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"Please, Draw Me a Field of Jurisdiction": Regulating Securities, Securing Federalism

Jean Leclair[*]

> [L]ittle thought has been given to the possibility that the main problem in a federal state may no longer be so much how to divide powers over entire policy fields but how to allocate different tasks within one and same policy field.
>
> Thomas O. Hueglin[**]

I. INTRODUCTION

In Antoine de St-Exupéry's famous story *The Little Prince*,[1] an aviator makes a crash landing in the middle of the Sahara desert and there encounters the main character, a child originating from a distant planet. On first meeting the aviator, without a word of introduction, the Little Prince asks him bluntly to draw him a sheep. Somewhat disconcerted, the aviator acquiesces and tries his best to satisfy the child. He pens a very sketchy silhouette of what he hopes will pass for a sheep. But the Little Prince is not satisfied: "This one is already quite sick. Make another." The aviator tries again. Another failure. "[T]hat's not a sheep, it's a ram. It has horns," says his newfound friend. And again the aviator applies himself at drawing a suitable sheep. However, this time the sheep is said to be too old. His patience tried, the aviator finally draws a box and says to the Little Prince: "This is just the crate. The sheep you want is

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[*] Professor, Faculty of Law, Université de Montréal. I wish to thank François Chevrette, Fabien Gélinas, Sébastien Gignac, Noura Karazivan, Michel Morin, François Ramsay, François Roberge, Bruce Ryder, Stéphane Rousseau and Maxime Trottier for their very helpful comments. I remain, as always, *etc*., *etc*.

[**] "The Principle of Subsidiarity: Tradition — Practice — Relevance" in Ian Peach, ed., *Constructing Tomorrow's Federalism* (Winnipeg: University of Manitoba Press, 2007), at 202.

[1] Translated by Richard Howard (Orlando: Harcourt Inc., 2000). Original version: *Le Petit Prince*, collection folio junior (Gallimard, 1946).

inside." To his surprise, the child beams with joy and says: "That's just the kind I wanted."

Drawing with precision the breadth of a power over "general regulation of trade"[2] under section 91(2) of the *Constitution Act, 1867*[3] is a most daunting task. It is much easier simply to draw a conceptual box whose contours are so obscure and vague that one can find in it exactly what he wants when he wants it.

As I will try to demonstrate, notwithstanding that there are good reasons to argue that this power cannot serve as a basis for the recognition of a federal authority to regulate the securities market, I do believe that the Supreme Court of Canada will resort to it as a peg on which to hang the central government's securities hat.[4] The challenge the high court will then face will be in establishing limits to the reach of such a power. This article intends to focus on that particular problem.[5]

As we will see, the case law makes it quite difficult to calibrate the breadth of a power, once it has been recognized. This is especially so where the GRT power is invoked. The test designed to delimit this field of jurisdiction is so abstruse, more so in fact than tests delimiting the extent of other heads of power, that the door is open to results that have more to do with ideological convictions than with the empirical reality of the securities market in Canada.

If the federal structure of the Canadian state and, paradoxically, the *divided* nature of our *common* market, are to be taken seriously into account, the challenge then lies in allowing both the central government *and* the provinces a legitimate and guaranteed space in the regulation of

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[2] Hereinafter "GRT".

[3] (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No. 5.

[4] This paper will not examine whether the "national interest" doctrine founded on Parliament's residuary power could justify the recognition of a federal authority to regulate the securities market. Since the said doctrine confers an *exclusive* and *permanent* jurisdiction over both the interprovincial and the intraprovincial aspects of a particular matter (*Reference re Anti-inflation Act*, [1976] S.C.J. No. 12, [1976] 2 S.C.R. 373, at 444 and 461 (S.C.C.); *Johannesson v. West Saint-Paul (Rural Municipality)*, [1952] S.C.J. No. 3, [1952] 1 S.C.R. 292, at 311-12 (S.C.C.) [hereinafter "*Johannesson*"]; *R. v. Crown Zellerbach Canada Ltd.*, [1988] S.C.J. No. 23, [1988] 1 S.C.R. 401, at 433 (S.C.C.) [hereinafter "*Crown Zellerbach*"]), the federal government is most unlikely to invoke it. In fact, Peter W. Hogg, lead counsel for the central government in the intended reference to the Supreme Court on the proposed federal Securities Act, always refers to the GRT power as his prime weapon: see, for example, Kelly Harris, *Constitutional Heavyweights Spar Over Single National Securities Regulator*, November 16, 2009, online: <http://www.canadianlawyermag.com/Constitutional-law-heavyweights-spar-over-single-national-securities-regulator.html.>

[5] This paper was written before the release, on May 26, 2010, of the federal government's Proposed Canadian Securities Act, online <http://www.fin.gc.ca/drleg-apl/csa-lvm-eng.asp>. Be that as it may, reference is made to it when necessary.

securities. The recognition of a space for provinces entails the rejection of constitutional approaches that would make it possible for Parliament to claim a jurisdiction over the *entire* field of securities — either directly by way of an all-encompassing exclusive power over such a matter or indirectly by way of a limited exclusive power buttressed by an ancillary power allowing a federal encroachment over provincial spheres of jurisdiction. The only solution, one by the way that stands little chance of success, would be to confine federal jurisdiction over securities to matters that provinces have proved unable to address, that is, matters having a strictly interprovincial or international character.

After underlining the fragile empirical basis of many arguments in favour of a unified federal securities regime (II), I intend to describe how the division of powers has been judicially apprehended in recent years, particularly in commercial and economic matters (III). I will then discuss how our current understanding of such division of powers constitutes a next to insurmountable obstacle to the preservation of an unassailable provincial sphere of intervention over securities if, indeed, the Supreme Court invokes the GRT power as the basis of a valid federal intervention in that field (IV). Finally, I will examine how a true federal spirit might inspire a less Manichean approach to the regulation of securities (V).[6]

II. THE QUESTIONABLE EMPIRICAL BASIS JUSTIFYING THE ENTHUSIASTIC EMBRACE OF A FEDERAL MONOPOLY OVER SECURITIES REGULATION

I am not a specialist in matters of securities regulation. Be that as it may, many informed actors in that field do question the empirical validity of a great number of factual statements forming the basis of arguments levelled against the present provincial securities regulatory system.

Although some do recognize advantages to provincial regulation, most critics of the present system[7] essentially emphasize the following

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[6] On the notion of "federal spirit", see Jean Leclair, "Forging a True Federal Spirit — Refuting the Myth of Quebec's 'Radical Difference'" in André Pratte, ed., *Reconquering Canada: Quebec Federalists Speak Up for Change* (Toronto: Douglas & MacIntyre, 2008), at 29-74, online: <http://hdl.handle.net/1866/2927>.

[7] *It's Time*, the Wise Persons' Committee to Review the Structure of Securities Regulation in Canada (December 2003), online: <http://www.wise-averties.ca/reports/WPC%20Final.pdf> [hereinafter "The Wise Persons"]; Crawford Panel on a Single Canadian Securities Regulator, *Blueprint for a Canadian Securities Commission*, Final paper (June 2006), online: <http://www.crawfordpanel.ca/Crawford_Panel_final_paper.pdf> [hereinafter "Crawford Panel on a Single Canadian

three lacunae.[8] First, the present structure of regulation based on the "passport system" is said to be too fragmented, requiring decisions to be coordinated across up to 13 jurisdictions, thus making it difficult for provincial securities regulators to react quickly and decisively to capital market events. Second, this system is claimed to be incongruent with the national response required to address developments in capital markets that are increasingly national and international in scope. In other words, it is unable to manage systemic risk. In fact, some critics seem to argue for a federal jurisdiction not only over securities but also over all financial sector regulators in Canada so as to manage risk in a proactive, collaborative and effective manner.[9] Third, it is claimed that, by misallocating resources — these having to be allocated to 13 separate securities regulators — the provincial passport system causes securities regulation to be less efficient and also too costly since redundancy engenders duplication which itself results in unnecessary costs, overstaffing and delays. Last, some critics appear to be partially fuelled by a possible "race to the bottom" between provincial jurisdictions.[10]

In a series of very exhaustive studies, authors such as Cédric Sabbah, Jean-Marc Suret and Cécile Carpentier, the last two working under the aegis of the *Centre interuniversitaire de recherche en analyse des organisations* ("CIRANO"), radically questioned the empirical foundations of the above mentioned criticisms.[11] In case anyone should think that

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Securities Regulator"]; Crawford Panel on a Single Canadian Securities Regulator, *One Year On: Seeing the Way Forward* (June 2007), online: <http://www.crawfordpanel.ca/OneYearOn.pdf>; Expert Panel on Securities Regulation, *Creating an Advantage in Global Capital Markets — Final Report and Recommendations* [hereinafter "Hockin Report"], January 2009, online: <http://www.expertpanel.ca/eng/reports/index.html>.

[8] Hockin Report, *id.*, at 40.

[9] *Id.*, at 40 and 49. See also David Laidler, *Grasping the Nettles — Clearing the Path to Financial Services Reform in Canada*, C.D. Howe Institute, Commentary, no 238, 2006, online: <http://www.cdhowe.org/pdf/commentary_238.pdf>.

[10] The Wise Persons, *supra*, note 7, at 49.

[11] Jean-Marc Suret & Cécile Carpentier, *Canadian Securities Regulation: Issues and Challenges*, Burgundy Report, Commission des valeurs mobilières du Québec, 2003RB-06, 2003, online: <http://www.cirano.qc.ca/pdf/publication/2003RB-06.pdf> [hereinafter "Suret & Carpentier, *Canadian Securities Regulation: Issues and Challenges*"]; Jean-Marc Suret & Cécile Carpentier, *Securities Regulation in Canada*, Commission des valeurs mobilières du Québec, 2003RP-12, 2003, online: <http://www.cirano.qc.ca/pdf/publication/2003RP-12.pdf> [hereinafter "Suret & Carpentier, *Securities Regulation in Canada*"]; Cédric Sabbah, *Fédéralisme, concurrence intergouvernementale et intérêt national dans le domaine des valeurs mobilières au Canada*, Faculty of Law, University of Montreal, LL.M. Thesis, 2006, online: <https://papyrus.bib.umontreal.ca/jspui/bitstream/1866/2383/1/11741805.pdf> [hereinafter "Sabbah"]; and Cécile Carpentier & Jean-Marc Suret, *Proposal for a Single Securities Commission: Comments and Discussion*, 2009RP-05, September 2009, online: <http://www.cirano.qc.ca/pdf/publication/2009RP-05.pdf> [hereinafter "Carpentier & Suret, *Proposal for a Single Securities Commission*"]. As for the *Autorité des marchés financiers du Québec*,

these authors' studies are based on a purely "quebecocentrist" perspective, their work, it must be emphasized, is based upon an "interjurisdictional competition" theoretical perspective that has generated a vast literature in the field of economy.[12]

In a preamble to one of their studies, Suret and Carpentier went so far as to assert that

> Canadian economic and regulatory policy decisions have more often than not been guided by myths put forward by pressure groups rather than by actual knowledge resulting from rigorous, independent research. It is disturbing to realize that some are considering reforming a system which has not been analyzed carefully, on the basis of assertions made primarily by pressure groups.[13]

Recognizing that ameliorations are certainly possible and that mutual recognition could not see the light of day without a willingness to harmonize rules, these authors demonstrate, with convincing data, that no empirical evidence exists proving that the current regulatory structure disadvantages Canadian issuers[14] or that it constitutes an obstacle to the development of solutions tailored to the financing of growth companies.[15] As to costs, the authors underline that

> [f]our studies show that the cost of initial offerings is significantly lower in Canada than in the United States, which does not have multiple securities commissions. The process for an initial offering is not only less costly in Canada, it is also more rapid. It is thus difficult to argue that the existence of several securities authorities in Canada heavily penalizes the competitiveness of the primary securities market,

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its opinion is detailed in an eloquently entitled document: *Single Regulator: A Needless Proposal*, Brief Submitted to the Expert Panel on Securities Regulation, July 2008, online: <http://www.lautorite.qc.ca/publication/intervenants-secteur-financier.en.html>.

[12] To name but a few authors referred to in the above mentioned studies: Albert Breton, *Competitive Governments — An Economic Theory of Politics and Public Finance* (Cambridge: Cambridge University Press, 1996); Daphne A. Kenyon, "Theories of Interjuridictional Competition" (1997) New England Economic Rev. 13-35; Wallace E. Oates, "Environmental Policy in the European Community: Harmonization or National Standards?" (1998) 25 Empirica 1-13 ; Charles M. Tiebout, "A Pure Theory of Local Expenditure" (1956) 64 J. of Pol. Ec. 416 and Richard H.K. Vietor, *Contrived Competition: Regulation and Deregulation in America* (Cambridge: Harvard University Press, 1994).

[13] Suret & Carpentier, *Canadian Securities Regulation: Issues and Challenges*, *supra*, note 11, at 5.

[14] *Id.*, at 27.

[15] Carpentier & Suret, *Proposal for a Single Securities Commission*, *supra*, note 11, at 49.

> especially since in both countries brokerage commissions constitute the greater share of total direct costs.[16]

Furthermore, since centralization is always presented as a panacea, especially as it could curb the "race to the bottom" between provinces that regulatory competition is said to generate, Suret and Carpentier demonstrate that in fact "a race to the top and not to the bottom exists in the securities field where, traditionally, the most exacting jurisdictions have attracted a greater number of issuers and investors".[17]

Insistence on centralization as the only solution to the problems facing the present regulatory system also presumes that harmonization and uniformity are always the best paths toward efficiency. First, this posture minimizes the harmonization efforts already deployed by the Canadian Securities Administrators since 1997.[18] Second and most importantly, it seems far from evident that perfect harmonization or uniformity may even be the most desirable paths toward efficiency. Suret and Carpentier underline, more so than any of the proponents of centralization, the heterogeneous nature of the Canadian securities market, one characterized by diversity in terms of types of companies and provincial initiatives,[19] so much so that, according to these authors, it would be preferable to refer to "a group of markets rather than [to] a single market".[20] Third, to say the least, empirical evidence concerning the success of the United

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[16] Suret and Carpentier, *Canadian Securities Regulation: Issues and Challenges*, *supra*, note 11, at 12.

