find that the Draft Federal Act’s purpose, its structure and the limits it imposes upon the exercise of the Authority’s delegated

power all support the conclusion that it has this narrow objective. Importantly, this singular focus distinguishes the Draft Federal Act from the *Proposed Canadian Securities Act* at issue in *Reference re Securities Act*, which went beyond the regulation of nationally significant systemic risk to regulate day-to-day aspects of the trade in securities as well (paras. 97 and 100).

[88] The Draft Federal Act's preamble refers to "the stability of Canada's financial system" and to the "detection, prevention and management of systemic risk". It adds that "events and circumstances in domestic and international capital markets can have a profound effect on the stability of Canada's financial system and on the Canadian economy as a whole". The dual purposes of the Draft Federal Act are clearly expressed in s. 4:

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.

This provision, when read together with the Authority's statutory mandate (s. 6), suggests that the federal government's role in regulating capital markets is limited to the detection, prevention and management of risk to the stability of the Canadian economy, as well as to the protection against financial crimes. These stated purposes are not nearly as broad as those of the proposed legislation that was at issue in *Reference re Securities Act*, namely "to provide investor protection, to foster fair,

efficient and competitive capital markets and to contribute to the integrity and stability of Canada's financial system" (para. 95).

[89] Effect is given to the purposes listed in s. 4 by the substance of the Draft Federal Act, the terms of which carefully limit federal authority to the management of threats to the stability of the Canadian economy. The regulatory powers authorized by the Draft Federal Act are engaged solely when such threats *may foreseeably affect national economic interests*.

[90] The cornerstone of the Draft Federal Act is the prevention and control of "systemic risk related to capital markets", which is defined in s. 3 as follows:

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.

For the purposes of this definition, systemic risk can be understood as having three constituent elements: (a) it must represent a threat to the stability of the country's financial system *as a whole*; (b) it must be *connected to the capital markets*; and (c) it must have the potential to have a *material adverse effect* on the Canadian economy. It is noteworthy that this definition does not encompass every economic risk that may relate to capital markets, but is limited to those that pose a sufficiently significant threat to the Canadian economy.

[91] The concept of “systemic risk” is invoked throughout the Draft Federal Act as a means of limiting the scope of federal regulatory powers. This is made clear in Part 2, which empowers the Authority to make an order designating a benchmark as “systemically important” (s. 18) and to prescribe by regulation a product to be “systemically important” (s. 20) or a practice to be “systemically risky” (s. 22). Where such an order or regulation is made, the Authority is also given the power to “prescribe requirements, prohibitions and restrictions” respecting these benchmarks (s. 19), products (s. 21) or practices (s. 23).

[92] The Draft Federal Act constrains the exercise of each of these powers in several ways. First, the Authority does not have the power to make any such designation or prescription unless the benchmark, product or practice “could pose a systemic risk related to capital markets” (ss. 18 and 20). Second, any regulations prescribing requirements, prohibitions or restrictions respecting a designated benchmark, product or practice may be made only “in order to address a systemic risk related to capital markets” (ss. 19 and 21). Third, the Authority’s power under s. 24 to make an urgent order can likewise be exercised only for the purpose of addressing “a serious and immediate systemic risk to the capital markets”. Finally, in designating a benchmark or prescribing a product or practice, the Authority must consider a number of factors, including whether there are any relevant existing provincial regulations (ss. 18(2), 20(2) and 22(2)). These requirements indicate that the effect of the Draft Federal Act is to address any risk that “slips through the

cracks” and poses a threat to the Canadian economy (C.A. reasons, at para. 197, (per Schragger J.A., dissenting)).

