Institute of Intergovernmental Relations

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## I. Introduction [1]

This paper is about the kind of federalism expressed in the Supreme Court of Canada's opinion in the *Securities Reference*. The justices unanimously determined that the federal government's proposed securities legislation was, in fact, a "wholesale takeover" of securities regulation, not justified by the arguments of the federal solicitors (*Reference Re Securities Act, 2011 SCC 66).* Thus, it is *ultra vires* of the government of Canada.

This opinion of the justices is important not only because of its treatment of the federal trade and commerce power but also because of its references to the nature of Canadian federalism. In a nutshell, the justices came down strongly in support of what they called "cooperative federalism." However, they did not offer a lengthy discussion of what precisely they meant by cooperative federalism nor did they venture into a consideration of the implications of their preferred model of federalism.

Interestingly, in at least four places in the opinion, the justices noted that the federal solicitors had grounded their argument ***entirely*** on one head of power, i.e., the general branch of the trade and commerce power, and that the justices had not been asked to consider other powers that might justify the proposed legislation. The implication appears to be that, if other justifications had been invoked, the Court may have ruled differently.

The justices also indicated that their task is to maintain "the constitutional balance." Aside from wondering what they mean by constitutional balance, we are impelled to wonder whether the constitutional balance is really their concern.

In what follows, I do not attempt a study of the legal argumentation but rather a critical analysis of the justices' federalism-related comments. To do this, I am guided by these three questions: first, does the kind of federalism expressed in the *Securities Reference* represent a break of some sort from the federalism-related views that the Court expressed in the *Secession Reference*? Secondly, when the justices say that the two senior levels of government are "coordinate," what exactly is meant? And thirdly, on what is the justices' view of Canadian federalism based?

To answer these questions, I first look closely at what the justices said about Canadian federalism in the *Securities Reference*. As intimated, I am particularly interested in the justices' comment that Canadian federalism rests on the principle that the two senior levels of government are co-ordinate;[2] one is not subordinate to the other. I then offer a discussion of the meaning of federalism and of the nature of Canadian federalism. The next section focuses on the *Secession Reference*, the opinion in which the Court identified federalism as a fundamental organizing principle of the Canadian federation, to determine if, in that opinion, the justices spoke directly or indirectly of co-ordinate federalism.

## II. The Supreme Court's Federalism as Expressed in the *Securities Reference*

The *Securities Reference* contains several comments on federalism. This fact alone reveals something of the justices' thinking. By including – within an opinion that supports provincial power – a discussion on federalism and its importance to provincial diversity, the justices convey

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1 I wish to express my deep appreciation to Ms. Reem Zaia, an outstanding former student of mine, now in law school, who undertook an enormous amount of research for me.

2 Webster's Universal College Dictionary defines the adjective, "co-ordinate," this way: "of the same order or

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Given this view and Chief Justice Dickson's support for it, one might have thought that the Court would have been more open to the federal government's proposal.

As mentioned, federal solicitors based their argument solely on one federal power, a strategy that seemed to leave the justices somewhat bewildered. At paragraph 68, they write, “As noted earlier, Canada grounds its submission in support of the Act's constitutionality entirely on this power.” At paragraph 129, they repeat themselves for a fourth time: “We further note that we have not been asked for our opinion on the extent of Parliament's legislative authority over securities regulation under other heads of federal power or indeed the interprovincial or international trade branch.” The reader is left to wonder if their advisory opinion would have been substantially different if the federal side had adopted a different strategy. It also appears to the reader that the federal government, in basing its case solely on one head of power, left its solicitors with one hand tied behind their backs. Could it be that the federal government was divided on the issue of a single national securities regulator for Canada? Given the Prime Minister's supportive attitude toward provincial power, it is arguable that it was.

Also, as Professor Wayne MacKay points out, the concept of balance is a subjective concept. What is balance to one person is imbalance to another. Thus, he dismisses the use of the balance concept as a guide for judges in their decision-making. Since he does

dominated by the national governments. John Cioffi, a political scientist and legal scholar at the University of California, undertook just such a review and found that corporate governance reform, including reform of securities regulation, "substantially centralized state regulatory authority"(Cioffi 2010: 231).