[17] *Id.*, at 17. Kathryn Harrison, "Are Canadian Provinces Engaged in a Race to the Bottom? Evidence and Implications" in Kathryn Harrison, ed., *Racing to the Bottom? Provincial Interdependence in the Canadian Federation* (Vancouver: UBC Press, 2006), 257) examined empirical evidence of interprovincial competition, and came to the conclusion that "provinces within the Canadian federation are not completely at the mercy of destructive provincial competition" (at 257) and that "competition for investment and to avoid benefit claimants has not decimated the provinces' capacity to govern" (at 269). The author stressed, however, that "it is premature to lay to rest the prospect of races to the bottom in the Canadian federation" (at 269).

[18] Securities regulators exist in each of the 10 provinces and three territories in Canada. All these associated themselves to form the Canadian Securities Administrators. The latter has the mandate of protecting Canadian investors and the general public.

[19] Suret & Carpentier, *Securities Regulation in Canada*, *supra*, note 11, at 68:

> Diversity of the Canadian securities market is revealed by the characteristics of companies on one hand and provincial initiatives on the other. Small western businesses have little in common with those at the heart of the Ontario economy, which are also different from medium-sized businesses central to the Quebec economy. Moreover, independence with respect to securities has been used by various provinces to initiate programs meeting the needs of their respective customers — companies and investors.

[20] Suret and Carpentier, *Canadian Securities Regulation: Issues and Challenges*, *supra*, note 11, at 15 and 17-18; and Suret & Carpentier, *Securities Regulation in Canada*, *supra*, note 11, at 68-73.

States'[21] or Australia's[22] system, does not convincingly establish the superiority of national securities commissions.

I might add that the *Organisation for Economic Co-Operation and Development* ("OECD") has ranked Canada's securities regulatory system as the second best in the developed world, just after New Zealand, and ahead of the United States' and the United Kingdom's centralized systems.[23]

Having thus shaken the empirical foundations of many arguments in favour of centralization, the abovementioned authors engage in a critical analysis of the strengths of the present system. For instance, the latter allows for multiple experimentations whereas a national system is structurally limited to one experience at a time.[24] This diversity of experimentation limits the costs of failure to one single jurisdiction and not to the whole country.[25] A decentralized system is more responsive

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[21] In the conclusion of one of their studies, Suret & Carpentier, *Proposal for a Single Securities Commission*, *supra*, note 11, at 49 state that, in Canada,

> [t]he direct costs of offerings are lower than those in the United States for offerings of the same size, time frames are shorter than those in the United States and, in particular, the cost of financing for small issuers, measured by the returns earned by investors, is favourable to issuers. These market characteristics provide issuers with a considerably higher life expectancy at the time of an offering than that observed for offerings by more mature companies in other countries, including the United States. Improvements are certainly possible, but it is difficult to argue that the existing regulatory structure has been an obstacle to the development of solutions tailored to the financing of growth companies. The experts mandated by the Panel [Crawford Panel on a Single Canadian Securities Regulator, *supra*, note 7] emphasized the importance of taking steps to reduce the cost of corporate financing. We have shown that, in general, this cost is identical to that in the United States. For issuers, it seems abnormally favourable, especially in the case of growth companies.

See also Sabbah, *supra*, note 11, at 49-50.

[22] Suret & Carpentier, *Securities Regulation in Canada*, *supra*, note 11, at 6, 14, 37 and 53; Carpentier & Suret, *Proposal for a Single Securities Commission*, *supra*, note 11, at 13 and 47; and Sabbah, *supra*, note 11, at 9-10, 18-20 and 50.

[23] *Economic Policy Reforms Going for Growth, 2006*, Organisation for Economic Co-Operation and Development, 2006, at 126. The document mentions (*id.*, at 127) that this ranking was based on the following detailed empirical study: Alain De Serres, *et al.*, "Regulation of Financial Systems and Economic Growth" (August 2006). OECD Working Paper No. 506. Available online: <http://ssrn.com/abstract=965693>. However, in a more recent document (Economic Survey of Canada, 2008, *Policy Brief*, OECD, June 2008 at 4 — <http://www.oecd.org/dataoecd/20/27/40811541.pdf> it is stated that "[t]he current diversity of regulations [in Canada] — for example, each province has its own securities regulator — makes it difficult to maximise efficiency, and increases the risk that firms will choose to issue securities in other countries. *A single regulator would eliminate the inefficiencies created by the limited enforcement authority of individual provincial agencies*." (emphasis in original) Then again, it must be underlined that, contrary to the conclusions of the 2006 document that were based on extensive empirical data, not a shred of evidence is provided to buttress this claim.

[24] Sabbah, *supra*, note 11, at 41 and 45.

[25] *Id.*, at 41.

than a national one to problems that only affect subgroups of the national industry.[26] A national system might not be as sensitive as a decentralized one to local sensibilities.[27] Furthermore, since an important objective of securities regulation is investor protection, and since it must be acknowledged that investors are always situated "somewhere" in one province or another, hence, it must be admitted that investigations and enforcement of breaches to securities regulation always involve a local dimension. It can therefore be argued that investor protection through enforcement can be better served by provincial regulators who act in an institutional and cultural environment they are more familiar with.[28] And even though some proposals advocate a federal "model includ[ing] a local presence through regional and district offices",[29] the very structure of a national system requires that compromises be devised, compromises that are bound to ignore the more local voices.[30]

Finally, a national securities commission might fall prey to "regulatory capture", that is, a situation where a regulatory agency, instead of acting in the public interest, acts in favour of the dominant commercial interests in the very industry it is called upon to regulate.[31] Centralizing the regulation of securities markets removes an effective check on this risk, this check being regulatory competition.[32] The risk of "regulatory capture" cannot be dismissed lightly given the high concentration of the financial industry in Canada, with the large banks controlling the major investment dealers firms.[33] Indeed, capture of the regulatory process is more probable where concentration is high.[34] Provincial regulatory agencies are not immune to such capture, but monopolizing the attention of each and every one of the 13 provincial and territorial securities commissions is less likely to happen.[35]

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[26] *Id*., at 46.

[27] *Id*., at 47-48.

[28] The previous two sentences were penned by my colleague Stéphane Rousseau. Professor Rousseau is a securities law specialist. Not being able to call mine the modifications he so generously proposed after reading my manuscript, I therefore decided to insert them in my paper with a clear identification of their origin.

[29] The Wise Persons, *supra*, note 7, at 68 and Hockin Report, *supra*, note 7, at 47.

[30] Sabbah, *supra*, note 11, at 47-48.

[31] Jean-Marc Suret & Cécile Carpentier, "The Canadian and American Financial Systems: Competition and Regulation" (2003) 29 Canadian Public Policy 431.

[32] This sentence and the following two sentences were penned by my colleague Stéphane Rousseau.

[33] For a similar preoccupation, see Jean-Marc Suret *and* Cécile Carpentier, *supra*, note 11.

[34] Gary Becker, "A Theory of Competition among Pressure Groups for Political Influence" (1983) 98 Quart. J. Econ. 371.

[35] Sabbah, *supra*, note 11, at 49.

A look at the evolution of securities legislation in Canada since the beginning of the 20th century also shows the deep involvement of provinces in securities regulation. More particularly, such evolution demonstrates that provinces have experimented with different regulatory approaches.[36] In 1912, Manitoba enacted the first Blue Sky law, inspired by the regulatory approach put forth by Kansas in the United States.[37] Pursuant to the Blue Sky model, in order to protect investors, the governmental authority had control over share issues. While a number of provinces followed Manitoba,[38] other provinces experimented with other techniques. Ontario, for instance, followed another path with the *Security Frauds Prevention Act*,[39] which established a registration regime backed by sanction provisions for fraud. Quebec preferred to rely on a disclosure model and only later integrated anti-fraud provisions.[40]

After the market crash of 1929, the United States undertook a fundamental reform of its regulatory regimes. Following an in-depth study of the securities market, Congress enacted the *Securities Act of 1933* and the *Securities and Exchange Act of 1934*.[41] The thrust of the reform was to move away from the paternalistic Blue-Sky laws to a disclosure-based model. The United States reforms prompted Canadian provinces to explore new avenues to regulate the securities markets. Ontario took the lead in following the United States model. Later, in the 1960s, with the publication of the *Kimber Report*,[42] Ontario set the foundations of "modern" securities legislation with a model that was widely followed across provinces afterwards.

In the 1970s, acting within the Canadian Securities Administrators, provincial securities commissions increasingly focused on harmonization. The strong push toward harmonization eventually led to the Passport initiative. Despite the fact that securities regulation is nowadays

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[36] See generally J. Peter Williamson, *Securities Legislation in Canada* (Toronto: University of Toronto Press, 1960).

[37] *Sale of Shares Act*, S.M. 1912, c. 75. See Paul G. Mahoney, "The Origins of the Blue Sky Laws: A Test of Competing Hypotheses" (2003) 46 J. Law & Econ. 229.

[38] Christopher Armstrong, *Blue Skies and Boiler Rooms: Buying and Selling Securities in Canada, 1870-1940* (Toronto: University of Toronto Press, 1997), at 66-72. See also Tara Gray & Andrew Kitching, *Reforming Canadian Securities Regulation*, Parliamentary Information and Research Service, PRB 05-28E, 2005, at 2, online: <http://www2.parl.gc.ca/Content/LOP/ResearchPublications/prb0528-e.pdf>.

[39] S.O. 1928, c. 34.

[40] This paragraph and the following three paragraphs were penned by Stéphane Rousseau.

[41] Louis Loss & Joel Seligman, *Fundamentals of Securities Regulation*, 5th ed. (Aspen Publishers, 2004), at 1.

[42] *Report of the Attorney General's Committee on Securities Legislation in Ontario* (Toronto: Queen's Printer, 1965).

highly harmonized at the pan-Canadian level, particularities remain in provincial statutes, some of which are the product of innovations stemming from local initiatives. While these particularities can be seen as technical, they reflect the contributions that Alberta, British Columbia and Quebec have made over decades of regulation and that are now encapsulated in the harmonized framework. For instance, Quebec acted as a leader with respect to the regulation of various dimensions of financial intermediaries, such as ownership, capital structure and activities. Indeed, Quebec was at the forefront of the decompartmentalization of financial institutions in the 1980s.[43] This prompted the enactment of an original regulatory framework in Quebec concerning financial intermediaries.[44]

A contemporary example of the role of diversity in securities regulation is found in the "Canadian response" to the *Sarbanes-Oxley Act*.[45, 46] Adopted in 2002 in the wake of the wave of corporate scandals that hit the United States, SOX introduced stringent requirements to restore investor confidence. Despite its sound objective, SOX was criticized for imposing undue costs on issuers. In Canada, the Canadian Securities Administrators debated whether or not to implement SOX-like reforms north of the border. The debates centred on whether SOX should be "cut and pasted" in Canada or whether it should be adapted to the Canadian context. Ultimately, adaptation was favoured. The Canadian Securities Administrators adopted regulation that imposed additional corporate governance requirements tailored to the particularities of Canadian issuers.

From the foregoing, it follows that provinces are certainly not incapable of regulating securities. Nevertheless, proponents of decentralization do recognize a legitimate role for Parliament in the field of securities regulation. Cédric Sabbah,[47] for instance, argues for recognition of federal power only where provinces are constitutionally unable to intervene or where a truly national public interest is at stake. In other words, recognition of federal authority would hinge upon proof being made that federal

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[43] On the transformation of financial institutions, see Christopher C. Nicholls, *Financial Institutions — The Regulatory Framework* (Markham, ON: LexisNexis Canada, 2008).

[44] See *Act respecting the distribution of financial products and services*, R.S.Q., c. D-9.2 adopted in 1998.

[45] *An Act to protect investors by improving the accuracy and reliability of corporate disclosures made pursuant to the securities laws, and for other purposes* [hereinafter "SOX"].

[46] See Christopher C. Nicholls, "The Characteristics of Canada's Capital Markets and the Illustrative Case of Canada's Legislative Regulatory Response to *Sarbanes-Oxley*" in Task Force to Modernize Securities Legislation in Canada, *Canada Steps Up*, vol. 4 — *Maintaining a Competitive Capital Market in Canada* (Toronto, 2006), at 127.

[47] Sabbah, *supra*, note 11, at 108-16 and 153-56.

intervention constitutes a plus-value and not simply a means of providing uniformity of regulation just for the sake of uniformity.

According to that logic, Sabbah argues for a *complementary* federal-provincial regulation model. Provinces would remain competent as regards the protection of investors and public protection, while Parliament would be endowed with the power to regulate matters having cross-border, *i.e.*, extraprovincial aspects. That category would comprise matters such as the regulation of stock exchanges, hub of all sorts of interprovincial and international transactions. Representation of Canada in international forums and authority to negotiate international agreements would also fall in the federal lap. Finally, Sabbah argues for a federal power to establish minimal standards that provinces would have to integrate to their own sets of rules so as to prevent the dreaded "race to the bottom" and also, more importantly, because Ottawa is the only level of government that can legitimately claim a right to determine where the *national* public interest lies — the public interest being the guiding principle of all 13 securities regulators.[48]

Sabbah insists that to capitalize on the advantages of both provincial securities specialization and interprovincial competition, a market participant should be allowed to choose a primary jurisdiction of his or her choice.[49] But for this choice to be abided by, the participant's province of

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[48] *Id.*, at 23-28, 108 and 119.

[49] *Id.*, at 89-90, 96-108 and 137-39. Presently, s. 1.1 of the *Provincial/Territorial Memorandum of Understanding Regarding Securities Regulation*, online: <http://www.securitiescanada.org/2004_0930_mou_english.pdf> defines the "primary jurisdiction" as the province or territory to which a market participant is considered to be most closely connected for the purposes of the measures contemplated in the Memorandum. In most circumstances this will correspond

i) for an individual registrant, the jurisdiction in which the individual's normal working office is located;

ii) for a registrant that is not an individual, the jurisdiction in which the registrant's head office is located;

iii) for an issuer, the jurisdiction in which the issuer's head office is located.

