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Taking Stock: Securities Markets and the Division of Powers

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Recent developments in Canada's securities markets highlight their national character and call for a fresh consideration of the question of federal securities regulation. Developments in the constitutional case law have changed the legal context, such that the trade and commerce and the peace, order and good government powers under the Constitution Act, 1867 would likely support federal securities legislation. The securities question, important in its own right, also serves as a case study for how the Supreme Court of Canada conducts division of powers analysis for matters that have undergone substantive change. The authors contend that competence over a provincial matter should be reassigned to Parliament only when that matter has changed so substantially that untenable legal fictions are required to keep it "within the province," no benefits associated with the values of federalism arise from continuing provincial jurisdiction, and uniform interprovincial cooperation is required for effective regulation. The existing level of interprovincial cooperation regarding securities shows the need for national regulation and raises concerns about influence based on market and not democratic power: by virtue of its market dominance, Ontario exerts a significant extra-territorial influence over other provinces' securities regulators. While a reorganization of Canada's securities regulation would clearly require negotiation between the two levels of government, the increasing strength of the legal case for federal regulation, in terms of changes in the securities markets and in the constitutional case law, would influence such negotiations.

Des développements récents dans les marchés financiers canadiens indiquent le caractère national de ceux-ci et soulèvent donc le besoin d'une nouvelle analyse de la question de la réglementation fédérale des valeurs mobilières. Des développements dans la jurisprudence constitutionnelle en ont aussi modifié le cadre légal: une loi fédérale réglementant les valeurs mobilières serait probablement valide en vertu de la compétence générale en matière d'échanges et de commerce, ainsi qu'en vertu de la compétence en matière de paix, d'ordre et de bon gouvernement. La question des valeurs mobilières, aussi importante soit-elle, sert également d'exemple de la manière dont la Cour suprême du Canada fait l'analyse du partage des compétences quand une matière s'est profondément modifiée. Les auteurs prétendent que la compétence d'une matière provinciale ne puisse être accordée au Parlement par la Cour que lorsque cette matière s'est modifiée dans une mesure où elle ne serait plus "dans la province" que grâce à une fiction juridique insoutenable, lorsqu'aucun bénéfice associé aux principes du fédéralisme ne découlerait de la continuation de la compétence provinciale, et lorsque la réglementation efficace exigerait une coordination inter-provinciale uniforme. Quant aux valeurs mobilières, le niveau de coordination inter-provinciale fait preuve de la nécessité d'une réglementation nationale. Or cette coordination soulève une influence qui se fonde sur une

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puissance dans les marchés et non pas sur un pouvoir démocratique: la puissance de ses marchés permet à l'Ontario d'exercer un pouvoir extra-territorial, pour ainsi dire, sur la réglementation des valeurs mobilières dans les autres provinces canadiennes. Tandis que la réalité politique ne permettrait pas l'instauration d'un régime fédéral dans le champ des valeurs mobilières sans des pourparlers entre les deux paliers de gouvernement, la puissance croissante de l'argument juridique pour la réglementation fédérale, soit à cause des changements dans les marchés, soit à cause des changements dans le cadre jurisprudentiel, influencerait sans doute de telles négociations.

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Conclusion

Introduction

March 15, 1999, witnessed yet one more indication of the changing character of Canada's financial markets. On that day, Canada's four stock exchanges entered into a *Memorandum of Agreement* "intended to enhance the efficiency of the trading facilities."¹ This agreement is explicitly not a corporate merger between them. Yet by the terms of this cooperative venture, the Stock Exchanges agreed to specialize, each of them becoming the exclusive provider of trading facilities and services in a single market sector.² What is significant is that the Stock Exchanges divided the Canadian market by product or market sector, not by geography. This development among the major self-regulatory organizations for the securities markets in Canada³ suggests that unifying forces are predominating over regional differences, and that Canada needed a single coordinated system. The Stock Exchanges cannot be viewed in isolation from the other components of Canada's markets. The *March 1999 Agreement* shows a need to view not only market administration, but also regulation on a national level.

1. Memorandum of Agreement by The Alberta Stock Exchange, The Montreal Exchange, The Toronto Stock Exchange and Vancouver Stock Exchange [hereinafter collectively the "Stock Exchanges"] (15 March 1999) [hereinafter the "*March 1999 Agreement*"].

2. *Ibid.* The Montreal Exchange will provide exclusively for all exchange-traded derivative products, including any type of option and futures contracts; the Toronto Stock Exchange will provide for all senior securities; and the Alberta Stock Exchange and Vancouver Stock Exchange will provide for all junior securities. Subsequent amendments desired by Quebec do not detract from the overall impact of the *March 1999 Agreement*.

Serious discussion about a national securities regime in Canada began with the *Porter Report* (1964)⁴ and the *Kimber Report* (1965).⁵ In 1979, the federal government published *Proposals for a Securities Market Law for Canada*.⁶ Most recently, the current federal government has pursued the issue, releasing in 1994 a draft *Memorandum of Understanding Regarding the Regulation of Securities in Canada*.⁷ This document proposed that an autonomous new Canadian Securities Commission be established by the federal government, to which both the federal and the provincial governments would delegate regulatory power. This proposal for delegation obviated the question of who properly had legislative competence over regulation of securities. The initiative became mired in funding and other squabbles, however, and it seems for the moment as though the federal government lacks the political will to proceed towards national securities regulation in the face of provincial resistance.⁸

In recent years, it is not only the securities markets, but also the law itself that has changed. The Supreme Court of Canada (the “Supreme Court” or the “Court”) has given greater substance to some of the federal heads of power. The constitutional analysis of securities regulation is different in 2000 than it was before cases such as *General Motors of Canada v. City National Leasing*,⁹ *R. v. Crown Zellerbach Canada*,¹⁰ *Ontario Hydro v. Ontario (Labour Relations Board)*,¹¹ *RJR-MacDonald Inc. v. Canada (A.G.)*,¹² *R. v. Hydro-Québec*¹³ and even the *Reference Re*

3. M.R. Gillen, *Securities Regulation in Canada*, 2d ed. (Toronto: Carswell, 1998) at 89.

4. Canada, *Report of the Royal Commission on Banking and Finance* (Ottawa: Queen’s Printer, 1964).

5. Ontario, *Report of the Attorney General’s Committee on Securities Legislation in Ontario* (Toronto: Queen’s Printer, 1965). See D. Tse, “Establishing a Federal Securities Commission” (1994) 58 Sask. L. Rev. 427 at 427.

6. *Proposals for a Securities Market Law for Canada* (Consumer and Corporate Affairs Canada, 1979), 3 vols. [vol. 3 is hereinafter *Proposals*].

7. Printed in (1994), 17 O.S.C.B. 4401.

8. See, for example, “National Unity of National Securities” *The Globe and Mail* (25 June 1996) A14; A. Willis, “Uncertain Future Hobbles OSC” *The Globe and Mail* (26 June 1996) B15. The stubbornness of the premier of British Columbia and Ontario’s demand for \$200 million in compensation obviated a head-on conflict between the federal government and the Parti Québécois government in Quebec.

9. [1989] 1 S.C.R. 641, 58 D.L.R. (4th) 255 [hereinafter *City National Leasing* cited to S.C.R.].

10. [1988] 1 S.C.R. 401, 49 D.L.R. (4th) 161 [hereinafter *Crown Zellerbach* cited to S.C.R.].

11. [1993] 3 S.C.R. 327, 107 D.L.R. (4th) 457 [hereinafter *Ontario Hydro* cited to S.C.R.].

12. [1995] 3 S.C.R. 199, 127 D.L.R. (4th) 1 [hereinafter *RJR* cited to S.C.R.].

13. [1997] 3 S.C.R. 213, 151 D.L.R. (4th) 32 [hereinafter *Hydro-Québec* cited to S.C.R.].

Secession of Quebec.¹⁴ Moreover, the recurring discussion of the place of securities regulation in the federation suggests that the subject lies along a fault-line in constitutional argument and so serves as a focus for analysis of broader issues in constitutional law. Through the timely example of securities regulation, we shall explore the issue of the division of powers in the face of substantive change in a provincial matter.

This analysis is more than academic. Jeremy Webber has written that it is important to know the constitutional legal status in advance of key political events;¹⁵ this reasoning applies to securities regulation in Canada. Given the dynamics of current Canadian federalism, any change would require federal-provincial dialogue and cooperation; indeed, any future initiative might only proceed with delegated authority along the lines of the 1994 draft memorandum. Moreover, there are numerous political concerns with the issue that lie beyond the scope of this paper. Nevertheless, a conviction that Parliament had the strong constitutional authority to legislate unilaterally respecting securities, without even obtaining the provinces' agreement to delegate provincial authority, would alter the dynamics of any future negotiation. We hope that this study will, to some degree, advance the public policy discussion about regulation of securities and enrich the understanding of how the Supreme Court approaches the division of powers.

I. *Description and characterization of securities markets and regulation*

The securities markets are said to perform two basic functions. First, they bring together persons seeking funds and persons who have surplus funds to invest. The markets perform this function through underwriting and distributing new issues of securities in a process referred to as "primary market" trading. Second, the system provides a liquid market for the trading of outstanding securities. In this "secondary market" trading, an investor exchanges securities for payment from another investor, generally without involving the issuer. The securities market actors who perform these functions are underwriters, brokers and dealers, and advisors.¹⁶

14. [1998] 2 S.C.R. 217, 161 D.L.R. (4th) 385 [hereinafter *Secession Reference* cited to S.C.R.].

15. J. Webber, "The Legality of a Unilateral Declaration of Independence under Canadian Law" (1997) 42 McGill L.J. 281 at 284-85.

16. Gillen, *supra* note 3 at 24-25 and 423-26.

We will not attempt to explore deeply the definition of “security.” Provincial securities acts typically define “security” to include “any bond, debenture, note or other evidence of indebtedness, share, stock, unit, unit certificate, participation certificate, certificate of share or interest, preorganization certificate or subscription.”¹⁷ Frank Iacobucci (as he then was) contributed a substantial background paper to *Proposals for a Securities Market for Canada*, and there is little need to retread the same ground.¹⁸ In any case, the proliferation of securities and quasi-securities products in the last twenty years further complicates that question beyond the scope of this paper.

Securities are distinguishable from consumer products. For example, sale of securities gives rise to a fiduciary duty. Securities are also subject to elaborate regulation requiring, among other things, registration of persons involved in the securities business, registration of securities themselves, and substantial disclosure.¹⁹ The costs associated with compliance with these regulatory requirements are considerable.

Currently, the Canadian securities markets are regulated primarily by provincial legislation supported by the provinces’ power over “property and civil rights within the province.”²⁰ There are ten provincial and three territorial securities regulatory authorities.²¹ Provincial regulators have recognized to some extent the challenges that the existing structure creates for the markets. The provincial and territorial securities regulatory authorities together comprise the Canadian Securities Administra-

17. *Ibid.* at 107 [footnotes omitted].

18. F. Iacobucci, “The Definition of Security for Purposes of a Securities Act” in *Proposals*, *supra* note 6 at 221.

19. D. Johnston & K.D. Rockwell, *Canadian Securities Regulation*, 2d ed. (Toronto: Butterworths, 1998) at 6-7.

20. *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3, s. 92(13), reprinted in R.S.C. 1985, App. II, No. 5 [hereinafter the “Constitution”]. The main sources of law with respect to securities legislation include provincial securities acts, the regulations passed pursuant to those acts, policy statements, blanket orders, notices and decisions of securities administrators and the by-laws, rules and policies of stock exchanges and other self-regulatory organizations. See Gillen, *supra* note 3 at 87-99.

