Determining the Constitutionality of the National Securities
Regulator Proposal and Beyond: The Federal Trade and
Commerce Power, the General Motors test and the Choice
Between ‘Categorization’ and ‘Balancing’

by

Oren S. Winer

A thesis submitted in conformity with the requirements
for the degree of Master of Laws (LL.M.)

Graduate Department of the Faculty of Law
University of Toronto

© Copyright by Oren S. Winer, 2011
Determining the Constitutionality of the National Securities Regulator Proposal and Beyond: The Federal Trade and Commerce Power, the General Motors test and the Choice Between ‘Categorization’ and ‘Balancing’

Oren S. Winer
Master of Laws (LL.M.)
Faculty of Law
University of Toronto
2011

Abstract

In addition to demonstrating the judiciary’s role in constitutional adjudication and an application of the federal trade and commerce power, judicial determination of Parliament’s constitutional jurisdiction to enact securities legislation is noteworthy also due to the vast policy debates that are involved. Though such determinations routinely invite a process removed from the contemplation of desirable policy, the ‘General Motors test’ used to define and apply the relevant constitutional power here seems to implicitly allow it. The choice between ‘categorization’ and ‘balancing’ in constitutional analysis is therefore significant, in terms of its juxtaposed tolerance for policy considerations. With these analytical options in mind, this thesis considers Parliament’s proposal, so to identify a reasonable process for determining its constitutionality. It argues that balancing relevant policy concerns is necessary and justifiable in the application of the legal norms in question. Crucial, however, is lending the process structure, so that its shortcomings are mitigated.
Acknowledgments

My sincere thanks to Professor Ian B. Lee (Faculty of Law, University of Toronto) for his challenging comments and thoughtful guidance during the writing of this thesis. Also, a very special thanks to my wife, Heather, for her patience and support during this past year. This thesis would certainly not have been possible without her. Lastly, I am forever indebted to my parents for all their help, guidance and encouragement during my many years of schooling. In particular, I am grateful to my father, Professor Stanley L. Winer, for showing me what it takes to achieve scholarly success, and from whom I continue to learn a great deal.
Table of Contents

1. Introduction ......................................................................................................................... 1
   1.1 Research Question(s) ................................................................................................. 4
   1.2 Thesis: Toward a Proper Approach for Determining Constitutionality under the Federal
       Trade and Commerce Power in the ‘National Securities Regulator Reference’ and Beyond
       ........................................................................................................................................... 5
   1.3 Structure and Methodology ....................................................................................... 6

2. Canadian Federalism and the Division of Powers: Works in Progress ......................... 8
   2.1 Canadian Federalism and the Division of Powers ..................................................... 8
   2.2 The Evolutionary Nature of Canadian Federalism and its Division of Powers ........ 11

3. The Proposed Canadian Securities Act: Renewed Potential for a National Regulator 16

4. The Courts and their Contemplation of the Division of Powers ................................. 22
   4.1 The Judiciary’s Role regarding the Division of Powers ......................................... 23
   4.2 Principles and Processes ......................................................................................... 24
   4.3 The Federal Trade and Commerce Power ............................................................. 27
   4.4 Characterizing the GM Test: An Indeterminate Role for Policy Considerations ...... 30

5. Approaching an Analysis of the Constitution: Categorization versus Balancing..... 34

6. An Argument for Expressly Allowing (Structured) Balancing When Contemplating
   Jurisdiction under General Trade and Commerce: Updating the GM Test .......... 40
   6.1 The Current Approach to the Use of ‘General Trade and Commerce’ is Inadequate... 41
   6.2 The Inadequacy of an Exclusively Categorical Inquiry into the Division of Powers and
       the Utility of Balancing in this Context ........................................................................ 43
   6.3 ‘Structured Balancing’: A Sensible Way to Consider Jurisdiction under ‘General Trade
       and Commerce’ ................................................................................................................. 50

7. Conclusion ......................................................................................................................... 56

8. Post-Script: Preliminary (Pre-Decision) Reflections on the SCC’s Reference Hearing
   ............................................................................................................................................. 59
1. Introduction

After many years of vigorous debate, Canadians are once again witnessing a renewed possibility that the Federal government will establish a national regulator over the Canadian securities markets. The proposed legislation to empower such a body would mark a sharp turn in the regulation of these markets, as it would drastically alter the current system of disparate provincial regulators. From a constitutional standpoint, such potential reform is also notable, as it would adjust the exercise of jurisdictional power in Canada. Consequences for the dynamics of the Canadian federation are therefore a possibility.

In considering the proposed reforms from this constitutional perspective, we are accordingly reminded of the complexities of Canada’s federal system – a system that delineates spheres of constitutional jurisdictional power in a manner that does not rule out adjustments over time, in terms of the boundaries of those spheres and the exercises of those powers. Indeed, the structure of Canada’s federal state, defined by the “division of powers” given in ss. 91-95 of the Constitution Act, 1867, is in a perpetually indefinite state where, despite the codified assignment of provincial and federal jurisdictional powers, it can develop in various ways.

Effecting such constitutional ‘development’ or ‘evolution’, broadly speaking, comes by way of three mechanisms: (i) formal amendment, (ii) informal adjustment and (iii) judicial adjudication. It is the latter of these three mechanisms that has been invoked with regard to the proposal for a national regulator, as a reference has been put to the Supreme Court of Canada (SCC) (along with two others, recently decided by the Quebec and Alberta Courts of Appeal), so that it can interpret the meaning and scope of the relevant constitutional jurisdictional power, and apply that interpretation to a determination of constitutionality of the proposed legislation in question. This two-stage analytical process will thus allow the

---

1 Originally referred to as the British-North America Act (U.K.), 30 & 31 Victoria, c. 3.
2 In this paper, the terms constitutional ‘development’ and ‘evolution’ of the division of powers will be used to describe not only situations in which some power is modified, but also where those powers are newly recognized or differently exercised by a given level of government. In this regard, constitutional development or evolution may include formal changes in the nature of the division of power (such as creating a new competency, or shifting jurisdiction between levels of government) as well as shifts that are not strictly ‘changes’, but simply differences in either an understanding, exercise or application of those powers.
Court to render a final decision on the constitutional ability of the Federal government to enact legislation (i.e. a Proposed Canadian Securities Act$^3$) that would empower the proposed national watchdog. To be sure, through this SCC reference, and though the Alberta Court of Appeal (CA)$^4$ and Quebec Court of Appeal (CA)$^5$ have already deemed the draft Act unconstitutional, it is possible that the constitutional division of powers, at least in terms of the level of government allowed to exercise some power, will again be re-conceptualized. Given the occasional, but profoundly important propensity for court-led evolution of Canada’s federal system in matters like these ones, an analysis of the role of the judiciary with respect to the constitutional adjudication that can spur such acknowledgements or re-conceptualizations thus seems timely and appealing.