Section 5.1 of the *Memorandum* specifies that the

> passport system for securities regulation will provide a single window of access to market participants. This could be done through mutual recognition, legal delegation, or a combination of these approaches, as one approach may work best in certain areas of regulation but be less than optimal in other areas.
>
> Under mutual recognition, participating jurisdictions would recognize that a market participant who complies with, files documents under and/or receives approvals respecting market access requirements of the primary jurisdiction, is deemed to be in compliance with or exempt from the market access compliance, document filing and/or approval requirements of its host jurisdiction(s).
>
> Under legal delegation, participating jurisdictions would delegate powers to make decisions to the primary jurisdiction.

origin would then have to ensure that the selected regulatory regime be applicable within the limits of its own territory. Although, in my view, the constitutional validity of such a "referential legislation" scheme is not to be doubted, I believe that resort may be had to a complementary federal legislation ensuring the extraprovincial application of provincial regulation. If the central government is competent over the interprovincial aspects of securities and over extraterritorial issues,[50] it can most certainly incorporate by reference legal rules it might have adopted itself. Finally, it is trite law that federal legislation can apply only in one or in some provinces.[51]

Whether or not Sabbah's proposition should be followed to the letter is a question that falls to be answered by securities experts. However it does illustrate that, if serious consideration is given to the empirical reality of the securities environment in Canada, an unavoidable conclusion imposes itself: it is far from self-evident that federal uniformity and exclusivity of regulation would necessarily lead to greater efficiency. Therefore, when in doubt, and especially so in a federal state, the prudent approach, it seems to me, would be for courts to recoil from any federal demand for exclusive control of the securities markets.

Be that as it may, as I will now try to demonstrate, the dice appear loaded against any attempt at limiting federal jurisdiction over both the intra-and extraprovincial aspects of securities regulation. To recognize a federal power of such extent, the Supreme Court need not think out of the box. To paraphrase the aviator in Saint-Exupéry's tale, "GRT is a crate. The power Ottawa wants is inside."

After briefly describing how the division of powers has been judicially apprehended in recent years, particularly in commercial and economic matters (III), I will try to describe how difficult a task it will be for provinces to convince the Supreme Court of the necessity of preserving an unassailable provincial sphere of intervention over securities if, indeed, the latter tribunal invokes the GRT power as the basis of a valid federal intervention in that field (IV).

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[50] *Hunt v. T&N plc*, [1993] S.C.J. No. 125, [1993] 4 S.C.R. 289 (S.C.C.) [hereinafter "*Hunt*"] and *Reference re Upper Churchill Water Rights Reversion Act*, *1980 (Newfoundland)*, [1984] S.C.J. No. 16, [1984] 1 S.C.R. 297 (S.C.C.) [hereinafter "*Reference re Upper Churchill*"].

[51] *Canadian Egg Marketing Agency v. Richardson*, [1998] S.C.J. No. 78, [1998] 3 S.C.R. 157, at para. 61 (S.C.C.).

III. THE "GENERAL REGULATION OF TRADE POWER": SETTING THE TABLE FOR FEDERAL SECURITIES LEGISLATION

Since the 1960s, the federal government — liberal or conservative — has always nurtured a desire to invest the field of securities regulation. The Harper government, although apparently ready to disengage Ottawa from the Canadian social union, shows an uncanny earnestness in promoting a strong economic union. Although the wish to ingratiate itself with Ontario voters is most certainly part of the equation, I surmise that the present government's intent, as it was of those who preceded it, is to further enhance the power and legitimacy of the central government to regulate the economy in general.

Parliament's enumerated powers are, for the most part, "electorally unattractive". Interprovincial transportation, communications and national defence might have had some appeal in 1867, but with the advent of the welfare state, health, social welfare and education have become the politicians' preferred fields of battle. The sorrowful nature — if I may be allowed this expression — of the central government's enumerated heads of power explains the enthusiastic recourse to the spending power witnessed during the 1960s through the 1980s and beyond. However, in view of the spending power's dubious constitutionality in the eyes of many, the central government has tried, quite legitimately, to find ways of expanding its existing legislative powers.[52]

After enjoying some success with its residuary power, both in its "emergency"[53] and "national interest"[54] dimensions, the federal government was faced with the Supreme Court's dwindling enthusiasm towards this potentially federation-destroying power.[55] Nevertheless, as it was closing the door on the national interest doctrine, the Supreme Court was at the same time opening wide the window of the criminal law power. "The purpose of the criminal law [it was said] is to underline and protect our fundamental values."[56] Thus inflated, the criminal law power allowed

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[52] For a thorough study of this question, see Jean Leclair, "The Supreme Court's Understanding of Federalism: Efficiency at the Expense of Diversity" (2003) 28 Queen's L.J. 411, online: <http://hdl.handle.net/1866/1431> [hereinafter "Leclair, 'The Supreme Court's Understanding'"].

[53] *Reference re Anti-Inflation Act*, *supra*, note 4.

[54] *Crown Zellerbach*, *supra*, note 4.

[55] See La Forest J.'s comment in *R. v. Hydro-Québec*, [1997] S.C.J. No. 76, [1997] 3 S.C.R. 213, at para. 116 (S.C.C.) [hereinafter "*Hydro-Québec*"]. See Jean Leclair, "The Elusive Quest for the Quintessential 'National Interest'" (2005) 38 U.B.C. L. Rev. 355.

[56] *Hydro-Québec*, *id.*, at paras. 127 and 154. See Jean Leclair, "The Supreme Court, the Environment, and the Construction of National Identity" (1998) 4 Revue d'études constitutionnelles/ Review of Constitutional Studies 372.

for interventions in the fields of health protection[57] and environment protection.[58]

Although open, the door was not unhinged. Indeed, the "dangerous character" of an activity, a person or an object, operates as an intrinsic limit to the criminal law power. Absent such danger, the application of the criminal law power cannot be triggered. Justice La Forest, in *Hydro-Québec*, took time to point out that, contrary to the national interest doctrine, the criminal law power did not assign "full power to regulate an area to Parliament. … Rather it seeks by discrete prohibitions to prevent evils falling within a broad purpose, such as, for example, the protection of health."[59] Furthermore, unlike the national interest doctrine,[60] the criminal law power does not confer on Parliament an *exclusive* and *permanent* jurisdiction over both the interprovincial and the intraprovincial aspects of a particular matter. Therefore, a widened criminal law power does not prevent the working of the double aspect doctrine.[61]

The residuary power and the criminal law power, however broadly they have been interpreted, cannot be successfully mobilized to allow for Parliament to regulate the economy. Another field of jurisdiction must be sought.

Of the many federal enumerated powers endowing Parliament with authority to regulate the economy,[62] the most encompassing is the federal trade and commerce power (section 91(2) of the *Constitution Act, 1867*). Prior to 1989, this field of jurisdiction had been interpreted as conferring on Parliament the exclusive power to regulate interprovincial and international commerce and to regulate intraprovincial transactions only to the extent that it was necessarily incidental to the effective regulation of interprovincial and international trade.[63] Although this incidental power did exist, it has not been invoked frequently by the Courts to justify fed-

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[57] *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] S.C.J. No. 68, [1995] 3 S.C.R. 199, at para. 69 (S.C.C.) [hereinafter "*RJR-MacDonald*"]: "Health underlies many of our most cherished rights and values, and the protection of public health is one of the fundamental responsibilities of Parliament."

[58] *Hydro-Québec*, *supra*, note 55. See Jean Leclair, "Aperçu des virtualités de la compétence fédérale en matière de droit criminel dans le contexte de la protection de l'environnement" (1996) 27 Revue générale de droit 137.

[59] *Id.*, at para. 128.

[60] *Reference re Anti-Inflation Act*, *supra*, note 4, at 444 and 461; *Johannesson*, *supra*, note 4 at 311-12; *Crown Zellerbach*, *supra*, note 4, at 433.

[61] *Hydro-Québec*, *supra*, note 55, at para. 131.

[62] For a description of the Supreme Court's liberal interpretation of Parliament's powers over the economy, see Leclair, "The Supreme Court's Understanding", *supra*, note 52, at 421-30.

[63] *Caloil Inc. v. Canada (Attorney General)*, [1970] S.C.J. No. 91, [1971] S.C.R. 543 (S.C.C.) and *R. v. Klassen*, [1959] M.J. No. 63, 20 D.L.R. (2d) 406 (Man. C.A.).

eral encroachments on the provinces' jurisdiction over intraprovincial commerce.[64]

All this changed in 1989 with the *General Motors of Canada Ltd. v. City National Leasing Ltd.* decision.[65] In that case, building upon an earlier judicial gloss[66] on a very laconic statement made by the Privy Council more than 100 years before,[67] a unanimous Court recognized Parliament's power over the regulation of "general trade and commerce affecting Canada as a whole".[68] This new power enabled Parliament, under certain conditions, to adopt legislation "concerned with trade as a whole rather than with a particular industry".[69] What it conferred on the central government was jurisdiction over both the interprovincial and the intraprovincial aspects of trade.[70] Thus, in *City National Leasing*, a federal law regulating competition was held to be *intra vires* even though it encroached upon the provinces' jurisdiction over intraprovincial competition.

However, just like the criminal law power, the GRT power does not impair the workings of the double aspect doctrine: GRT constitutes the exclusive power; the matter that falls under that head does not.[71]

The five criteria devised by Dickson C.J.C. in *City National Leasing* to determine whether a matter falls under GRT were summed up as follows in *Kirkbi AG v. Ritvik Holdings Inc.*:

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[64] This led Dickson J., as he then was, to note that, even though there is always a " … possibility for a [provincial] scheme to affect incidentally inter-provincial trade, so long as the scheme is not in pith and substance in relation to interprovincial trade. This last proposition, while obvious in other areas of constitutional law, was remarkably absent in the cases respecting trade and commerce decided in the first half of this century.": *Canadian Industrial Gas & Oil Ltd. v. Saskatchewan*, [1977] S.C.J. No. 124, [1978] 2 S.C.R. 545, at 603 (S.C.C.) (Dickson J. was writing in dissent but not on this particular point).

[65] [1989] S.C.J. No. 28, [1989] 1 S.C.R. 641 (S.C.C.) [hereinafter "*City National Leasing*"].

[66] Cheif Justice Laskin's *obiter* in *MacDonald v. Vapor Canada Ltd.*, [1976] S.C.J. No. 60, [1977] 2 S.C.R. 134, at 156-65 (S.C.C.) and the dissenting opinion of Dickson J. in *Canada (Attorney General) v. Canadian National Transportation, Ltd*., [1983] S.C.J. No. 73, [1983] 2 S.C.R. 206, at 267-68 (S.C.C.) [hereinafter "*Canadian National Transportation*"].

[67] In *Citizen's Insurance Co. of Canada v. Parsons* (1881), 7 App. Cas. 96, 113 (P.C.) [hereinafter "*Parsons*"], Sir Montague Smith recognized that s. 91(2) conferred on Parliament a power over interprovincial and international trade regulation, but also over the "general regulation of trade affecting the whole dominion".

[68] *City National Leasing*, *supra*, note 65, at 657.

[69] *Id.*, at 661.

[70] *Id.*, at 680-81.

[71] *Id.*, at 682: " … competition is not a single matter, any more than inflation or pollution. The provinces too, may deal with competition in the exercise of their legislative powers in such fields as consumer protection, labour relations, marketing and the like. The point is, however, that Parliament also has the constitutional power to regulate intraprovincial aspects of competition."

> (i) the impugned legislation must be part of a regulatory scheme; (ii) the scheme must be monitored by the continuing oversight of a regulatory agency; (iii) the legislation must be concerned with trade as a whole rather than with a particular industry; (iv) the legislation should be of a nature that provinces jointly or severally would be constitutionally incapable of enacting; and (v) 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 … These factors are not exhaustive and, to be valid, it is not necessary for federal legislation to satisfy all five criteria.[72]

The difficulties raised by these criteria will be addressed below. For the time being, I wish only to underline how uncannily appropriate this test appears to be for recognizing a federal power over securities.

My belief, even though I have no evidence to buttress this claim, is that Dickson J. (as he then was) had both competition *and* securities regulation in mind when he wrote his dissenting opinion in *Canadian National Transportation*. A year earlier, in *Multiple Access Ltd. v. McCutcheon*,[73] he had taken great pains to underline, in *obiter*, that in acknowledging a provincial power over securities he was not to be understood as denying "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".[74] And

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[72] [2005] S.C.J. No. 66, [2005] 3 S.C.R. 302, 2005 SCC 65, at para. 17 (S.C.C.) [hereinafter "*Kirkbi*"].

[73] [1982] S.C.J. No. 66, [1982] 2 S.C.R. 161 (S.C.C.) [hereinafter "*Multiple Access Ltd.*"].

[74] *Id*., at 173-74:

> Parliament has not yet enacted any comprehensive scheme of securities legislation. To date the Canadian experience has been that the provinces have taken control of the marketing of securities, differing in this respect from the United States where the Securities and Exchange Commission has regulated trading and primary distribution of securities. I should not wish by anything said in this case 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. The federal government, it may be noted, has already produced Proposals for a Securities Market Law for Canada (1979). Professor Anisman, writing in 1981 in respect of those proposals expressed the view that:
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> > … the factors that indicated a need for federal regulatory involvement in the securities market in 1979 are still present and, if anything, have been reinforced by events during the past two years. The Proposals are premised ultimately on the national and international character of the Canadian securities market and its importance to the economic welfare of the country. The fact that the market is national in scope has long been acknowledged and is demonstrated by the cooperative efforts of the provincial commissions with respect to the adoption of national policies and by the statutory au-

even though he acknowledged that, since the 1932 *Lymburn v. Mayland*[75] case, courts had systematically given wide constitutional recognition to provincial securities regulations, he nonetheless quoted with approval[76] the following excerpt from Philip Anisman's and Peter W. Hogg's 1979 study entitled "Constitutional Aspects of Federal Securities Legislation":

> The reluctance of the courts to strike down provincial securities legislation likely stems in part from the fact that there is no federal securities law so that a declaration of the invalidity of a provincial act or any of its provisions would create a potential gap in the existing regulatory scheme that might be exploited by the unscrupulous.[77]

In *City National Leasing* itself, Dickson C.J.C. again referred to this same study, not once but twice.[78] He did not then emit any opinion as to the constitutional validity of hypothetical federal securities legislation. Nevertheless, his reading of Professors Anisman's and Hogg's paper establishes beyond doubt that he was aware of the potentialities of section 91(2) as a basis for federal intervention in the field of securities.