[93] The same is true of Part 1 of the Draft Federal Act, which deals with the collection and disclosure of information. Section 9 confers on the Authority the power to make regulations pertaining to the keeping and provision of records and information, but only for the purposes of “monitoring activity in capital markets or detecting, identifying or mitigating systemic risk related to capital markets”, or “conducting policy analysis related to the Authority’s mandate and the purpose of [the Draft Federal Act]”. Similar restrictions are placed on the Chief Regulator’s authority to require that records and information be provided to him or her (s. 10(1)) and on the Authority’s right to disclose information obtained under the Draft Federal Act to various specified bodies (s. 15(1)).

[94] Part 3 of the Draft Federal Act deals with the administration and enforcement of the Act. It provides, among other things, for (a) the Authority’s power to conduct inquiries into matters relating to compliance with the Draft Federal Act (ss. 28 to 32), and (b) the power of a tribunal (which is to be established under legislation known as the *Capital Markets Regulatory Authority Act*) to make certain orders where it is deemed “necessary to address a systemic risk related to capital markets” (s. 39). Parts 4 and 5 concern offences, and the validity of their provisions is not at issue in this Court. Part 6 contains various general provisions relating to the operation of the Draft Federal Act, including the procedure for making regulations.

Parts 7 and 8 contain transitional provisions and consequential amendments, respectively.

[95] Thus, unlike the proposed legislation that was at issue in *Reference re Securities Act*, the Draft Federal Act does not purport “to regulate, on an exclusive basis, all aspects of securities trading in Canada” (*Reference re Securities Act*, at para. 106). It does not contain provisions that go to the day-to-day regulation of all aspects of securities trading, like requirements for the registration of dealers, prospectus filing and disclosure obligations. The extent to which the statutory powers under the Draft Federal Act permit the regulation of these matters remains circumscribed by the requirement of systemic risk, which is a significant threshold that must be met before those powers can be exercised (A.F. (Canada), at para. 94). The management of risk which falls below this threshold — that is, risk that does not pose a threat to the Canadian economy *as a whole* — lies outside the scope of the Draft Federal Act.

[96] Properly understood, therefore, the intention is not that the Draft Federal Act will *displace* provincial and territorial securities legislation. It was instead designed to *complement* these statutes by addressing economic objectives that are considered to be national in character.

[97] When the Draft Federal Act is viewed as a whole, its pith and substance clearly does not relate, as Quebec suggests, to regulation of the trade in securities generally (R.F., paras. 111-16). Rather, its subject matter accords with its stated

purposes: “to promote and protect the stability of Canada’s financial system through the management of systemic risk related to capital markets” (s. 4(a)), and “to protect capital markets, investors and others from financial crimes” (s. 4(b)).

(b) *Classification of the Draft Federal Act*

[98] We now turn to the question of whether the Draft Federal Act, so characterized, falls within federal jurisdiction. We observe, at the outset, that there is no dispute regarding Parliament’s authority to enact the provisions related to criminality in capital markets (i.e. Parts 4 and 5). At issue is the validity of the balance of the Draft Federal Act — that is, those portions that are regulatory in nature.

[99] The Attorney General of Canada, supported by a number of interveners, submits that Parliament has the constitutional jurisdiction to enact the Draft Federal Act pursuant to the general trade and commerce power, one of two branches of Parliament’s jurisdiction under s. 91(2) of the *Constitution Act, 1867* (*Citizens Insurance Co. of Canada v. Parsons* (1881), 7 App. Cas. 96 (H.L.), at p. 113; *General Motors*, at pp. 656-57). The other branch under s. 91(2) is the power over international and interprovincial trade and commerce.

[100] The scope of Parliament’s jurisdiction over trade and commerce has been greatly influenced by “the need to reconcile the general trade and commerce power of the federal government with the provincial power over property and civil rights”

(*General Motors*, at p. 659). The concern here is that an overly broad interpretation of the general branch under s. 91(2) could entirely supplant the provinces' jurisdiction over property and civil rights (s. 92(13)) and over matters of a purely local nature (s. 92(16)), while an unduly narrow interpretation could leave this branch “vapid and meaningless” (*General Motors*, at p. 660).