21. The securities acts of the provinces of Alberta, British Columbia, Manitoba, Newfoundland, Nova Scotia, Ontario, Quebec and Saskatchewan create securities commissions. The securities acts of New Brunswick, Prince Edward Island, the Northwest Territories, the Yukon Territory and Nunavut do not create separate commissions, but instead assign administrative responsibilities to government officials. Gillen, *supra* note 3 at 88-89.

tors ("CSA"). Through this loose association, they have instituted certain measures to coordinate their activities and regulatory standards across the country.²²

In Ontario, securities legislation is intended "to provide protection to investors from unfair, improper or fraudulent practices" and "to foster fair and efficient capital markets and confidence in capital markets."²³ It is significant that fostering confidence in the markets is one of the chief goals of securities regulation. It means that the public perception of securities markets must be a substantive concern of the level of government dealing with them; there cannot be effective regulation without confidence in the markets.²⁴

Provincial power to regulate is limited by the inapplicability of provincial laws to the essential corporate attributes of federal corporations.²⁵ So while provincial regulators cannot make discretionary decisions concerning federal corporations' issuing of securities, provincial rules concerning the use of licensed brokers²⁶ and with respect to insider trading apply to all corporations.²⁷ Parliament has enacted valid legislation regulating certain aspects of the securities markets under its power over criminal law.²⁸

Parliament has never enacted a general securities law,²⁹ and the absence of comprehensive federal securities legislation has led courts to stretch the provincial power to regulate securities beyond what might appear to be the normal bounds of subsection 92(13).³⁰ Yet Lamer C.J. has written: "There is no doctrine of laches in constitutional division of powers doctrine; one level of government's failure to exercise its juris-

22. For an optimistic account of CSA initiatives, see D.A. Brown, "After MacKay: Re-aligning Financial Services Regulation: A Framework for Market Regulation in Canada" (Securities Superconference, Hotel Intercontinental, Toronto, 24 February 1999), online: Ontario Securities Commission <<http://www.osc.gov.on.ca>> (date accessed: 1 March 1999).

23. *Securities Act*, R.S.O. 1990, c. S-5, s. 1.1 [hereinafter the "Ontario Act"]. See also Gillen, *supra* note 3 at 79-87.

24. Johnston & Rockwell, *supra* note 19 at 4-5.

25. *Manitoba (A.G.) v. Canada (A.G.)*, [1929] A.C. 260, [1929] 1 D.L.R. 369 [hereinafter *Manitoba Securities*].

26. *Lymburn v. Mayland*, [1932] A.C. 318, [1932] 2 D.L.R. 6 (P.C.).

27. For example, a remedy for insider trading established by a province was upheld notwithstanding a comparable federal remedy. See *Multiple Access v. McCutcheon*, [1982] 2 S.C.R. 161, 138 D.L.R. (3d) 1 [hereinafter *Multiple Access* cited to S.C.R.].

28. *Criminal Code*, R.S.C. 1985, c. C-46, ss. 380(2), 382, 383, 384 & 400.

29. In contrast, the United States has federally enacted securities legislation in addition to state regulation. See Gillen, *supra* note 3 at 73-74.

30. See, for example, *Dupont v. Taronga Holdings*, [1987] R.J.Q. 124, 49 D.L.R. (4th) 335 (Sup. Ct.); *R. v. W. McKenzie Securities*, [1966] 4 C.C.C. 29, 56 D.L.R. (2d) 56 (Man. C.A.). See also Tse, *supra* note 5 at 438.

diction, or failure to intervene when another level of government exercises that jurisdiction, cannot be determinative of the constitutional analysis.”³¹ That provincial securities legislation has been found to be *intra vires* the provincial legislatures should not be taken to mean, then, that federal jurisdiction has been thereby displaced. In the absence of a federal securities regime, courts have allowed provinces wide regulatory powers. These powers may operate in tandem with federal rules so long as the rules do not directly conflict. Where equally valid federal and provincial rules could not both be satisfied, the federal paramountcy rule would render the provincial rule inoperative.³²

Since the existing regulatory regime in Canada is complex,³³ discussion of the regulation of securities in isolation from the rest of the Canadian financial services landscape is somewhat artificial. Securities firms (dealers and portfolio managers) have traditionally been viewed as constituting one of the “four pillars,” alongside the banks, trust companies, and insurance companies. In addition, there are today a number of other participants, including finance companies, mortgage brokers and financial planners. Mutual funds and other collective investment arrangements are increasingly important providers of financial services to Canadians and do not fit easily into the architecture of the four pillars.

Separate provincial or federal legislation governed each of the four pillars, granting, at least in theory, the exclusive right to provide a core financial service. Banks provided commercial and consumer loans, accepted deposits and offered chequing accounts. Insurance companies underwrote and sold insurance. Trust companies provided estate and trust administration and mortgage loans. Securities firms underwrote new issues of securities, and sold and advised with respect to securities in the primary and secondary markets. There was little overlap between the products and services offered by each pillar, and cross ownership between the pillars was limited or prohibited. The extensive reform to the *Bank Act*³⁴ in the late 1980s changed this situation dramatically with the

31. *Ontario Hydro*, *supra* note 11 at 357. See also Reed J. on the non-existence of “constitutional squatters’ rights,” *Alberta Government Telephones v. C.R.T.C.*, [1985] 2 F.C. 472 at 488, 15 D.L.R. (4th) 515 (T.D.), *rev’d* [1986] 2 F.C. 179, 24 D.L.R. (4th) 608 (C.A.), *aff’d* [1989] 2 S.C.R. 225, 61 D.L.R. (4th) 193.

32. *R. v. Smith*, [1960] S.C.R. 776, 25 D.L.R. (2d) 225 [hereinafter *Smith*]; *Royal Bank of Canada v. LaRue*, [1928] A.C. 187 (P.C.).

33. Brown, *supra* note 22: Brown observed that a federally chartered financial institution, operating in every province and territory with both a securities subsidiary and an insurance subsidiary, may have to deal with over 30 regulatory authorities, many of them with different rules and offering varying protections for consumers. Johnston and Rockwell have written that “the existence of 12 varying jurisdictions does diminish the efficient market goal” (*supra* note 19 at 252).

34. S.C. 1991, c. 46.

virtual elimination of the rules separating the four pillars.³⁵ One of the most significant changes was the elimination of the prohibition against banks owning securities dealers. Now that the big banks own the major securities dealers, the banks are subject to federal legislation in respect of their “banking” activities and provincial legislation in respect of their securities dealings.³⁶ The general trend is toward almost total integration in the provision of financial services.

This trend is driven by much the same forces that are changing the financial services industry rapidly and extensively world-wide. Technological advances have changed the way that securities markets operate. Automation and Internet trading have made geographical barriers much less important.³⁷ A securities purchase transacted over the Internet is less rooted in a determinable location than one conducted in a bank branch or broker’s office. These changes are significant for securities more than for other products sold over the Internet, such as books, because securities are subject to heavy, expensive regulation that applies on the basis of geography.³⁸ An interprovincial Internet sale of a book does not trigger the same degree of regulatory compliance as does a securities trade. Globalization, too, has changed markets. As Gillen has noted, North American companies have sought increasing amounts of capital overseas, and there have been substantial increases in trading beyond national borders.³⁹

35. Brown, *supra* note 22.

36. Some market participants see a need to move towards functional regulation instead of institutional regulation, the idea being that the provinces would retain control of the functions that they regulated when the lines between institutions were clearer. See *A Framework for Market Regulation in Canada: A Concept Paper Prepared for the Canadian Securities Administrators* (February 1999), online: Ontario Securities Commission <<http://www.osc.gov.on.ca>> (date accessed: 3 March 1999).

37. McKinsey & Company, *The Changing Landscape for Canadian Financial Services: New Forces, New Competitors, New Choices* (Research Paper prepared for the Task Force on the Future of the Canadian Financial Services Sector) (September 1998), online: The Task Force on the Future of the Canadian Financial Services Sector <<http://finservtaskforce.fin.gc.ca>> (date accessed: 4 March 1999).

38. For example, see the Ontario Act, *supra* note 23, Part XI.

39. Gillen, *supra* note 3 at 43-44.

For the purposes of this discussion, we assume that the basis of a national regime of securities regulation would be the structure currently in place in Ontario and that a federal act would be based on the Ontario Act.⁴⁰

II. *Division of powers: judicial reasoning*

A brief review of the division of powers case law places this discussion of securities in context. Behind the tests and interpretations that the courts apply to the provisions of sections 91 and 92 of the Constitution lies a constant concern: how can the distribution of powers in the Canadian federation be balanced and re-balanced in changing circumstances? The division of powers gives the appearance of fixity. This stability of form, however, belies the chimerical nature of the substantive division of powers between Parliament and the provincial legislatures. Technological, social, and political forces continually subject the initial distribution of powers to stress. In particular, problems may arise when a matter initially recognized as within the legislative competence of the provinces grows in complexity and inter-connectedness so as to make unilateral regulation by a province impracticable. In such cases, arguments based on efficiency might collide with concerns for the balance of powers between the levels of government.

Where a matter not expressly assigned in sections 91 or 92 has grown beyond its initial local nature, we suggest that courts generally have three options. First, the courts might rely on a narrow assumption that the provinces can only be responsible for discrete local matters that can be dealt with by each province individually. In many cases this solution might be efficient. It also respects the theory that provinces operate independently as coordinate sovereign entities. It would result, however, in an inexorable siphoning off of provincial powers to Parliament. The drive for theoretical neatness would thus undo the balance of the federation and would present provinces with a disincentive to inter-relate since so doing would signal that a matter was no longer provincial. Perhaps for these reasons, courts have generally avoided this course.

40. Such assumptions are reasonable given the degree of market concentration in Toronto. We will not discuss here the integration of federal securities legislation with existing federal legislation such as the *Bank Act*. Compare Tse, *supra* note 5 at 441: “[The suggestion is] that the federal government establish a securities commission with authority over all interprovincial and international securities activity. This federal commission would also be responsible for the investigation and prosecution of securities-related criminal activity. The existing provincial securities commissions should be maintained to regulate intra-provincial securities activity and promote regional economic concerns.”

Second, courts could choose always to leave matters to the level of government where their exercise was first recognized as *intra vires*. Thus even provincial matters that outgrow their local natures would remain within provincial competence. Legal fictions could be employed to designate a matter “within the province” though it might not really be so. Moreover, provinces could be allowed latitude to cooperate in the regulation of inter-connected matters. Such legal fictions, however, might cost the law credibility. If they are unbelievable to the point of absurdity, they might threaten the relevance of and respect for the Constitution.

Given the current nature of securities markets, we will argue that the existing constitutional distribution of power over securities is sustained only by legal fictions that not only are costly to market participants and to consumers, but, more importantly, are increasingly implausible. We recognize that constitutional law will always rely to some degree on legal fictions, but we suggest that if terms such as “within the province,” “interprovincial” and “intraprovincial” are to retain meaning, the securities question should be reconsidered. Moreover, as we shall discuss, the division of powers in the Constitution is not meant to allow a council of provinces to impose a unified law upon all Canadians. Such a result would attack the principles of diversity and local control that underlie the federation.⁴¹

We suggest that a third option is most appropriate: normally, the provinces should retain jurisdiction over matters previously within their domain—even where the matter is increasingly inter-connected and only fictionally “within the province.” Provinces should be allowed room to work cooperatively to further their own efforts at regulation. We recognize that efficiency is clearly not the primary objective of Canada’s construction as a federation in the first place, but argue that, when judicial latitude and legal fiction are used to keep within provincial jurisdiction a matter that has changed substantially, some benefit associated with the values of federalism should be attained, such as the possibility of respect for diversity, of opportunities for local democratic solutions, or of

41. See, for example, *Secession Reference*, *supra* note 14 at 244-45 and 251. For the opinion that interstate cooperation is consistent with the values of federalism in the United States, see “To Form a More Perfect Union?: Federalism and Informal Interstate Cooperation” (1989) 102 Harv. L. Rev. 842.

innovative and productive competition between governments.⁴² It would be senseless to sacrifice efficiency and consistency in securities regulation if there were no hope of gain in any of the values of federalism. Thus where a provincial matter is highly inter-connected such that it cannot be regulated unilaterally by a province, where it requires uniform treatment, and where it is thereby not subject to local democracy or problem-solving, there is a strong case that legislative treatment of it should be upheld as *intra vires* Parliament.

We submit that when a provincial matter has substantively changed, as securities has, it is not an adequate response to say that “the balance of powers” in the federation precludes recognizing federal competence respecting it. It is hard to see that the constitutional status quo is an untouchable equilibrium. It is clear that the “balance of powers” is always changing to some degree. For example, the provinces’ powers over hospitals⁴³ has obviously increased in importance since 1867. It is unclear, then, why greater jurisdiction in the economic field for Parliament is precluded. Indeed, we argue that keeping such a matter “within the province” only by virtue of untenable legal fictions and by interprovincial cooperation is at least as “unbalancing” as recognizing Parliament’s competence over it.