The matter of the national securities regulator (and its empowering draft Act) is interesting not merely because it is an example of constitutional adjudication and (possible) evolution in the exercise of the division of powers, however. Rather, the matter is noteworthy also because of the debates that have long been held regarding why a national regulator would be desirable, or conversely, detrimental to Canada, assuming it could be constitutionally achieved. For the most part, these discussions have involved consideration of its potential for economic efficiency, its impact on national identity (mainly in Quebec) and its consequences for the regional distribution of economic activity. Yet, while the courts may somehow consider such issues when contemplating jurisdictional constitutionality, they do not appear to do so openly, in any clearly defined way.

In considering the constitutionality of a matter such as the proposed national securities regulator – a federal proposal relating to the financial markets, which would usurp the jurisdiction of the provinces – it is expected that the SCC will (and, in fact, the Alberta and Quebec Courts of Appeal already have) make primary reference to the jurisdictional confines of the ‘federal trade and commerce power’ and its ‘general branch’. In s. 91(2) of the Constitution Act, the Parliament is given the power to make laws related to the regulation of

---

3 Minister of Finance, Proposed Canadian Securities Act (Department of Finance, 2010), online: Department of Finance http://www.fin.gc.ca/drleg-apl/csa-lvm-eng.asp.
5 Renvoi Concernant La Compétence du Parlement du Canada en Matière de Valeurs Mobilières (31 Mars 2011), Province de Québec 200-09-006746-090 (Cour D’Appel de Québec).
trade and commerce. Stemming from Citizen’s Insurance Co. v. Parsons,6 this federal power is held to encompass both ‘international/inter-provincial’ matters and ‘general’ regulation affecting the whole of Canada. Though it remained underused due to its vague plain meaning, the elucidation of a five-part test given in General Motors Canada Ltd. v. City National Leasing7 (the “GM” test) brought new life to the analysis that a court could undertake to determine the constitutionality of a law under the general branch.8 Indeed, GM offered significant insight into how federal jurisdictional power under the general branch of trade and commerce differed from provincial authority over ‘Property and Civil Rights’. Accordingly, the test now figures prominently in any contemplation of constitutional jurisdiction under the general trade and commerce power, and appears ready to figure in this way regarding the national regulator proposal as well. However, even with considerable clarification regarding the process for determining when a law can be validly situated under the general trade and commerce power, the GM test leaves a significant degree of indeterminacy.

Interestingly, through a surface reading (in particular, of its fourth and fifth factors), the GM test appears rather ‘functionally’ based when applying an interpretation of general trade and commerce, as it primarily seeks to uncover and categorize the level of government able to constitutionally implement and execute the given (impugned) legislation. Yet, neither in GM, nor in subsequent case law (not even the recent Court of Appeal rulings) or commentary, is there any absolutely decisive position taken regarding what the test can require of the courts in terms of policy considerations. In fact, as Lee (2010) describes, a tension between two modes of analysis appears to underlie the test: ‘categorization’ (which requires a straightforward classification of jurisdiction) and ‘balancing’ (which would allow the GM test to consider an application of jurisdiction also with regard to what is best for Canadians

---

6 (1880), 4 S.C.R. 215.
8 The test states that an impugned provision (or Act) would fall validly within federal power, if (i) the impugned legislation is part of a general regulatory scheme, (ii) the scheme is overseen by a regulatory agency, (iii) the legislation is concerned with trade as a whole rather than with a particular industry, (iv) the legislation is of a nature that the 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.
from various policy perspectives). In this regard, it can be debated as to what the correct characterization of the GM test should be, and how exactly the courts should be determining constitutionality under the division of powers in light of it, according to one or the other approach. As such, further to any analysis of the role of the courts in constitutional adjudication and possible evolution of the division of powers in a matter like the national securities regulator issue, the specific manner in which they can employ their interpretation of constitutional norms in such a context, and especially, the considerations that they are able to utilize, are also of interest.

1.1 Research Question(s)

Given the important role played by the courts (particularly the Supreme Court) in the adjudication over, and possible evolution of the constitutional division of powers, the result of which can have profound implications for Canadian federalism, it is important to consider exactly how these courts are able to interpret and apply Canada’s supreme legal document, along with the adequacy of the manner in which they do so. It is therefore the aim of this paper, generally speaking, to analyze this constitutional division of powers adjudication.

More specifically, with the imminent SCC determination on the long-debated creation of a national securities regulator, particularly in light of the many policy concerns involved, a discussion of how the judiciary engages in adjudication over the division of powers and its potential evolution will be placed directly in that context. That is, it is specifically the goal of the present paper to consider how the Supreme Court should carry out their analysis of that draft proposal’s constitutionality, which will turn on the application of the relevant constitutional jurisdictional power. In this regard, given the importance of the general trade and commerce power and the GM test to the national regulator issue, the paper will critically comment on the appropriate analytical approach that the SCC should use in the determination of jurisdictional fit under that power, based on the test set out in GM. Ultimately, it is hoped

---

that this analysis will provide a reasonable finding on how the national regulator reference should be considered, as well as other like issues.\textsuperscript{10}

\textbf{1.2 Thesis: Toward a Proper Approach for Determining Constitutionality under the Federal Trade and Commerce Power in the ‘National Securities Regulator Reference’ and Beyond}

It will be argued that when the Supreme Court considers the constitutionality of the draft federal securities legislation in the Spring/Summer of 2011 (or any future like issue), the proper approach to be used when applying an understanding of the federal trade and commerce power, via the \textit{GM} test, should be one that allows structured ‘balancing’ of relevant policy concerns. This is so, due to a need for clarity and consistency in the judiciary’s use of the \textit{GM} test, and because balancing of relevant policy concerns, placed within certain confines, can offer a meaningful and reasonable way for a court – a body which plays a key role in the evolution of Canadian federalism – to ensure that constitutional division of powers norms are applied responsively to the needs and desires of Canadians and their federal system.

Namely, the current manner in which the courts are able to determine the constitutionality of an impugned law according to the general branch of the ‘trade and commerce’ power is inadequate, as the \textit{GM} test that guides this process seems to indeterminately allow not only categorical-like considerations of capacity and incapacity, but also veiled balancing inquiries into policy preferences. This indeterminacy is inappropriate, as the notion of federalism presupposes a need for the adoption of, and respect for clear rules. And, whereas judicial decisions relating to trade and commerce have the potential to impact the exercises of jurisdictional power, and possibly even the federal structure, the application of such constitutional norms should therefore be lent a certain degree of clarity and consistency.