[101] Bearing these concerns in mind, this Court has developed an approach that seeks to limit the general branch to matters of a genuinely national scope — matters that are “qualitatively different from anything that could practically or constitutionally be enacted by the individual provinces either separately or in combination” (*Attorney General of Canada v. Canadian National Transportation Ltd.*, [1983] 2 S.C.R. 206, at p. 267). The regulation of such matters, which are irreducible to individual transactions, specific industries or local markets, will necessarily transcend local concerns and must therefore, by their very nature, “be regulated federally, or not at all” (*Reference re Securities Act*, at para. 87; see also M. Lavoie, “Understanding Trade as a Whole in the *Securities Reference*”, (2013) 46 *U.B.C. Law. Rev.* 157, at p. 160).

[102] This delicate balance between federal and provincial jurisdiction has been safeguarded by the application of several indicia that this Court has recognized as useful in identifying matters that properly fall within the general branch under s. 91(2) (see *MacDonald v. Vapor Canada Ltd.*, [1977] 2 S.C.R. 134; *Canadian National Transportation, Ltd.*; *General Motors*, at p. 662; *Kirkbi AG v. Rivtik*

Holdings Inc., 2005 SCC 65, [2005] 3 S.C.R. 302, at paras. 16-18). These indicia assist the courts in answering the “ultimate question” with respect to classification within the general trade and commerce power: “whether the Act, viewed in its entirety, addresses a matter of genuine national importance and scope going to trade as a whole in a way that is distinct and different from provincial concerns” (*Reference re Securities Act*, at para. 124; see also para. 83). Where a close examination of the statute yields an affirmative answer, the absence of federal power to legislate in respect of the subject matter would create a constitutional gap, which this Court has described as “constitutional anathema in a federation” (*Reference re Securities Act*, at para. 83).

[103] The five *General Motors* indicia are as follows:

- (1) Is the law part of a general regulatory scheme?
- (2) Is the scheme under the oversight of a regulatory agency?
- (3) Is the law concerned with trade as a whole rather than with a particular industry?
- (4) Is the scheme of such a nature that the provinces, acting alone or in concert, would be constitutionally incapable of enacting it?
- (5) Would a failure to include one or more provinces or localities in the scheme jeopardize its successful operation in other parts of the country?

Although these inquiries are neither exhaustive nor determinative of a law's validity under the general trade and commerce power, affirmative answers to these questions will strongly suggest that the subject matter of a federal enactment is "genuinely a national economic concern" (*Canadian National Transportation*, at p. 268; see also *General Motors*, at p. 662-63).

[104] In *General Motors*, affirmative answers with respect to these indicia supported the validity of a federal statute that regulated anti-competitive behaviour. Dickson C.J., writing for the Court, described the impugned *Combines Investigation Act*, R.S.C. 1970, c. C-23 (now the *Competition Act*, R.S.C. 1985, c. C-34) as "a complex scheme of competition regulation aimed at improving the economic welfare of the nation as a whole" which was "designed to control an aspect of the economy that must be regulated nationally if it is to be successfully regulated at all" (p. 682). The subject matter of the legislation therefore fell within Parliament's power over trade and commerce *even though* the provinces are also competent to "deal with competition in the exercise of their legislative powers in such fields as consumer protection, labour relations, marketing and the like" (p. 682).

[105] This Court unanimously reached the opposite conclusion in analyzing the constitutional validity of the *Proposed Canadian Securities Act* in 2011, finding that its enactment would be *ultra vires* Parliament pursuant to the general trade and commerce power:

. . . the day-to-day regulation of all aspects of trading in securities and the conduct of those engaged in this field of activity that the [challenged statute] would sweep into the federal sphere simply cannot be described as a matter that is truly national in importance and scope making it qualitatively different from provincial concerns.

