English Version of the judgment rendered by the Court of Appeal of Quebec on June 27th, 2013

Canada (Procureur général) c. Québec (Procureur général) **2013 QCCA 1138**

COURT OF APPEAL

CANADA
PROVINCE OF QUEBEC
REGISTRY OF MONTREAL

No: 500-09-023030-125
(500-17-071284-122)

DATE: JUNE 27th, 2013

CORAM: THE HONOURABLE **NICOLE DUVAL HESLER, C.J.Q.**
JACQUES CHAMBERLAND, J.A.
NICHOLAS KASIRER, J.A.
MARIE ST-PIERRE, J.A.
JACQUES J. LEVESQUE, J.A.

THE ATTORNEY GENERAL OF CANADA
APPELLANT - Defendant
v.

THE ATTORNEY GENERAL OF QUEBEC
RESPONDENT - Plaintiff
and
COMMISSIONER OF FIREARMS
CHIEF FIREARMS OFFICER
REGISTRAR OF FIREARMS
RESPONDENTS – Impleaded parties

JUDGMENT

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[1] The Appellant has appealed a judgment rendered on September 10 2012 by the Superior Court, District of Montreal (the honourable Marc-André Blanchard), granting the Motion of the Attorney General of Quebec, with costs; declaring section 29 of *An Act to amend the Criminal Code and the Firearms Act* invalid only in respect of the data

originating from Quebec or concerning residents of that province and those persons in the province as well as those who commit offences involving a firearm in the province, more specifically data contained in all records and registries relating to the registration of firearms other than prohibited and restricted firearms in the Canadian Firearm Registry; declaring that the Attorney General of Quebec is entitled to receive, within a delay of thirty (30) days from the final judgment, all data originating from Quebec and concerning residents of that province and those persons in the province, as well as those who commit offences involving a firearm in the province, more specifically data contained in all records or registries relating to the registration of firearms other than prohibited and restricted firearms in the Canadian Firearm Registry; declaring that the Attorney General of Canada and the Registrar of Firearms must continue to register, until the transfer of such data, or at the latest for a delay of thirty (30) days following final judgment, any transfer of an unrestricted firearm in the possession of a Quebec resident or that is to be found in that province; and finally, declaring that section 11 of the *Law Ending the Long-gun Registry Act* is without effect in respect of unrestricted firearms in the province.

[2] For the reasons of the Chief Justice, with which Chamberland, Kasirer, St-Pierre and Levesque, JJ.A. concur, the COURT:

[3] **ALLOWS** the appeal;

[4] **SETS ASIDE** the judgment of first instance;

[5] **DISMISSES** the Motion for a Declaration of Constitutional Invalidity of the Attorney General of Quebec;

[6] **GIVES** ACT to the undertaking of the Attorney General of Canada not to destroy the records concerned before the expiry of a delay of two weeks following receipt of the present judgment.

[7] **THE WHOLE** with costs against the Attorney general of Quebec in both Courts.

NICOLE DUVAL HESLER, C.J.Q.

JACQUES CHAMBERLAND, J.A.

NICHOLAS KASIRER, J.A.

MARIE ST-PIERRE, J.A.

JACQUES J. LEVESQUE, J.A.

Me Claude Joyal
Me Dominique Guimond
Me Ian Demers
JOYAL LEBLANC
Justice Canada
For the appellant

Me Éric Dufour
Me Hugo Jean
BERNARD ROY (JUSTICE QUÉBEC)
For the respondent

Date of hearing: March 13 and 14, 2013

REASONS OF THE CHIEF JUSTICE

[8] The judgment *a quo*[1] ordered the federal government to continue registering long gun transfers in the firearm registry until the creation and implementation of a provincial registry to which the Quebec data concerning such firearms could be transferred. To this end, it declared of no force or effect section 29 of the *Act to amend the Criminal Code and the Firearms Act*[2] ("the Act"), which provides for the destruction of the data concerned "as soon as feasible". The judge of first instance also suspended the application of section 11 of the same Act, which he had not been asked to do. In addition, he declared that the Attorney General of Quebec was entitled to receive the current data from the Attorney General of Canada within thirty (30) days of the final judgment, thereby enabling the transfer from the federal registry to the provincial registry, which, it should be added, has yet to be created.[3]

[9] I note that the declarations and orders in the impugned judgment contemplate only the data concerning Quebec, since the information respecting long guns registered in other provinces was destroyed on October 31, 2012.