The regulation of securities is one such subject. While British Columbia and Alberta may use securities regulation to help preserve their junior and venture capital markets,⁴⁴ even proponents of continuing provincial control admit that, in general, the matter requires a substantial degree of uniform national regulation.⁴⁵ We submit that it is, for the most part, not a matter that is susceptible to grass-roots local control, and that no sufficient opportunity for diverse local responses compensates for the

42. On competition between governments in a federation, see A. Breton, “The Theory of Competitive Federalism” in G. Stevenson, ed., *Federalism in Canada: Selected Readings* (Toronto: McClelland & Stewart, 1989) 457; D.V. Smiley, *The Federal Condition in Canada* (Toronto: McGraw-Hill Ryerson, 1987) at 94-98. On the benefits of such competition in terms of better legislation or regulation, see, for example, R.J. Daniels, “Should Provinces Compete? The Case for a Competitive Corporate Law Market” (1991) 36 McGill L.J. 130; N. Guthrie, “A Good Place to Shop: Choice of Forum and the Conflict of Laws” (1995) 27 Ottawa L. Rev. 201. See, *contra*, with a pessimistic view of such competition, S. Rose-Ackerman, “Risk Taking and Reelection: Does Federalism Promote Innovation?” (1980) 9 J. Legal Stud. 593.

43. The Constitution, *supra* note 20 at s. 92(7).

44. Johnston & Rockwell, *supra* note 19 at 253.

45. Brown, *supra* note 22.

losses in efficiency currently posed by provincial regulation.⁴⁶ Given the requirement in Canada that a dealer register in every province where it distributes securities, any benefit from the choice of forum competition between jurisdictions would likely be offset by the expense of compliance with different regimes in every province. Securities regulation is distinguishable from corporate law, where a company may choose to incorporate in the jurisdiction with the laws most favourable to it. The choice of forum theorists do not contemplate concurrent compliance⁴⁷ with all the competing regimes in a federation but, obviously, a choice between them.⁴⁸ In Canada, in the absence of federal regulation of securities, instead of having a competitive market of different, innovative regimes, one province, Ontario, dominates and sets standards for the others. Given that companies wishing to distribute their securities in other provinces must still comply with the requirements of those provinces, Ontario does not operate as a Delaware for securities regulation. We argue, then, that securities regulation should fall to Parliament.

While Canadian courts have not explicitly adopted this approach, we argue that it is consistent with the leading cases for the interpretation of the general “trade and commerce power”⁴⁹ and the “national concern” branch of the power with respect to peace, order and good government.⁵⁰ Both the *City National Leasing* and *Crown Zellerbach* cases apply complex tests that can best be explained as attempts simultaneously to allow, but also to restrict, federal jurisdiction over matters that have become too general or too inter-connected to admit of independent provincial regulation. The tests of “provincial incapability” and “provincial inability” elaborated in these cases are phrased to permit some cooperation between provinces without inviting provinces to introduce national standards by regulating in lock step.

46. As Johnston and Rockwell have noted, current provincial differences in the provincial regulatory systems include the closed system; levels of regulation; prospectus filing; hold periods; insider trading reports; material change reports; registration of persons; limitation periods; and sanctions (*supra* note 19 at 252). For a defence of provincial differences in securities regulation, see Tse, *supra* note 5; F. Normand, “Nouvelle présidente de la Commission des valeurs mobilières du Québec: Carmen Crépin est contra la création d’une commission pancanadienne” *Le Devoir* (3 September 1999) A6.

47. Even the selection of a principle jurisdiction for multi-provincial offerings under National Policy 1 has not eliminated duplication. See Johnston & Rockwell, *supra* note 19 at 254.

48. See, for example, W.L. Cary, “Federalism and Corporate Law: Reflections upon Delaware” (1974) 83 *Yale L.J.* 663; R. Romano, “The State Competition Debate in Corporate Law” (1987) 8 *Cardozo L. Rev.* 709; Daniels, *supra* note 42; Guthrie, *supra* note 42.

49. The Constitution, *supra* note 20 at s. 91(2).

50. *Supra* note 20 at s. 91 [hereinafter the “p.o.g.g. power”].

Admittedly, the Supreme Court would need convincing legal arguments to justify a modification to the balance of powers concerning securities. We suggest that using the trade and commerce power to support a federal regime of securities regulation is the most desirable and least radical course. Alternatively, if the trade and commerce power proved insufficient to save federal securities regulations, the next most preferable route is using the national concern branch of the p.o.g.g. power. As a last resort, we would consider the power over banking,⁵¹ the criminal law power,⁵² and the declaratory power over works for the general advantage of Canada.⁵³

In this matter, the onus falls on the party advocating recognition of federal competence. The weight of *res judicata*, *stare decisis* and judicial inertia falls on the side of ongoing provincial competence. A court could reject our recharacterization of the securities markets as more general than a particular industry. Moreover, while the legal tests applied are not always strictly logical, the courts can still apply them; the trade and commerce and p.o.g.g. tests could be interpreted to reject a federal securities act.

Even had the Privy Council or the Supreme Court found securities to be exclusively a provincial field, it is possible that the Court would one day rule differently given changes in the matter. There is a suggestion that the Court should be more willing to overrule constitutional cases than others because there is no easy legislative recourse.⁵⁴ Moreover, as Professors Anisman and Hogg have noted in a discussion of the general trade and commerce power, "the Supreme Court has indicated its willingness, where necessary, to overrule decisions of the Privy Council as well as its own earlier decisions."⁵⁵ Furthermore, Professor Hogg has observed that in the field of securities regulation, some laws already have a double aspect.⁵⁶ It is possible, then, that a federal securities act might be found *intra vires* under one of the section 91 heads of power.

51. The Constitution, *supra* note 20 at s. 91(15).

52. *Supra* note 20 at s. 91(27).

53. *Supra* note 20 at s. 92(10).

54. P.W. Hogg, *Constitutional Law of Canada*, looseleaf (Toronto: Carswell, 1992) under heading 8.7 [hereinafter *Constitutional Law*].

55. P. Anisman and P.W. Hogg, "Constitutional Aspects of Federal Securities Legislation" in *Proposals*, *supra* note 6, 135 at 165 [footnotes omitted] [hereinafter "Constitutional Aspects"].

56. *Constitutional Law*, *supra* note 54 under heading 15.5(c), discussing *Smith*, *supra* note 32; *Multiple Access*, *supra* note 27.

Faced with a federal securities act, the courts would first need to characterize the impugned legislation in its “pith and substance” and then attempt to characterize it as within section 91 or section 92. A number of approaches might inform the Supreme Court’s consideration of the securities question.

One approach to constitutional interpretation is originalism.⁵⁷ Originalism generally carries little weight in the Supreme Court of Canada.⁵⁸ Yet it has a certain amount of support in the academic literature. Professor Abel has provided a reading of the framers’ organizational vision concerning the division of powers which amounts to a modified originalism. Instead of wondering what the framers would have said, he attempted to discern the organizational principles behind the division of powers:

What clearly emerges is a bestowal on the Dominion of responsibilities which have as their characterizing trait the management of the economy. . . . What seems at first glance a mere congeries of specifics turns out to be . . . really a roll call of . . . standard pressure points for effectuating financial and market regulation—economic planning, if you will.⁵⁹

Professor Abel’s argument would suggest that securities, as more economic than sociological, belong under federal jurisdiction.

In a discussion on competition, Professors Hogg and Grover wrote, “It is surely obvious that major regulation of the Canadian economy has to be national. . . . Indeed, a basic concept of the federation is that it must be an economic union.”⁶⁰ Surely they did not intend to espouse originalism, but, at the same time, it is hard to see where their understanding of the “basic concept” comes from if not from the framers. We accept the force of this argument and submit that it is helpful in ensuring that the economic heads of power, particularly trade and commerce, are given meaningful interpretation.

57. For an American exposition of the position, see R. Berger, *Government by Judiciary: The Transformation of the Fourteenth Amendment* (Cambridge, Mass.: Harvard University Press, 1977).

58. See the Court’s rejection of the special joint committee testimony and parliamentary debates in interpreting s. 7 of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter *Charter*], in *Reference Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486, 24 D.L.R. (4th) 536.

59. A.S. Abel, “The Neglected Logic of 91 and 92” (1969) 19 U.T.L.J. 487 at 500-01; cited in, for example, M. Patenaude, “L’interprétation du partage des compétences à l’heure du libre-échange” (1990), 21 R.D.U.S. 1, on the federal government’s economic power in light of *Crown Zellerbach* and *City National Leasing*.

60. P.W. Hogg & W. Grover, “The Constitutionality of the Competition Bill” (1976) 1 Can. Bus. L.J. 197 at 199.

A contrasting approach is the doctrine of progressive interpretation. This doctrine stipulates that the general language used to describe the heads of power is not to be frozen in the sense in which it was understood in 1867.⁶¹ The doctrine traces its roots in Canadian constitutional interpretation to Lord Sankey's *dictum* that the Constitution is like "a living tree capable of growth and expansion within its natural limits."⁶² Determinations of the "natural limits," however, are likely to introduce some reference to the intentions of the Constitution's framers.

It is not only section 91 but also section 92 that requires analysis. Much depends on how narrowly a court chooses to read the last words of subsection 92(13), "in the province," if it pays attention to them at all. As Chelsea A. Sneed has noted, in *Bennett v. British Columbia (Securities Commission)*,⁶³ the British Columbia Court of Appeal relied on the pith and substance test; that is, the court upheld section 68 of the *Securities Act*,⁶⁴ even though the section might have extra-provincial effects, because the pith and substance of the impugned section was local. The extra-provincial effects were merely incidental.⁶⁵ In contrast, in *Global Securities*, the same court struck down subsection 141(1)(b) of the B.C. Act. Newbury J.A. wrote there that the subsection referred solely and specifically to the laws of another jurisdiction, and that the extra-provincial or cross-border aspect of the provision was its dominant feature. The head of power under which the respondent Securities Commission founded its authority in this matter was not property and civil rights, but rather "the administration of justice in the province."⁶⁶ Nevertheless, in this instance we see the court upholding strictly the qualifier "in the province." As securities transactions become increasingly detached from particular intraprovincial locations, it may become clearer that provincial securities regulation is not confining itself to operations "in the province." These cases do not indicate how the Supreme Court would be likely to decide, but only that the qualifier "in the province" merits substantive consideration.

61. *Constitutional Law*, *supra* note 54 under heading 15.9(f).

62. *Edwards v. Canada (A.G.)*, [1930] A.C. 124 at 136, [1930] 1 D.L.R. 98 [hereinafter *Edwards*].

63. (1992), 69 B.C.L.R. (2d) 171, 94 D.L.R. (4th) 339 (C.A.), leave to appeal to S.C.C. refused (1992), 70 B.C.L.R. (2d) xxxii, 97 D.L.R. (4th) vii.

64. R.S.B.C. 1996, c. 418 [hereinafter the "B.C. Act"].

65. C.A. Sneed, "Awakening Canada's Dormant Trade and Commerce Clause: How Canadian Courts Test Concurrent Provincial Legislation" (1997) 20 *Loy. L.A. Int'l & Comp. L.J.* 193 at 214-15.

66. The Constitution, *supra* note 20 at s. 92(14).

Under any federal constitution, change is a given. The question, then, is how will the distribution of powers respond to such change? There will always be tension because when competence over a matter is differently recognized, one level of government wins and another loses. Even if the division of powers is not regarded as a strictly zero sum game, say by recognizing concurrency, provinces still resent a perceived incursion into their legislative competence. From the perspective of one of the levels of government, sharing the field is less than occupying it.