\textsuperscript{10} It is important to note that it is not the goal of this paper to comment on the constitutionality of the proposed national regulator itself. Rather, the national regulator proposal is considered as a pertinent case study of a matter where numerous policy-related matters will weigh on the deliberations of the SCC, when it interprets and applies the trade and commerce power.
Of course, along with the need for precision and constancy, there is also a need for flexibility and forward thinking. Essentially, the Constitution demands progressivity, with an eye to optimization, in both the interpretation and application of constitutional norms. With respect to the division of powers in particular, progressivity is especially important; it is needed in order to ensure that the federal-provincial balance of powers is persistently attentive to the various needs and desires of the federation’s constituents, and so that it respects the various imperatives for a healthy federal design. A meaningful approach to the use of the general trade and commerce power should therefore be one that allows for the balancing of relevant policy concerns toward the above-mentioned ends. Indeed, given the judiciary’s critical role in the maintenance and evolution of Canada’s federal structure, denying their ability to ponder relevant policy concerns would be unwise, as it would ignore the central effects that constitutional determinations have on the structure and operation of the federal system. Importantly though, if such an approach is to be permitted, it should be in a ‘structured’ manner, where the balancing inquiries are made explicit, and include an open weighing of relevant policy matters. Not only will this contribute to the required clarity and consistency of constitutional adjudication, but it would also alleviate the vagueness and minimize the excess judicial discretion that balancing can itself otherwise lead to.

### 1.3 Structure and Methodology

Given that the writing and submission of this LL.M. thesis bridges mainly the lead up to, but also the aftermath of the Supreme Court’s hearing of the national regulator reference (though not the Court’s judgment), the paper is undertaken with a ‘before and after’ analytical approach. That is, the majority of the paper (the ‘before’ portion) is structured as an analysis and commentary on the manner in which the Court should consider the constitutionality of the *Proposed Canadian Securities Act*, and other like issues. A brief post-script (the ‘after’ portion), added subsequent to the Supreme Court reference hearing, then follows, which reflects on how the matters that bear relevance to this paper were discussed in the Court’s proceedings. Such reflections are preliminary in nature, as the Court’s judgment will not have been released at the time of this paper’s submission.
To carry out the main portion of the analysis, the paper begins by considering the nature and characteristics of the Canadian federal state, focusing on its legal aspects: its division of jurisdictional powers. The introductory review is completed with a preliminary look at the reality that they are, through three primary methods, dynamic. The paper proceeds to discuss the matter of the national securities regulator, which serves as the back-drop for the paper. The long history of a proposed national regulator is surveyed, including a review of the many issues, concerns and considerations that have been debated as to its merits, leading to the reference still to be resolved by the SCC.

Attention then shifts to the judiciary’s role in and process by which they interpret and apply the constitutional division of powers. Special attention is given to the federal government’s trade and commerce power. An analysis of the *GM* test then becomes the focus of the section, in order to elucidate the way in which the judiciary is to understand and apply (that understanding of) the trade and commerce power. The section concludes by characterizing the test, through its literal reading, and as read by the courts and other scholars, in order to uncover the methodological approach that seems to have arisen as to its use.

In the concluding portions of the ‘before’ analysis, an examination of the categorization vs. balancing debate over the appropriate analytical approach to constitutional adjudication generally (applicable to a discussion of the trade and commerce power) is undertaken. With the national securities regulator issue as the back-drop, the argument is subsequently made that it is something akin to ‘structured balancing’ that is proper when contemplating the validity of an impugned law under the general federal trade and commerce power.

As a reaction to the Supreme Court’s hearing of the national securities regulator reference, though prior to the release of the Court’s judgment, brief reflections on the hearing, in respect of the issues discussed in the present paper, then follow. Analysis is focused on the nature of the arguments presented, and the preliminary reactions to them by the Court, particularly with respect to discussion related to policy contemplation.
2. Canadian Federalism and the Division of Powers: Works in Progress

Before critically analyzing the manner in which the judiciary adjudicates over the division of powers (particularly the trade and commerce power) and commenting on the appropriate approach to consider the SCC national securities regulator reference, it is necessary to place such a discussion in the proper context. This can be achieved via a brief overview of Canadian federalism and the constitutional division of powers. Further, analysis of the dynamic nature of the Canadian federal state is also pertinent.

2.1 Canadian Federalism and the Division of Powers

As a product of Canadian history, its social, political, legal and economic makeup, and its institutional designs, the Canadian federation can be seen to have developed distinctively. Indeed, it is through expansion from a handful of provinces at confederation (to its current makeup of ten provinces and three territories, which includes two linguistic communities), population increases (from approximately 3.5 million in 1867 to 33 million currently), economic growth and global integration, social/cultural evolution (which includes dimensions such as language, regionalism, multiculturalism and aboriginal peoples), the inherited British parliamentary system, and codification of a constitution and a “division of powers”, that Canada’s various governmental roles and responsibilities have developed in the ways that they have.¹¹

All told, the Canadian federation, with its parliamentary system and guiding Constitution, has come to be represented by two distinct jurisdictions of political authority: a federal level, along with regionally-based provincial governments.¹² Interestingly, the interplay of these

---

levels of authority allows for a special balance of centralized and decentralized power.\footnote{See e.g. Peter W. Hogg & Wade K. Wright, “Canadian Federalism, the Privy Council and the Supreme Court: Reflections on the Debate About Canadian Federalism” (2005) 38 U.B.C. L. Rev. 329.} Namely, while they are of course linked, there is a significant division of duties between the two levels, leading to characterization of the system as decentralized, in the sense that the provinces handle numerous matters under their own competence, without oversight of the federal government. In fact, such dynamics often lead commentators to note that there is a rather fragmented structure of leadership in the country, where the provinces compete against each other, as well as the national government, rather than contribute to the management of a single, unified polity.\footnote{Supra note 11.} On the other hand though, Canada is also often characterized as fairly centralized, in that there can be a tendency toward a dominant role of the federal government in respect of many matters.\footnote{See e.g. infra note 41 at 123.}

The legal confines of the federation is primarily elucidated in Canada’s Constitution Act, 1867, where both federal and provincial jurisdictional abilities are enunciated in a legislated ‘division of powers’; a document that was undoubtedly a product of the time in which it was drafted.\footnote{Certainly, from a legal perspective, and for the purposes of the present paper, the constitutional dimension to the Canadian federation is of paramount importance. It is therefore to these legal dimensions of Canadian federalism that this section now turns. See e.g. John D. Whyte, “Federalism Dreams” (2008) 34 Queen’s L.J. 1 at 3-6.} To be sure, the division of powers in the Constitution Act reflects several tensions that existed at confederation, making its delineations of power a main source of the brand of federalism that exists in Canada today.\footnote{That is, tensions emerging from the realities of cultural and ethnographic pluralism. See e.g. See John D. Whyte, “Federalism Dreams” (2008) 34 Queen’s L.J. 1 at 3-6.} For the most part, it is described as being a result of joining of two linguistic communities into a single political unit that the division of powers took on the character that it did,\footnote{This is a realization recognized by the Supreme Court in Reference Re Secession of Quebec, [1998] 2 S.C.R. 217, where federalism was seen to be responsible for facilitating the goals of the different cultural and linguistic communities in Canada.} as competing visions of the federation were at play: one that saw a unitary federation as the proper modus operandi, and one that sought to protect community values (that is, those of the French community).\footnote{Supra note 13 at 329-330.} Indeed, as was alluded to above, the division of powers, read literally from the Constitution’s text, has been understood...
as both centralized and even “quasi-federal”, as well as highly decentralized and divisive. The text of the Constitution thus reflects these differing views, thereby contributing to Canada’s particular brand of federalism.