[10] To understand what is at stake here, a review of the legislative context of the Act is in order. In 1995, Parliament enacted the *Firearms Act*[4] (the "FA") with a view to establishing a Canada-wide registration scheme for all firearms. Under this scheme and the *Criminal Code*, firearms are divided into three categories: restricted firearms, prohibited firearms, and unrestricted firearms ("long guns").

[11] The Act came into force on April 5, 2012. It amended the *Criminal Code* by decriminalizing the possession of unregistered long guns and amended the FA by repealing the obligation for long-gun owners to register them. Currently, this decriminalization is in effect across Canada, but the suspension of section 11 of the Act by the trial judge means that the obligation for long-gun owners in Quebec to register their firearms remains in place.

[12] In the interest of greater clarity, I note that prior to the adoption of the Act, registration certificates were required for all three categories of firearms: prohibited firearms, restricted firearms, and unrestricted firearms or long guns. This requirement is

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1 *Quebec (Attorney General) v. Canada (Attorney General)*, 2012 QCCS 4202.

2 S.C. 2012, c. 6; short title: *Ending the Long-Gun Registry Act.*

3 Bill 20, entitled the *Firearms Registration Act*, was tabled just weeks prior to the hearing of the appeal.

4 S.C. 1995, c. 39; most of the provisions concerning firearm registration came into effect on December 1, 1998, through the *Order Fixing December 1, 1998 as the Date of the Coming into Force of Certain Sections of the Act*, P.C. 1998-1733 – 24 September 1998.

now in effect only with regard to the first two categories, namely, prohibited firearms and restricted firearms.

[13] Section 29 of the Act provides for the immediate destruction of all the data relating to long guns obtained under the FA registration scheme. This provision is the only one whose constitutional validity is challenged in this case. It reads as follows:

29. (1) Le commissaire aux armes à feu veille à ce que, dès que possible, tous les registres et fichiers relatifs à l'enregistrement des armes à feu autres que les armes à feu prohibées ou les armes à feu à autorisation restreinte qui se trouvent dans le Registre canadien des armes à feu, ainsi que toute copie de ceux-ci qui relève de lui soient détruits.	**29. (1)** The Commissioner of Firearms shall ensure the destruction as soon as feasible of all records in the Canadian Firearms Registry related to the registration of firearms <u>that are neither</u> prohibited firearms nor restricted firearms and all copies of those records under the Commissioner's control.
(2) Chaque Contrôleur des armes à feu veille à ce que, dès que possible, tous les registres et fichiers relatifs à l'enregistrement des armes à feu autres que les armes à feu prohibées ou les armes à feu à autorisation restreinte qui relèvent de lui, ainsi que toute copie de ceux-ci qui relève de lui soient détruits.	**(2)** Each chief firearms officer shall ensure the destruction as soon as feasible of all records under their control related to the registration of firearms that are neither prohibited firearms nor restricted firearms and all copies of those records under their control.
(3) Les articles 12 et 13 de la *Loi sur la Bibliothèque et les Archives du Canada* et les paragraphes 6(1) et (3) de la *Loi sur la protection des renseignements personnels* ne s'appliquent pas relativement à la destruction des registres, fichiers et copies mentionnés aux paragraphes (1) et (2).	**(3)** Sections 12 and 13 of the Library and Archives of Canada Act and subsections 6(1) and (3) of the Privacy Act do not apply with respect to the destruction of the records and copies referred to in subsections (1) and (2).

The Trial Judgment

[14] In the judgment *a quo*, the judge accepted the submissions of the AGQ and found that section 29 of the Act is constitutionally invalid for the following two reasons: (**1**) in its pith and substance, this provision does not fall within the criminal law power and constitutes a direct attempt to prevent Quebec from acting within an area under its constitutional jurisdiction, and (**2**) the federal government's announcement that it wished

to prevent the provinces from using the data from the registry was contrary to the principles of cooperative federalism. The trial judge declared section 29 to be of no force or effect with respect to Quebec on the basis of section 52(1) of the *Constitution Act, 1982.* He then went on to declare that the AGQ is entitled to receive the current data in the registry from the AGC because none of the parties own the data, the latter having been obtained through a federal-provincial partnership.