Finally, in the recent *Global Securities Corp. v. British Columbia (Securities Commission)*,[79] while giving an expansive interpretation to the province's power over the securities market, the Supreme Court again went out of its way to stress that, though it "decline[d] to comment on the constitutionality of hypothetical overlapping federal legislation", it

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> thorization for and increasing frequency of joint hearings held by a number of provincial commissions to decide issues that transcend provincial boundaries.

Justice Estey, dissenting on another issue, shared a similar point of view (at 225):

> Counsel for the Attorney General for Canada did not wish to found the validity of these sections upon an independent claim that, by reason of the potential extra-provincial nature of securities trading, they could be sustained by the authority of s. 91(2) alone. I venture to say that there will be more and more challenges in the future to the dominant position now occupied by the securities exchange authorities of the province in which the major stock exchange of the country is located. As the magnitude and number of multi-provincial security transactions increase the strain on the present unbalanced regulatory system will mount. It remains to be seen whether this will precipitate a change in the national appreciation of constitutional requirements and federal legislative policy. Until such a development occurs the disposition of this appeal must be found in the light of the positions herein taken by the parties. These reasons therefore reflect only the record as advanced by the proponents and opponents of the traditional arguments on the constitutional nature of corporate and securities legislation.

[75] [1932] J.C.J. No. 2, [1932] A.C. 318 (P.C.) [hereinafter "*Lymburn*"].

[76] *Multiple Access Ltd.*, *supra*, note 73, at 183.

[77] Philip Anisman *et al.*, *Proposals for a Securities Market Law for Canada*, vol. 3 (Ottawa: Consumer and Corporate Affairs Canada, 1979).

[78] *City National Leasing*, *supra*, note 65, at 673-74 and 686.

[79] [2000] S.C.J. No. 5, [2000] 1 S.C.R. 494 (S.C.C.) [hereinafter "*Global Securities Corp.*"].

had, in *Multiple Access Ltd.*, "already upheld aspects of federal securities regulation … under the 'double aspect' theory".[80]

Therefore, at first glance, it seems most probable that, enticed by Peter W. Hogg's eloquence and charming accent, the Supreme Court will do what it does best, *i.e.*, quote and concur with Peter W. Hogg. And if a federal jurisdiction over securities is found to exist on the basis of the GRT power, then nothing will be able to stop Parliament from regulating both the intra- and extraprovincial aspects of this subject matter. However, before moving on to the examination of that particular facet of the issue, the following caveat must be made.

As I said in the introduction, this article is based on the presumption that the Supreme Court of Canada will resort to the GRT power as a means of providing the central government with authority to regulate the securities market. My intent therefore is to examine whether or not there exists, under the present state of Canadian constitutional law, a means by which the federal government could be prevented from entirely ousting the provinces from this field. However, before pursuing this tack, it must be confessed that my presumption might not materialize, *i.e.*, the Supreme Court might not recognize the GRT power as a valid ground for a proposed federal Securities Act.

Such a conclusion could flow from the inability of the recently proposed federal legislation to satisfy the fifth criterion enunciated in *City National Leasing*: "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".[81] Now, as it presently stands, the Proposed Canadian Securities Act[82] released on May 26, 2010 indicates, in its preamble, that "Parliament intends to create a single Canadian securities regulator" and, more importantly for our purpose, it states that Parliament "chooses to do so through a process under which

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[80] *Id.*, at para. 46:

> The Attorney General of Canada intervened in this appeal to argue that: "if the provision in question is held to be within provincial jurisdiction, this decision would not preclude overlapping federal jurisdiction over securities matters in respect of international and interprovincial transactions and co-operation, or any other relevant head of federal jurisdiction." Since the central question presented by this appeal is the power of the province to enact s. 141(1)(b), I decline to comment on the constitutionality of hypothetical overlapping federal legislation. I would note, however, that this Court has already upheld aspects of federal securities regulation, in another context, in *Multiple Access*, *supra*, under the "double aspect" theory. The Court's decision in the present appeal should not be taken in any way to question the holding of that case.

[81] *City National Leasing*, *supra*, note 65, at 662 and *Kirkbi*, *supra*, note 72, at para. 17.

[82] *Supra*, note 5.

the regime will apply as willing provinces and territories opt in". Sections 250 (1) and (2) prescribe as follows:

> 250 (1) Subject to sections 251 and 252, sections 1 to 10 and Parts 1 to 14 do not apply in a province unless it is designated under subsection (2).
>
> (2) After receiving the written consent of the Lieutenant Governor in Council of a province and on the recommendation of the Minister, the Governor in Council may, by order, designate the province as a participating province.

In other words, unless the written consent of a province's political authorities is given, the bulk of the proposed federal legislation will not apply in that province. As a consequence, according to the federal government itself, the effectiveness of its legislative scheme does not require the participation of all provinces. If that is so, how then can it be argued that "the failure to include one or more provinces or localities in [the] legislative scheme [will] jeopardize the successful operation of the scheme in other parts of the country"? Ironically, in trying not to alienate the provinces by providing for an opting-in procedure instead of imposing a full-blown uniform regulatory system, the federal authorities may have committed constitutional harakiri.

It remains to be seen, however, whether the Supreme Court will downplay this fifth criterion by calling to mind its cautionary remark enunciated in *City National Leasing*, according to which "[t]hese *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."[83]

Closing this parenthesis, let us presume then that the Supreme Court of Canada will indeed resort to the GRT power as a means of providing the central government with authority to regulate the securities market, and let us examine whether or not there exists, under the present state of Canadian constitutional law, a means by which the federal government could be prevented from entirely ousting the provinces from this field.

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[83] *Supra*, note 65, at 662-63. In *Kirkbi*, *supra*, note 72, at para. 17, the Court states that "[t]hese factors are not exhaustive and, to be valid, it is not necessary for federal legislation to satisfy all five criteria."

IV. THE OBSTACLES TO THE PRESERVATION OF AN UNASSAILABLE PROVINCIAL SPHERE OF INTERVENTION OVER SECURITIES

If an efficient securities market requires the presence of both levels of government, how can one make sure that the federal government will not entirely expel the provinces from this field? What kind of constitutional barriers could be erected around Parliament's GRT power? Not many, I fear.

Before examining some possible avenues, let us look at how the present structure of the Supreme Court's understanding of the constitutional division of powers makes it difficult to envisage a complementary federal-provincial approach to the regulation of securities.

First of all, to limit the extent of Parliament's power over GRT, one must attack the very definition given to the power[84] because, once a power is recognized as allowing Parliament to intervene at both the intra- and extraprovincial levels, courts are prohibited from scrutinizing the manner in which that power is exercised. In a sense, the division of powers is an "all of nothing" game. A level of government either has a power to regulate (*directly* through one of its *exclusive* heads of jurisdiction or *indirectly* by way of its *ancillary* power) or it does not. Once recognized, the exercise of such a power cannot be modulated according to the wishes of the courts.

If, for instance, the Supreme Court recognizes the existence of a national emergency, it will serve no purpose to argue that the proposed federal remedy will be inefficient.[85] If, for example, Parliament is said to be authorized to regulate the sale of young hooded seals under its fisheries jurisdiction,[86] or the licensing and registration of ordinary firearms under its criminal law power,[87] the Court will refuse to hear arguments based on extrinsic evidence to the effect that the federal legislation should have been better designed,[88] that the federal government should have engaged in more consultation with the provinces prior to its

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[84] This will be the subject of section V, *infra*.

[85] *Reference re Anti-Inflation Act*, *supra*, note 4, at 468.

[86] *Ward v. Canada (Attorney General)*, [2002] S.C.J. No. 21, [2002] 1 S.C.R. 569, 2002 SCC 17 (S.C.C.) [hereinafter "*Ward*"].

[87] *Reference re Firearms Act (Can.)*, [2000] S.C.J. No. 31, [2000] 1 S.C.R. 783 (S.C.C.).

[88] *Id.*, at para. 56.

enactment,[89] that the law will not be effective,[90] that it is inappropriate or undesirable from a social or economic perspective,[91] that its implementation will be too expensive,[92] or that the government failed to employ the best means to achieve its purpose.[93]

There is, however, one exception to the rule that extrinsic evidence cannot be invoked to sustain the validity of legislation. In *City National Leasing*, the Supreme Court revisited the ancillary power doctrine, that is, the power recognized to both levels of government to legislate in ways that may incidentally affect the other government's spheres of power. Chief Justice Dickson stated that, in determining whether or not an impugned provision is valid, one must focus on its connection to or relationship with valid legislation.[94] This connection is assessed by establishing "how well the provision is integrated into the scheme of the legislation and how important it is for the *efficacy* of the legislation".[95] Measuring such efficacy should therefore justify resorting to empirical evidence. I say "should" because, in that case, Dickson C.J.C. confirmed the validity of the impugned provision without going outside of the legislation itself. He found the private right of action to be "a core provision" of the *Combines Investigation Act* because it served to reinforce other sanctions of the Act; it was intimately linked to the Act and could only be understood by reference to other provisions of the Act and had no independent content. Finally, the impugned provision provided a private remedy only for particular violations of the Act and did not create a private right of action at large.[96]

The Court has also rejected arguments claiming that a federal legislation trenched on provincial powers in a manner that risked upsetting the balance of federalism. Indeed, as the Court was quick to answer, once found to be valid, a law cannot be said to upset the balance of federal-

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[89] *Id.*, at para. 57.

[90] *Ward*, *supra*, note 86, at paras. 18 and 22; *RJR-MacDonald*, *supra*, note 57, at para. 44, *per* La Forest J.; *Ontario Hydro v. Ontario (Labour Relations Board)*, [1993] S.C.J. No. 99, [1993] 3 S.C.R. 327, at paras. 48-49 (S.C.C.), *per* Lamer C.J.C.; *Reference re Firearms Act (Can.)*, *supra*, note 87, at para. 57.

[91] Justice McIntyre, speaking for the Court in *Reference re Upper Churchill*, *supra*, note 50, stated at 334 that "it is not for this Court to consider the desirability of legislation from a social or economic perspective where a constitutional issue is raised". See also Laskin C.J.C. in *Central Canada Potash Co. v. Saskatchewan*, [1978] S.C.J. No. 72, [1979] 1 S.C.R. 42, at 76 (S.C.C.).

[92] *Reference re Firearms Act (Can.)*, *supra*, note 87, at para. 57.

[93] *Ward*, *supra*, note 86, at para. 26 and *Global Securities Corp.*, *supra*, note 79, at paras. 35-36.

[94] *City National Leasing*, *supra*, note 65, at 668.

[95] *Id.*

[96] *Id.*, at 684-85.

ism.[97] The Court also concluded that a proportionality test similar to the one developed under section 1 of the Canadian Charter should not be resorted to when courts are called upon to delimit the scope of the powers set out in sections 91 and 92 of the *Constitution Act, 1867*.[98]

Virginity does not allow half-measures, likewise for constitutional authority. Either a level of government is competent or it is not.

If a jurisdiction over securities is ever recognized to Parliament under the GRT power, one will be hard pressed to convince a court that the reach of the legislation is too great or that provinces should have been consulted, or that such recognition of power upsets the balance of federalism.

The second hurdle faced by those who would wish to see Parliament's power over GRT curbed is that the Supreme Court, in recent years, has become a staunch advocate of concurrent powers. Indeed, the aspect doctrine and its corollary, the double aspect, now so dominate constitutional thinking that we are witnessing a "ratatinement jurisprudentiel du principe d'exclusivité",[99] a judicial shrivelling of the exclusivity principle.[100]

The Court quite systematically upholds provincial or federal legislation, resorting to the paramountcy principle to settle the issue of conflict between federal and provincial legislation.[101] Therefore, if the constitutional validity of federal securities legislation is ever challenged before the Supreme Court, it stands a good chance of being upheld. The Court will probably recoil at the idea of substituting a more conceptual definition of GRT, which would call for an explicit definition of its exclusive core, to its present highly pragmatic and functional approach.

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[97] *Reference re Firearms Act (Can.)*, *supra*, note 87, at para. 48.

[98] *Id.* See *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"].

[99] "Des motifs juridiques et extra-juridiques expliquent le ratatinement jurisprudentiel du principe d'exclusivité": Jean-François Gaudreault-DesBiens, "Le Fédéralisme et le législateur fédéral" (2008) 2 Journal of Parliamentary and Political Law 427, at 444.

[100] *Canadian Western Bank v. Alberta*, [2007] S.C.J. No. 22, [2007] 2 S.C.R. 3, 2007 SCC 22 (S.C.C.) [hereinafter "*Canadian Western Bank*"]. In his dissenting opinion, Bastarache J. rebelled against the pragmatic approach of the majority, arguing for a more abstract approach to division of powers issues (see para. 118).

[101] See Bruce Ryder, "The End of Umpire? Federalism and Judicial Restraint" (2006) 34 S.C.L.R. (2d) 345 [hereinafter "Ryder"], noting the Court's "disinclination, since the early 1980s, to issue declarations of invalidity" in division of powers cases and an increasing resort to the paramouncy doctrine to limit the operation of provincial statutes (at 347).