(Reference re Securities Act, at para. 125)

[106] Importantly, however, this Court found that *some* aspects of securities regulation are actually national in character (*Reference re Securities Act* at paras. 6, 7 and 131). In particular, it recognized that the “preservation of capital markets to fuel Canada’s economy and maintain Canada’s financial stability” is one aspect of securities regulation that may fall within the general trade and commerce power (*Reference re Securities Act*, at para. 114; see also paras. 97 and 123). This Court therefore accepted that Parliament is competent to enact legislation that pursues these “genuine national goals”, which include the management of systemic risk and nationwide data collection (paras. 121 and 123). This was central to this Court’s analysis of the *General Motors* indicia — particularly respecting the fourth inquiry, which pertains to the provinces’ capacity to implement the proposed regulatory scheme.

[107] More specifically, this Court endorsed the concept of “systemic risk” as a useful way to differentiate matters that are genuinely national in scope from matters of merely local concern. It accepted the definition of systemic risk 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” (*Reference re Securities Act*, para. 103, citing M. J. Trebilcock, *National Securities Regulator Report* (2010)). This Court also relied on expert evidence in concluding that “systemic risk is an emerging reality, ill-suited to local legislation” (para. 104).

[108] *Reference re Securities Act* settled a number of issues pertaining to the relationship between securities regulation and the general branch of the trade and commerce power under s. 91(2). The guidance it offers will be helpful to us as we analyze the constitutional validity of the Draft Federal Act in accordance with the *General Motors* criteria.

[109] Neither of the first two indicia is at issue here: it is common ground that the Draft Federal Act creates a general regulatory scheme that operates under the oversight of a regulatory agency (R.F., at para. 124).

[110] Regarding the third indicium, the Attorney General of Canada submits that the Draft Federal Act is concerned with trade *as a whole* rather than with the regulation of the securities industry in particular. The Attorney General of Quebec counters that securities trading takes place within a specific industry or segment of the economy, and that the law applicable to it is therefore distinguishable from competition law or trade-marks law.

[111] Although this Court held in *Reference re Securities Act* that the impugned legislation in that case was concerned not with trade as a whole but rather with the

regulation of the securities market in particular, the Draft Federal Act is qualitatively different. Unlike the *Proposed Canadian Securities Act*, it does not “descen[d] into the detailed regulation of *all* aspects of trading in securities” (at para. 114); rather, federal intervention in capital markets is instead limited to addressing issues and risk of a *systemic* nature that may represent a material threat to the stability of Canada’s financial system. In other words, the regulation of systemic risk in capital markets goes to promoting the stability of the economy generally, not the stability of one economic sector in particular. Securities transactions are one of the principal means by which money moves from suppliers to consumers throughout the country (*Reference Re Securities Act*, at para. 113). For this reason, the Draft Federal Act is not concerned only with regulating capital markets specifically, but instead addresses economic matters of national scope which transcend the concerns of any one province. It is therefore akin to the *Combines Investigation Act* that was at issue in *General Motors*, in that both are aimed at stamping out risks and practices that are unhealthy to the Canadian economy. That Parliament’s trade and commerce power is exercised in a way that affects particular industries is not inherently objectionable, so long as the focus of that exercise is on matters that affect trade as a whole.

[112] Like the Majority of the Court of Appeal, we can do no better than to reiterate what this Court stated back in 2011:

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.

(*Reference re Securities Act*, para. 114)

[113] Turning now to the fourth indicium, we are of the view that the provinces, acting alone or in concert, would be incapable of enacting a scheme like the one set out in the Draft Federal Act. Relying on the principle of parliamentary sovereignty, this Court in *Reference re Securities Act* observed that “[t]he 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” (para. 121), given that each of the provinces “retain[s] the ability to resile from an interprovincial scheme” (para. 119). In other words, the fact that any one province can opt against participating in (or can subsequently resile from) such a cooperative scheme could seriously impair that scheme’s capacity to protect the Canadian economy from systemic risk. The Draft Federal Act, with its carefully tailored scope, constitutes a response to this provincial incapacity, with Parliament stepping in to fill this constitutional gap.