[15] In short, the trial judge pronounced a declaratory judgment in which he declared section 29 of the Act to be of no force or effect in Quebec, ordered the suspension of the effects of section 11 as an incidental measure, and upheld the right of the AGQ to receive the data concerning Quebec from the registry, current to the date of transfer.

[16] With respect, and despite the thoughtfulness of the trial judge's opinion, it appears from his judgment that there was some confusion regarding the various components of the registry established under the FA. Some of the facts should therefore be restated before proceeding with the analysis of the issues raised by the appeal.

The Facts

[17] Two types of registries exist under the FA: one is maintained by the Chief Firearms Officers and the other by the Registrar of Firearms. The Chief Firearms Officers issue licences for the possession and use of firearms in all three categories identified above to persons or businesses in their province. There are ten Chief Firearms Officers, one for each province, but there is only one Registrar of Firearms, who issues registration certificates for each firearm newly acquired by individuals in Canada. Since the enactment of the impugned Act, the registration certificate is no longer required for the category of "unrestricted firearms". These include, in particular, long guns for hunting.

[18] Thus, the Chief Firearms Officers keep registries of licences issued in their provinces, while the Registrar keeps a registry of all the registration certificates of firearms that have been issued in Canada. Only the registry maintained by the Registrar is contemplated in the Act impugned in this case. And only registration certificates issued for long guns by the Registrar are to be destroyed pursuant to section 29 of the Act. The registration certificates of restricted firearms and prohibited firearms, the unregistered possession of which continues to be an offence under the *Criminal Code*, will remain on the registry kept by the Registrar.

[19] Section 90 of the FA provides:

90. Le directeur et le contrôleur des armes à feu ont réciproquement accès aux registres qu'ils tiennent respectivement aux termes de l'article	**90.** The Registrar has a right of access to records kept by a chief firearms officer under section 87 and a chief firearms officer has a right of

> 87 et aux termes des articles 83 ou 85; le contrôleur des armes à feu a également accès aux registres tenus par les autres contrôleurs des armes à feu aux termes de l'article 87.
>
> access to records kept by the Registrar under section 83 or 85 and to records kept by other chief firearms officers under section 87.

The implementation of this provision led to the creation of the Canadian Firearms Information System ("Canadian System"). This system, also known as the CFIS, centralizes the registries kept by the Chief Firearms Officers as well as the one kept by the Registrar. It is through CFIS that all the actors can access the various registries. Thus, the Canadian System is not a registry in itself but merely an access system.

[20] The Canadian System is administered by the Royal Canadian Mounted Police and makes available all of the information preserved under the terms of the FA. This information can be broken down into two types: the data entered by the Chief Firearms Officers in their registry (**A**) and that entered by the Registrar of Firearms in his or her own registry (**B**).

(A) The Registries of the Chief Firearms Officers

[21] The Chief Firearms Officers issue licences and possession and transport authorizations to individuals or businesses that wish to own firearms.[5] They verify their eligibility under the criteria set by the FA.[6] The Chief Firearms Officers create a record for each person, which includes an inventory report on the firearms that person possesses, and compiles this data in the Chief Firearms Officers' registry (or "licence registry"). The Chief Firearms Officer is the only one who can modify a record in the registry.[7] He or she can destroy records under the terms in the *Firearms Records Regulations*, that is, generally speaking, after the expiration of 10 years after the date of the last administrative action taken regarding the information in the record.[8]

[22] A Sûreté du Québec officer was designated by the Quebec Minister of Public Security as the Chief Firearms Officer for Quebec. The power of provincial ministers to designate the Chief Firearms Officer for their provinces is set out in section 2 of the FA. In addition, the Quebec Minister has also delegated the powers conferred upon him by the FA to this "individual" (this is the term used in section 2 of the FA).[9] When a province chooses not to designate its own Chief Firearms Officer, the federal minister appoints an employee of the Royal Canadian Mounted Police to this office.