Interestingly enough, the Supreme Court justifies its refusal to define the core of a legislative head of power by the danger it would entail for provincial powers:

> Excessive reliance on the doctrine of interjurisdictional immunity would create serious uncertainty. It is based on the attribution to every legislative head of power of a "core" of indeterminate scope — difficult to define, except over time by means of judicial interpretations triggered serendipitously on a case-by-case basis. The requirement to develop an abstract definition of a "core" is not compatible, generally speaking, with the tradition of Canadian constitutional interpretation, which favours an incremental approach. While it is true that the enumerations of ss. 91 and 92 contain a number of powers that are precise and not really open to discussion, other powers are far less precise, such as those relating to the criminal law, trade and commerce and matters of a local or private nature in a province. Since the time of Confederation, courts have refrained from trying to define the possible scope of such powers in advance and for all time ...[102]

Justice Binnie goes on to explain that defining the core of a particular field of jurisdiction is particularly dangerous where the commerce power is concerned:

> For example, while the courts have not eviscerated the federal trade and commerce power, they have, in interpreting it, sought to avoid draining of their content the provincial powers over civil law and matters of a local or private nature. A generalized application of interjurisdictional immunity related to "trade and commerce" would have led to an altogether different and more rigid and centralized form of federalism. It was by proceeding with caution on a case-by-case basis that the courts were gradually able to define the content of the heads of power of Parliament and the legislatures, without denying the unavoidable interplay between them, always having regard to the evolution of the problems for which the division of legislative powers must now provide solutions.[103]

So then, trying to limit the extent of a federal power over GRT by trying to define its exclusive core would not be an easy task to undertake. In fact, such a strategy might backfire in the provinces' faces. The central government could end up with even more power than that with which it is presently endowed.

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[102] *Canadian Western Bank*, *supra*, note 100, at para. 43.

[103] *Id.*

Third, the Court's *penchant* for concurrency and "co-operative federalism",[104] its reticence towards the imposition of abstract limitations, its emphasis "on the legitimate interplay between federal and provincial powers",[105] its "concern that a court should favour, where possible, the ordinary operation of statutes enacted by *both* levels of government",[106] all this translates into a willingness, where need be, to resort to the ancillary power doctrine to justify the validity of a federal[107] or provincial law.[108]

In fact, *City National Leasing* is a good example of a situation where the Supreme Court offered one level of government the best of all worlds: the disputed *legislation* was held to be *intra vires* on the basis of the aspect doctrine, whereas the impugned *provision* was justified by recourse to the ancillary power. As we saw, Dickson C.J.C. held that it was "sufficiently integrated into the Act to sustain its constitutionality".[109] The *Kirkbi* case followed the same approach, with the same result.[110] Again, any strategy aimed at limiting the scope of Parliament's power would appear doomed to failure.

It bears underlining that the Court's understanding of cooperative federalism is radically different from that of the Privy Council. The Court's understanding is based on the conviction that "… the task of maintaining the balance of powers in practice falls primarily to governments" and that, accordingly, "constitutional doctrine must facilitate, not undermine what this Court has called 'co-operative federalism'".[111] In contrast, the Privy Council's brand of cooperative federalism envisaged a much greater role for courts. By strictly confining both levels of govern-

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[104] *Multiple Access Ltd.*, *supra*, note 73, at 190; *Husky Oil Operations Ltd. v. M.N.R.*, [1995] S.C.J. No. 77, [1995] 3 S.C.R. 453, at para. 162 (S.C.C.); *Reference re Employment Insurance Act (Can.)*, *ss. 22 and 23*, [2005] S.C.J. No. 57, [2005] 2 S.C.R. 669, 2005 SCC 56, at para. 10 (S.C.C.) [hereinafter "*Reference re Employment Insurance Act*"]; *Chatterjee v. Ontario (Attorney General)*, [2009] S.C.J. No. 19, [2009] 1 S.C.R. 624, at para. 32 (S.C.C.) and *Canadian Western Bank*, *supra*, note 100, at para. 24.

[105] *Canadian Western Bank*, *id.*, at para. 36.

[106] *Id.*, at para. 37.

[107] *City National Leasing*, *supra*, note 65.

[108] *Kitkatla Band v. British Columbia (Minister of Small Business, Tourism and Culture)*, [2002] S.C.J. No. 33, [2002] 2 S.C.R. 146, 2002 SCC 31 (S.C.C.) [hereinafter "*Kitkatla Band*"]; and *Global Securities Corp.*, *supra*, note 79.

[109] *City National Leasing*, *supra*, note 65, at 670.

[110] *Supra*, note 72, at para. 36 (finding that the "passing off" civil action in s. 7(b) of the *Trade-marks Act* is "sufficiently integrated" in the Act's legislative scheme that the Court found to be valid pursuant to the GRT power). For a critical discussion of the result in *Kirkbi*, see Ryder, *supra*, note 101, at 357-62.

[111] *Canadian Western Bank*, *supra*, note 100, at para. 24.

ment to the exercise of their *exclusive* powers, the Privy Council was in fact *imposing* on the federal government an obligation to cooperate with provinces.[112] The modern brand of cooperative federalism affords a much greater leeway to the central government. If it chooses to resort to its paramount power, it could by-pass the provinces altogether. As Bruce Ryder puts it, the Court's approach puts the provinces

> in the position of supplicants to the federal government. To secure legislative space for the pursuit of distinct policy objectives, the provinces must negotiate with a national government that is holding the legal trump card — the federal paramountcy rule — in its hand ... So long as the provincial pursuit of distinct policies in the growing areas of shared jurisdiction is conditional upon federal consent or forbearance, the provinces cannot be confident that their autonomy will be secured in the future.[113]

In *Reference re Anti-Inflation Act*,[114] counsel for one of the interveners submitted that, instead of turning immediately to its emergency power to regulate inflation, Parliament should have sought a federal-provincial cooperative scheme circumscribed by each level of government's respective powers under sections 91 and 92. Chief Justice Laskin bluntly rejected this suggestion in the following terms:

> No doubt, federal-provincial co-operation along the lines suggested might have been attempted, but it does not follow that the federal policy that was adopted is vulnerable because a co-operative scheme on a legislative power basis was not tried first. Co-operative federalism may be consequential upon a lack of federal legislative power, but it is not a ground for denying it.[115]

I believe that the modern understanding of cooperative federalism is more in tune with that of Laskin C.J.C. than that of the Privy Council. This in no way facilitates attempts at limiting the reach of a federal power.

Is there no way then to curtail the authority over securities which the GRT power would confer on the central government?

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[112] See for instance *Reference re Board of Commerce Act, 1919 (Alberta)*, [1921] J.C.J. No. 4, [1922] 1 A.C. 191, at 200-201 (P.C.); *Reference re Weekly Rest in Industrial Undertakings Act (Can.)*, [1937] J.C.J. No. 5, [1937] A.C. 326, at 353-54 and 403-404 (P.C.). See also the Supreme Court decision in *R. v. Eastern Terminal Elevator Co*., [1925] S.C.J. No. 20, [1925] S.C.R. 434, at 448 (S.C.C.).

[113] Ryder, *supra*, note 101, at 374 and 377.

[114] *Supra*, note 4.

[115] *Id.*, at 421.

V. DELIMITING THE REACH OF THE GENERAL REGULATION OF TRADE POWER: RESORTING TO THE PARTICULAR NATURE OF THIS FIELD OF JURISDICTION AS A NORMATIVE AND METHODOLOGICAL YARDSTICK

Guaranteeing jurisdictional space for provinces over securities requires, as I have said before, a re-examination of the GRT power itself. Two avenues are open that both emphasize the need to appeal to the particular nature of a field of jurisdiction as a measuring yardstick of its potential reach: a normative approach and a methodological approach. Both will now be analyzed.

1. The Normative Approach: Commerce as Competition

Out of the few elements that enable courts to assess the potential range of a field of jurisdiction, the distinct nature of the latter is quite certainly the most important. In other words, the singular essence of a power will not only determine its compass but also the type of legislative objectives that a level of government is allowed to pursue.[116]

In *Hydro-Québec*,[117] La Forest J. stated that in determining the extent of Parliament's power over the environment, the nature of each and every one of its powers had to be taken into account:

> In examining the validity of legislation … , it must be underlined that the nature of the relevant legislative powers must be examined. Different types of legislative powers may support different types of environmental provisions. The manner in which such provisions must be related to a legislative scheme was, by way of example, discussed in

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[116] For more on this subject, see Jean Leclair, "L'impact de la nature d'une compétence législative sur l'étendue du pouvoir conféré dans le cadre de la Loi constitutionnelle de 1867" (1994) 24 Revue juridique Thémis 661-719, online: <http://hdl.handle.net/1866/2525> ; and Jean Leclair, "L'étendue du pouvoir constitutionnel des provinces et de l'État central en matière d'évaluation des incidences environnementales au Canada" (1995) 21 Queen's L.J. 37.

[117] *Supra*, note 55. In *Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992] S.C.J. No. 1, [1992] 1 S.C.R. 3, at 67-68 (S.C.C.), La Forest J. had already underlined that:

> It must be noted that the exercise of legislative power, as it affects concerns relating to the environment, must, as with other concerns, be linked to the appropriate head of power, and since the nature of the various heads of power under the *Constitution Act, 1867* differ, the extent to which environmental concerns may be taken into account in the exercise of a power may vary from one power to another. For example, a somewhat different environmental role can be played by Parliament in the exercise of its jurisdiction over fisheries than under its powers concerning railways or navigation since the former involves the management of a resource, the others activities.

> *Oldman River* in respect of railways, navigable waters and fisheries. An environmental provision may be validly aimed at curbing environmental damage, but in some cases the environmental damage may be directly related to the power itself. There is a considerable difference between regulating works and activities, like railways, and a resource like fisheries, and consequently the environmental provisions relating to each of these. Environmental provisions must be tied to the appropriate constitutional source.[118]

The intrinsic limit of certain powers enables courts to define, with a certain degree of precision, the bounds of their reach or the type of interventions they authorize. For instance, the criminal law power requires that there be an element of danger in the activity, the person or the thing regulated. Absent such danger, section 91(27) cannot be invoked.[119] Likewise, Ottawa's power over fisheries does not allow it to control local logging operations on the sole basis that they *might* have deleterious effects on fish.[120] To be valid, a federal provision based on such jurisdiction must link the proscribed conduct to actual or potential harm to fisheries. A blanket prohibition of certain types of activity falling under provincial power is not sufficiently linked to any likely harm to fisheries.

Therefore, in the execution of their mandate as arbiters of federalism, courts are allowed to invoke the particular nature of a field of jurisdiction to limit its reach. What of the GRT power? Could the singular nature of that field of jurisdiction enable courts to limit its ambit?

At first glance, one would think that there are no internal limits imposed by the nature of such a power. GRT grants the right to regulate both the intra- and the extraprovincial dimensions of a "trade" matter, as long as the latter is aimed at the economy as a single integrated national unit rather than as a collection of separate local enterprises. Provided that the matter regulated possesses the required quiddity, all methods seem therefore legitimate, whether they impinge on provincial powers or not. However, a closer look at the reasoning of Dickson C.J.C. in *City National Leasing* might cast some light on the issue.

In that case, Dickson C.J.C. clearly emphasized the fundamental importance of *efficiency* in determining whether power should or should not

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[118] *Hydro-Québec*, *id.*, at para. 114.

[119] For example, see *RJR-MacDonald*, *supra*, note 57; *Hydro-Quebec*, *id.*, and *R. v. Swain*, [1991] S.C.J. No. 32, [1991] 1 S.C.R. 933 (S.C.C.).

[120] *R. v. Fowler*, [1980] S.C.J. No. 58, [1980] 2 S.C.R. 213 (S.C.C.). See also *R. v. Northwest Falling Contractors Ltd.*, [1980] S.C.J. No. 68, [1980] 2 S.C.R. 292 (S.C.C.).

be recognized to Parliament under the GRT rubric. As we saw earlier, one of the constitutional triggers of that power is empirical evidence that "the failure to include one or more provinces or localities in a [federal] legislative scheme would jeopardize the successful operation of the scheme in other parts of the country".[121] In other words, one must demonstrate that the failure to include one or more provinces would lead to inefficiency. After reviewing arguments on that subject in Section VIII of the decision,[122] Dickson C.J.C. came to the conclusion that "[these arguments] ma[d]e it clear that not only is the Act meant to cover intraprovincial trade, but that it must do so if it is to be *effective*".[123] Earlier on, he had peremptorily asserted: "It is evident from this discussion that competition cannot be *effectively* regulated unless it is regulated nationally."[124]

If efficiency is of such moment for determining the existence of a federal power under GRT, could it not be argued that the very nature of that power demands that efficiency be taken seriously? In other words, since all fields of jurisdiction comprehend both a descriptive and a normative dimension, should not the courts be forced to require credible evidence, based on empirically valid conclusions, as to the exact nature of the strengths and the weaknesses of the Canadian securities market? From a more normative perspective, could it not be contended that commerce is more in tune with competition than with monopoly, with diversity and experimentation than with uniformity?

A normative perspective sympathetic to competition is also infinitely more compatible with a federal structure of government. The Supreme Court is oftentimes lyrically eloquent when economic imperatives are said to justify by-passing territorial barriers.[125] In *Hunt*, for instance, La Forest J. noted that, Canada being a federation, the traditional rules of private international law emphasizing sovereignty needed to be softened. Ironically, he claimed that these rules seemed "to 'fly in the face of the

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[121] *City National Leasing*, *supra*, note 65, at 662.

[122] That section is entitled "The Validity of the Regulatory Scheme", therefore demonstrating that efficiency criteria were here invoked to justify the validity of the *whole scheme*. Efficiency was also resorted to uphold the validity of the *impugned section* (*City National Leasing*, *id.*, at 686 and 693-94).

[123] *Id.*, at 681 (emphasis added).

[124] *Id.*, at 680 (emphasis added).