In contributing to the Canadian federal structure, the Constitution Act, in ss. 91-95, sets out several powers, which define the jurisdictional limits of the governments of Canada, and thus, the legal boundaries of the federal structure itself. In general, ss. 91 and 92(10) grant the Parliament of Canada (i.e. the federal government) exclusive powers over matters of national interest. For the most part, these enumerated matters of national interest include powers that are fairly easily discernible. Among these discrete powers, there is also a significantly wider one found within s. 91(2) – the federal ‘trade and commerce’ power (which is of primary concern in this paper). Generally speaking, the trade and commerce power allows the federal government to make laws related to international/inter-provincial matters, as well as the “general” regulation of matters affecting the whole of Canada. The trade and commerce power will be revisited in greater detail below.

In ss. 92, 92(A) and 93, it is the provincial governments that are then given various enumerated powers. And like their federal counterpart, the provinces are also given a broad power in s. 92(13), which grants them jurisdiction over ‘property and civil rights’; a power referring to matters related to property rights and civil law generally (including contractual rights, labour relations, professions, intra-provincial marketing, advertising, manufacturing, and industry), against which the federal trade and commerce power is often balanced.

---

20 Ibid. As Hogg and Wright describe, there are features in the Constitution Act that reflect intentions of the framers to erect both a highly centralized, and a highly decentralized structure – what seems to be a contradiction.

21 These discrete matters include powers over criminal law, public debt, unemployment insurance, national taxation, the postal services, the census, national defence, shipping, quarantines, the fisheries, ferries, the Canadian currency, banking, bankruptcy, intellectual property, aboriginals, citizenship, marriage/divorce, and works connecting provinces, works within a province but to the advantage of Canada/or more than one province, and works extending beyond Canadian boundaries.

22 At the provincial level, discrete powers include those over the management/sale of public lands belonging to the province, direct provincial taxation, prisons, hospitals, municipalities, formalization of marriage, administration of civil/criminal justice, education, incorporation of companies, natural resources, and matters of a local and/or private nature.
Recognizing that there should be some overlap of jurisdiction for certain issues, ss. 94A and 95 give concurrent powers over immigration, pensions, and agriculture (in addition to marriage, which is enumerated in both ss. 91 and 92). And finally, s. 91, confers to Parliament a power to make laws “for the peace, order and good government of Canada, in relation to all matters not... assigned exclusively to the legislatures of the provinces” – a “residuary” power which implies that matters that do not come clearly within federal or provincial jurisdiction, when of a national dimension (or alternately when involving a national emergency) are to come within federal jurisdiction, so that every area of legislation comes under one or both of Canada’s two orders of government.  

Admittedly, even though these seemingly compartmentalized powers are enumerated in the Act, they can still be the subject of debate as to their meaning and application. This reality, in the context of the courts’ role as adjudicators over constitutional powers, particularly with respect to applications of the trade and commerce power, is dealt with further below. However, a more general discussion of the dynamic nature of Canadian federalism follows immediately.

2.2 The Evolutionary Nature of Canadian Federalism and its Division of Powers

To say that the Canadian federal structure and the associated exercises of jurisdictional power are set in stone would be untrue, even though they are largely legally determined within Canada’s supreme law, giving the “appearance of fixity”. Instead, federalism is “more of a process than a fixed state”. It has already been alluded to that Canadian federalism has been greatly influenced by several factors over the course of Canada’s history. In this regard, it should be recognized that Canadian federalism is dynamic and flexible.

---

23 See Government of Canada, Privy Council Office, “The Constitutional Distribution of Legislative Powers” (2010), online: http://www.pco-bcp.gc.ca/. Though, to be sure, such a broad residuary power has not been given unlimited reach by the courts.


25 Supra note 11.
The impetus for the many instances of the evolution of Canadian federalism, broadly speaking, has emerged from numerous sources over the years, including changing economic, social and political circumstances, as well as various policy agendas. For instance, recessions and new understandings of economic efficiencies, efforts to challenge federal dominance, and the rise and fall of various matters on governmental agendas (such as Quebec nationhood, hydro-electricity, social welfare and unemployment insurance), have been some of the key causes of evolution in Canadian federalism. Additionally, lack of clarity pertaining to the heads of power is also a source for such evolution, as various parties have, as a result of economic, social and political circumstances, sought to clarify their jurisdictional limits.26

What these causes of the plasticity of Canada’s federal arrangements therefore highlight is that no one reading of the Constitution describes fully what the different levels of Canadian government do. And further, the relative importance of a given jurisdictional power or its exercise may vary depending on the circumstances, or even cease to exist. At the same time, others can be newly created. In essence, Canadian federalism is rooted in a document that does not exhaustively define its limits, and is dynamic in a way that mirrors the fluidity of Canadian society as it meets new challenges.27 Some have even described the division of powers as only a “starting point” in understanding various aspects of the jurisdictional power that have evolved since the framing of the Constitution Act.28

Effecting the aforementioned evolution of federalism, and its guiding division of powers, occurs via three key processes: formal amendment, informal adjustment, and judicial adjudication. The first of these methods, as one would expect, is a process determined by a formal act of legislative amendment. Prior to the patriation of Canada’s Constitution in 1982,

27 See supra note 17 at 1-2. As Whyte explains of Canada’s constitutional character, what Canadian federalism, rooted in its constitution, truly is can be best explained by understanding it as a political community that is historical and contingent, and ultimately, best grasped as a ‘national narrative’.
28 Stanley L. Winer, “On the Reassignment of Fiscal Powers in a Federal State” in G. Galeotti, P. Salmon & R. Wintrobe eds., *Competition and Structure: The Political Economy of Collective Decisions: Essays in Honour of Albert Breton* (New York: Cambridge University Press, 2000) at 158. It is interesting to note that evolution in a constitutional division of powers is not just a Canadian phenomenon. In Australia, for example, although their constitutional founders rejected aspects of Canadian-like centralism when formulating their federal structure, the country has actually ended up as one of the most centralized federal states in the world. This reality vividly displays that a constitution is only a starting point, and can evolve in unexpected ways.
amendment to the Constitution Act, 1867 came by way of an enactment by the U.K. (Imperial) Parliament (which, following the Imperial Conference of 1930, was agreed to occur only at the request and with the consent of the dominion in question). Through this process (until 1982), Canada’s Constitution was amended twenty-plus times, of which only a handful of instances pertained specifically to the division of powers. Notably, exclusive power over unemployment insurance (per s. 91(2)) was given to the federal government in 1940, concurrent power over old age pensions (per s. 94A) was given to the federal government in 1951, and power over natural resources (per s. 92A) was given to the provinces in 1982.