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5 *Firearms Act*, *supra* note 4, s. 56.
6 *Ibid*., ss. 5–12.
7 *Firearms Records Regulations*, SOR/98-213, s. 7(2).
8 *Ibid.*, s. 5; *Firearms Act*, *supra* note 4, s. 87(2).
9 Examples of the powers conferred by the FA on the provincial minister: authorization to operate a shooting range (s. 29) or exemption from obtaining a licence (s. 97(3)).

(B) The Registry of the Registrar of Firearms

[23] The Registrar of Firearms issues registration certificates for every firearm acquired or transferred, while verifying whether the holder has a licence authorizing the possession of that kind of firearm.[10] The certificate is valid so long as the holder remains owner of the weapon[11] and the Registrar must authorize any proposed transfer of firearms between individuals.[12] There is only one Registrar of Firearms in Canada, and this person is a federal public servant.[13]

[24] The registration certificates issued or denied by the Registrar are compiled in the Canadian Firearms Registry,[14] (CFR). As already noted, only the data contained in the CFR is contemplated in section 29 of the Act. Moreover, this provision targets only one part of this data, that relating to long guns, since they remain unrestricted firearms or, in other words, firearms that are neither restricted nor prohibited.

[25] The Registrar is the only one able to modify the information entered in the CFR.[15] He or she may destroy records under the terms in the *Firearms Records Regulations*, that is, generally speaking, after the expiration of 10 years after the date of the last administrative action taken regarding the information in the record.[16] It is worth pointing out that the Registrar also keeps another registry that is not at issue in this case, namely, the Registry of Public Agencies, which contains information relating to the firearms of police forces.[17]

[26] In short, the impugned Act provides that long-gun owners no longer have to register their long guns with the Registrar to enjoy full legal possession of these weapons. The Registrar no longer has the power to issue registration certificates for long guns[18] or the power to control their acquisition or transfer.[19] In addition, section 29(1) of the Act imposes on the Registrar the obligation to erase from the CFR all registration certificates issued in the past for such a firearm.

[27] Legally and in actual fact, the Chief Firearms Officers and the Registrar have control over and may amend only their own registries. Nevertheless, each has right of access to the registries of the others through the Canadian System, or the CFIS.[20]

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10 *Firearms Act*, *supra* note 4, ss. 13–16.
11 *Ibid.*, s. 66.
12 *Ibid*., ss. 23 and 31.
13 *Ibid.*, s. 82.
14 *Ibid.*, s. 83.
15 *Firearms Records Regulations, supra* note 7, s. 7(1).
16 *Firearms Act*, *supra* note 4, s. 84; *Firearms Records Regulations*, *supra* note 7, s. 4(1).
17 *Firearms Act*, *supra* note 4, s. 85.
18 *Ending the Long-gun Registry Act, supra* note 2, s. 10.
19 *Ibid*., ss. 11 et seq.
20 *Firearms Act*, *supra* note 4, s. 90.

[28] Considering these facts, it must be concluded that there was some confusion as to the different registries on the part of the trial judge. The judgment deals with the CFR, which was created by federal legislation and controlled by federal employees, interchangeably with the Canadian System (the CFIS), which is the computer system that provides bodies responsible for ensuring public security in any jurisdiction with access to the CFR. There was also some confusion between the registration of firearms, which is carried out by the Registrar alone, and the issuing of ownership licences for these firearms, which is carried out by the Chief Firearms Officers.

[29] The trial judge's finding that Quebec contributed to the CFR and that the CFR was the fruit of a partnership between the provinces and the federal government is erroneous in light of both the facts and the FA. The participation of the Quebec Chief Firearms Officer is limited to compiling the information she collects with regard to licences for the purpose of the registry for which she is responsible. She does not contribute to the CFR, but has access to it through the Canadian System.

[30] In paragraph 27 of his decision the trial judge correctly states:

> [TRANSLATION]
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> The FA provides for the creation of two types of registry. The first concerns information related to obtaining a license and to possessing and acquiring firearms, which is kept by the Chief Firearms Officer, while the other contains the firearm registries and is kept by the Registrar.

[31] In paragraph 28, however, he inaccurately refers to the Canadian System (CFIS) as a [TRANSLATION] "registry", when in actual fact the CFIS is nothing more than a system providing electronic access to the registries kept by the Registrar and the Chief Firearms Officers.

