The Supreme Court of Canada Long-Gun Registry Decision: The Constitutional Question Behind an Intergovernmental Relations Failure

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Introduction

In 2012, Parliament repealed the federal law that had established a mandatory long-gun registry. The law to repeal the long-gun registry also provided for the destruction of the data contained therein. Quebec, however, expressed its intention to establish its own gun-control scheme and asked the federal government for its data on long-guns owned by residents of Quebec.[1] When the federal government refused to turn over the data from the long-gun registry, despite the fact that Quebec government officials had access to the data while the long-gun registry was in operation, Quebec challenged the constitutionality of the federal law providing for the destruction of the data and sought an order requiring the federal government to turn over the data to Quebec.[2] The federal government's refusal to participate in an act of intergovernmental cooperation began a three-year round of constitutional litigation that concluded in March of 2015 with a split decision of the Supreme Court of Canada.

At first, the decision of the majority of the Supreme Court of Canada would seem to be fairly straightforward; a government that has the constitutional jurisdiction to enact a law should, naturally, have the jurisdiction to repeal that law. Further, given that data on Canadians was gathered under that law as part of its administration, a government ought to be able to dispose of the data it has gathered as it deems appropriate. The dissenting judgment, though, complicates the constitutional question of whether the federal government had the jurisdiction to destroy the data, rather than turn it over to the Quebec government. The issue is not so straightforward.

The judicial history of the challenge

In 2012, the Quebec Superior Court decided that the Canadian Firearms Registry (CFR) was the result of an exercise in cooperative federalism between the different orders of government and that, in "pith and substance," the purpose of destroying the data in the long-gun registry was to prevent provincial governments from exercising their jurisdiction when using the products of this partnership for their own purposes.[3] Having determined that cooperative federalism was a principle of Canadian constitutional law, the Superior Court determined that the federal government's action in destroying the data in the long-gun registry was a violation of the principle and therefore *ultra vires* the federal government's jurisdiction over criminal law.[4] The Quebec Court of Appeal, however, reversed the decision of the Quebec Superior Court, concluding that Parliament has the jurisdiction to destroy the data in the CFR, as a consequence of it having

the jurisdiction to create the registry in the first place, and that the principle of cooperative federalism cannot override the division of powers.[5] The Court of Appeal also decided that Quebec has no right to obtain the data contained in the registry, as Quebec did not have a property right in the data.[6]

The majority judgment in the Supreme Court of Canada: The jurisdiction to legislate includes the jurisdiction to repeal

The majority of the Supreme Court of Canada concluded that a law that repeals legislation validly enacted under the federal government's criminal law power is also an exercise of the federal government's criminal law jurisdiction; though the repealing Act does not create a prohibition backed by a penalty for a criminal law purpose (the quintessential definition of the federal criminal law power), the "matter" with which the repealing legislation is concerned is clearly criminal law if it is repealing a validly-enacted criminal prohibition.[7] The majority also found that the principle of cooperative federalism, which Quebec used to argue that the federal government could not exercise its jurisdiction in a way that would impede cooperation between the orders of government, "has no foundation in our constitutional law . . . ."[8] Whether or not this argument is strictly true is a debatable proposition, given that federalism is an unwritten, underlying principle of the Constitution and the scope of that principle will continue to be defined through jurisprudence.

The majority of the Court states that the principle of cooperative federalism cannot impose limits on an otherwise valid exercise of jurisdiction;[9] it is therefore a negative protection against conflicting policy positions creating deadlock between governments (and, as the Court notes, is reflected in such principles of constitutional law as interjurisdictional immunity),[10] rather than a positive, legal obligation to cooperate. Indeed, the Court quotes its decision in the *Reference re Securities Act*, in which the Supreme Court stated that "While flexibility and cooperation are important to federalism, they cannot override or modify the separation [sic] of powers."[11] Mind you, the Court did state in that decision that, along with demanding respect for the division of powers, the underlying constitutional principle of federalism demands the maintenance of a constitutional balance between the powers of the federal and provincial governments.[12] Nonetheless, we accept the statement of the majority of the Supreme Court in the long-gun registry decision that