After patriation in 1982, the process of formal amendment was, for the first time, put directly into the hands of Canadians, as the Constitution Act, 1982 laid out five amending formula. The cumbersome and complex nature of these formulas, however, has made formal amendment rare. In fact, since 1982, there have been only minor amendments (ten in total), while the only two significant proposed amendments were rejected (at Meech Lake and Charlottetown in 1987 and 1992, respectively). For many, formal amendment is now routinely seen as quite unlikely, perhaps even “hopelessly unachievable”.

Alongside the formal amendment procedures are also various informal adjustment mechanisms. Because of the difficulties of formal amendment, the use of such informal mechanisms has been quite prevalent over the years. For instance, informal fiscal arrangements and inter-governmental agreements which may reassign jurisdictional power according to the negotiated desires of the executive parties involved power have become

---

30 Under Part V, amendments can be proposed under s. 46(1) by both the provincial and federal levels, according to given formula: (1) the general formula (the “7/50 formula”) set out in s. 38(1) requires (a) assent from the House of Commons and the Senate, (b) approval of two-thirds of the provincial legislatures (at least seven provinces), representing at least 50% of the population; (2) s. 41 gives a unanimity procedure for five defined kinds of amendments, requiring the assents of the federal Parliament and all of the provinces; (3) s. 43 allows a “some-but-not-all” provinces procedure for amendment of provisions not applying to all provinces, requiring assents of the federal Parliament and only the provinces affected; (4) the federal government is given exclusive power to amend provisions regarding its executive and Houses in s. 44; and (5) likewise, each provincial legislature can amend its respective ‘constitution’, per s. 45. For a discussion of the amending formula, see e.g. ibid. at 257-258.
31 Jean Leclair, “Reforming the Division of Powers in Canada: An (Un)achievable Endeavour?” in Gerhard Robbers ed., Reforming Federalism - Foreign Experiences for a Reform in Germany (Frankfurt, 2005) at 93.
quite common. In fact, thousands of such agreements have been entered into between the federal and provincial governments, and thus play a substantial, perhaps even primary role in shaping the administration of the public sector. For instance, the hugely influential power to tax in Canada, though rooted in the Constitution, has been subject to many informal arrangements between the federal and provincial governments, and thus, has been highly flexible over the years.

Alongside informal agreements, many also point to the development of the ‘federal spending power’ as another important cause of informal constitutional adjustment. Though only implicitly given by the Constitution, this power allows the federal government to transfer money to the provinces for matters within provincial jurisdiction (e.g. matters of health and/or welfare), however, attached can be conditions for the use of those funds. The result (when conditions are attached) is the potential for de facto alteration of certain exercises of constitutional jurisdiction.

Further still, various powers listed in the Constitution regarding allowable government practices can also lead to informal adjustment of constitutional competences. Namely, the Governor General (via ss. 56 and 90 of the Constitution Act) is given powers of ‘disallowance’ over federal or provincial legislation within the two years after their passing, and can thus be a manifestation of a less formalistic type of adjustment to constitutional jurisdiction. Similarly, the ‘declaratory power’ found within the ‘works and undertakings’ clause of s. 92(10) of the Constitution Act allows Parliament to declare that certain public

---

32 Ibid. at 103.
33 See e.g. Albert Breton & Anthony Scott, The Economic Constitution of Federal States (Toronto: University of Toronto Press, 1982) at 65. Indeed, the reassignment of power via informal agreement is seen as a normal event in the Canadian federal system.
34 See e.g. supra note 28 at 172-176. The power of the provinces to tax within their domain has certainly been at the center of this set of shifts. The emergence of provincial sales taxation in the 1930’s, followed by the lessening of this power during the war years, and the regaining of the power after that, typified this evolutionary process. With the introduction of the federal harmonized sales tax (HST), the taxing power now once again appears to be shifting back to the domain of the federal government. See also G.V. LaForest, “The Allocation of Taxing Power Under the Canadian Constitution” in Canadian Tax Paper No. 65, 2d ed. (Toronto: Canadian Tax Foundation, 1981).
35 Supra note 11.
36 Supra note 31 at 107-108.
37 See Peter W. Hogg, Constitutional Law of Canada, 4th ed. (Scarborough: Carswell, 1997) at 120. Admittedly, this ability appears to have fallen into disuse.
works in a province are for the ‘general advantage of Canada’ (or two or more provinces), which has the effect of giving the federal government authority to take control over them.\textsuperscript{38} And finally, the ability of the federal government to acquire public properties can also lead to federal appropriation of provincial jurisdiction with respect to that particular property.\textsuperscript{39} Of course, it is important to note that all of the abovementioned informal processes for tinkering with constitutional jurisdiction are of a nature that do not actually directly affect the division of powers. That is, while these adjustments can modify accepted exercises of constitutional competencies (particularly the widely used informal agreements), they will not actually directly alter understandings or applications of the division of powers \textit{per se}.\textsuperscript{40}

The third and final process of constitutional evolution is ‘judicial adjudication’ – the focus of this thesis – which is perhaps most accurately understood as involving both the clarification and application of constitutional norms, though it need not result in formal constitutional change. In their role as adjudicators over the meaning and applications of the various governmental heads of power, the judiciary is involved in the evolution of the division of powers through three key ways: (i) in litigation that may arise in respect of constitutional matters, (ii) when ‘references’ are given to the courts for the purpose of constitutional clarification at the request of Parliament or the provinces (often regarding questions of the constitutionality of a proposed or existing statute or provision), and (iii) in respect of inter-governmental agreements, where in a secondary role, the courts facilitate such agreements through litigation or references that may have arisen, often because of a resulting jurisdictional overlap.\textsuperscript{41} While the constitutional issues considered by the courts can be wide-ranging, they boil down to those that are either of a federal-provincial or international nature, where the scope of respective jurisdictions, as well as questions of the proper degree of centralization vs. decentralization, as applied to a particular context, are considered.\textsuperscript{42}

\textsuperscript{38} Claude Belanger, “The Declaratory Power in the Canadian Constitution” (2001), online: \url{http://faculty.marianopolis.edu}.
\textsuperscript{40} Supra note 31 at 105.
\textsuperscript{42} Ibid.
How a court actually carries out its duties via the use of several core principles, is considered below. Suffice it to say at this point that with the many issues that come before the courts in mind, they have been responsible for the interpretation and application of several federal and provincial jurisdictional powers and/or their exercise over the years, in a multitude of niches, leading to what can be seen as the continued development of the constitutional division of powers.\footnote{For an overview of various major SCC decisions which impacted the divisions of powers, see e.g. supra note 13. Recall also that “development” and/or “evolution” of the constitutional division of powers are terms (in this paper) meant to cover everything from formalistic changes to a power, all the way to shifts in the understandings, applications or exercises of a power: see supra note 2.} There is no question that the reference on the constitutionality of a Canadian securities regulator (to be deliberated on by the SCC) will also soon become another such instance of judicial adjudication, seemingly having the potential to carry with it the effect of further constitutional evolution, in the sense of novel exercises of jurisdictional power.