In *Global Securities*, Southin J.A. argued in her dissent for a generous interpretation of subsection 92(13) concerning the provincial power to regulate securities by referring to *Edwards* and the living tree.⁶⁷ This reference is peculiar, given her originalist reference within the same decision. What is interesting is that, given the inevitability of change, invoking the theory in *Global Securities* does not particularly assist the province. Redefining “person” to include women, as was the case in *Edwards*, does not simultaneously deprive anyone else of anything. In contrast, within a constitution that has distributed the totality of legislative power between two levels of government, giving a particular power to one level of government means denying it to the other, or at least reducing that government’s influence over a matter. The notion of the living tree cannot be applied blindly, because Lord Sankey’s phrase does not consider what to do when one branch of the tree grows at the expense of another branch. Clearly, then, merely citing *Edwards* is not enough. Why should the provinces continue to regulate a matter that appears to have grown beyond their capacity to regulate? Moreover, in a consideration of subsection 91(2), the invocation probably assists the federal government, as the living tree theory hardly seems to contemplate a dead branch for trade and commerce.

What is necessary instead of a mere call for a living and changing constitution is a frank discussion of the values at stake: why should a matter remain within the legislative competence of the provinces? Why might it not belong, instead, in federal jurisdiction? What are the policy issues at stake? Recent case law concerning the trade and commerce and p.o.g.g. powers shows the Supreme Court wrestling with these questions.

We would note that the Supreme Court is at liberty to consider “external” data in characterizing securities for division of powers purposes. While in recent years we are most familiar with the Court using social science and other data in assessing reasonable justification under section 1 of the *Charter*,⁶⁸ the Court has done so in non-*Charter* cases,

67. *Supra* note 59 at 621-22.

68. See, for example, *RJR*, *supra* note 12.

such as *City National Leasing*. Indeed, it is hard to see how the Court can assess terms such as “provincial inability,” as required in *Crown Zellerbach*, without looking beyond the text of the Constitution itself and the existing case law.

At the same time, however, the Court sometimes claims not to consider such issues. In *Ontario Hydro*, Chief Justice Lamer attempted to exclude certain concerns from constitutional analysis. He referred to “the comments of McIntyre J., for the Court, in *Reference re Upper Churchill Water Rights Reversion Act*, [1984] 1 S.C.R. 297, at p. 334: ‘. . . it is not for this Court to consider the desirability of legislation from a social or economic perspective where a constitutional issue is raised’.”⁶⁹

We have suggested a principled approach to the constitutional analysis when a matter has changed. In what follows, we contrast our explanation with the reasoning of the Court.

III. *Trade and commerce*

The leading case of *Citizens Insurance Co. v. Parsons* divides subsection 91(2) into two branches, “regulation of trade in matters of interprovincial concern and . . . general regulation of trade affecting the whole dominion.”⁷⁰ Since that time, the head of power has moved in and out of favour; at one point the Privy Council almost dismissed it as an ancillary power without substance.⁷¹ Before determining the constitutional valid-

69. *Supra* note 11 at 358.

70. (1881), 7 A.C. 96 at 113 (P.C.) [hereinafter *Parsons*].

71. See *Canada (A.G.) v. Alberta (A.G.)*, [1916] 1 A.C. 588, 10 W.W.R. 405 (P.C.) [hereinafter *Insurance Reference*] (trade and commerce not saving licensing regime for insurance companies other than provincial companies operating wholly within the province); *Re Board of Commerce Act*, [1922] 1 A.C. 191 at 198, 60 D.L.R. 513 (P.C.) [hereinafter *Board of Commerce*] (trade and commerce not saving anti-combines provisions, the trade and commerce power being merely ancillary to other federal powers); *Toronto Electric Commissioners v. Snider*, [1925] A.C. 396, [1925] 1 W.W.R. 785 (P.C.) [hereinafter *Snider*] (trade and commerce viewed again as merely ancillary, so not saving federal labour laws); *Proprietary Articles Trade Association v. Canada (A.G.)*, [1931] A.C. 310 at 326, [1931] 2 D.L.R. 1 (P.C.) [hereinafter *P.A.T.A.*] (upholding anti-combines law under s. 91(27) but repudiating in *obiter* the ancillary theory on s. 91(2)); *British Columbia (A.G.) v. Canada (A.G.)*, [1937] A.C. 377, [1937] 1 D.L.R. 691 (P.C.) [hereinafter *Natural Products*] (marketing schemes invalid under general trade and commerce as some transactions targeted could be completed within the province); *Canadian Federation of Agriculture v. Quebec (A.G.)*, [1951] 1 A.C. 179, [1950] 4 D.L.R. 689 (P.C.) [hereinafter *Margarine Reference*] (margarine legislation invalid because certain transactions proscribed could be completed within a province).

ity of a federal securities regime, therefore, the Supreme Court would have to decide whether subsection 91(2) has any substance at all, and if so, what that substance should be. In *MacDonald v. Vapor Canada*,⁷² the Supreme Court reversed the Federal Court of Appeal's holding that "a law laying down a set of general rules as to the conduct of business men in their competitive activities in Canada" fell validly within the general category of trade and commerce.⁷³ Despite finding the impugned legislation invalid, however, Chief Justice Laskin did suggest some circumstances where the trade and commerce power would be available.⁷⁴ Following these suggestions, the Supreme Court has upheld the impugned competition legislation in *City National Leasing* and it seems that subsection 91(2) indeed has independent substance.

1. *Interprovincial trade and commerce*

Parliament's power to regulate securities trading that is interprovincial is not in question. Dickson J. (as he then was) has said in *obiter*:

I should not wish . . . to affect prejudicially the constitutional right of Parliament to enact a general scheme of securities legislation pursuant to its power to make laws in relation to interprovincial and export trade and commerce. This is of particular significance considering the interprovincial and indeed international character of the securities industry.⁷⁵

Professors Anisman and Hogg wrote that, despite the breadth of the words used in *Parsons* and the Supreme Court's "recent tendency to read life into them, the traditional and still dominant analytic approach, including the 'flow of commerce' rubric, rests on a transactional analysis of the legislation—that is, on whether tangible goods or commodities physically cross a provincial border as a result of a transaction"⁷⁶ Securities are choses in action. Nevertheless, they are generally treated as commodities transactions.⁷⁷ Anisman and Hogg outlined a number of arguments for the interprovincial character of much of securities activity.⁷⁸ They noted, however, that most secondary trading consists of

72. [1977] 2 S.C.R. 134, 66 D.L.R. (3d) 1 [hereinafter *Vapor Canada*].

73. [1972] F.C. 1156 at 1171, 33 D.L.R. (3d) 434 (C.A.).

74. *Vapor Canada*, *supra* note 72 at 156ff.

75. *Multiple Access*, *supra* note 27 at 173.

76. "Constitutional Aspects," *supra* note 55 at 159 [footnotes omitted].

77. *Ibid.*

78. For example, since corporate securities are created and issued in the issuer's province of incorporation, it is arguable that all transactions in which the securities issued end in the hands of an ultimate purchaser in a different province are interprovincial: *ibid.* at 160.

intraprovincial transactions and would be beyond the scope of any federal legislation valid under this power.⁷⁹

We submit that the intraprovincial nature of many securities trades is sustained only artificially by legislative registration requirements. For example, when an individual in Alberta walks into her bank branch and buys units of that bank's proprietary mutual funds, a transaction of intraprovincial trade occurs. The transaction is intraprovincial because legislation requires that the bank or its securities dealing subsidiary register in each province where it trades. The head office of the bank, however, is likely in Montreal or Toronto. The computer system, which is where, as much as it is anywhere, the transaction actually exists, may be based in Oakville or Winnipeg. Where does this transaction really take place? It is clearly not an intraprovincial trade transaction in the same way as buying a tangible good in a store located within one province. As technology continues to alter the securities markets, the legal insistence on the intraprovinciality of individual trades becomes increasingly absurd.

In response to such arguments, the provinces might argue that the Privy Council repeatedly rejected federal legislation regulating particular trades as *ultra vires*, even when over 80 percent of the commodity in question was destined not merely for interprovincial but instead international trade.⁸⁰ Accordingly, the branch of interprovincial trade is probably incapable of sustaining general regulation of the securities markets; rather, the general branch holds more potential.

2. General trade and commerce: *City National Leasing*

Even though subsection 91(2) had been consistently rejected as a support for federal policies of economic regulation,⁸¹ in 1978 Professors Anisman and Hogg believed the power sufficient to uphold federal legislation regulating all aspects of the market that are of any more than provincial significance.⁸² In 1989, the Supreme Court in *City National Leasing* upheld the impugned *Combines Investigation Act*⁸³ under subsection

79. *Ibid.* at 160-61.

80. *R. v. Eastern Terminal Elevator Co.*, [1925] S.C.R. 434, [1925] 3 D.L.R. 1 [hereinafter *Eastern Terminal Elevator*].

81. See *ibid.*; see also *Insurance Reference, Board of Commerce, Snider, Natural Products, Margarine Reference*, all *supra* note 71. But see *Ontario (A.G.) v. Canada (A.G.)* (Canada Standard Trade Mark), [1937] A.C. 405, [1937] 1 D.L.R. 702 (P.C.).

82. "Constitutional Aspects", *supra* note 55 at 171. See generally the discussion at 161-71.

83. R.S.C. 1970, c. C-23, now the *Competition Act*, R.S.C. 1985, c. C-34.

91(2),⁸⁴ thus breaking the line of federal schemes that had failed under that provision. Anti-combines legislation had previously been upheld under the criminal law power.⁸⁵ In a sense, then, the reliance on subsection 91(2) is even more notable as it represents a choice to use the general trade and commerce power instead of the criminal law power.

Referring to Laskin C.J. in *Vapor Canada*, Dickson C.J. wrote:

Chief Justice Laskin . . . proposed three hallmarks of validity for legislation under the second branch of the trade and commerce power. First, the impugned legislation must be part of a general regulatory scheme. Second, the scheme must be monitored by the continuing oversight of a regulatory agency. Third, the legislation must be concerned with trade as a whole rather than with a particular industry. . . . By limiting the means which federal regulators may employ to that of a regulatory scheme overseen by a regulatory agency, and by limiting the object of federal legislation to trade as a whole, *these requirements attempt to maintain a delicate balance between federal and provincial power.*⁸⁶

To these elements, Dickson C.J. added two more: “(i) the legislation should be of a nature that the provinces jointly or severally would be constitutionally incapable of enacting; and (ii) the failure to include one or more provinces or localities in a legislative scheme would jeopardize the successful operation of the scheme in other parts of the country.”⁸⁷ He continued:

In total, the five factors provide a preliminary checklist of characteristics, the presence of which in legislation is an indication of validity under the trade and commerce power. These indicia do not, however, represent an exhaustive list of traits that will tend to characterize general trade and commerce legislation. Nor is the presence or absence of any of these five criteria necessarily determinative.⁸⁸

These five factors, none of which need be present, and which together do not constitute an exhaustive list, are clearly not a strict legal test. The two Chief Justices were not engaged in an exercise of purely legal reasoning. Indeed, Laskin C.J.’s words emphasized above show that he was keenly aware he was addressing the balance in the distribution of powers. Dickson C.J. was also aware that the criteria left the Supreme Court ample

84. Dickson C.J. set out a helpful history of the trade and commerce power: see *supra* note 9 at 655-63.

85. *P.A.T.A.*, *supra* note 71; *Canada (A.G.) v. Canadian National Transportation*, [1983] 2 S.C.R. 206, 3 D.L.R. (4th) 16 [hereinafter *Canadian National Transport*] (Laskin C.J. assuming that the *Combines Investigation Act* rests solely on the criminal law power for analysis of the Attorney-General of Canada’s power to prosecute criminal offences).

86. *City National Leasing*, *supra* note 9 at 661 [emphasis added].

87. *Supra* note 9 at 662. Dickson J. (as he then was) had first introduced these two factors when writing for the minority in *Canadian National Transport*, *supra* note 85.