[32] Later on, he erroneously concluded that the CFR was a combined federal-provincial effort :

> [TRANSLATION]
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> [102] It may be stated here... that the firearms registry results from the combined effort of the municipal, provincial and federal levels of government and is thus a product of cooperative federalism. …
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> . . .
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> [151] It is contrary to common sense – not to say the common good – to prevent Quebec from using data that it took part in gathering, analyzing, organizing, and modifying.

> . . .
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> [153] Thus, from this perspective, it appears to be pointless, indeed specious, to determine whether there is in fact a "common registry" of data. ...
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> . . .
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> [192] ...The firearms registry is a complex interweaving of federal, provincial and municipal powers, such that it could not exist without the close and constant collaboration of each level of government. ...

[33] In my opinion, this palpable error, although it constitutes the factual basis upon which the trial judge founded his judgment in law, is not overriding. As I will explain below, regardless of this factual inconsistency, there can be no question that this area falls within federal jurisdiction, and there lies the error of law justifying the reversal of the trial judgment.

[34] Before proceeding further, one observation should be made: once the basis of the constitutional validity of section 29 of the Act has been demonstrated, the appropriateness of the impugned legislation is not relevant to the analysis. Courts must not substitute their own assessment of the appropriateness of proposed legislation for that of the legislature. This question is essentially a political one and is not a justiciable issue. The issue of the effectiveness and usefulness of keeping a registry of the long guns in circulation is fundamentally political.

[35] If there is a price to be paid for enacting a statute that could engender pointless costs for another level of government because of the destruction of data in the registry, it is to be paid at the polling booths and not before the courts, absent a lack of jurisdiction or a violation of *Charter* rights.

The Issues

[36] The appeal raises three questions:

1. Does section 29 fall within the jurisdiction of Parliament?
2. Is Quebec entitled to obtain the files from the long gun registry?
3. What remedy could the Superior Court order after a declaration of constitutional invalidity under section 52(1) of the *Constitution Act, 1982*?

1. Does section 29 fall within the jurisdiction of Parliament?

[37] I find it difficult to imagine why the federal Parliament would not have the jurisdiction to enact a statute that abolishes the requirement to keep a registry that it itself created in a prior statute, and that provides for the destruction of the data contained in that registry.

[38] In the trial judge's opinion, Parliament's main intent was to prevent Quebec from using the long gun data in the firearms registry, even more than it was to decriminalize the unregistered possession of these weapons (see in particular paragraphs 97, 113 and 116 of the judgement *a quo*). He stated his view that it constituted an [TRANSLATION] "improper exercise of Parliament's criminal law power to invade provincial jurisdiction".[21] He then concluded that section 29 does not fall within Parliament's "ancillary" power to legislate in criminal law.[22]

[39] This position is based on the doctrine of colourability, in that, according to Quebec, the primary federal objective in this case was to prevent the provinces from re-using the data and thus to carry out a harmful intent [TRANSLATION] "with respect to all other provincial legislatures".[23]

[40] In support of this argument, the respondent relies in particular on *Churchill Falls*,[24] the facts of which I shall outline here briefly for the purpose of discussion.

[41] Churchill Falls, a federally incorporated company, had developed the hydroelectric resources of the Churchill Falls waterfall under a statutory lease granted by Newfoundland. Once the development was complete, the company signed a contract with Hydro-Québec by which it agreed to sell the latter practically all the power produced by the falls for 65 years. Newfoundland, hoping to recall more power than was provided for in the contract, enacted the *Upper Churchill Water Rights Reversion Act*,[25] providing for the reversion to the province of the right to the use of the water and the rights to the power produced at Churchill Falls. The Court of Appeal ruled in favour of Newfoundland, finding that the statute fell within the jurisdiction of the province. The Supreme Court came to the opposite conclusion, finding that it was colourable legislation that had no purpose other than to put an end to Hydro-Quebec's right to receive the agreed amount of power at the agreed price. Since this right does not fall within the territorial jurisdiction of the Newfoundland legislature, the statute was found to be constitutionally invalid.

[42] First, it should be pointed out that some significant distinctions may be drawn between *Churchill Falls* and the case before us. Here, the objective of the federal government is to abolish the long-gun registry, which was its own creation. It in no way seeks to prevent provinces from enacting their own registries, although it does not wish to participate in the creation of a provincial registry. It is therefore difficult to find that the principles in *Churchill Falls* are applicable to this case.