As this section has displayed, the federal arrangement in Canada is delineated by a constitutional division of powers, which sets out discrete and general jurisdictional competences. Yet, this delineation is not entirely rigid. Rather, because of social, cultural, political and economic factors, Canadian federalism is dynamic. Namely, the division of powers (and its applications), can evolve in a number of ways; by formal amendment, informal adjustment and judicial adjudication. Importantly though, because of the rarity of formal amendment, the division of powers has consequently been left to the executive to tinker with, and to judges to interpret and apply.\footnote{Supra note 31 at 93.} But, that informal adjustments largely sidestep the division of powers in its legalistic sense, the role of the judiciary is especially important. Given this crucial role, it is in their direction that this paper ultimately turns.

### 3. The Proposed Canadian Securities Act: Renewed Potential for a National Regulator

Given the focus of this thesis on the proper analytical approach to the division of powers (the trade and commerce power in particular), against the back-drop of the draft securities
legislation, it is consequently necessary to consider the national securities regulator proposal itself. The present section therefore examines the proposal, including its history, the proposed legislation, and the various issues it raises (that is, the policy considerations involved, and the required jurisdictional analysis of the trade and commerce power, via the “GM test”).

Before the prospect of a national regulator, or even the current system of regulating securities, the Canadian capital markets were notoriously difficult to navigate. As the division of powers recognized (following interpretation in some landmark cases45) provincial jurisdiction to regulate the securities markets, their regulation in Canada became cumbersome, costly and complex, as those trading in securities had to abide by the rules of each province they had an interest in dealing in. Indeed, requirements for fees, filings and amendment of prospectuses, as well as continuous disclosure obligations, for example, had to be respected in each jurisdiction.46 Countless criticisms of such a system have therefore led to the current, more coordinated manifestation of securities regulation in Canada.47

Currently, Canadian markets are overseen by provincial regulators in each province. These regulators work together (through joint agreements with the provinces, and with de facto cooperation of Ontario) via the ‘Canadian Securities Administrators’ (CSA), which coordinates regulation of the markets among these different bodies. While certainly not wholly centralized, there is some consistency achieved through the CSA, most notably in that investors and issuers may buy and sell their securities through compliance with the rules set out in their home province, and through the establishment of a principal regulator for a given filer. The current regulatory structure is in fact typified by this “passport system”.48

46 For a historical overview of securities regulation prior to its current manifestation, see J. Peter Williamson, Securities Regulation in Canada (Toronto: University of Toronto Press, 1960); Mary G. Condon, Making Disclosure: Ideas and Interests in Ontario Securities Regulation (Toronto: University of Toronto Press, 1998).
48 Securities Law, ibid.
Yet, like the structures that came before it, the current system remains controversial. The structure of the system, and its component parts, are frequently critiqued for overlap and duplication resulting in operational inefficiencies and complexities. For instance, regulatory responses to securities’ market incidents are often observed to be delayed. Further, because provincial approaches to securities regulation are sometimes inconsistent, the regime can be difficult and costly to navigate. And finally, few critics forget to mention that Canada’s decentralized system is unlike virtually all other countries’ federal systems of regulation.

As a result of the recurring critiques of the current system, many therefore believe that a national securities regulatory agency would remove the impediments caused by the existing limitations that are inherent to a decentralized system. To be sure, the prospect of a national regulator has long been considered. As far back as the ‘Porter Report’ (1964) until the present day, in fact, has the structure and operation of the Canadian financial system, in respect of a federally implemented securities regulator, been assessed. For the most part, commissions and panels have favoured the creation of a federal regulatory authority in order to implement more uniform standards. Yet, for a plethora of reasons, each report’s recommendations have been resisted, and ultimately, none have been (entirely) implemented; it was a “saga of political futility”, according to MacIntosh (2011). Anand & Green (2010) comment further that while most provinces seem to recognize some benefit in adopting a common regulatory model, the source of disagreement has involved the content of such a standardized model. To date, consensus has not been fully reached regarding such content not only because of a lack of cooperation, but also because of a lack of coordination. In

49 Revisiting, supra note 47.
50 See e.g. Marcel Boyer, “Canadian Securities Regulation: Single Body Or Decentralization?” (January 2008), online: Economic Note http://www.iedm.org/files/janvier08_en.pdf. It is frequently pointed out that Canada is the last major industrialized nation without a national system.
51 Revisiting, supra note 47.
light of ongoing resistance to a national regulator, the divisive provincial system has
continued to develop without federal encroachment – a fact that is still welcome to many.

In spite of continued resistance, the notion of a national regulator continues to be the subject
of discussion, and was recently rather well-received in the ‘Wise Persons’ Committee (WPC)
Report’.

Stemming from this report, and the ‘Expert Panel’ which backed the WPC, the
national regulator idea has not only been revived, but rather, it looks as though the federal
government is finally resolved to install such a regulatory authority. In fact, in May of 2010,
the Minister of Finance released a Proposed Canadian Securities Act, which represents the
clearest intent on the part of the federal government to create a national regulator, to date.
They did so, assuming that the federal government has the jurisdictional power to regulate
the securities markets in Canada, in addition to the provinces.

What sets the draft Act (made up largely of WPC recommendations) apart from previous
proposals, is its proposed structure and novel opt-in feature. Key to the draft Act are its
proposed separation of adjudicative and regulatory divisions (though there would be a forum
where the two could interact), as well as its proposed investor and small issuer panels,
through which the voices of big and small investors could be heard. Most importantly, the
Act would allow provinces to opt-in to the federal system on a volunteer basis.

Otherwise, (and though a detailed analysis of the components of the proposed Act is beyond
the scope of this paper) the draft Act adopts conventional objectives (to ensure fairness,
efficiency and confidence in the capital markets) and mechanisms (registration requirements,
various disclosure obligations, compliance/enforcement mechanisms etc.) of securities
legislation currently in existence at the provincial level. In general, as its framers posit, the

---

55 Wise Persons’ Committee Report: Committee to Review the Structure of Securities Regulation in Canada,
It’s Time (Ottawa: Department of Finance, 2003), online: http://www.wise-averties.ca/main_en.html.
56 Expert Panel on Securities Regulation, Creating an Advantage in Global Capital Markets: Final Report and
Recommendations (Ottawa, Department of Finance, January 2009), online: Expert Panel on Securities
57 Supra note 3.
58 The draft Act differentiates itself from the WPC report in this respect, as the WPC also proposed to allow
individual issuers to opt in or out of the system. Supra note 9 at 74.
proposed Act would thus seek to “enhance the integrity and stability of the financial system, as well as the existing investor protection and market efficiency mandates”.60