[125] *Hunt*, *supra*, note 50. Strangely enough, although absolutely pivotal in the advent of the Canadian federation, apart from a vague reference at paras. 42 and 96, next to no mention is made of economic factors as justifying the 1867 union in the *Reference re Secession of Quebec*, [1998] S.C.J. No. 61, [1998] 2 S.C.R. 217 (S.C.C.).

obvious intention of the Constitution to create a single country'".[126] Though I agree with La Forest J., conversely, it could also be contended that, Canada being a federation, care must be taken not to bestow the entirety of economic control in the hands of one level of government. A true federal spirit requires an assessment of both the virtue of unity and that of diversity.

This keenness for uniformity also translates into a presumption that federalism necessarily entails the pursuit of harmony. In *Canadian Western Bank*, Binnie J. mentioned "foster[ing] co-operation among governments and legislatures for the common good" as one of the fundamental objectives of federalism.[127] But how about legitimate and fruitful interprovincial competition? If, as the same Binnie J. tells us, constitutional doctrines "must also be designed to reconcile the legitimate diversity of regional experimentation with the need for national unity",[128] then commerce, it would seem, is the ideal sphere where such experimentation should be encouraged.

Although it sometimes appears as if interprovincial competition is an expression to be avoided[129] — this might have to do with the fact that provincial disharmony is a trigger for the setting in motion of the GRT power — our constitutional structure is designed to stimulate and promote it. In *Canadian Egg Marketing Agency v. Richardson*,[130] Iaccobucci and Bastarache JJ., for the majority, said the following:

> The federal structure of our Constitution authorizes the growth of distinct systems of commercial regulation whose application is inevitably defined "in terms of provincial boundaries". Provincial

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[126] *Hunt*, *id.*, at 322, quoting *Morguard Investments Ltd. v. De Savoye*, [1990] S.C.J. No. 135, [1990] 3 S.C.R. 1077, at 1099 (S.C.C.). The *Morguard* quotation is worth reproducing in its entirety:

> In any event, the English rules seem to me to fly in the face of the obvious intention of the Constitution to create a single country. This presupposes a basic goal of stability and unity where many aspects of life are not confined to one jurisdiction. A common citizenship ensured the mobility of Canadians across provincial lines, a position reinforced today by s. 6 of the Charter ... In particular, significant steps were taken to foster economic integration. One of the central features of the constitutional arrangements incorporated in the *Constitution Act, 1867* was the creation of a common market. Barriers to interprovincial trade were removed by s. 121. Generally trade and commerce between the provinces was seen to be a matter of concern to the country as a whole; see *Constitution Act, 1867*, s. 91(2). The Peace, Order and Good Government clause gives the federal Parliament powers to deal with interprovincial activities ... And the combined effect of s. 91(29) and s. 92(10) does the same for interprovincial works and undertakings.

[127] *Supra*, note 100, at para. 22.

[128] *Id.*, at para. 24.

[129] Sabbah, *supra*, note 11, at 64 and 75-76.

[130] *Supra*, note 51.

> legislation validly enacted under s. 92 of the Constitution is applicable only within a single province and may have an effect on the conditions according to which a livelihood may be pursued. Federal legislation, or cooperative federal-provincial legislative schemes, may also apply only in some provinces and, thus, create variable conditions for the pursuit of a livelihood in different provinces ... This type of economic legislation, and the growth of divergent regulatory regimes in the provinces, is undoubtedly authorized by the Constitution.[131]

Canada not being a unitary state, judges as arbiters of federalism must therefore reflect upon the economic and commercial benefits that can flow from decentralization. Some of these benefits have been described in Part II and, therefore, need not be reiterated.[132]

Another argument in favour of a complementary federal-provincial approach in economic and commercial matters is that, when confronted with a potentially all-encompassing subject matter, the Supreme Court has generally refused to confine its regulation to one level of government. Hence, what was deemed appropriate for inflation and environment should also be applied to economic and commercial regulation.

Indeed, a tried and true solution exists when Canadian legislatures seek to endow a single regulator with jurisdiction to address both the intra- and extraprovincial dimensions of trade.[133] Divided jurisdiction over trade, a fundamental feature of Canadian federalism since *Parsons*,[134] can be overcome through a cooperative scheme of interlocking federal and provincial legislation, using techniques such as administrative delegation and incorporation by reference. This is precisely the approach that the courts have encouraged and sanctioned in contexts such as the regulation of trucking and agricultural products marketing.[135] For example, in *Fédération des producteurs de volailles du Québec v. Pelland*, the Court upheld legislation that conferred jurisdiction over the intra- and extraprovincial marketing of chickens on a Quebec board. Justice Abella, writing for a unanimous Court, noted that "[e]ach level of

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[131] *Id.*, at paras. 61-63.

[132] See also Robert Wisner, "Uniformity, Diversity and Provincial Extraterritoriality: *Hunt v. T&N plc*" (1995) 40 McGill L.J. 759, at 772-73.

[133] I am grateful to Bruce Ryder for the observations in this paragraph.

[134] *Supra*, note 67.

[135] *Prince Edward Island (Potato Marketing Board) v. H.B. Willis Inc.*, [1952] S.C.J. No. 31, [1952] 2 S.C.R. 392 (S.C.C.); *Coughlin v. Ontario (Highway Transport Board)*, [1968] S.C.J. No. 38, [1968] S.C.R. 569 (S.C.C.); *Reference re Agricultural Products Marketing Act, 1970*, [1978] S.C.J. No. 58, [1978] 2 S.C.R. 1198 (S.C.C.); *Fédération des producteurs de volailles du Québec v. Pelland*, [2005] S.C.J. No. 19, [2005] 1 S.C.R. 292 (S.C.C.) [hereinafter "*Pelland*"].

government enacted laws and regulations, based on their respective legislative competencies, to create a unified and coherent regulatory scheme."[136] In response to objections to the scheme, she held that its constitutional validity is supported by "a venerable chain of judicial precedent".[137] The federal government's draft Securities Act, in contrast, chooses to assert federal jurisdiction over both the intra- and extra-provincial aspects of securities regulation, with no legislative support from the provinces. Rather than push the limits of the GRT power and strain the federal principle, if the federal government truly wants to pursue a constitutionally sound, cooperative approach to endowing a single regulator with jurisdiction over all aspects of securities regulation, it should follow the "well-established body of precedent upholding the validity of administrative delegation in aid of cooperative federalism".[138]

Finally, in interpreting the meaning to be given to a particular field of power, courts should be "guided by the way in which courts have interpreted the power in the past"[139] and attention should be given to the manner in which past judges have apprehended "the activity at stake".[140]

Now, provinces have been validly regulating securities for next to 100 years[141] with the courts' repeated approval.[142] Provincial power has been said to encompass both a territorial and a personal dimension.[143] Besides, as we have seen in Part II, provinces have managed to put in place a system that, although not perfect, is quite efficient. All this should hinder attempts at interpreting the GRT power in such a way as to deprive provinces of a meaningful authority over securities.

Divesting provinces of that power would also go against the grain of the democratic principle. Indeed, the Court seems intent on ensuring, through constitutional doctrines such as the double aspect doctrine, "that the policies of the elected legislators of both levels of government are

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136 *Pelland*, *id.*, at para. 38.

137 *Id.*, at para. 52.

138 *Id.*, at para. 55.

139 *Reference re Employment Insurance Act*, *supra*, note 104, at para. 10.

140 *Ward*, *supra*, note 86, at para. 43.

141 See *supra*, notes 36 to 46 and accompanying text.

142 *Luckey v. Ruthenian Farmers' Elevator Co*., [1923] S.C.J. No. 42, [1924] S.C.R. 56 (S.C.C.); *Manitoba (Attorney General) v. Canada (Attorney General)*, [1929] A.C. 260, 1 D.L.R. 369; *Lymburn*, *supra*, note 75; *R. v. Smith*, [1960] S.C.J. No. 47, [1960] S.C.R 776 (S.C.C.); *Gregory & Co. v. Québec (Securities Commission)*, [1961] S.C.J. No. 38, [1961] S.C.R. 584 (S.C.C.); *Multiple Access Ltd.*, *supra*, note 73; *Global Securities Corp.*, *supra*, note 79; *R. v. W. McKenzie Securities Ltd.*, [1966] M.J. No. 3, [1966] 4 C.C.C. 29 (Man. C.A.); *Bennett v. British Columbia (Securities Commission)*, [1991] B.C.J. No. 1021, 82 D.L.R (4th) 129 (B.C.S.C.); *Pearson v. Boliden*, [2002] B.C.J. No. 2593, 2002 BCCA 624 (B.C.C.A.).

143 *Global Securities Corp.*, *supra*, note 79, at para. 42.

respected".[144] Discarding 100 years of provincial efforts at regulating securities would fly in the face of the obvious intention of the Constitution to create a federal country.

Moreover, in examining the breadth to be given to a federal power over securities regulation, arguments of efficiency should not conceal the importance, for provinces, of the indirect revenues generated — through taxation for example — by the securities industry, *i.e.*, revenues flowing from the establishment of financial services providers, legal and investment firms, *etc*.[145]

If stock is taken of all that has been said already, it becomes possible to argue for a federal power strictly confined to matters over which the provinces are constitutionally incompetent. An argument of that very nature was successfully adduced in *Ontario Hydro v. Ontario (Labour Relations Board)*.[146]

In that case, the Supreme Court had to decide whether federal labour relations legislation applied to employees working at provincial nuclear electrical generating stations. The latter had been declared to be to the general advantage of Canada under subsection 92(10)(c) and section 91(29) of the *Constitution Act, 1867*. In addition, atomic energy has been recognized as falling under Parliament's power under section 91 of that Act to make laws for the peace, order and good government ("POGG") of Canada. The question therefore hinged upon whether Parliament's exclusive jurisdiction over Ontario Hydro's nuclear electrical generating plants under the POGG power or the declaratory power extended to labour relations. In other words, was the central government invested with a plenary power over atomic energy? Justice Iacobucci, speaking for a majority of the Court on that particular issue,[147] answered this question in the negative:

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[144] *Canadian Western Bank*, *supra*, note 100, at para. 30; see also para. 37.

[145] Sabbah, *supra*, note 11, at 83. For an assessment of the negative economic repercussions linked to the establishment of a single national securities commission, see Daniel Denis, *Enjeux économiques associés à la mise en place d'une commission unique*, SECOR (April 2010), online: <http://www.lautorite.qc.ca/index.fr.html>.

[146] *Supra*, note 90.

[147] Of the seven judges that heard the case, four (Lamer C.J.C. and La Forest, L'Heureux-Dubé and Gonthier JJ.) decided that labour relations were integral to Parliament's declaratory and POGG jurisdictions. Yet only three of them (La Forest, L'Heureux-Dubé and Gonthier JJ.) were of the opinion that Parliament could so act because of the plenary nature of its power. As for Lamer C.J.C., although concurring in the result, he nevertheless shared the dissenters' opinion (Sopinka, Cory and Iacobucci JJ.) to the effect that Parliament's power was not plenary (at 340):

> Rather, federal jurisdiction over such works must be carefully described to respect and give effect to the division of legislative authority on which our federal constitutional scheme is based. Under s. 92(10)(c), I fully agree with Iacobucci J. that "Parliament's

> To summarize, the federal declaratory power is unique in that under it, Parliament may decide as a matter of policy to withdraw a work or an undertaking linked to works from what would normally be provincial jurisdiction by declaring the work or undertaking to be a work for the general advantage of Canada, or of two or more provinces. Parliament's jurisdiction over a declared work is not plenary, but extends only to those aspects of the work which make the work specifically of federal jurisdiction. Put another way, Parliament obtains exclusive jurisdiction to regulate those aspects of the work that are integral to the federal interest in the work.[148]

Justice Iacobucci was of the opinion that labour relations did not constitute one such aspect.

Justice La Forest, dissenting on this issue, stated that there was no authority supporting the view that either the POGG power or the declaratory power should be narrowly construed because of the danger a liberal interpretation of these fields of jurisdiction might pose to the structure of Canadian federalism.[149] Once a declaration is made, or once a matter is said to fall under the POGG power, "the legislative power flowing therefrom is governed by the Constitution".[150] According to La Forest J., "protection against abuse of these draconian powers is left to the inchoate but very real and effective political forces that undergird federalism".[151]

Inasmuch as La Forest J.'s opinion was not approved by a majority of the Court, an argument can be forged upon the reasoning of Iacobucci J. Hence, since GRT allows for recognition to Parliament of a power over both the intra- and the extraprovincial facets of securities regulation,

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> jurisdiction over a declared work must be limited so as to respect the powers of the provincial legislatures but consistent with the appropriate recognition of the federal interests involved"... The POGG power is similarly subject to balancing federal principles, limiting the federal government's POGG jurisdiction to "the national concern aspects of atomic energy ... namely the fact of nuclear production and its safety concerns".

[148] *Id.*, at 404-405. He applied the same reasoning to the POGG power (at 424). Justice Dickson adopted the same kind of restrictive approach in *Schneider v. British Columbia*, [1982] S.C.J. No. 64, [1982] 2 S.C.R. 112, at 131-32 (S.C.C.):

> There is no material before the Court leading one to conclude that the problem of heroin dependency as distinguished from illegal trade in drugs is a matter of national interest and dimension transcending the power of each province to meet and solve its own way. It is not a problem which "is beyond the power of the provinces to deal with" … I do not think the subject of narcotics is so global and indivisible that the legislative domain cannot be divided, illegal trade in narcotics coming within the jurisdiction of the Parliament of Canada and the treatment of addicts under provincial jurisdiction.

[149] *Id.*, at 370-71.

[150] *Id.*, at 373.

[151] *Id.*, at 372.

thereby encroaching deeply on a matter that would normally fall under provincial jurisdiction, one might contend that Parliament should be authorized to regulate the intraprovincial aspects of securities if, and only if, credible evidence is put forward demonstrating that such regulation would lead to more efficiency.