> Neither this Court's jurisprudence nor the text of the *Constitution Act, 1867* supports using that principle [the principle of cooperative federalism] to limit the scope of legislative authority or to impose a positive obligation to facilitate cooperation where the constitutional division of powers authorizes unilateral action. To hold otherwise would undermine parliamentary sovereignty and create legal uncertainty whenever one order of government adopted legislation having some impact on the policy objectives of another. Paradoxically, such an approach could discourage the practice of cooperative federalism for fear that cooperative measures could risk diminishing a government's legislative authority to act alone.[13]

We would also generally agree with the majority judgment that Parliament has a right to destroy data when it was obtained and kept exclusively as an act of Parliament's criminal law jurisdiction.[14] As the Supreme Court determined as long ago as 1991, in the *Reference re Canada Assistance Plan (B.C.)*, Parliament has the authority to alter legislative schemes within its jurisdiction despite the expectations of the provinces, even in the case of legislative schemes that establish intergovernmental fiscal transfers.[15] As the Court noted in the long-gun registry decision, "These legal instruments [e.g. federal-provincial agreements] . . . are unquestionably subordinate to parliamentary sovereignty and can therefore be displaced by valid federal legislation."[16] We would also agree that, were the CFR data gathered and used exclusively for the purposes of administering valid federal criminal law, that the "matter" of the provision to destroy the data would be criminal law, the same as the "matter" of the registration scheme in the first place.[17]

Therefore, if that were the case, Quebec would be incorrect to assert that the destruction of the long-gun registry data was not a valid exercise of the federal criminal law power because it encroached too extensively on provincial powers.[18] We would also go so far as to accept as a general principle of constitutional law that, as the majority states, "An intention on the part of one level of government to prevent another from realizing a policy objective it disagrees with does not, on its own, lead to the conclusion that there is an encroachment on the other level of government's sphere of exclusive jurisdiction."[19] However, we are not convinced that, given the particular facts of this case, destroying the data is not a colourable attempt by the federal government to encroach on provincial jurisdiction over property and civil rights and is therefore unconstitutional. While the CFR may have been established as an exercise of the federal criminal law power and the data contained in the CFR collected, at least in part, as an exercise of that power, it is not clear to us that the data was either collected or used **exclusively** through the exercise of Parliament's criminal law power, despite what the majority of the Supreme Court asserts.[20] The dissenting judgment of the Supreme Court identifies some particular, important details about the long-gun registry data that cause us to wonder about this.

The dissenting judgment and the constitutional implications of the use of the CFR data

Interestingly, the dissent in the Supreme Court of Canada disagrees with the majority about whether the long-gun registry was exclusively an exercise of the federal criminal law power, stating

> In our opinion, and this is where we diverge from our colleagues' view, both the collection of the data with respect to long guns and the broader initiatives aimed at regulating the use of such guns were the result of a partnership with the provinces, including Quebec. Where an integrated scheme such as this requires the exercise of both federal and provincial legislative powers, the analytical framework for questions related to the division of powers must be adapted and applied accordingly. Whether the means the federal government adopted to terminate this partnership were constitutional can be measured, in particular, in terms of the effect they will have on its partners' powers.[21]

They come to this conclusion despite the Supreme Court's decision in the *Reference re Firearms Act (Can.)* that the creation of a long-gun registry would be a valid exercise of the federal criminal law power.[22] The dissent states that providing for the destruction of the data in the long-gun registry

> "prevents the latter [Quebec] from using them [the data] in the exercise of their powers. This section has significant effects on Quebec's legislative powers and is not necessary to the achievement of the *ELRA*'s [*Ending the Long-Gun Registry Act*'s] purpose. Section 29 [the section dealing with the destruction of the data in the registry] is therefore unconstitutional and should be declared to be invalid."[23]

The dissenting justices see the fact that Chief Firearms Officers are designated by the provinces and that information on both registration certificates for firearms (issued by the federally-appointed Chief Firearms Registrar), and authorizations to possess, carry, and transport firearms (issued by each province's Chief Firearms Officer), are contained in the same registry as important elements in arriving at their conclusion. In their view, the registry is a partnership and, if the federal government unilaterally destroy the "fruits" of that partnership, then such an action is unconstitutional.[24] We, however, would suggest that the dissent raises another point that is critical to a conclusion that the unilateral federal requirement that data in the long-gun registry be destroyed is unconstitutional — specifically, the Quebec government uses the data in the registry for the administration of constitutionally-valid provincial legislation and this data is collected from individuals "subject to the rights and protections set out in federal and Quebec legislation concerning access to information and the protection of personal information."[25] This provision of the federal-Quebec agreement on the administration of the *Firearms Act* would suggest that Quebecers registering their firearms and seeking

to be licensed to possess those firearms would have been informed that the information they provided would be used not only in the administration of the federal *Firearms Act*, but in provincial legislation as well. As the dissenting justices noted, "the factual reality unique to the CFIS [the registry] and the partnership of which it forms a part is essential to the determination of whether s. 29 of the *ELRA* is constitutional."[26]