88. *City National Leasing*, *supra* note 9 at 662-63.

flexibility.⁸⁹ Through analysis of the *City National Leasing* decision and by applying the Laskin-Dickson test to a federal securities act, we shall discuss what the Supreme Court was doing by devising such characteristics.

a. *A general regulatory scheme*

The Laskin test asks whether the impugned legislation is part of a regulatory scheme. From the analysis in *City National Leasing*, it is clear that what matters is not that the legislation be part of a regulatory scheme, but rather that it introduce and implement such a scheme. This aspect of federal securities legislation is not contentious. Dickson C.J.'s assessment of the anti-combines regulatory regime applies closely to one for securities: "[T]hese three components, elucidation of prohibited conduct, creation of an investigatory procedure, and the establishment of a remedial mechanism, constitute a well-integrated scheme of regulation designed to discourage forms of commercial behaviour viewed as detrimental to Canada and the Canadian economy."⁹⁰ These components would clearly be present in federal legislation resembling the Ontario Act.

b. *Oversight of a regulatory agency*

Dickson C.J.'s analysis in *City National Leasing* conflates the first two of Laskin C.J.'s criteria. Similarly, concerning securities, if legislation is going to pass the first test, that of being part of a general regulatory scheme at all, it is likely to pass the regulatory oversight test. Federal legislation, certainly if based on the Ontario Act, would delegate authority to a national securities commission.

c. *Trade as a whole*

This criterion follows naturally from the decision in *Parsons* that subsection 91(2) did not include the power to regulate by legislation the contracts of a particular business or trade, in that case insurance.⁹¹ Recent decisions have generally been consistent.⁹² Dickson J. agreed with the

89. *Canadian National Transport*, *supra* note 85 at 268.

90. *City National Leasing*, *supra* note 9 at 676.

91. *Parsons*, *supra* note 70 at 113.

92. Dickson C.J. commented that legislation found *ultra vires* in *Labatt Breweries of Canada v. Canada (A.G.)*, [1980] 1 S.C.R. 914, 110 D.L.R. (3d) 594 [hereinafter *Labatt Breweries*], regulated a single trade or industry: *City National Leasing*, *supra* note 9 at 678.

“careful case by case assessment” in *Parsons* and emphasized that the object of the legislation be “genuinely a national economic concern and not just a collection of local ones.”⁹³

We suggest that analysis of the Canadian securities markets as simply a co-existence of separate local industries is myopic. Such analysis focuses on individual transactions, not on the effect of the collective activity of securities market participants. Despite the popular term “securities industry,” ensuring the integrity of the markets and the availability of capital to businesses and of investment opportunities to individuals is much more than a single industry. It is not merely that many people and businesses across Canada participate in their local securities markets. Many products, including light beer,⁹⁴ are consumed widely across the country, but fail to surpass their particularity to be classified as “general.” Rather, the securities markets form an integral part of the infrastructure of the Canadian economy. The provision of capital is more central to the broad spectrum of businesses than are other suppliers. Even if most companies purchase insurance of various kinds, insurance is not their lifeblood the way capital is. Hogg wrote that the capacity to raise capital is an essential attribute of corporate status;⁹⁵ we suggest that it is an essential part of the Canadian economy.

During this era of globalization, world markets are organized on national levels. Citing *Parsons*, an insurance licensing decision from 1881, hardly responds to this reality. Whether individual provinces realize it or not, Canadian markets are perceived as a national unity by international markets. Exchange rates and interest rates and levels of foreign investment are determined nationally, not provincially. It is on these points that a court could distinguish securities from areas of commerce that have also been affected substantially by globalization and developments in technology. Securities is part of the economic framework of the nation that we see recognized under Parliament in section 91.⁹⁶ There are few, if any, other areas of commerce that could be characterized similarly, so securities would not merely be the first of many areas to fall to Parliament under a reassessment of the division of powers. The provinces would not need to fear a much broader expansion of federal power based on our argument.

93. *Canadian National Transport*, *supra* note 85 at 268.

94. See *Labatt Breweries*, *supra* note 92.

95. *Constitutional Law*, *supra* note 54 under heading 21.10(a), discussing *Manitoba Securities*, *supra* note 25.

96. See *Abel*, *supra* note 59.

The decision in *City National Leasing* is important because the characterization of competition applies also to securities markets. Dickson C.J. wrote: “The deleterious effects of anti-competitive practices transcend provincial boundaries. Competition is not an issue of purely local concern but one of crucial importance for the national economy.”⁹⁷ The efficient flow of capital is also of crucial importance for the national economy. It is possible to replace “competition” with “securities” in a way that is not possible with specific industries. More interesting, though, is Chief Justice Dickson’s sleight of hand when he introduces p.o.g.g. language into the assessment of generality. “Particular” is not the antithesis of “nationally important”; indeed, many of the matters under provincial jurisdiction, such as education, are tremendously important for the national economy. Once Dickson draws in the language of importance, parallels between competition and securities become clear.

In *City National Leasing*, the Attorney-General of Quebec had argued that the regulation of competition in its intraprovincial dimension does not fall within the federal jurisdiction. Quebec submitted that the provinces have an important role to play in local competition laws and, in fact, that both the *Civil Code*⁹⁸ and the common law have already provided some remedies for unfair competition.⁹⁹ Consequently, the federal legislation should be read down and limited to interprovincial matters. Dickson C.J., however, accepted counter-arguments not only that the impugned Act was “meant to cover intraprovincial trade, but that it *must* do so if it is to be effective.”¹⁰⁰ Dickson C.J. summarized: “Because regulation of competition is so clearly of national interest and because competition cannot be successfully regulated by federal legislation which is restricted to interprovincial trade, the Quebec argument must fail.”¹⁰¹ This development is astonishing, and breathes considerable life into subsection 91(2). Here Chief Justice Dickson suggested that it is the very intention to deal with intraprovincial trade that somehow validates the initiative, as if merely wanting to cover intraprovincial trade is enough. The comment suggests that there is scope for a federal initiative to affect intraprovincial trade in a substantive way if concurrent with a valid exercise of power over interprovincial trade. Moreover, it was not an answer for Quebec to say that successful regulation of competition could be achieved by a combination of federal regulation of interprovincial trade and provincial regulation of interprovincial trade.

97. *City National Leasing*, *supra* note 9 at 678 [emphasis added].

98. *Civil Code of Lower Canada*, now the *Civil Code of Québec*.

99. *City National Leasing*, *supra* note 9 at 680-81.

100. *Supra* note 9 at 681 [emphasis added].

101. *Supra* note 9.

Professors Anisman and Hogg suggested that federal regulation would not treat securities as a particular trade. "A federal securities act would be directed not at a particular business or trade in the provinces but rather at the capital-raising function by issuers throughout Canada and would be designed to facilitate the allocational efficiency of the primary market, the capital-raising mechanism, by increasing investor confidence in the securities market generally."¹⁰² At the time, they noted that it might be difficult to include regulation of secondary distributions, as this segment of the industry does not deal directly with the movement of fresh capital.¹⁰³ Yet Anisman and Hogg also wrote, "As the securities market underlies commercial activities throughout the country, the interprovincial or transprovincial impact of the primary and secondary markets is theoretically and practically clear."¹⁰⁴ Moreover, the failed Quebec argument in *City National Leasing* seems to resolve this issue in favour of federal regulation: because national regulation of the securities markets cannot be accomplished without regulating intraprovincial trade, such intraprovincial regulation by the federal government is necessary. In a matter such as competition, claiming that the subject matter is severable into interprovincial and intraprovincial halves does not matter. Post-*City National Leasing*, legislation specifically aimed at intraprovincial trade alone would be problematic, but a general initiative targeting both branches should be possible.

d. *Provincial (in)capability*

As Dickson C.J.'s analysis in *City National Leasing* demonstrates, the final two criteria are closely related. The question whether the provinces are themselves constitutionally capable of enacting the impugned legislation requires careful analysis; the bar for finding them incapable must not be set too high. Dickson C.J. wrote "jointly or severally,"¹⁰⁵ but we suggest that this phrase needs to be defined carefully to mean less than all the provinces. If not, if the question is indeed meant to include the possibility of unanimous joint action by the provinces, the general power for trade and commerce and the residual powers would be entirely eliminated. Nothing would ever be considered to fall beyond the scope of the provinces. Surely the provinces, if they cooperated fully, could regulate the National Capital Region, and competition, areas that have been found to fall under federal competence either by p.o.g.g. or by trade

102. "Constitutional Aspects," *supra* note 55 at 165-66.

103. *Supra* note 55 at 169.

104. *Supra* note 55 at 168.

105. *City National Leasing*, *supra* note 9 at 662; see Part III(2) above.

and commerce;¹⁰⁶ indeed, the first example would require cooperation by only two provinces, Ontario and Quebec. In *City National Leasing*, it was argued that competition could not be regulated on the provincial level because companies could move easily to a neighbouring province with less stringent anti-competitive rules. Yet, while this problem could be solved by unanimous provincial agreement on identical legislation, anti-competitive measures passed Dickson C.J.'s test. We take the decision in *City National Leasing* to mean that, in a matter of general trade and commerce, Parliament has legislative competence even if all the provinces together could address the problem.

Even if securities legislation is characterized legally as a local, intraprovincial matter of transactions, there are arguments that one province's refusal to regulate or failure to regulate effectively would affect others. In part, this is because a perception exists, irrespective of what courts determine, that securities are national in scope. For example, given that Canadians think of their markets as national, a regulatory gap in one province that permitted a serious scandal in the securities business might well depress investor confidence across the country. A major scandal in any province affects Canadian investor confidence much more than one in the United States or in Mexico. The scandal of Bre-X Minerals Ltd. ("Bre-X"), a regulatory failure on the part of Ontario regulators, comes readily to mind. "Observers familiar with the junior mining sector say it's impossible to overestimate how damaging [the] Bre-X Minerals Ltd. gold mining scam has been to investor psychology."¹⁰⁷ Clearly, such a major scandal in one province can tarnish the reputation and reduce market confidence not only in respect of that province, but also of other provinces. For example, while Bre-X was listed on The Toronto Stock Exchange, the scandal clearly hurt the Vancouver Stock Exchange: "The [Vancouver] exchange saw turnover slump and prices drop to 12-month lows after Bre-X Minerals Ltd.'s Busang gold debacle in Indonesia."¹⁰⁸ A provincial regulator's failure also harms Canada as a whole, viewed on the international scene: "*The Bre-X meltdown has badly tarnished the image of Canadian stock markets and securities regulators with international investors.* In the wake of such a colossal embarrassment, the

106. See, respectively, *Munro v. National Capital Commission*, [1966] S.C.R. 663, 57 D.L.R. (2d) 753; *City National Leasing*, *supra* note 9.

107. P. Kennedy, "Major Players Gift Lift to Miners" *The Globe and Mail* (21 December 1998) B1.

108. "VSE Campaign Woos Foreign Investors" *The Globe and Mail* (26 June 1997) B4 (emphasis added); "Bre-X Minerals Ltd. shares never traded on the Vancouver Stock Exchange, but the company's scandalous collapse in mid-March still haunts the exchange, which is fuelled by demand for speculative resource stocks" ("VSE Continues to Suffer from Skepticism Over Resource Shares" *The Globe and Mail* (3 June 1997) B5).

foreign press is characterizing Canada as a kind of regulatory Wild West, where frauds such as Bre-X can flourish.”¹⁰⁹ Bre-X is not the only regulatory lapse by Ontario to have harmed investor confidence and market reputations in the other provinces.¹¹⁰

The identity of the province designated for the hypothetical test is critical. At the end of the day, less than optimal regulation in, say, Newfoundland is not going to prevent other provinces entirely from regulating their own intraprovincial transactions. On the other hand, failure to regulate effectively in Ontario, where the great majority of the country’s securities transactions occur, would unquestionably affect every other province. Ontario-based securities dealers must register in other provinces, and to that extent they must meet the standards in those provinces. If, however, the core businesses of such dealers were unregulated or ineffectively regulated in Ontario, investors and businesses seeking capital across the country would be harmed. The tests concerning