The exclusive power recognized to Parliament over "maritime law" provides an interesting counter-example. In that case, the nature of the power, more so than would be the case for securities regulation, called for an integrated and unified regulatory regime:

> Quite apart from judicial authority, the very nature of the activities of navigation and shipping, at least as they are practised in this country, makes a uniform maritime law which encompasses navigable inland waterways a practical necessity. Much of the navigational and shipping activity that takes place on Canada's inland waterways is closely connected with that which takes place within the traditional geographic sphere of maritime law. … For it would be quite incredible, especially when one considers that much of maritime law is the product of international conventions, if the legal rights and obligations of those engaged in navigation and shipping arbitrarily changed as their vessels crossed the point at which the water ceased or, as the case may be, commenced to ebb and flow. Such a geographic divide is, from a division of powers perspective, completely meaningless, for it does not indicate any fundamental change in the use to which a waterway is put. In this country, inland navigable waterways and the seas that were traditionally recognized as the province of maritime law are part of the same navigational network, one which should, in my view, be subject to a uniform legal regime.
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> I think it obvious that this need for legal uniformity is particularly pressing in the area of tortious liability for collisions and other accidents that occur in the course of navigation.[152]

The same reasoning does not apply in matters of securities. As I have mentioned earlier,[153] Canada's securities market is very diversified, some provincial regulators specializing in particular sectors. This diversity encourages specialization and innovation. Therefore, it would not be accurate to state that, in the case of securities, "a geographic divide is, from a division of powers perspective, completely meaningless".

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[152] *Whitbread v. Walley*, [1990] S.C.J. No. 138, [1990] 3 S.C.R. 1273, at 1294-96 (S.C.C.).

[153] See text accompanying notes 19 and 20, *supra*.

Finally, the failure of Parliament as an interregional bargaining forum,[154] as an institution that can counterbalance the centrifugal effects of Supreme Court decisions enhancing Ottawa's power,[155] brings some additional legitimacy to such a prudent approach.

From the preceding discussion, it could therefore be argued that, if the nature of the GRT jurisdiction is duly considered, the power it confers over securities should be strictly confined to matters over which provinces are constitutionally incompetent. Competition being the essence of trade, any attempt by Parliament to impose a set of uniform rules in sectors that traditionally have fallen under provincial jurisdiction should be prohibited. Furthermore, the process required to attain harmonization in a jurisdictionally divided system of securities regulation stands a better chance of insuring the growth of a federal ethic than the unilateral imposition of national rules. Indeed, uniform standards can only be adopted by provinces willing to mitigate their autonomy claims so as to insure the benefit of all.

To be quite honest though, there is little chance that such a radical approach will meet with the approval of the Court. Indeed, the whole purpose of "inventing" the GRT power was precisely to bestow on Parliament an authority it did not possess before, *i.e.*, the right to prescribe uniform rules in a sector — intraprovincial trade and commerce — that traditionally has fallen under provincial jurisdiction.

If so, then, at the very least, a specific methodological approach should guide the courts called upon to determine whether the GRT power should be triggered. This will be the object of the final section of this article.

2. The Methodological Approach: Measuring Efficiency

The approach developed by Dickson C.J.C. in *City National Leasing* to identify matters that could potentially fall within GRT is equivalent, in the words of Noura Karazivan and Jean-François Gaudreault-DesBiens, to a "non-evidence based approach".[156] Indeed, as we shall see, the test is

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[154] See Jean Leclair, "Jane Austen and the Council of the Federation" (2006) 15 Constitutional Forum 51.

[155] Noemi Gal-Or, "In Search of Unity in Separateness: Interprovincial Trade, Territory, and Canadian Federalism" (1997-98) 9 National Journal of Constitutional Law 307, at 333.

[156] Noura Karazivan & Jean-François Gaudreault-DesBiens, "On Polyphony and Paradoxes in the Regulation of Securities within the Canadian Federation" (2010) 49 Can. Bus. L.J. 1, at 22 [hereinafter "Karazivan & Gaudreault-DesBiens"].

no test at all. It is a purely rhetorical device. As a result, a much more stringent methodological approach is needed, one that will safeguard the diversity required at once by economic efficiency and by the principle of federalism. According to such an approach Parliament would only be authorized to regulate the intraprovincial aspects of securities if, and only if, it succeeds in bringing forward credible empirical evidence demonstrating that its intervention would lead to greater efficiency.

(a) The Problematic Nature of the "Provincial Incapacity" Test

For clarity's sake, let us recall the last three identification criteria formulated by Dickson C.J.C.:

> … (iii) the legislation must be concerned with trade as a whole rather than with a particular industry; (iv) the legislation should be of a nature that provinces jointly or severally would be constitutionally incapable of enacting; and (v) 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 … These factors are not exhaustive and, to be valid, it is not necessary for federal legislation to satisfy all five criteria.[157]

In a word, federal jurisdiction will be said to exist if provinces are incapable of regulating efficiently a particular field of the economy.[158]

The "provincial incapacity" criterion has enjoyed some success over the last decades. Its use has not been confined to the GRT power. It has also been harnessed in the POGG case law to determine whether a matter has attained the required degree of singleness that clearly distinguishes it from matters of provincial concern and justifies considering it a single indivisible matter of national interest.[159]

The "provincial incapacity" criterion is extremely problematic. First, it was mobilized and applied by the Supreme Court itself in a very erratic

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[157] As summarized in *Kirkbi*, *supra*, note 72, at para. 17.

[158] I have already briefly addressed the issue of "provincial incapacity", see *supra*, notes 80 to 83 and accompanying text.

[159] *Crown Zellerbach*, *supra*, note 4, at 432:

> In determining whether a matter has attained the required degree of singleness, distinctiveness and indivisibility that clearly distinguishes it from matters of provincial concern it is relevant to consider what would be the effect on extra-provincial interests of a provincial failure to deal effectively with the control or regulation of the intra-provincial aspects of the matter.

manner[160] that shows how devoid of any logical barriers a functional test can be.

Second, what does "provincial incapacity" mean? Does it refer to jurisdictional or political inability? Could not 100 years of successful securities regulation count as evidence of "provincial capacity"?

Could it mean unwillingness to cooperate then? It does seem that evidence of unwillingness to cooperate might be judicially equated with provincial incapacity. In *Multiple Access Ltd.*, Dickson J. (as he then was) quoted with approval the following excerpt taken from an article written by Philip Anisman:[161]

> [T]he factors that indicated a need for federal regulatory involvement in the securities market in 1979 are still present and, if anything, have been reinforced by events during the past two years. … The fact that the market is national in scope has long been acknowledged and is demonstrated by the cooperative efforts of the provincial commissions with respect to the adoption of national policies and by the statutory authorization for and increasing frequency of joint hearings held by a number of provincial commissions to decide issues that transcend provincial boundaries.[162]

It is somewhat baffling to realize that the provinces' willingness to cooperate with one another to harmonize regulation over a matter that falls under their jurisdiction could count as a reason for vesting legislative power over that very same subject matter with the federal government. Furthermore, since when is provincial willingness or unwillingness to cooperate on matters allocated under section 92 of the *Constitution Act, 1867* a reason to upset the balance of power in the Canadian federation?[163] Is not a federation based on a principle of autonomy and diversity?

This leads us to the third difficulty raised by the provincial incapacity test. As Karazivan and Gaudreault-DesBiens underscore, Dickson C.J.C.'s approach is founded on the two following premises: effectiveness can only be achieved by the federal polity and efficiency is

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[160] See Jean Leclair, "The Elusive Quest for the Quintessential 'National Interest'", *supra*, note 55; Jean Leclair, "La théorie des dimensions nationales: une boîte à phantasmes — *Canada (Procureur général) c. R.J.R. MacDonald Inc.*" (1993) 72 Can. Bar Rev. 524.

[161] Philip Anisman, "The Proposals for a Securities Market Law for Canada: Purpose and Process" (1981) 19 Osgoode Hall L.J. 329, at 352.

[162] *Supra*, note 73, at 174.

[163] Karazivan & Gaudreault-DesBiens, *supra*, note 156, at 23.

reducible to uniformity.[164] However, as I have tried to demonstrate in Part II, these are normative statements that do not appear to be validated by empirical reality.

The empirical laxity of Dickson C.J.C.'s trigger test constitutes the last, but not the least, important flaw that needs to be addressed.

(b) Efficiency and Empirical Evidence

Notwithstanding the uncertainty surrounding the purport of "provincial incapacity", it is safe to conjecture that, in the final analysis, this criterion will be understood as conferring jurisdiction to Parliament over certain specific trade matters if provinces are *incapable of regulating them efficiently*.

The nature of the GRT power, its very definition, imposes the recourse, not to a conceptual, but to a highly functional approach.[165] And although, as we saw earlier, empirical evidence of efficiency or inefficiency is generally forbidden when the constitutional validity of *legislation* is at stake, such a prohibition does not operate where the existence of a *constitutional power* commands that facts be demonstrated.

In general, one needs only show that there is "a rational basis for the legislation" in the head of power invoked in support of its validity.[166] For instance, in *Reference re Anti-Inflation Act*, Laskin C.J.C. underlined that, in considering the extrinsic evidence put forward to establish the existence of an emergency, "the Court does not look at [such evidence] in terms of whether it provides proof of the exceptional circumstances as a matter of fact. The matter concerns social and economic policy and hence governmental and legislative judgment."[167] Consequently, in that

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[164] *Id.*, at 25-26.

[165] Katherine Swinton, "Federalism Under Fire: The Role of the Supreme Court of Canada" (1992) 55:1 Law & Contemp. Probs. 120, at 133:

> The judicial perspective has shifted from the conceptual (that is, is this a problem with a situs outside the territorial reach of the legislature which might wish to regulate it?) to the functional (is this a problem affecting the national interest, even if much of the regulation will fall within a province?). Once we shift to the functional, we face the perennial problem of criteria for national importance.

[166] *Reference re Anti-Inflation Act*, *supra*, note 4, at 423; see also 420. In *Provincial Court Judges' Assn. of New Brunswick v. New Brunswick (Minister of Justice)*; *Ontario Judges' Assn. v. Ontario (Management Board); Bodner v. Alberta; Conférence des juges du Québec v. Quebec (Attorney General); Minc v. Quebec (Attorney General)*, [2005] S.C.J. No. 47, [2005] 2 S.C.R. 286, 2005 SCC 44, at para. 37 (S.C.C.), a unanimous Court specified that "… determin[ing] whether it is rational for the government to rely on the stated facts or circumstances … is done by looking at the soundness of the facts in relation to the position the government has adopted in its response".

[167] *Reference re Anti-Inflation*, *id.*, at 423.

case, even though the extrinsic evidence tended to demonstrate that the impugned legislation would fail at curbing inflation, a majority of judges nevertheless concluded that there was a rational basis for the Act as a crisis measure. The *Anti-Inflation* case demonstrates, yet again, that once a power is recognized to a level of government, courts are prohibited from scrutinizing the manner in which that power is exercised.

The nature of the emergency power might explain the low threshold of evidence prescribed by the Court in *Reference re Anti-Inflation Act*. The decision to declare a state of national emergency is contingent upon a careful appraisal of many political, economic and social variables that do not necessarily all point in the same direction. The final choice is therefore highly political and should not fall to be made by unaccountable magistrates.

Other heads of power might, however, justify the imposition of a more substantial burden of proof. In *Kitkatla Band*, the Supreme Court had to determine whether or not a provincial law of general application could be said to so affect the essential and distinctive values of Indianness that it would engage the federal power over Indians and lands reserved for the Indians (section 91(24) of the *Constitution Act, 1867*). After pointing out that constitutional questions should not be discussed in a factual vacuum, LeBel J. stated that "[e]ven in a division of powers case, rights must be asserted and their factual underpinnings demonstrated."[168] In this case, the appellants were claiming that the impugned legislation touched upon the core of their cultural values and identity — their Indianness — and, as a consequence, on a federal head of power. More specifically, the legislation allowed for the destruction of culturally modified trees the band claimed as theirs. "Because of this assertion," LeBel J. said, "the nature and quality of the evidence offered will have to be assessed and discussed."[169] He then referred to the evidentiary standards applicable in Aboriginal law cases and asserted that they were applicable, even if the case at hand was a division of powers case.[170] After confirming that oral evidence of Aboriginal values, customs and practices was necessary and relevant, he made the following comments:

> Nevertheless, this kind of evidence must be evaluated like any other. Claims must be established on a balance of probabilities, by persuasive evidence …

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168 *Kitkatla Band*, *supra*, note 108, at para. 46.
169 *Id.*
170 *Id.*

> The appellants attempted to downplay the importance and relevance of this issue by stressing that this Court was not faced with a claim of aboriginal rights or title. As stated above, facts must be established in order to demonstrate in this case that there exists a conflict between federal and provincial legislative powers.[171]

In this respect, he concluded that the factual basis of the claim looked weak and he eventually denied the existence of any conflict.

As we saw earlier, GRT aims at conferring jurisdiction to Parliament over certain specific trade matters where a court comes to the conclusion that provinces are *incapable of regulating them efficiently.* According to the reasoning expounded in *Kitkatla Band*, the factual underpinnings of a claim of inefficiency must therefore be established by the party alleging it. And to paraphrase LeBel J., because of this assertion of inefficiency, the nature and quality of the evidence offered will have to be assessed and discussed. Such a claim will have to be established on a balance of probabilities, by persuasive evidence. Even more so in a context where, once proven, such inefficiency will endow Parliament with jurisdiction to legislate over matters that traditionally fell within the provinces' exclusive sphere of power.

Upon what kind of evidence did Dickson C.J.C. rely, in *City National Leasing*, to recognize to the central government a power over the regulation of intra- and extraprovincial competition? What kind of evidence was adduced to establish provincial incapacity to regulate efficiently?

Two doctrinal sources were invoked. Most striking about these is their purely normative content. The long excerpt taken from the first one[172] written by Peter W. Hogg and Warren Grover,[173] begins as follows: "It is surely obvious that major regulation of the Canadian economy has to be national." It then goes on enumerating a number of very general assertions of the following type: "Goods and services, and the cash or credit which purchases them, flow freely from one part of the country to another without regard for provincial boundaries"; "[a]n over-all national policy is the key to efficiency in the production of goods and services"; "[a]ny attempt to achieve an optimal distribution of economic activity must transcend provincial boundaries"; "with few exceptions, any individual or corporation, including a provincially incorporated corporation, has the capacity to 'walk across' provincial boundaries in order to buy or

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171 *Id.*, at paras. 46-47.