While the Supreme Court of Canada had found, in coming to its decision in the *Reference re Firearms Act (Can.)*, that the *Firearms Act* "d[id] not significantly hinder the ability of the provinces to regulate the property and civil rights aspects of guns" and was valid because it did not upset the balance of federalism,[27] it is more difficult to conclude that the destruction of the data in the long-gun registry does not significantly hinder the ability of provinces like Quebec, which use that data in the administration of their own legislation, to effectively regulate the property and civil rights aspects of guns and does not, therefore, upset the balance of federalism. Furthermore, in the *Reference re Firearms Act (Can.)*, the Court found that, in establishing the long-gun registry, "There is no colourable intrusion into provincial jurisdiction, either in the sense that Parliament has an improper motive or that it is taking over provincial powers under the guise of the criminal law."[28] We are of the view that this is not the case in providing for the destruction of the data in the long-gun registry. Thus, one could see in the unilateral federal decision to destroy this data, used in the administration of both federal and provincial laws, a colourable attempt on the part of the federal government to regulate provincial jurisdiction over property and civil rights in the province.

Of course, as the Court stated in the *Reference re Firearms Act (Can.)*, "Laws mainly in relation to the jurisdiction of one level of government may overflow into, or have 'incidental effects' upon, the jurisdiction of the other level of government. It is a matter of balance and of federalism: no one level of government is isolated from the other, nor can it usurp the functions of the other."[29] Section 29 of the *Eliminating the Long-Gun Registry Act*, however, by providing for the destruction of data that is used in the administration of both federal and Quebec laws, does not have merely an "incidental effect" on Quebec's jurisdiction; rather, it usurps the capacity of Quebec to regulate the property and civil rights aspect of firearms in a significant way. The Court also stated in the *Reference re Firearms Act (Can.)* that "We are not persuaded that the registration provisions [which established the long-gun registry] can be severed from the rest of the Act . . . ."[30] It is clearly not the case, however, that section 29 of the *Eliminating the Long-Gun Registry Act* cannot be severed from the rest of an act that is meant to end the long-gun registry.

Further support for this view comes from the Supreme Court of Canada's determination, in the *Reference re Secession of Quebec*, that the principle of federalism is an underlying, unwritten principle of the Constitution of Canada. In that case, the Supreme Court stated that this principle "recognizes the diversity of the component parts of Confederation, and the autonomy of provincial governments to develop their societies within their respective spheres of jurisdiction . . . ."[31] The Court expanded on this idea in *Canadian Western Bank v Alberta*, stating that "The fundamental objectives of federalism were, and still are, to reconcile unity with diversity, promote democratic participation by reserving meaningful powers to the local or regional level and to foster cooperation among governments and legislatures for the common good"; the Court also determined that "The constitutional doctrines [which are based on the underlying principles of the Constitution] permit an appropriate balance to be struck in the recognition and management of the inevitable overlaps in rules made by the two levels of legislative power . . . ."[32] Clearly, securing a balanced federalism has been a matter of significant concern to the Supreme Court of Canada.

Observing that the Supreme Court has come to increasingly rely on the underlying principle of federalism in division of powers cases since the *Reference re Secession of Quebec*, legal scholar Jean-François Gaudreault-DesBiens has suggested a way to give the principle more precise meaning, by reference to the principle of "federal

loyalty" present in other federal constitutional arrangements, such as those of Belgium, Switzerland, South Africa, and, especially, Germany.[33] As he describes it, the principle of federal loyalty, by being inherent in the principle of federalism itself, irrespective of the particular constitutional expression of federalism in a particular country, "illustrates the principle of federalism's intrinsic normative potential."[34] He does note, however, that the principle of federal loyalty seems especially relevant in federations with a rather deep level of socio-cultural diversity, which would include Canada.[35] Gaudreault-DesBiens observes that the principle of federal loyalty tends to "promote stability and predictability by leading to the adoption of solutions that discourage abrupt and unexpected shifts in the relationships between the governments of the federation."[36] This is akin to the effect of the determination in the *Reference re Secession of Quebec* that governments have a duty to negotiate constitutional changes in response to a repudiation of the existing constitutional order.[37] He also notes the importance that the Supreme Court of Canada attaches to balance within the federation, such as in the *Reference re Securities Act*, where the Supreme Court "unanimously struck down the main provisions of a proposal of federal securities legislation, as massively trenching upon provincial jurisdiction over property and civil rights."[38] There, the Court said that