109. J. Heinzl, “The Bre-X Scandal: TSE President Defends Handling of Fiasco” *The Globe and Mail* (7 May 1997) B1 [emphasis added]. “And because *Canada’s* reputation has been tarnished by the gold mine fraud, exploration funding may swing toward London” (M. Hayes, “OSC Mines for Investor Confidence: Hopes That Tougher Controls Will Help the Resource Sector After the Bre-X Scandal” *The Globe and Mail* (18 June 1998) B27 [emphasis added]); “The scam cost shareholders \$3 billion and tarnished *Canada’s* reputation as a world leader in the mining industry” (“TSE Study Demands Tougher Regulations to Halt Second Bre-X” *Winnipeg Free Press* (3 February 1999) B5 [emphasis added]). See, generally, “TSE’s Bre-X Report Urges Tighter Rules” *The Lethbridge Herald* (3 February 1999) 6; “TSE Tightens Rules for Mining Interests” *Winnipeg Free Press* (21 August 1998) B8; K. Howlett, “Tougher Rules Urged for Miners: Ontario Regulators Call for Better Drilling Disclosure, Standards for Analysts in Wake of Bre-X Fraud” *The Globe and Mail* (9 June 1998) B1; B. Tannock, “Barroom Dreams” *The Globe and Mail* (26 September 1997) P44; S. Northfield, “Investors Lower Their Sights” *The Globe and Mail* (24 September 1997) B18; “Stockbrokers Urged to Adopt Tough New Disclosure Rules” *Winnipeg Free Press* (19 September 1997) B5; B. Milner, “Caveat Emptor at Mining Show: While Some Keen Investors Are Snapping Up Junior Stocks at Bargain Basement Prices, Others Look But Don’t Touch Following the Bre-X Debacle” *The Globe and Mail* (31 May 1997) B9; A. Barnes, “Interest Rate Jitters Plague Stocks” *The Globe and Mail* (29 May 1997) B17; J. McFarland, “Bre-X Fiasco Not Result of Regulatory Flaw But Watchdogs to Review Mining Finances” *The Globe and Mail* (16 May 1997) B3; J. Partridge, “IDA Chief Urges Calm in Regulators’ Response” *The Globe and Mail* (14 May 1997) B3; B. McKenna, “Bre-X Debacle Spurs Clamour for Overall Securities Regulator” *The Globe and Mail* (7 May 1997) B8; J. McFarland, “Bre-X Plummets in Record Trading” *The Globe and Mail* (7 May 1997) B1; D. Goold, “Bre-X Fiasco a Market Watershed” *The Globe and Mail* (6 May 1997) B1; K. Howlett, “The Bre-X Scandal: Institutional Investors Criticize TSE ‘Gambling’” *The Globe and Mail* (6 May 1997) B10; A. Bell, “Bay Street Nurses Black Eye” *The Globe and Mail* (6 May 1997) B11; V. Lawton, “Bre-X Samples False” *The Globe and Mail* (5 May 1997) A1; M. Stinson, “Bre-X Debacle Devastates Mining Shares” *The Globe and Mail* (28 March 1997) B12; A. Willis, “The Bre-X Saga” *The Globe and Mail* (28 March 1997) B1; J. Saunders *et al.*, “Bre-X’s Woes Panic Markets” *The Globe and Mail* (27 March 1997) A1.

110. See, for example, P. Waldie, “Mob Boss Picked Canadian Exchanges for YBM Scam” *The Globe and Mail* (8 June 1999) B1; K. Howlett & P. Waldie, “OSC Had Concerns About YBM for a Year Before Crackdown” *The Globe and Mail* (8 February 1999) B1.

provincial incapability or inability do not specify which province would be capable of jeopardizing the other provinces' efforts; the tests do not ask about removing the province least involved in the matter. Thus we must accept the possibility that Ontario would be that non-participating province.

This question of Ontario's market dominance raises other provincial capability concerns. Securities regulators in other provinces routinely defer to the Ontario Securities Commission in many regards; in a sense, the OSC functions as a *de facto* national regulator, exercising extra-territorial influence. While the other provincial securities commissions, their own powers delegated to them by elected legislative assemblies, make decisions to follow Ontario's lead, and are accountable to the electorates for those decisions, we suggest that this situation is problematic. We submit that one province so dominating the others and so routinely dictating regulatory policy in a matter of so-called provincial legislative authority is not in line with the objectives of Canadian federalism, such as diversity. Competitive federalism would have provinces adopting from their neighbours the policies that prove most efficient in practice; the concept is not that other provinces routinely follow the same province in regulating a given matter. Given Ontario's unelected dominance on the basis of its market share, it is arguable that it would be preferable for securities regulation to be federal: federal regulation could potentially be more accountable to the various regions than is Ontario and could perhaps better accommodate regional aspirations and concerns.

Furthermore, we suggest that analysis of the securities markets should build on the characterization of securities markets as more than a particular industry. In this way, the question is not whether one province's refusal to regulate its own intraprovincial securities transactions impedes another province's ability to do the same thing within its own borders. The question becomes whether one province's refusal to regulate its portion of the national securities markets prevents Canadians in other provinces from having an effective system of *national* regulation. Given how, particularly in light of globalizing forces, securities markets are viewed nationally, this question is appropriate. Clearly, one province's refusal to regulate would stop Canadians within that province, and also in the rest of Canada, from having their securities markets regulated effectively at the national level.

The high degree of interprovincial cooperation that the CSA are trying to achieve and maintain is significant.¹¹¹ These initiatives indicate that

111. Brown, *supra* note 22.

the provincial regulators recognize that securities in this country can no longer be regulated effectively by the individual provinces. We also suggest that such initiatives are likely to prove ultimately inadequate in dealing with the growing transprovincial, global pressures on securities markets. Such cooperation relies fully on interprovincial, intergovernmental cooperation, and even when this cooperation exists, the CSA's processes are necessarily cumbersome insofar as it takes thirteen authorities, even working together, much longer to approve changes than a single regulator. Given the pace of change in the industry, regulation cannot be effective unless it, too, is capable of changing quickly.

Even if this cooperative provincial regulation were to be effective, which we suggest it is not, we argue that it exceeds the appropriate "natural limits," to use the *Edwards* term, of Canadian federalism. Provincial cooperation to regulate jointly matters that the provinces would otherwise be incapable of so treating effectively operates as a pan-Canadian legislative and regulatory power distinct from, if not in opposition to, the Dominion. We would note that the marketing scheme upheld in *Reference Re Agricultural Products Marketing Act, 1970*¹¹² related to delegation of authority by one level of government to another and to cooperative federalism between the federal and provincial governments. In that sense it is immediately distinguishable from provincial regulation that is only possible by cooperation between the provinces and that sets up the united provinces against the federal government.

In *City National Leasing*, Dickson C.J. quoted with approval the following syllogism by Professors Hogg and Grover:

[R]egulation of the competitive sector of the economy can be effectively accomplished only by federal action. If there is no federal power to enact a competition policy, then Canada cannot have a competition policy. The consequence of a denial of federal constitutional power is, therefore, in practical effect, a gap in the distribution of legislative powers.¹¹³

The test for provincial inability must, of course, rely on an assumption as to *what* the underlying goal is: in other words, the ability to do what? In *City National Leasing*, the Court assumed that the goal was to provide a nationally consistent regulatory regime for competition: "[R]egulation of the competitive sector of the economy can be effectively accomplished only by federal action." Had the Court made all its assumptions explicit, it would have said: *National* regulation of the competitive sector of the economy can be effectively accomplished only by *federal* action. From

112. [1978] 2 S.C.R. 1198, 84 D.L.R. (3d) 257.

113. Hogg & Grover, *supra* note 60 at 200, quoted in *City National Leasing*, *supra* note 9 at 683.

there, the finding of provincial inability is a foregone conclusion—of course one province's non-cooperation would jeopardize the national regime. Had the Court initially assumed that the objective was to create *provincially* effective anti-competition regimes, allowing provinces to define their own diverse approaches to economic intervention, the Court would, presumably, have found the provinces perfectly able to regulate competition. Insofar as inability is a function of the assumptions as to precisely which ability is at issue, we suggest that the outcome of the provincial inability requirement depends on a policy decision *vis-à-vis* the best level for the regulation of a matter.

It was noted in *City National Leasing* that provincial anti-competition regulation would not solve the problem because companies could easily relocate to a neighbouring province with lower standards. It was not noted, however, that even with national regulation, companies can still move to the United States or Mexico. In a sense, then, even Parliament has a kind of incapability with respect to competition. Thus *City National Leasing* does not stand for the proposition that matters must be governed at the level that can regulate them perfectly. Rather, while the Court is constrained by the Constitution, its interpretation of that Constitution sometimes includes, when deciding which level of government is going to have competence, choosing the *better* of two imperfect capabilities. This reasoning applies equally to the regulation of securities markets. In a global context in which capital permeates all borders, Parliament has the better, albeit imperfect, capability to regulate securities markets.

3. Conclusion

We suggest that the Court is developing the tests in *Vapor Canada* and *City National Leasing* to give itself the discretion to monitor the distribution of powers in the field of commerce. Given that the list of traits is neither exhaustive nor determinative, it is clear that the Court is not restricting itself, but rather reserving power for itself. While there are countless matters that could only be regulated nationally by all the provinces or by Parliament, we submit that the selection of securities markets would be in line with the decision in *City National Leasing* and Abel's understanding of the original scheme of sections 91 and 92.

The case that this trade and commerce power could sustain federal securities legislation is stronger now than when Anisman and Hogg wrote. Dickson C.J. wished, by using his criteria combined with Laskin C.J.'s, to "maintain a delicate balance between federal and provincial power."¹¹⁴ We would argue, however, that, given the current nature of the

114. *City National Leasing*, *supra* note 9 at 661.

securities markets and their pan-Canadian significance, the exclusive power to regulate securities is not one that is appropriately provincial. It is not one that provides some of the benefits intended to accrue from local control.¹¹⁵ Acknowledging federal power in this regard, exclusive or merely concurrent but substantial and with recourse to paramountcy, should not upset any legitimate delicate balance.

IV. *The p.o.g.g. power*

The power of Parliament to legislate with respect to the peace, order, and good government of Canada has been judicially interpreted to cover matters of "national concern."¹¹⁶ Le Dain J. for the majority of the Supreme Court in *Crown Zellerbach* approved Beetz J.'s reasoning in the *Reference Re Anti-Inflation*¹¹⁷ to establish the current test for application of the p.o.g.g. power's national dimensions branch.¹¹⁸ The p.o.g.g. power is residual, and will only be considered as support for an impugned federal law once no specific federal head of power applies.¹¹⁹ The p.o.g.g. power would only be required to justify a federal securities act if the argument above for the trade and commerce power failed. Unlike jurisdiction based on enumerated section 91 powers, which may be concurrent with provincial jurisdiction, the power conferred by the national concern branch of p.o.g.g. is exclusive¹²⁰ and includes intraprovincial aspects.¹²¹ This capacity of the federal government to sweep up previously provincial powers has worried some commentators who find it an unacceptable extension of the reasoning in the *Anti-Inflation Reference*.¹²² Unlike the emergency branch of p.o.g.g., the effect of national concern is a permanent allocation of jurisdiction over a matter. If the national concern doctrine supported a federal securities regime, existing provincial rules would be rendered invalid, not merely inoperative (as by paramountcy),

115. See, *contra*, Tse, *supra* note 5.

116. Viscount Simon developed the modern elaboration of the national concern branch in *Ontario (A.G.) v. Canada Temperance Foundation*, [1946] A.C. 193, [1946] 2 D.L.R. 1 at 5: "[I]f [the subject matter] is such that it goes beyond local or provincial concern or interests and must from its inherent nature be the concern of the Dominion as a whole . . . then it will fall within the competence of the Dominion Parliament as a matter affecting the peace, order and good government of Canada, though it may in another aspect touch on matters specially reserved to the provincial legislatures." P.o.g.g. also includes the emergency branch and the "gap" branch: see *Constitutional Law*, *supra* note 54 under heading 17.1.

117. [1976] 2 S.C.R. 373, 68 D.L.R. (3d) 452 [hereinafter *Anti-Inflation Reference*].

118. For more recent considerations of the national dimensions branch, see *Ontario Hydro*, *supra* note 11; *RJR*, *supra* note 12; *Hydro-Québec*, *supra* note 13.

119. *Constitutional Law*, *supra* note 54 under heading 17.1.

120. *Hydro-Québec*, *supra* note 13 at 288.

121. *Crown Zellerbach*, *supra* note 10 at 432-33.