172 *City National Leasing*, *supra*, note 65, at 679.

173 Peter W. Hogg & Warren Grover, "The Constitutionality of the Competition Bill" (1976) 1 Can. Bus. L.J. 197, at 199-200.

sell, lend or borrow, hire or fire," *etc*. A predictable conclusion ensues from all this: "the market for goods and services is competitive on a national basis, and provincial legislation cannot be an effective regulator".

As for the second study, it is even more prescriptive than the first, if possible. The first two lines of the quote[174] taken from A.E. Safarian's *Canadian Federalism and Economic Integration* say it all: "Competition policy can be used most effectively to support the common market if it is within federal power. With mobility of goods, it is quite unrealistic to attempt to maintain diverse provincial competition policies."[175] In the words of Karazivan and Gaudreault-DesBiens:

> These statements are general observations on interprovincial integration; they do not allow targeting a specific line of argument related to effectiveness in either qualitative or quantitative terms. More specifically, neither the *positive* added-value of federal legislation nor the *negative* aspects of provinces' inability to regulate the field were substantiated; that is, the provinces' incapacity to regulate the field has not been demonstrated, nor have the federal government's superior abilities in the field been proven.[176]

In point of fact, the authors' assertions are normative statements founded on the belief of the provinces' ontological incapacity to work for the economic good of Canada as a whole. Normative statements morphed by Dickson C.J.C. into empirical truths.[177] After referring to the above mentioned quotes, he concludes that "[i]t is evident from this discussion that competition cannot be effectively regulated unless it is regulated nationally."[178]

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[174] *City National Leasing*, *supra*, note 65, at 679-80.

[175] (Ottawa: Privy Council Office, 1974) at 58.

[176] *Supra*, note 156, at 17.

[177] Discussing the conclusions of Hogg & Grover, Karazivan and Gaudreault-DesBiens conclude, *id*., at 16, footnote 65:

> With all due respect, this is an argument, not a formal demonstration, let alone an empirical one. In no way does it really address the provinces' ability (or lack thereof) to legislate, from their own constitutional standpoint, in view of facilitating or fostering the economic union. On the contrary, it seems to assume that provinces are ontologically incapable to work for the economic good of Canada as a whole. In other words, even if Professors Hogg and Grover's argument may be philosophically or economically appealing to some, it looks, in the end, like a petition of principle.

[178] *City National Leasing*, *supra*, note 65, at 680. At 683, Dickson C.J.C. would again resort to Hogg's and Grover's opinion as a means of buttressing his normative conclusion. He quotes extensively the following passage of his own dissenting opinion in *Canadian National Transportation*, *supra*, note 66, at 278:

> A scheme aimed at the regulation of competition is in my view an example of the genre of legislation that could not practically or constitutionally be enacted by a provincial

In *Kirkbi*, the Supreme Court considered whether the civil action for passing off in section 7(b) of the *Trade-marks Act* is a valid exercise of the GRT power. The validity of the Act was not directly challenged by the parties, and the Court seemed to assume, with little discussion, that the Act a whole was valid. The few comments that LeBel J. did make on behalf of the Court suggest that normative assumptions similar to those operating in *City National Leasing* shaped the Court's views on the validity of the *Trade-marks Act* pursuant to the GRT power:

> The *Trade-marks Act* is clearly concerned with trade as a whole, as opposed to within a particular industry. There is no question that trade-marks apply across and between industries in different provinces. Divided provincial and federal jurisdiction could mean that the provincial law could be changed by each provincial legislature. This could result in unregistered trade-marks that were more strongly protected than registered trade-marks, undermining the efficacy and integrity of the federal Parliament's *Trade-marks Act*. The lack of a civil remedy integrated into the scheme of the Act, applicable to all marks, registered or unregistered, might also lead to duplicative or conflicting and hence inefficient enforcement procedures
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> … if trade-marks are intended to protect the goodwill or reputation associated with a particular business and to prevent confusion in the marketplace, then a comprehensive scheme dealing with both registered and unregistered trade-marks is necessary to ensure adequate protection.[179]

As explained already, my thesis is that the nature of GRT calls for a much more substantial burden of proof. Such power being ontologically linked to the existence of provincial inefficiency, then efficiency's logic must be played to the hilt. If Parliament is to win the day, it must establish on a balance of probabilities, by persuasive evidence, that the failure to include one or more provinces or localities in its legislative scheme would jeopardize the efficient regulation of securities in Canada as a

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government. Given the free flow of trade across provincial borders guaranteed by s. 121 of the *Constitution Act, 1867* Canada is, for economic purposes, a single huge marketplace. If competition is to be regulated at all it must be regulated federally. This fact leads to the syllogism cited by Hogg and Grover, [*supra*, note 173] at p. 200:

> ... regulation 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. This is certainly untrue as regards securities.

[179] *Kirkbi*, *supra*, note 72, at paras. 29 and 31. *Trade-marks Act*, R.S.C. 1985, c. T-13.

whole. This is especially so in a context where provinces have, for a long time, been constitutionally endowed with power over the litigious matter.

In any case, the *City National Leasing* decision should be used prudently.[180] It is worth recalling that this decision was concerned only with a very limited issue: the constitutional validity of a private remedy established under the *Combines Investigation Act*.[181] Similarly, in *Kirkbi* the constitutional validity of a civil remedy was at issue; the parties did not challenge the *Trade-marks Act* as a whole.[182] In addition, contrary to securities, neither competition nor trade marks has ever been the subject of full-fledged and systematic provincial regulation. The case for provincial inefficiency was therefore made that much easier to argue.

From what has been established up to now, we can conclude the following: although Parliament is most certainly competent over the interprovincial and international aspects of the securities trade, for this power to be extended to the intraprovincial dimensions of the latter, a rigorous empirical demonstration of provincial inefficiency should be mandatory.

As we will see in the final section, avenues of solution do exist to properly divide up power where concurrent authority is concerned.

(c) Efficiency and Subsidiarity[183]

Under the umbrella of the *Maastricht Treaty* a great number of concurrent powers are recognized to the European Union and its member states. And so as to ensure that "decisions are taken as closely as possible to the citizen",[184] paragraph 5(3) of Title I of the *Consolidated version of the Treaty on European Union*[185] provides:

> Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and insofar as the

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[180] The arguments in this paragraph are taken from Karazivan & Gaudreault-DesBiens, *supra*, note 156, at 13 and 17-19.

[181] *City National Leasing*, *supra*, note 65, at 670: "The issue is not whether the Act as a whole is rendered *ultra vires* because it reaches too far, but whether a particular provision is sufficiently integrated into the Act to sustain its constitutionality." See *Combines Investigation Act*, R.S.C. 1970, c. C-23.

[182] *Kirkbi*, *supra*, note 72, at para. 19: "The constitutionality of the *Trade-marks Act* as a whole is not challenged on this appeal."

[183] This section owes a great deal to Part IV(2) entitled "Concerns About the Court's Methodology: A Look at the Principle of Subsidiarity" of Karazivan's and Gaudreault-DesBiens' article, *supra*, note 156, at 29-32.

[184] Preamble of the *Consolidated version of the Treaty on European Union*, at 83/16, online: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2010:083:0013:0046:EN:PDF>.

[185] *Id.*, at 83/18.

> objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level.

Interestingly, although subsidiarity can lead to recognition to the Union of greater latitude in the exercise of a concurrent power, as appears from a reading of paragraph 5(3), it does not automatically endow the Union with the entirety of the said power. Indeed, in conformity with the principle of proportionality, the latter power will be granted "only if and insofar as" the member states' incapacity justifies it.[186]

The functional test established under paragraph 5(3) of the *Treaty on European Union* bears a close resemblance to Dickson C.J.C.'s "provincial incapacity" criterion — with a twist, however. Whereas the Canadian version allows for the mobilization of purely rhetorical and normative arguments in the establishment of provincial incapacity, a much more rigorous system for monitoring the application of the subsidiarity and proportionality principles is provided in the *Protocol (No. 2) on the Application of the Principles of Subsidiarity and Proportionality.*[187]

First of all, before proposing European legislative acts, the European Commission, it is said, "shall consult widely" (section 2) and such consultations "shall, where appropriate, take into account the regional and local dimension of the action envisaged" (*id.*). Drafts of European legislative acts need to be forwarded to national Parliaments (section 4) and must contain a detailed statement making it possible to appraise compliance with the principles of subsidiarity and proportionality (section 5). Finally, and most importantly for the purpose of our discussion, this last provision specifies that "[t]he reasons for concluding that a Union objective can be better achieved at Union level shall be substantiated by *qualitative and*, wherever possible, *quantitative indicators*."[188] Consequently, not only shall persuasive empirical evidence be necessary to prove the Union's claim, but the proportionality principle will also enjoin that proof be made of the difficulty or impossibility of achieving voluntary collaboration between the member states.[189] The "credibility of cooperation" test establishes that, in situations where the need to act in

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[186] Paragraph 5(4), *id*., at 83/18, states that "[u]nder the principle of proportionality, the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties."

[187] *Id.*, at 83/206.

[188] Emphasis added.

[189] Karazivan & Gaudreault-DesBiens, *supra*, note 156, at 30.

common has been established, centralization is not required when voluntary cooperation among Member States is credible.

The Supreme Court of Canada might therefore find some guidance in the European approach just described, especially since it has twice referred, in the recent past, to the principle of subsidiarity, a principle it defined as "the proposition [according to which] law-making and implementation are often best achieved at a level of government that is not only effective, but also closest to the citizens affected and thus most responsive to their needs, to local distinctiveness, and to population diversity".[190] The European approach certainly raises a number of difficulties. However, it provides a credible methodology to assess issues of efficiency and to limit the reach of the central government's power over intraprovincial securities regulation. It also provides an answer to the question of how the conflict between a valid federal securities legislation and its valid provincial counterparts would be settled. Assuming that GRT is found to provide Parliament with power to regulate all aspects of the Canadian securities market, what of the fate of the provincial regulatory system now in place?

Under the double aspect doctrine, the constitutional validity of this system could not be questioned. But could the central government go as far as proposed by the Hockin Report[191] and provide that, following a transition period of two years' duration after the adoption of a national legislation, all provincial securities legislation would be repealed?

Favouring as it does[192] the recourse to an "operational conflict" rather than to an "occupied field" test to determine whether federal paramountcy is engaged, the Supreme Court might be hesitant to pronounce provincial securities legislation inoperable. The end result would be a deep and maybe complicated intertwinement of federal and provincial legislation.

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[190] *114957 Canada Ltée (Spraytech, Société d'arrosage) v. Hudson (Town)*, [2001] S.C.J. No. 42, [2001] 2 S.C.R. 241, at para. 3 (S.C.C.); see also *Canadian Western Bank*, *supra*, note 100, at para. 45.

[191] *Supra*, note 7, at 61-62.

[192] *Canadian Western Bank*, *supra*, note 100, at paras. 70-75. At para. 70, Binnie J. remarked that

> the main difficulty consists in determining the degree of incompatibility needed to trigger the application of the doctrine of federal paramountcy. The answer the courts give to this question has become one of capital importance for the development of Canadian federalism. To interpret incompatibility broadly has the effect of expanding the powers of the central government, whereas a narrower interpretation tends to give provincial governments more latitude.

If, on the other hand, the methodological approach proposed here were ever to be adopted, this conflict issue might be deflated. Once credible demonstration has been made that federal intervention would indeed guarantee greater efficiency in the securities market, it would fall to reason that the continued application of provincial legislation "would frustrate the purpose of the federal law".[193] However, the simple assertion of the existence of a conflict would not suffice to bring about a conclusion of inoperability.

VI. CONCLUSION

The regulation of securities in a federal state is a complex question. But then federalism is a complex system that acknowledges the intricate nature of our modern lives. The avenues of solution described here all emphasize the need to bestow a complementary jurisdiction upon both the federal and provincial levels of government. They do so because incantatory assertions about the virtues of strict uniformity or radical decentralization belie the empirical reality of the tightly woven nature of the extraprovincial and intraprovincial facets of the securities sector.

The temptation will be great for the Supreme Court of Canada to abide by the wishes of the proponents of uniformity. However, caution should prevail. What for the present looks like a strictly economic question could easily transmute itself into an all-out identitary battle. If weak arguments based on a flimsy test of provincial incapacity are resorted to by the Supreme Court to justify federal encroachments upon the provincial power over securities, not only will the legitimacy of the federal intervention be questioned, but so will the legitimacy of the Court itself.[194] Indeed, one should never forget that considerations of efficiency always bring the following question to the fore: efficient for whom? The national or the local community?

The better solution might be to simply jettison GRT as the constitutional basis of federal intervention in securities matters. To guarantee a complementary instead of a plenary role to Parliament in such matters, one avenue, as I said before,[195] would be to ground federal legislation in the central government's jurisdiction over extraprovincial commercial

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[193] *Id.*, at para. 75 and *Rothmans, Benson & Hedges Inc. v. Saskatchewan*, [2005] S.C.J. 1, [2005] 1 S.C.R. 188, at para. 14 (S.C.C.).

[194] Karazivan & Gaudreault-DesBiens, *supra*, note 156, at 37-39.

[195] See *supra*, notes 49 to 51 and accompanying text.

matters *and* its jurisdiction over extraterritorial issues. In this way, Parliament could, for instance, contribute to the success of a passport system that would allow a market participant to choose a primary jurisdiction of his or her choice. As mentioned earlier, for this choice to be respected, Parliament could, by means of a referential legislation scheme, ensure that the selected regulatory regime would be applicable all over the country. These two heads of power, defined in more conceptual than functional terms, have the undeniable advantage of not being based on any notion of efficiency.

In a word, if this sheep is not to look like a ram, courts will have to be as imaginative as the Little Prince.