Even with greater acceptance than ever before, opposition to a federal plan remains, spearheaded by Quebec and Alberta. Indeed, many commentators continue to argue that a provincially administered regulatory structure (through the administration of the CSA and its passport system) has provided Canada with an adequately flexible system that is attentive to industry and regional needs.61 In contrast, a centralized system would be a “disruptive, costly [initiative]... that will not give Canadians what they expect, while erasing many of the benefits achieved so far”.62 Especially since the draft Act was proposed, the court of public opinion has thus been in overdrive, assessing the relative merits and flaws of the national regulator plan.63

Due to their opposition, the provinces outwardly dissenting to the proposal (Quebec and Alberta in particular) brought references to their respective Courts of Appeal, and by effect, and have provoked Parliament to seek a final opinion of the Supreme Court of Canada on their ability to enact and implement the proposed Act. In general, the references all rest on an assessment of the federal government’s constitutional jurisdiction to enact and implement the proposed Act.64 And though it is subject to the ruling of the Supreme Court, the recently handed down decisions of the Alberta and Quebec Courts of Appeal (to be parsed more fully

60 See Department of Finance, “Backgrounder: A New Canadian Securities Regulatory Authority” (Department of Finance, 2010), online: Department of Finance http://www.fin.gc.ca/n10/data/10-051_1-eng.asp at 3.
61 See e.g., among many others, Pierre Lortie, “Securities Regulation in Canada at a Crossroads” (October 2010) 3: 5 SPP Research Papers, University of Calgary, online: http://policyschool.ucalgary.ca.
62 Ibid. at 1.
64 The question posed to the SCC is specifically: “is the annexed Proposed Canadian Securities Act within the legislative authority of the Parliament of Canada?” See Department of Finance, “Fact Sheet on Reference to the Supreme Court of Canada on the Proposed Canadian Securities Act” (May 2010), online: Department of Finance, News Release 10-051 http://www.fin.gc.ca/n10/data/10-051_3-eng.asp. This reference question accompanies those answered by the Alberta and Quebec in their respective Courts of Appeal, but which are ultimately subject to the final say of the Supreme Court.
below) that the proposed federal Act is an intrusion into provincial jurisdictional competence is surely a preliminary feather in the cap of the federal proposal’s detractors. In the unanimous Alberta ruling, the CA found that securities regulation falls under the authority of the provinces’ power over “property and civil rights”, and the federal government has no power allowing it to enter the field. Similarly, the Quebec CA (though with only a 4-1 majority) also held that the federal government does not have constitutional jurisdiction to regulate the securities sector, except in respect of the proposed Act’s criminal provisions.

Regardless (since the CA findings are not conclusive, with a Supreme Court judgment still to be given) an SCC finding of the constitutionality of the proposed Act has the potential, in some respects, to redefine the exercise of power in the Canadian federal system, and is therefore no small matter. Given the provincial powers over securities markets (recognized as within the scope of the Constitution Act, s. 92(13)), the reference will undoubtedly (and did, in the Alberta and Quebec references) rely on interpreting the scope of the federal government’s power over the regulation of (general) trade and commerce and whether the proposed law can fit under it, which is a process carried out via the so called GM test. Due to the importance of this power (and its associated test), it is examined further below.

Interestingly though, the current SCC reference does not only once again turn our attention to the federal nature of the Canadian state, and how a constitutional issue has the power to affect its make-up and functioning. Nor does it also only remind us of the importance that the judiciary plays in this process, especially given the broad jurisdiction potentially granted under the trade and commerce power. Rather, while the constitutional question posed to the SCC may be seen to involve only doctrinal legal matters, the long history of a national regulator notion, and the many views attached to it, tell us that there are an array of competing policy issues also at play. These include those of an economic, social and political

---

67 See e.g. Multiple Access, supra note 45.
68 A case for jurisdiction under this power was famously elucidated in Philip Anisman & Peter W. Hogg, “Constitutional Aspects of Federal Securities Legislation” in Philip Anisman et al., Proposals for a Securities Market Law for Canada, vol. 3 (Ottawa: Consumer and Corporate Affairs Canada, 1979), and has since found much support, in various forms.
nature. Specifically, frequent are opinions given with respect to whether a national regulator would be more economically and functionally efficient than the current system, or whether it would diminish systemic risk. Essentially, from different perspectives, the potential improvements of a national regulator are regularly considered, as compared to the current system. Further, given the regional, social and cultural divides between provinces, a national regulator is also typically assessed in terms of its potential sensitivity to regionally-specific investor issues. In Quebec, some even attach its regulator with the province’s ‘identity’, thus making a national regulator’s possible affront to this identity an additional policy concern. In short, the notion of a national regulator has been investigated, supported and/or critiqued from several very different policy perspectives. As per the above realizations, it is therefore incumbent upon us to consider exactly how the SCC should approach the constitutional question that faces it, in light of the fact that various policy concerns exist. That is, it is necessary to determine the proper approach to judicial contemplation concerning the general trade and commerce power, and its guiding GM test, with respect to whether the Court should take into account policy matters.

4. The Courts and their Contemplation of the Division of Powers

Given the importance of the impending SCC reference judgment, and the questions facing the Court, the present section seeks to analyze more fully the role of, and process by which Canadian courts interpret the division of powers and apply its norms, specifically with respect to the trade and commerce power. The section does so, en route to an argument

---

69 See e.g. supra note 24; supra note 47 at 119; supra note 52; supra note 54; supra note 61; see also e.g. Anita I. Anand & Peter Klein, “Inefficiency and Path Dependency in Canada’s Securities Regulatory System: Towards a Reform Agenda” (2005) 42 Can. Bus. L.J. 41; Tara Gray & Andrew Kitching, “Reforming Canadian Securities Regulation” (19 September, 2005), online: Parliamentary Research Service http://www2.parl.gc.ca; Jeffrey MacIntosh, “Systemic Fallacy: A national regulator wouldn’t have prevented the credit crisis” The Financial Post (23 November, 2010), online: The Financial Post http://www.financialpost.com.


71 See e.g. Kelly Harris, “Constitutional law heavyweights spar over single national securities regulator” Canadian Lawyer Magazine (16 November, 2009), online: Canadian Lawyer In House www.canadianlawyermag.com.
proposing how the SCC should approach a matter such as the aforementioned constitutional reference. The section recalls the judiciary’s important role, discusses the principles and process of constitutional adjudication over the division of powers, examines the trade and commerce power and the GM test in greater detail, and characterizes that test, in terms of how policy concerns may have occasion to form part of its use.