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21 Judgment *a quo* at para. 126.
22 *Ibid.* at para. 127.
23 *Ibid.* at para. 136.
24 *Reference re Upper Churchill Water Rights Reversion Act*, [1984] 1 S.C.R. 297.
25 *The Upper Churchill Water Rights Reversion Act*, 1980 (Nfld.), c. 40.

[43] Along the same lines, I would add that this case involves the destruction of records that did not exist before 1998 and that this destruction is part of the abolition of the registration of long guns in the CFR going forward. Rightly or wrongly, Parliament decided that it was pointless and inefficient to register long guns. Its decision changes nothing with regard to the acquisition of one of these firearms or the transfer of one to someone else, which still requires a licence. The data relating to licences will also be preserved. By virtue of its sovereignty, Parliament has decided to decriminalize the possession of unregistered long guns. This includes the abolition of the obligation to register them and, so as not to unduly risk the disclosure of information the government no longer needs,[26] the destruction of the registries at issue to protect the privacy of long gun owners. This is a political decision, not a legal one, and has moreover been the subject of a highly publicized political debate.

[44] The federal power to enact the FA was upheld by the Supreme Court in *Reference re Firearms Act* :[27]

> We conclude that the gun control law comes within Parliament's jurisdiction over criminal law. The law in "pith and substance" is directed to enhancing public safety by controlling access to firearms through prohibitions and penalties. This brings it under the federal criminal law power. While the law has regulatory aspects, they are secondary to its primary criminal law purpose. The intrusion of the law into the provincial jurisdiction over property and civil rights is not so excessive as to upset the balance of federalism.

[45] If the federal government had the power to enact it, it also has the power to amend it through subsequent legislation.

[46] Section 84 of the FA, as validated by the Supreme Court, reads as follows :

84. Le directeur peut détruire les fichiers versés au Registre canadien des armes à feu selon les modalités de temps et dans les situations prévues par règlement.	**84.** The Registrar may destroy records kept in the Canadian Firearms Registry at such times and in such circumstances as may be prescribed.

[47] This provision confers on the Registrar the power to destroy records kept in the CFR. It would be illogical for section 29 of the impugned Act, which also provides terms for the destruction of records in the CFR, to be constitutionally invalid.

[48] In the *Reference re Firearms Act*, the federal government's encroachment on provincial matters was found to be incidental to the implementation of an objective that

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[26] It may be useful to note that section 73 of the *Act respecting access to documents held by public bodies and the Protection of personal information*, R.S.Q., c. A-2.1, indicates that when the purposes for which personal information was collected or used have been achieved, the public body must destroy the information, subject to the *Archives Act* or the *Professional Code.*

[27] [2000] 1 S.C.R. 783, 2000 SCC 31 at para. 4.

was validly within its criminal law jurisdiction under section 91(27) of the *Constitution Act, 1867:*[28]

> In our view, Alberta and the provinces have not established that the effects of the law on provincial matters are more than incidental. First, the mere fact that guns are property does not suffice to show that a gun control law is in pith and substance a provincial matter. Exercises of the criminal law power often affect property and civil rights to some degree: *Attorney-General for British Columbia v. Attorney-General for Canada*, [1937] A.C. 368 (P.C.). Such effects are almost unavoidable, as many aspects of the criminal law deal with property and its ownership. The fact that such effects are common does not lessen the need to examine them. It does suggest, however, that we cannot draw sharp lines between criminal law and property and civil rights. Food, drugs and obscene materials are all items of property and are all legitimate subjects of criminal laws. In order to determine the proper classification of this law, then, we must go beyond the simplistic proposition that guns are property and thus any federal regulation of firearms is prima facie unconstitutional.

[49] Since the impugned Act does nothing more than abolish a scheme that was constitutionally valid, it cannot encroach any further on provincial jurisdiction than did the statute that created and implemented the scheme in the first place. This encroachment remains incidental to the federal criminal law power.