> "It is a fundamental principle of federalism that both federal and provincial powers must be respected, and one power may not be used in a manner that effectively eviscerates another. Rather, federalism demands that a balance be struck, a balance that allows both the federal Parliament and the provincial legislatures to act effectively in their respective spheres . . . ."[39]

To Gaudreault-DesBiens, "Federal loyalty sheds light on the possible foundations for a normative theory for cooperative federalism . . . federal loyalty [however] acts at a deeper level as it is inherent to federalism, irrespective of the abstract model . . . a given federation is deemed to reflect."[40] For Gaudreault-DesBiens, then, reading the normative doctrine of federal loyalty into the unwritten constitutional principle of federalism would both add substance to the principle of federalism and reflect the requirement of balance in Canadian federalism that the Supreme Court of Canada has articulated.

It is debatable whether our courts should add depth to the meaning of the underlying constitutional principle of federalism by importing the norm of federal loyalty into that principle, or if the existing interpretive principles of the division of powers are sufficient as they are. However, the bottom line is that the majority of the Supreme Court of Canada should have recognized the constitutional relevance of the fact that the Quebec government still uses the data contained in the CFR for the administration of its provincial laws. The Supreme Court of Canada should have accordingly declared section 29 of the *Eliminating the Long-Gun Registry Act* to be an unconstitutional intrusion into Quebec's jurisdiction.

Notes

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1 *Quebec (Attorney General)* v *Canada (Attorney General)*, 2015 SCC 14, at para 2 [*Quebec v Canada*].
2 *Ibid*.
3 *Ibid* at para 9.
4 *Ibid*.
5 *Ibid* at para 13.
6 *Ibid* at para 14.
7 *Ibid* at para 33.
8 *Ibid* at paras 15-16.
9 *Ibid* at para 19.
10 *Ibid* at para 17, quoting *Canadian Western Bank* v. *Alberta*, 2007 SCC 22, [2007] 2 SCR 3.
11 *Reference re Securities Act,* 2011 SCC 66, [2011] 3 SCR 837, at para 61 [*Securities Reference*].
12 *Ibid*.
13 *Quebec* v *Canada*, *supra* note 1, at para 20.
14 *Ibid* at para 25.
15 *Reference Re Canada Assistance Plan (B.C.)*, [1991] 2 SCR 525.
16 *Quebec* v *Canada*, *supra* note 1, at para 26.

17 *Ibid* at para 37.
18 *Ibid* at para 34.
19 *Ibid* at para 38.
20 *Ibid* at para 43.
21 *Ibid* at para 50.
22 *Reference re Firearms Act (Can.)*, [2000] 1 SCR 783 [*Firearms Reference*].
23 *Quebec* v *Canada*, *supra* note 1, at para 51.
24 *Ibid* at paras 60-62, 107-14, 121-22, 128.
25 *Ibid* at paras 125, 128, 130.
26 *Ibid* at para 135.
27 *Firearms Reference*, *supra* note 22, at paras 4, 51, 53, 58.
28 *Ibid* at para 53.
29 *Ibid* at para 26.
30 *Ibid* at para 47.
31 *Reference re Secession of Quebec*, [1998] 2 SCR 217, at para 58 [*Secession Reference*].
32 *Canadian Western Bank v. Alberta*, 2007 SCC 22, [2007] 2 SCR 3, at paras 22, 24.
33 Jean-François Gaudreault-DesBiens, "Cooperative Federalism in Search of a Normative Justification: Considering the Principle of Federal Loyalty" (2014) 23:4 Const Forum Const at 2.
34 *Ibid* at 3.
35 *Ibid.*
36 *Ibid* at 12.
37 *Secession Reference*, *supra* note 31, at para 88.
38 Gaudreault-DesBiens, *supra* note 33, at 13.
39 *Securities Reference*, *supra* note 11, at para 7.
40 Gaudreault-DesBiens, *supra* note 33, at 14.