In Germany, until the mid-1990s, securities regulation was the responsibility of eight self-regulating regional stock exchanges and the länder in which they were situated. During the 1990s not only was the role of the state expanded but the expansion was structured in "ways that broke with historically entrenched patterns of federalism and regulatory fragmentation"(Ibid.). Cioffi emphasizes that securities law refBT1 ct /TrregiETBTETarod ccetd,poli-pt

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(Norris 2008: ch. 7). However, Daniel Treisman suggests that the jury is still out on the question of whether federalism is associated with democracy. He quotes the eminent political scientist and democracy scholar, Juan Linz: "Although there are writers who suggest so, federal states are not

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> deal, local legislation conflicts with an Act passed by the Dominion parliament in the exercise of any of the general powers confided to it, the legislation of the local must yield to the supremacy of the Dominion parliament; in other words, that the provincial legislation in such a case must be subject to such regulations, for instance, as to trade and commerce of a commercial character, as the Dominion parliament may prescribe. I adhere to what I said in *Valin v. Langlois* (1), that the property and civil rights referred to, were not all property and all civil rights, but that the terms "property and civil rights" must necessarily be read in a restricted and limited sense, because many matters

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> Does a system of government embody predominantly a division of powers between general and regional authorities, each of which, in its own sphere, is co-ordinate with the others and independent of them? If so, that government is federal.

What seems contradictory in Wheare's book is his classification of the US[11] and Australia as countries with federal systems even though in both countries the central governments are dominant. The fact that in both countries the central government dominates undermines his definition of federalism. He undermined his work further when he wrote: (Wheare 1964: 34)

> All this concentration on the federal principle may give the impression that I regard it as a kind of end or good in itself and that any deviation from it in law or in practice is a weakness or defect in a system of government. It seems necessary to say, therefore, that this is not my view....And therefore, while I have maintained that it is necessary to define the federal principle dogmatically, I do not maintain that it is necessary to apply it religiously. The choice before those who are framing a government for a group of states or communities must not be presumed to be one between completely federal government and completely non-federal government. ***They are at liberty to use the federal principle in such a manner and to such a degree as they think appropriate to the circumstances.*** [Emphasis added.]

In other words, Wheare would appear to accept that a system of government is not necessarily "unfederal" if the central power is dominant.

In my view, federalism is a system of governance characterized by a constitutionally protected division of law-making powers between a central government and constituent governments, applied on a territorial basis. That said, several other points ought to be made.

The first is that federalism is a type of mechanism for unification. Colonies and states enter into a federal arrangement in order to come together or stay together. They recognize that, because federalism is above all a means for effecting a union of some sort, they will have to surrender at least some of their autonomy and powers to a central authority. The central government retains a degree of dominance or authority over the constituent units. In return, they receive protection and financial aid, as well as authority to legislate in certain, specified areas.

the claims of decentralization)[12], there is little doubt that for many decentralization remains a cardinal principle in the design of governance.

In Canada and elsewhere, e.g., Spain and Belgium, decentralization has meant increasing the powers of regional governments (provinces, states, autonomous communities, länder).[13] In Canada, it has been helped along by:

> nationalist and secessionist agitation in Quebec;
> the economic clout that has accrued to provinces as a consequence of their ownership of natural resources;
> the absence of a consistently robust response from the federal government;
> apparent elite acceptance of provincialization and devolution;
> the unleashing of provincialist momentum that resulted from the Meech Lake Accord/Charlottetown Accord débacle;
> the provincialist legacy of the JCPC; and
> the marginalization of the peace, order and good government clause.

Constitutions are not supposed to be swayed by political waves. That is why they are so hard to amend. And, as noted earlier and as will be discussed in the next section, the Canadian constitution that the founders conceived gives the federal level some substantial and invasive powers, including:

> the spending and taxing powers;
> the declaratory power;
> the criminal law power;
> the employment insurance power (as a result of the 1940 amendment);
> powers over international affairs and international trade;
> power over interprovincial trade;
> substantial powers regarding the environment; and
> the peace, order and good government power (although this was weakened by the JCPC in a number of judgments).

It is, therefore, very difficult to understand how the justices could say, in the *Securities Reference*, that "The Canadian federation rests on the organizing principle that the orders of government are coordinate and not subordinate one to the other" (paragraph 71). The constitution suggests, and the founders intended, otherwise. It is not the role of the judiciary to decide on cases in a way that would render federal powers meaningless because of some vision of federalism that it may hold. It is not its role to pursue a vision of Canada that would turn it from a federation into a confederation.

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12 Beramendi concludes that "The recent literature on federalism leaves no space for any federal illusion of any kind. The more scholars find out about federalism and decentralization, the more cautious they become in predicting their effects or advocating their adoption" (Beramendi 2007: 775).