[50] More specifically, Quebec argues that section 29 encroaches on provincial jurisdiction to such an extent that it can no longer constitute a legitimate exercise of Parliament's criminal law power. This is the same claim as that made by the provinces regarding the constitutional validity of the *Firearms Act* in the *Reference re Firearms Act* .[29]

> In a related argument, Alberta and the provincial interveners submit that this law inappropriately trenches on provincial powers and that upholding it as criminal law will upset the balance of federalism.
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> ...
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> The argument that the 1995 gun control law upsets the balance of Confederation may be seen as an argument that, viewed in terms of its effects, the law does not in pith and substance relate to public safety under the federal criminal law power but rather to the provincial power over property and civil rights. Put simply, the issue is whether the law is mainly in relation to criminal law. If it is, incidental effects in the provincial sphere are constitutionally irrelevant: see, e.g., *Consortium Developments (Clearwater) Ltd. v. Sarnia (City),* [1998] 3 S.C.R. 3,

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28 (U.K.), 30 & 31 Vict., c. 3; *Reference Re Firearms Act, supra* note 23 at para. 50.

29 *Reference re Firearms Act*, *supra* note 27 at paras. 48–49.

> and *Mitchell v. Peguis Indian Band*, [1990] 2 S.C.R. 85. On the other hand, if the effects of the law, considered with its purpose, go so far as to establish that it is mainly a law in relation to property and civil rights, then the law is *ultra vires* the federal government. In summary, the question is whether the "provincial" effects are incidental, in which case they are constitutionally irrelevant, or whether they are so substantial that they show that the law is mainly, or "in pith and substance", the regulation of property and civil rights.

[51] Furthermore, none of the parties before us questions Quebec's constitutional power to enact a statute to create its own long-gun registry.

[52] Cooperative federalism cannot be used as a basis for finding that section 29 of the Act is constitutionally invalid. As a principle of interpretation, it cannot, in itself, modify the division of powers. It encourages a more flexible application of the division of powers, but an application nonetheless. Only the provisions of the *Constitution Act, 1867*[30] dividing the areas of jurisdiction between Parliament and the provincial legislatures can ground a judgment of constitutional invalidity based on the division of powers. This understanding of cooperative federalism is consistent with the teachings of the Supreme Court in the *Secession Reference:*[31]

> Given the existence of these underlying constitutional principles, what use may the Court make of them? In the *Provincial Judges Reference*, *supra*, at paras. 93 and 104, we cautioned that the recognition of these constitutional principles (the majority opinion referred to them as "organizing principles" and described one of them, judicial independence, as an "unwritten norm") could not be taken as an invitation to dispense with the written text of the Constitution. On the contrary, we confirmed that there are compelling reasons to insist upon the primacy of our written constitution. A written constitution promotes legal certainty and predictability, and it provides a foundation and a touchstone for the exercise of constitutional judicial review.

[53] More recently, in *Reference re Securities Act*, the Supreme Court reiterated this position:

> In summary, notwithstanding the Court's promotion of cooperative and flexible federalism, the constitutional boundaries that underlie the division of powers must be respected. The "dominant tide" of flexible federalism, however strong its pull may be, cannot sweep designated powers out to sea, nor erode the constitutional balance inherent in the Canadian federal state. [32]

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30 *Supra* note 28.
31 *Reference re Secession of Quebec,* [1998] 2 S.C.R. 217, J.E. 98-1716 at para. 53.
32 *Reference Re Securities Act*, [2011] 3 S.C.R. 837, 2011 SCC 66 at para. 62.

[54] To conclude on this point, in addition to the above observations concerning other grounds for reversal, the trial judge also erred by applying the principle of cooperative federalism not as a mere interpretive tool but as the legal basis for a declaration that section 29 of the Act was [TRANSLATION] "of no force or effect".

2. Is Quebec entitled to obtain the records from the long-gun registry?

[55] Quebec has no property right in the data in the CFR. The data does not belong to Quebec, and the provinces have no control over it. From the moment the data is entered in the registry to the moment of its destruction, the Registrar of Firearms – a federal public servant – has sole responsibility for it. The Parliament of Canada, which considers the data at issue to be pointless and inefficient and believes that its existence in a registry infringes the right to privacy, can certainly decide to stop compiling and preserving that information. In addition, the fact that administrative functions were delegated to provincial public servants in exchange for compensation by the federal government does not confer on the province any right of property in or control over the CFR.