[114] We accept that the provinces can and do regulate systemic risk in their capital markets. However, our federalism jurisprudence supports the principle that a subject matter can have both federal and provincial aspects (*Hodge*, at p. 130; *Multiple Access Ltd. v. McCutcheon*, [1982] 2 S.C.R. 161, at p. 181; *Rio Hotel Ltd. v. New Brunswick (Liquor Licensing Board)*, [1987] 2 S.C.R. 59, at p. 65; *Law Society*

of *British Columbia v. Mangat*, 2001 SCC 67, [2001] 3 S.C.R. 113, at para. 23). In such a case, the double aspect doctrine permits the provinces to legislate in pursuit of a valid provincial objective and Parliament to do the same in pursuit of a separate federal objective. While provinces have the capacity to legislate in respect of systemic risk in their own capital markets, they do so from a *local* perspective and therefore in a manner that cannot effectively address *national* concerns which transcend their own respective concerns. As this Court made clear in *Multiple Access Ltd.*, at p. 175, “[t]he validity of the federal legislation must be determined without heed to the . . . [provincial] legislation” (see also: *General Motors*, at pp. 680-82).

[115] Our conclusion with respect to the fifth indicium largely flows from our conclusion as to the fourth. Given our discussion on that subject, we are of the view that the effective management of systemic risk requires market-wide regulation, such that any one jurisdiction’s failure to participate would jeopardize the scheme’s successful operation. Put simply, the management of systemic risk across Canadian capital markets must be regulated federally, if at all. Once again, this Court’s reasons in *Reference re Securities Act* effectively compel an affirmative answer to the final inquiry:

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. On these matters a federal regime

would be qualitatively different from a voluntary interprovincial scheme (para. 123).

[116] In our view, the *General Motors* framework leads to the conclusion that the Draft Federal Act addresses a matter of genuine national importance and scope that relates to trade as a whole. The preservation of the integrity and stability of the Canadian economy is quite clearly a matter with a national dimension, and one which lies beyond provincial competence. Moreover, the fact that the federal government's foray into securities regulation under the Draft Federal Act is limited to achieving these objectives supports the validity of this proposed statute. Given our conclusions with respect to each of the *General Motors* indicia, we therefore classify the legislation at issue in this case as falling within Parliament's power over trade and commerce pursuant to s. 91(2) of the *Constitution Act, 1867*.

(2) Regulations under the Draft Federal Act: Sections 76 to 79

[117] Before concluding, we will briefly address the argument that the Council of Ministers' role in the making of regulations under the Draft Federal Act undermines the validity of this draft statute. The Majority of the Court of Appeal accepted that this was a proper basis on which to find that the Draft Federal Act is *ultra vires*.

[118] The involvement of the Council of Ministers in the making of regulations is set out in ss. 76 to 79 of the Draft Federal Act. Broadly speaking, those provisions

require that the Authority submit proposed regulations to the Council of Ministers for approval, and confer onto the Council of Ministers the power either to approve any proposed regulation, to reject it, or to return it to the Authority for reconsideration. Approval from the Council of Ministers, whether express or implied, is necessary before a regulation can be made (see: s. 79 of the Draft Federal Act).

[119] The mechanism applicable to the approval or rejection of regulations by the Council of Ministers is set out in s. 5.2 of the Memorandum (reproduced above, at para. 27). The Majority below found that this section, when combined with ss. 76 to 79 of the Draft Federal Act, confers on “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)”, a “veto right” over proposed federal regulations (para. 87). In the Majority’s opinion, the possibility of a provincial veto “undermine[s] the constitutional foundation of the [Draft] Federal Act” (para. 137), since it belies the idea that the legislation’s subject matter truly “relates to matters that transcend interests of a purely local and provincial nature” (para. 96; see also para. 95).