122. See, for example, H. Brun & G. Tremblay, *Droit Constitutionnel*, 3d ed. (Cowansville, Qc: Yvon Blais, 1997) at 559.

or inapplicable (as by inter-jurisdictional immunity). This is simply the effect of the national concern's exclusive character.¹²³

1. *The test in Crown Zellerbach: function and significance*

The test developed for the p.o.g.g. power in *Crown Zellerbach*, like that for general trade and commerce in *City National Leasing*, is more flexible and policy-driven than it appears. The elaborate requirements of “singleness,” “indivisibility,” “national significance,” and “provincial inability” are not clear legal categories that admit of deductive application. On the contrary, they are devices that allow courts to engage in case-by-case analyses of the effect of a matter's characterization on the fundamental division of powers. Professors Brun and Tremblay have decried this flexibility, fearing that it inevitably favours Parliament: “Tous ces pseudo-critères impliquent une évaluation politique que la Cour ne cherche même pas à faire: ils sont destinés à être laissés en définitive à l'appréciation du gouvernement central. Pire, on peut démontrer que plusieurs de ces critères sont de simples paravents.”¹²⁴ Such fears are founded on their assumption that the Supreme Court is inclined to centralize power. Subsequent argument, however, shows that the “provincial inability” criteria, for example, can be used to allow provinces to cooperate in respect of some matters that have grown beyond their local nature. The flexibility in the test for national concern allows a court to assess the *balance* of powers—a process that may benefit provincial legislatures as well as Parliament.

The national concern branch may apply to a matter that was primarily of a local or private nature but which has subsequently evolved into one of national concern.¹²⁵ The national importance of a matter, however, is not a sufficient condition for the deployment of the p.o.g.g. power. In the *Anti-Inflation Reference*, Beetz J. insisted that the subject matter must have “a degree of unity that makes it indivisible, an identity which makes it distinct from provincial matters and a sufficient consistence to retain the bounds of form.”¹²⁶ Later, Le Dain J. added the requirement of “distinctiveness” and pointed explicitly to its role in preserving an equilibrium in the federal distribution of powers. He wrote: “For a matter to qualify as a matter of national concern . . . it must have a singleness, distinctiveness and indivisibility that clearly distinguishes it from matters of provincial

123. *Crown Zellerbach*, *supra* note 10 at 433.

124. *Supra* note 122 at 561.

125. *Crown Zellerbach*, *supra* note 10 at 432.

126. *Supra* note 117 at 457-58.

concern and a scale of impact on provincial jurisdiction that is reconcilable with the fundamental distribution of legislative power under the Constitution.”¹²⁷

Professor Hogg has argued that a “provincial inability” test is the most important, even sufficient, condition for the use of the “national concern” branch. He wrote that provincial inability is present where there is “a need for one national law which cannot realistically be satisfied by cooperative provincial action because the failure of one province to cooperate would carry with it adverse consequences for the residents of other provinces.”¹²⁸

Although Hogg’s definition of provincial inability is consistent with the case law and the logic of federalism, his analysis overstates the role that provincial inability plays in the test for national dimensions as elaborated in *Crown Zellerbach*. Le Dain J. wrote: “In the context of the national concern doctrine of the peace, order and good government power, its utility lies, in my opinion, in *assisting in the determination whether a matter has the requisite singleness or indivisibility* from a functional as well as a conceptual point of view.”¹²⁹ As provincial inability is only one indicator of indivisibility, it is theoretically open for a court to find that a nationally important, distinct matter falls under federal jurisdiction under the national concern branch even though the provinces are able to regulate that matter.

Professor Baier has noted the potential expansion of federal power that may flow from this re-positioning of provincial inability in the national concern test: “By applying provincial inability the way he did, Le Dain robbed it of its initial, necessity-based, narrowing effect and opens doors for national concern”; “[p]rovincial inability is the inch for centralists to take a mile. . . .”¹³⁰ The Supreme Court has acknowledged this danger in the national concern branch of p.o.g.g. and has refrained from employing p.o.g.g. in several subsequent cases.¹³¹ In *Hydro-Québec*, La Forest J. said that the application of the national concern power puts the matter “within the exclusive and paramount power of Parliament and has obvious impact on the balance of Canadian federalism.”¹³²

127. *Crown Zellerbach*, *supra* note 10 at 432.

128. *Constitutional Law*, *supra* note 54 under heading 17.3(b).

129. *Crown Zellerbach*, *supra* note 10 at 434 [emphasis added].

130. G. Baier, “Tempering Peace, Order and Good Government: Provincial Inability and Canadian Federalism” (1998) 9 N.J.C.L. 277 at 291, 305.

131. For example, *RJR*, *supra* note 12; *Hydro-Québec*, *supra* note 13.

132. *Supra* note 13 at 288.

It is not immediately clear why Le Dain J. would consider provincial inability an indication of indivisibility. The answer must be that distinctiveness does not only concern the nature of the matter *per se* (for we can conceivably divide all matters into relationships between sub-matters or group them under more general matters). Instead, “distinctiveness,” “indivisibility” and “singleness” must refer to the potential effect that a matter as within federal competence will have on the overall bundle of provincial powers. In other words, the concern, particularly given the exclusive, permanent nature of p.o.g.g., is that matters recognized under this power not draw others with them. It is telling that Le Dain J.’s exploration of the singleness and indivisibility of marine pollution is summed up in a single paragraph, which concludes as follows:

Moreover, the distinction between salt water and fresh water as limiting the application of the *Ocean Dumping Control Act* meets the consideration emphasized by a majority of this Court in the *Anti-Inflation Act* reference—that in order for a matter to qualify as one of national concern falling within the federal peace, order and good government power it must have ascertainable and reasonable limits, in so far as its impact on provincial jurisdiction is concerned.¹³³

As in the case of the general trade and commerce power, the various parts of the test in *Crown Zellerbach* are therefore best seen as attempts to re-describe in legal terms what is essentially a matter of judge-made policy: while adapting to changing circumstances, the national concern branch of p.o.g.g. must be “reconcilable with the fundamental distribution of legislative power under the Constitution.”¹³⁴

a. *National significance, not merely “local or private”*

In *Crown Zellerbach*, the Supreme Court noted that marine pollution (the result of dumping) flows easily across provincial and state boundaries.¹³⁵ This overflow effect convinced Le Dain J. that the matter was not merely local or private. On the arguments presented with respect to the generality of securities markets, it is clear that the results of irregularities in securities markets also flow across borders with ease.¹³⁶ Securities are often traded on several markets simultaneously. A scandal in the securities trade in any province might detrimentally affect investor confidence in Canadian markets generally. Securities markets are even less local than marine pollution in that their geographical locale is to a great extent notional. These markets are only fictionally “within the province” if they

133. *Crown Zellerbach*, *supra* note 10 at 437-38.

134. *Supra* note 10 at 432.

135. *Supra* note 10 at 436.

136. See discussion of provincial (in)capability above, Part III(2)(d).

are anywhere at all. In short, securities markets constitute a matter with the required national significance.¹³⁷

b. *Singleness, indivisibility, and distinctiveness*

While it is apparent that singleness, indivisibility, and distinctiveness are tools to limit the scope of the federal residual powers more than they are legal characterizations, the courts have not abandoned them for an explicit policy-based approach. It is appropriate, therefore, to consider these adjectives both as applying to the matter and as proxies for discussion of the appropriate balance to be struck between provincial and federal powers. Proponents of continued provincial regulation of securities might insist that the matter is divisible into primary and secondary markets. Yet we have already noted that the purposes of securities regulation are the capitalization of business and the protection of investors. With respect to these aims, the distinction between primary and secondary investors is insignificant. Moreover, a weakness in the secondary market for securities would certainly affect investor confidence in the primary market. From the consumer's point of view, it is all one market. And, while in other fields the consumer's perception might not be relevant, with respect to securities, consumer perception and investor confidence must stand at the core of the activity.

The distinctiveness test and its analogues are methods for courts to promote their understandings of the "fundamental distribution of legislative power."¹³⁸ As we have argued in Part II above, upholding federal securities regulation need not unbalance the federation. As we argued in Part I, regulation of securities is a distinct and special matter. Recognizing Parliament's ability to regulate securities would not cause a domino effect. Such recognition need not bring with it recognition of power over any other matter that has so far been recognized as a target of valid provincial regulation. Provinces cannot adequately regulate securities individually. Provincial regulation does not provide significant gains in the values of federalism such as diversity or local control. Finally, as argued in Parts II and III above, Parliament's jurisdiction in this matter is consistent with a reasonable view of the division of economic regulatory powers.

137. In comparing regulation of securities with aquatic pollution, we limit our concerns to the flow-over effects of a major problem. We do not address a possible race to the bottom in terms of lax regulation: that notion is highly questionable. See Guthrie, *supra* note 42; Romano, *supra* note 48.

138. *Crown Zellerbach*, *supra* note 10 at 432.

c. *Provincial inability*

The most cogent interpretation of the test for provincial inability in *Crown Zellerbach* is that suggested by Hogg: provinces are unable to regulate a matter if one province's non-cooperation would render the scheme ineffective.¹³⁹ It is clearly untenable that provincial inability arises only when all provinces acting in concert still could not regulate a matter—such a view is antithetical to the notion of a residual power. The arguments presented with respect to the test in *Crown Zellerbach* are relevant here: it is clear that if Ontario did not cooperate with other provinces, all provinces would be vulnerable to the effects of Canada's largest securities market.¹⁴⁰ Provincial inability is not a determinative component of the test in *Crown Zellerbach*, but rather an indicator of distinctiveness that, in turn, stands in for balancing the powers amongst the partners of the federation. The regulation of securities markets is a matter that meets the provincial inability requirement, but even if it did not, this would not be fatal to the use of the national concern branch of the p.o.g.g. power.

2. *Conclusion*

It is likely that federal securities legislation would pass even the "high threshold"¹⁴¹ set in *Crown Zellerbach* for finding jurisdiction under the national concern branch of p.o.g.g. The consequences of uneven regulation may easily flow across provincial boundaries. Securities markets evince the requisite singleness or indivisibility. Provinces would be unable to regulate securities effectively if a single key province did not cooperate in a common scheme. Most important, however, Parliament's power to regulate securities would be consistent with the economic understanding of the constitutional division of powers. Despite this, the mere use of the national concern branch of p.o.g.g. may be unbalancing in itself. Therefore, this residual power should only be used if the general trade and commerce power fails.

139. *Constitutional Law*, *supra* note 54 under heading 17.3(b).

140. See Part III(2)(d) above. Clearly, any elected government of Ontario probably has enough self interest that it would be unlikely to gut its securities regulation to an extent that other provinces would feel the effects. The test in *Crown Zellerbach*, however, asks about the possible effects of one province's non-cooperation. The test does not ask about the probability of such non-cooperation. After all, if society's controlling values were altered, it might be assumed that no province would be likely to permit aquatic pollution.

141. *Ontario Hydro*, *supra* note 11 at 352.

V. *Banking*

In 1978 Anisman and Hogg did not even discuss the banking power. Hogg, however, has since provided banking as an example of an area where the courts have applied progressive interpretation: the term is not limited to the extent and kind of business conducted by banks in 1867.¹⁴² Anisman and Hogg could not have known that, less than a decade after their paper, the *Bank Act* would be revised, effectively eliminating the divisions between the four pillars of financial regulation. Even more than some other terms, “banking” has no natural meaning; one legal dictionary definition begins, “The business of banking, as defined by law and custom. . . .”¹⁴³ In effect, banking is not even what bankers do—as a definition that would be circular enough—but rather what legislatures and courts say banks do.

The framers of the Constitution, in assigning banking to the federal government, did not contemplate the present situation. They supposed themselves to be assigning everything the banks did to Parliament; they did not imagine that banks would provide commercial and consumer loans, accept deposits and offer chequing accounts under federal legislation, and dominate the country’s securities dealing under provincial regulation. While discussion of the provincial power over securities often emphasizes the intraprovincial character of many of the transactions so regulated, the banking transactions contemplated in 1867 would have been, for the most part, intraprovincial too. In other words, it was not the relation of the transactions *vis-à-vis* provincial boundaries that prompted the assignment of subsection 91(15). In assigning banks to Parliament, the framers were presumably concerned that the Dominion’s financial markets, as they then conceived of them, be safely regulated by one level of government.