[56] As we have seen, the trial judge erroneously found that, on the facts, provincial public servants exercised control over the CFR on the basis of the partnership argued by Quebec, which stated before him that each partner makes daily data entries into the Canadian System (the CFIS). The evidence, however, reveals that the Quebec Chief Firearms Officer has never entered data into the CFR. As explained above, the Canadian system (the CFIS) enables access to information gathered by the Chief Firearms Officers and the Registrar in their respective registries so that they may be placed at the disposal of the various police forces, be they federal, provincial, or municipal. A reading of the FA reveals that the Chief Firearms Officers and the Registrar have legal control solely over their own registries[33] and have nothing more than access to the registries of the others,[34] with no control over the data they contain.

[57] The provincial government claims that it contributed information to the CFR when it was created. The information to which it refers, however, concerns licence holders. Thus, the province's participation was limited to the data in the Chief Firearms Officer's registry, which is not contemplated in section 29 of the Act. Consequently, this claim fails to demonstrate that there is a right to the data in the CFR or that Quebec participated in the creation of the CFR.

[58] Moreover, even in the event that the Chief Firearms Officer designated by Quebec did have some control over the content of the CFR, it should be recalled that she does not represent Quebec in the exercise of her duties as a Chief Firearms Officer. All of her powers flow from the FA, the federal statute that created her position. She was designated the Chief Firearms Officer by the Quebec Minister of Justice, but

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33 *Firearms Records Regulations*, *supra* note 7, s. 7(1)(2).

34 *Firearms Act*, *supra* note 4, s. 90.

this was done within a framework created by the FA.[35] The provincial minister also delegated his powers to her, but once again these were powers conferred on the minister by the FA.

[59] Simply stated, the Chief Firearms Officer of Quebec wears two hats: a federal hat as Chief Firearms Officer and a provincial hat as a member of the Sûreté du Québec. In this second role, she is vested with other responsibilities under provincial laws.[36] Although she uses the data in the Canadian System for the purposes of various provincial programs, she nevertheless holds a position that was created by a federal statute when she exercises powers conferred upon her by the FA.

[60] In support of its claims, Quebec states that it is entitled to receive the data from the Registrar of Firearms because of its close collaboration with the federal government in the application of the FA, particularly since the financial agreements between Canada and Quebec confirm this partnership.

[61] Through these agreements, Canada reimburses Quebec for costs incurred by the [TRANSLATION] "administration of certain aspects" of the FA on its territory. For example, the agreements refer to maintaining the position of the Quebec Chief Firearms Officer, the Officer's staff, and the logistics relating to the implementation of the licence registry. In addition, the possibility of entering into such financial agreements is expressly provided in section 95 FA.

[62] A reading of the agreements indicates that they concern only the administrative costs of keeping the Chief Firearms Officer's registry and confer on Quebec no property rights in the data in the registry of the Registrar, the CFR. Moreover, in my view, the fact that the federal government pays for all costs relating to the implementation of the FA appears to give more support to the contrary position that the administrative entities or positions created for the purpose of applying the FA remain federal in their statutory basis. Quebec is simply entitled to consult the CFR that was created, financed, amended, and controlled by the federal government.

[63] Thus, the trial judge erroneously concluded that there was a partnership between the two levels of government in this case. Legally, there is no real partnership between the federal government and the government of Quebec concerning the gathering and preservation of data contemplated in section 29 of the Act, the only provision that is being challenged here.

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35 *Firearms Act*, *supra* note 4, s. 2.

36 In particular, under the *Explosives Act*, R.S.Q., c. E-22 and the *Act to protect persons with regard to activities involving firearm*s, S.Q. 2007, c. 30.

3. The remedy available in the event of a declaration of constitutional invalidity of section 29 of the Act

[64] The remedy determined by the judge – that is, to compel the federal government to continue to compile the data – was clearly inappropriate here. So was the obligation to transfer this data to a future provincial registry. The courts must not substitute their assessment of the appropriateness of a legislative measure for the intent of the legislature.

[65] Moreover, given the constitutional nature of section 29 of the Act, consideration of the available remedies is moot.

[66] For these reasons, I would allow the appeal and dismiss the Attorney General of Quebec's motion for a declaration of constitutional invalidity.

NICOLE DUVAL HESLER, C.J.Q.