[120] The Dissenting Judge did not subscribe to the Majority’s reasoning on this point. He observed that Parliament may delegate regulatory authority over subject matters that fall within its jurisdiction, and can structure the internal processes of subordinate regulatory bodies in such manner as it deems most appropriate. In his

view, how regulatory authority is delegated under the Draft Federal Act cannot undermine the Act's validity.

[121] We agree with the Dissenting Judge. There is nothing problematic about the way in which the Draft Federal Act delegates the power to make regulations to the Authority under the supervision of the Council of Ministers.

[122] At the outset, we note that the Majority found that the mechanism for making regulations under the Draft Federal Act effectively confers on the participating provinces a "veto right". It is clear from s. 5.2 of the Memorandum that any request by the Council of Ministers to have the Authority reconsider a proposed regulation must be approved by a majority of the members of the Council of Ministers, and by one member representing the Major Capital Markets Jurisdictions and the federal government. Moreover, a decision to reject a proposed regulation after it has been reconsidered by the Authority must be approved by a majority of the members of the Council of Ministers and a majority of those members representing the Major Capital Markets Jurisdictions and the federal government. And it should be borne in mind that, in the absence of the requisite support for either a request to reconsider or a rejection, the regulation will be considered to have been approved by the Council of Ministers (article 5.2(a)). As a result, any attempts *to block* proposed federal regulations require the support of a majority of the Council of Ministers *as well as* some level of support from the Major Capital Markets Jurisdictions and the federal Minister of Finance. No one province can therefore be said to have a "veto"

power in this respect; at most, it is possible for a group of provinces *acting together* to reject a proposed federal regulation. As we will explain, however, this is not problematic.

[123] As noted above under the analysis of the first reference question, a corollary to the principle of parliamentary sovereignty is that the legislature has the broad authority to delegate *administrative* powers — including the power to make legally binding rules and regulations — to a subordinate body, like the Governor General in Council, the Lieutenant Governor in Council, an administrative agency or a Crown corporation. The Draft Federal Act is an excellent example of this: it sets out a broad framework for the regulation of systemic risk in capital markets, but delegates extensive administrative powers, including the power to make regulations, to the Authority. We repeat that this form of delegation of administrative powers is entirely consistent with the principle of parliamentary sovereignty, since the delegated authority can always be revoked by the sovereign legislature and its scope remains limited by and subject to the terms of the governing statute (*R. v. Furtney*, [1991] 3 S.C.R. 89). To borrow the words of the Judicial Committee of the Privy Council in *Hodge*:

It was argued at the bar that a legislature committing important regulations to agents or delegates effaces itself. That is not so. It retains its powers intact, and can, whenever it pleases, destroy the agency it has created and set up another, or take the matter directly into its own hands. How far it shall seek the aid of subordinate agencies, and how long it shall continue them, are matters for each legislature, and not for the Courts of Law, to decide. [Emphasis added; p. 132]

[124] This Court has confirmed that the legislature retains a significant degree of latitude in deciding how it will delegate administrative law-making powers pertaining to matters within its jurisdiction. While Parliament cannot transfer primary legislative authority to a provincial legislature (and vice versa), this Court has not taken issue with federal legislation that delegated administrative powers to a creature of a provincial legislature (*P.E.I. Potato Marketing Board v. Willis Inc.*, [1952] 2 S.C.R. 392) or that incorporated by reference provincial legislation as amended from time to time (*Coughlin v. Ontario Highway Transport Board*, [1968] S.C.R. 569).

[125] It is therefore important to note the distinction between the *constitutionality of legislation* and *the legislature's authority to delegate administrative powers* to a subordinate person or body. Even though a statute's subject matter may fall within the jurisdiction of the enacting legislature, that statute may still contravene the rule against legislative delegation if it purports to transfer primary legislative authority to the other level of government. Conversely, a statute that delegates administrative powers, including a subordinate law-making power, to a statutory body may be struck down as unconstitutional if its subject matter is *ultra vires* the enacting legislature. In respect of matters over which a legislature has competence, however, the statutory delegation of administrative powers cannot undermine the underlying validity of that statute itself. In the words of Laskin C.J. in *Reference re Agricultural Products Marketing Association*, [1978] 2 S.C.R. 1198, at p. 1225, "delegation . . . cannot impeach the assertion of power".