Were the Supreme Court starting over in interpreting the Constitution, it might interpret banking more broadly to reflect what banks currently do. Despite the banks’ wide-reaching activities, however, it is unlikely that subsection 91(15) would save a general federal act regulating Canada’s securities markets. Such a redefinition would be extreme, and could cause considerable anxiety as to what the Supreme Court would redefine next. In comparison with subsection 91(2) and the p.o.g.g. national concern power, such redefinition has fewer juristic restrictions on it and is less desirable from a perspective of balancing federal and provincial powers.

142. *Alberta (A.G.) v. Canada (A.G.)* (Alberta Bill of Rights), [1947] A.C. 503 at 553 (P.C.). Indeed, that “banking” has no substantive content has become a commonplace: Abel, *supra* note 59 at 506.

143. *Black’s Law Dictionary*, 6th ed., s.v. “banking.”

VI. *Criminal law*

Anisman and Hogg considered whether the criminal law power might sustain general securities legislation, and concluded that, at that time, it would not.¹⁴⁴ The most that they could contemplate in this area was that a federal securities act might reproduce the existing *Criminal Code* provisions associated with securities; the regulatory provisions would have to be justified some other way.¹⁴⁵

In subsequent years, the Supreme Court has interpreted the criminal law power liberally,¹⁴⁶ and has shown greater tolerance for regulatory criminal provisions. La Forest J. wrote, “As noted by Lamer C.J. in *R. v. Swain* . . . ‘it has long been recognised that there also exists a preventative branch of the criminal law power.’”¹⁴⁷ He also quoted Estey J. in *Labatt Breweries*, who, while “finding a detailed regulatory scheme with respect to production and content standards for malt liquor . . . [said] ‘That there is an area of legitimate regulations in respect of trade practices contrary to the interest of the community such as misleading, false or deceptive advertising and misbranding, is not under debate.’”¹⁴⁸ Such comments, each written more than a decade after Anisman and Hogg’s paper, suggest that the Court has moved closer to upholding, as criminal, provisions in respect of securities that did more than simply prohibit and penalize certain conduct. The whole apparatus of securities market regulation is surely “preventative” and aims to maintain structures and safeguards that prevent theft and fraud and other clearly criminal activities. The Court probably needs to interrogate further Estey J.’s “area of legitimate regulations”: the practices “contrary to the interest of the community” that he named are precisely some of the practices that provincial securities commissions currently address.

Major J. presented a more conservative view. He wrote that “lesser threats to society and its functioning do not fall within the criminal law, but are addressed through non-criminal regulation”¹⁴⁹ Although Major J. wrote in dissent, for himself and Sopinka J., such arguments

144. “Constitutional Aspects,” *supra* note 55 at 187. As authority, they cite *Smith*, in respect of a false prospectus.

145. “Constitutional Aspects,” *supra* note 55 at 189.

146. La Forest J. has declared that “[t]he criminal law power is plenary in nature and this Court has always defined its scope broadly”: *RJR*, *supra* note 12 at 240. He cited himself when again writing for the majority in *Hydro-Québec*, *supra* note 13 at 289.

147. *RJR*, *supra* note 12 at 255; see also *Hydro-Québec*, *supra* note 13 at 297-98. While this position is now the law, it emerged only over the dissent of Major and Sopinka JJ. in *RJR* and, even more narrowly, over the dissent of Lamer C.J., Iacobucci, Sopinka & Major JJ. in *Hydro-Québec*.

148. *RJR*, *supra* note 12.

149. *Supra* note 12 at 359.

might prevent subsection 91(27) from sheltering a broad statute regulating securities. Given the current composition of the Court, however, the criminal power might be held to include a detailed regulatory scheme if, in the words of La Forest J. with respect to environmental regulation, the law in question underlined our society's fundamental and emerging values.¹⁵⁰

VII. *Works and undertakings for the general advantage of Canada*

Despite its inclusion among the enumerated provincial heads of power, subsection 92(10) in fact derogates from the power in subsection 92(16) over matters that would otherwise be of a purely local nature. This subsection on works and undertakings might be used to support a federal securities regulatory regime if the other enumerated and residual powers failed. Subsection 92(10) should remain a last resort, however, because its applications would involve at least as many implausible legal fictions as the current recognition of provincial competence in respect of securities.

1. *Connected communications or transportation works and undertakings*

Subsection 92(10)(a) empowers the federal government to legislate in respect of transportation or communication works or undertakings that are interprovincial, not merely intraprovincial.¹⁵¹ If so inclined, a court could creatively characterize securities markets as interconnected networks that communicate offers to buy or sell, with parallel transportation networks for choses in action. Overall, such a characterization is unattractive to courts and proponents of federal regulation of securities alike. First, it would involve a high degree of legal fiction. Second, and more important, the use of subsection 92(10)(a) might allow indeterminate federal intrusion into provincial jurisdiction. If securities exchanges could be characterized as communications and transportation systems, it is possible that other matters might similarly fall to federal jurisdiction under such expanded definitions. It is precisely this possibility of opening flood-gates of intrusion that the courts have attempted to avoid.¹⁵²

150. *Hydro-Québec*, *supra* note 13 at 297.

151. *YMHA Jewish Community Centre of Winnipeg v. Brown*, [1989] 1 S.C.R. 1532 at 1552, 59 D.L.R. (4th) 694; *Canadian Pacific Railway Co. v. British Columbia (A.G.)*, [1950] A.C. 122 at 142 (P.C.) (*obiter*); *Re National Energy Board Act*, [1988] 2 F.C. 196 at 220, 48 D.L.R. (4th) 596 (C.A.); *Conklin & Garrett Ltd. v. Ontario (Director of Elevating Devices Branch of Ministry of Consumer and Commercial Relations)* (1989), 70 O.R. (2d) 713, 63 D.L.R. (4th) 545 (Div. Ct.), leave to appeal refused (1989), 70 O.R. (2d) 713 (note) (C.A.), leave to appeal refused (1990), 72 D.L.R. (4th) vii (S.C.C.).

152. See Parts III and IV above.

2. Works declared by Parliament to be for the general advantage of Canada

Subsection 92(10)(c) of the Constitution provides a support for federal regulation of the securities markets by permitting Parliament to declare a work “to be for the general advantage of Canada” and thus within its legislative jurisdiction. The effect of the declaration is the same as if that work were expressly enumerated in section 91.¹⁵³ While this provision is more restricted in that it applies only to works, these works are not limited to transportation and communication.¹⁵⁴ As La Forest J. has noted, “a wide variety of works—railways, bridges, telephone facilities, grain elevators, feed mills, atomic energy and munition factories—have been held to have been validly declared to be for the general advantage of Canada.”¹⁵⁵ The works apparently must be physical, although “the legislative jurisdiction conferred over a declared work refers to the work as a going concern or functioning unit, which involves control over its operation and management.”¹⁵⁶

In 1978, it was plausible for Anisman and Hogg to argue that the “trading floors and other physical facilities of securities markets could be designated works under subsection 92(10)(c).” The authors felt that, although the use of the declaratory power in this matter might be politically difficult, the courts would not bar its use.¹⁵⁷ That argument must be reconsidered in light of the closing of the trading floors and the ephemeral or non-physical nature of the securities market. It is unlikely that there is sufficient concentrated physical presence to the securities market to allow Parliament to invoke its declaratory power in subsection 92(10)(c).

3. Conclusion

Courts should be reticent to apply subsections 92(10)(a) or 92(10)(c) because to so find would remove a matter from provincial regulation in a way that might set an unbalancing precedent in the distribution of powers. Indeed, the courts are aware of this unbalancing potential. La Forest J. has written, “There is no doubt that the declaratory power is an unusual one that fits uncomfortably in an ideal conceptual view of

153. *Ontario Hydro*, *supra* note 11 at 362.

154. *Jorgenson v. Canada (A.G.)*, [1971] S.C.R. 725, 18 D.L.R. (3d) 297; *R. v. Chamney*, [1975] 2 S.C.R. 151, 40 D.L.R. (3d) 146; *Ontario Hydro*, *supra* note 11.

155. *Ontario Hydro*, *supra* note 11 at 370.

156. *Supra* note 11 at 367.

157. “Constitutional Aspects,” *supra* note 55 at 176.

federalism.”¹⁵⁸ If, however, a court held steadfastly that securities markets constituted a single industry, were local in nature, or were located physically within provinces (*contra* our arguments in respect of general trade and commerce and national concern), then proponents of a federal securities regime might be forced to employ subsection 92(10).

Conclusion

The division of powers in section 91 and section 92 requires that the courts referee the constant contest between Parliament and the provincial legislatures over the limits of their legislative competence.¹⁵⁹ Whenever a matter is not explicitly enumerated in these sections, the courts clearly do more than mechanically apply legal categories. A court is in a particularly difficult situation where a matter that at one time fell easily within provincial jurisdiction has outgrown its local nature or has become qualitatively more important to the country as a whole. In such situations, the courts cannot avoid making assessments based on their conceptions of the meaning and purpose of federalism. Recognizing that the understanding of federalism shifts over time, the courts have not articulated a general theory as to the logic behind the division of powers. Statements of federal principles, as in the *Secession Reference*, are too general to be tests for the characterization of ambiguous or evolving matters. The result has been that courts have engaged in case-by-case analysis. We suggest that changing assumptions about the proper balance of powers between the two levels of government affects where legislative competence is recognized. Instead of direct pragmatic or theoretical discussion of the proper distribution of powers, the Supreme Court has referred to the delicate balance of federalism without stating the criteria by which we could determine whether it remains balanced. The Supreme Court has devised and applied open-ended tests that allow it room to manoeuvre while maintaining the appearance of characterization by legal principles other than policy alone.

We have argued that the regulation of securities markets is a matter that has ceased to be “local” or “within the province” in any meaningful way. Furthermore, the *March 1999 Agreement* confirms that the lowest level at which markets organize themselves is national. The markets have changed, and it is necessary for regulatory regimes to change in order to be meaningful. We have demonstrated, further, that cooperation among provinces to regulate securities does not yield the benefits associated with federalism that could offset the accompanying loss of efficiency. If asked,

158. *Ontario Hydro*, *supra* note 11 at 370.

159. See generally Breton, *supra* note 42.

the courts should therefore uphold a securities act passed by Parliament. We have argued that they could do so without opening the floodgates to indeterminate or unacceptable intrusions into other provincial powers. The best option would be to use the federal power over general trade to this end. This is because, while the lines of reasoning associated with both trade and commerce and the p.o.g.g. national concern overlap, the former power retains the basic requirement that the matter be one of general, not particular, trade. The p.o.g.g. power has no similar limit. Federal securities regulation would easily possess the qualities required for matters of general trade and commerce as outlined in *City National Leasing* and would be the path of judicial restraint.

If, however, the federal power over general trade and commerce did not support a national securities regime, then the national concern branch of p.o.g.g. would likely suffice. We have argued that the provincial inability requirement is only one indicator of distinctness that, in turn, stands as a proxy for consideration of the federal balance of powers. Even if the courts strictly applied the test developed in *Crown Zellerbach*, the matter of securities regulation would likely satisfy the requirements for a national concern. On the unlikely chance that neither p.o.g.g. not trade and commerce sufficed to justify a national securities regime, its proponents could attempt to support federal legislation with the banking and criminal law heads of power. As a last resort, federal regulation of the securities markets might be upheld by a strained use of the declaratory power over works for the general advantage of Canada as provided for in subsection 92(10)(c) of the Constitution.

In its reasons in such a decision, a court could take pains to emphasize the special characteristics of securities, such as the matter's key importance in the economic structure of the nation and the high levels of regulation that we have chosen, through our elected representatives, to impose upon it.

We have shown that the federal regulation of securities markets would generate benefits, respect the values of federalism, and be constitutionally valid. Recognition of this regulatory power by Parliament would not precipitate unacceptable erosion of other provincial powers. On the contrary, there is ample room in the Constitution for provinces to cooperate in respect of inter-connected matters where such cooperation would promote the objectives of federalism. While the politics of federalism would require the federal government to negotiate its way carefully in asserting competence over securities, we submit that the constitutional path is now clear. We hope that our reasoning may assist in clear-headed and constructive negotiations towards establishing a national securities regime for Canada.

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