13 South Africa resisted the trend, with respect to federalism. The post-apartheid constitution provides for a dominant central government. Hueglin and Fenna write: "The federal division of powers in the South African Constitution...essentially followed the German model by establishing a cooperative pattern of administrative federalism. While concurrency predominates, and the provinces have been assigned only a very limited range of powers over parochial matters...the national government has been given sweeping powers to set national standards and norms....As a consequence, the South African federal system appears highly centralized and leaves to the provinces little room for autonomous development" (Hueglin, Fenna 2006: 166).

To illustrate the point: assume that the country's federal and provincial political leaders, in their wisdom, decided to amend the constitution so that the bulk of law-making authority resided with the provincial governments and that Ottawa's jurisdiction was restricted to defence and national security. In this scenario, the Supreme Court of Canada would be overstepping its authority, in the extreme, were it to lay out a vision of Canadian governance that was directly at odds with that set out in the new, amended constitution, and then follow up by significantly enlarging the powers of the central government and circumscribing the powers of the provinces.

On the issue of decentralization, the absence from both the *Securities Act Reference* and the *Secession Reference* of a discussion of just how decentralized Canada has become is remarkable, especially for a Court concerned about balance in the Canadian federation.

If the justices had pursued this issue, they would have noticed, for instance, the considerable

A more comprehensive scale was developed by Ferran Requejo, a Spanish scholar, who could also be fairly described as a Catalan nationalist supportive of what is called multinational federalism. The table below shows the results of Requejo's analysis of the "degree of constitutional self-government" enjoyed by federated units or regions in twenty-two nations. The indicators that Requejo used are: (Requejo 2010: 285-286)[16]

> a) the kind of legislative powers enjoyed by these sub-units (8) – subdivided in specific areas of government as follows: economy/infrastructure/communications (2), education and culture (2), welfare (2), internal affairs/penal/civil codes and others (2); b) the executive/administrative powers (2); c) whether or not the federated entities have the right to conduct their own foreign policy, taking into account both the scope of the matters and agreements with federal support (2); and d) their economic decentralization (8): it is calculated according to a single average index obtained taking into account the distribution of the public revenues and the public expenditures...in each country.

Degree of Constitutional Decentralization

| Country | Ranking | Points |
|---|---|---|
| Venezuela | 1 | 3.5 |
| Malaysia | 2 | 4 |
| Mexico | 3 | 6.5 |
| Pakistan | 4 | 6.5 |
| South Africa | 5 | 7 |
| Italy | 6 | 8 |
| Nigeria | 7 | 8.5 |
| Austria | 8 | 9.5 |
| Brazil | 9 | 10 |
| UK | 10 | 11 |
| India | 11 | 11.5 |
| Spain | 12 | 12 |
| Argentina | 13 | 13 |
| Russia | 14 | 13.5 |
| Germany | 15 | 14 |
| Belgium | 16 | 15.5 |
| US | 17 | 15.5 |
| Australia | 18 | 16 |
| Switzerland | 19 | 17 |
| Canada | 20 | 17 |
| Bosnia-Herzegovina | 21 | 18.5 |
| Serbia-Montenegro | 22 | 19.5 |

16 The numbers in brackets are the points allocated.

Of the twenty-two countries listed, Canada, along with Switzerland, ranks twentieth in degree of decentralization. In other words, Canada is among th

Paragraph 55 goes on to state:

> Our political and constitutional practice has adhered to an underlying principle of federalism, and has interpreted the written provisions of the Constitution in this light. For example, although the federal power of disallowance was included in the *Constitution Act, 1867*, the underlying principle of federalism triumphed early. Many constitutional scholars contend that the federal

occur, there was a remedy provided under the proposed constitution" (Ajzenstat 1999: 335).[22]

"And finally, all matters of trade and commerce, banking and currency, and all questions common to the whole people, we have vested fully and unrestrictedly in the General Government" (Canada Provincial Parliament 1865: 108). George Étienne-Cartier agreed: "Questions of commerce, of international communication and all matters of general interest, would be discussed and determined in the General Legislature" (Canada Provincial Parliament 1865: 55).

Alexander T. Galt also made clear that trade and commerce were to be a federal concern. He stated: (Galt 1864: 10)

> It was most important to see that no local legislature should by its separate action be able to put any such restrictions on the free interchange of commodities as to prevent the manufactures of the rest from finding a market in any one province, and thus from sharing in the advantages of the extended Union.

He stated further that the federal government "would have the regulation of all

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