[126] With this in mind, we turn to a second issue on the subject of the delegation of powers under the Draft Federal Act: Is the manner in which the Draft Federal Act delegates law-making powers to the Authority, under the oversight of the Council of Ministers, problematic from the perspective of federalism or the constitutional division of powers? In our view, the answer is quite clearly “no”. In exercising its sovereign legislative powers, Parliament has the authority to confer on a statutory body — in this case, the Council of Ministers — the power to approve or reject proposed subordinate regulations, even if some members of that body are representatives of certain provinces. The delegation of administrative powers in a manner solicitous of (or even dependent upon) provincial input is in no way incompatible with the principle of federalism, provided that the delegating legislature has the constitutional authority to legislate in respect of the applicable subject matter.

[127] And as we explained above, the Draft Federal Act is *intra vires* Parliament pursuant to the general trade and commerce power, notwithstanding the fact that provincial representatives will be involved in the making of regulations. To put it simply, the *General Motors* framework is not concerned with whether a particular subject matter relating to trade can only be dealt with through direct, unfettered federal action; rather, its purpose is to identify aspects of the economy that the provinces, acting either individually or collectively, lack the capacity to regulate effectively. For this reason, the fact that some regulations might never be adopted because of provincial opposition does not change the reality that the regulations that are adopted *must*, by their very nature, be respected by all the provinces if the

objectives underlying the Draft Federal Act are to be achieved. The Dissenting Judge's comments in this regard are particularly apt:

. . . Parliament is free to delegate [in the manner set out in *A.G. of Nova Scotia v. A.G. for Canada*, [1951] S.C.R. 31 and *P.E.I. Potatoe Marketing v. Willis*, [1952] 2 S.C.R. 372 and 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 [of Ministers]) 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 (C.A. reasons, at para. 205 (per Schragger J.A., dissenting), emphasis added).

[128] It therefore follows that we answer the second reference question in the negative.

VI. Conclusion

[129] For the foregoing reasons, we are of the view that the Cooperative System does not run afoul of the principle of parliamentary sovereignty or the rule respecting the legislature's authority to delegate law-making powers. Moreover, we hold that the enactment of the Draft Federal Act falls within Parliament's power over trade and commerce under s. 91(2) of the *Constitution Act, 1867*.

[130] Again, however, we note that our advisory opinion is limited to the constitutionality of the Cooperative System. It is up to the provinces to determine

whether participation is in their best interests. This advisory opinion does not take into consideration many of the political and practical complexities relating to this Cooperative System, and in particular those that may arise if a Participating Jurisdiction decides to withdraw at some later date. Moreover, with respect to the content of the Authority's enabling statute (which has not yet been published), we note that it will have to be carefully drafted so as to respect the limits on overlapping, yet distinct federal and provincial authority.

[131] *When and whether* to relinquish a degree of autonomy over the regulation of securities for the purpose of achieving national uniformity is *entirely* a matter of political choice. This too is a valid exercise of parliamentary sovereignty. The various jurisdictions have an unquestioned and equally sovereign right to join or to reject the Cooperative System.

[132] We answer the questions referred by the Government of Quebec as follows:

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"?

Answer: Yes.

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?

Answer: No.

Accordingly, the Attorney General of Canada's appeal is allowed, the Attorney General of British Columbia's appeal is allowed, and the Attorney General of Quebec's appeal is dismissed.

Appeals of the Attorney General of Canada and of the Attorney General of British Columbia allowed. Appeal of the Attorney General of Quebec dismissed.

Solicitor for the Attorney General of Canada: Attorney General of Canada, Montréal.

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Solicitor for the Attorney General of British Columbia: Attorney General of British Columbia, Victoria.

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