4.1 The Judiciary’s Role regarding the Division of Powers

In examining judicial consideration of the trade and commerce power, it is helpful to first recall the judiciary’s role as constitutional architects, as doing so situates a discussion of constitutional adjudication and the consideration of the constitutionality of the national regulator proposal. As was mentioned earlier, the judiciary is highly involved in the process of constitutional evolution, in their role as interpreters of the division of powers, and arbiters as to the matters falling within those powers. In this role, the judiciary may contemplate the division of powers through constitutional litigation, by way of judicial references, and by facilitating inter-governmental agreements. In respect of its different duties, and the matters it considers, Swinton (1992) concisely summarizes the three potential roles of the courts (the Supreme Court, in particular):

“... it is an institution for the resolution of disputes between federal and provincial governments about the scope of their respective jurisdictions. In the course of this problem-solver's role, the... [Court] may perform a second function by participating in the evolution and refinement of the Constitution's language in response to a changing social context. In addition, through its decisions on the constitutionality of various policy instruments by which the federal and provincial governments can structure their relationships, the court can act as a facilitator, [by] allowing other institutions to respond to the need for constitutional evolution”.

With such wide-ranging duties, there is no question as to the validity of the characterization of the judiciary as part-managers of the federal system. And given the infrequency of formal amendment, and the circumventing of the division of powers, in its legal senses, that

---

72 See supra note 41 at 137-138.
73 Ibid. at 125.
74 Ibid. at 138.
occurs when informal adjustments are made, the role of the judiciary seems to be of exaggerated importance.

**4.2 Principles and Processes**

In carrying out their constitutional adjudicative duties, the judiciary employs several principles (of general as well as specific varieties). While a comprehensive overview of these principles is not needed for the present paper, some guiding concepts bear mentioning. In general, *Reference Re: British North America Act 1867 (UK) Section 24* explicated that constitutional interpretation – the first key stage of constitutional adjudication – can proceed via two approaches: an ‘originalist’ approach, where a court is to interpret the Constitution with an eye to its framers’ original intent; or a ‘progressive’ approach, where the meanings behind the Constitution’s language is not to be seen as frozen in 1867, but understood progressively, so that its interpretation can reflect modern values. To be sure, originalism has not garnered much support from the judiciary in recent years, in large part because of the oft-mentioned analogy given (by the Privy Council in the same reference) in *Edwards v. Attorney General (Canada)* that the Constitution is a “living tree”. This analogy affirms that the constitution is to be seen as a document capable of responding to the changing situations, values and principles of Canadian society. It is not frozen at the time of confederation, but is capable of growth and expansion. Thus, in spite of the Constitution’s codification, its accepted character and required approach to its interpretation empower the judiciary to interpret the Constitution liberally, with rather significant wiggle-room. This issue of ‘responsiveness’ is revisited later in the paper.

As has been alluded to previously, constitutional *interpretation* in itself is not the sole obligation of the judiciary when it contemplates jurisdictional power. Rather, upon interpretation of the Constitution (using such principles as those noted above), its norms would then have to be *applied* to come to a determination of jurisdictional constitutionality in

---

a particular case. Therefore, in a scenario where adjudication over the division of powers is necessary (as it is for the issues discussed in this paper), the judiciary would first come to (or accept) a particular understanding of the general trade and commerce power or some other power (i.e. constitutional interpretation), and would then, as a related but conceptually distinct analytical step, apply that understanding (i.e. application of the interpretation) to allow for a determination of jurisdicitional fit for an impugned law under that power.

Essentially, there is a distinction between interpretation and the related process of applying that interpretation. The paper therefore proceeds under the understanding that interpretation and application of a law are two related and interacting processes, but still successive and conceptually dissociated.

In this regard, for the application of constitutional division of powers norms to an impugned (i.e. challenged) legislation/provision, it is important to appreciate that a court then faces two basic steps. To assess whether a law is a valid enactment of a particular level of government, the court first identifies that law’s ‘pith and substance’; it uncovers its subject matter, both in purpose and effect.\(^78\) The securities regulator proposal, for instance, would arguably be identified in terms of its attempts at regulation of the Canadian capital markets. The Alberta Court of Appeal (in its reference judgment), on this matter, specifically found that the proposal pertained to “the regulation of the participants in the public capital markets in Canada, and transactions relating to the raising of capital” – an uncontested point by all parties in that hearing.\(^79\) The Quebec CA concurred, finding that “the true meaning of the proposed Act is the regulation of trading in securities”, in terms of both participants and information.\(^80\) The reason for identifying an impugned law’s pith and substance rests on the need to situate only an impugned law’s core of its substance and effects within a particular jurisdictional competence, rather than those of an incidental nature. In essence, to find that an impugned law falls under a particular jurisdictional competence, it should substantially relate to a topic within that competence, not just tangentially touch on it.

\(^{78}\) Supra note 24.

\(^{79}\) Supra note 4 at para. 14.

\(^{80}\) See Reference: Re Power of Parliament to Regulate Securities (31 March 2011), Quebec 200-09-006746-090, English Summary (Quebec C.A.) at paras. 8, 15 [Quebec Reference].
Interestingly, this preliminary step in the application of constitutional norms has not always been utilized in the jurisprudence. In fact, it is strangely absent in important cases (to be parsed in greater detail below) regarding the trade and commerce power – *GM and Kirkbi AG v. Ritvik Holdings Inc.*\(^\text{81}\) This may imply that at times, the pith and substance of an impugned law is self-evident and can be assumed. Or, perhaps the pith and substance analysis is subsumed in a later stage of the relevant constitutional analysis.\(^\text{82}\) In light of the occasional omission of this analytical step, what might be said of it is that it can be an aid in determining the essence of an impugned law which contributes to the classification of that law under a particular head of power – the natural next step in the analytical process – but need not necessarily do so. This suggests that this test’s utility arises particularly when the relevant parties disagree as to the substance and effect of the impugned law. Where they do not (as appears to be the case in respect of the impugned national regulator proposal), the matter becomes more about classification of the law than a determination of pith and substance. Accordingly we proceed to the next analytic step.

Following a (possible) characterization of pith and substance, a court subsequently seeks to classify the law as within a proper head of power. In the matter of the national regulator, because the federal government is proposing to legislate in an area in which it asserts it has jurisdiction, but has not done so before (as the provinces have in its stead), contemplating the appropriate federal power will be of central significance – a matter to which this paper must now consider. For the sake of completeness, though, prior to addressing the classification of the law within such a head of power (dealt with in the next sub-section), a final set of principles should be noted. Because in the securities regulator context there would conceivably be both federal and provincial legislation operating concurrently, overlap and encroachment of the either law between levels of government may also be considered at this stage, thus making the doctrines of “paramountcy” and “double-aspect” quite relevant. While “paramountcy” gives federal legislation precedence over its provincial counterparts in respect of any conflict, it is more likely in this case that the double-aspect doctrine will be of critical

---

\(^\text{81}\) *Infra* note 92.

\(^\text{82}\) The pith and substance inquiry may perhaps at times be subsumed, for instance, in the third branch of the *GM* test (explored below), pertaining to the nature of the impugned law as relating to trade as a whole or of a particular industry.
importance. This latter doctrine recognizes the flexibility that should be present in the
exercises of constitutional power, and therefore allows the ordinary operation of statutes
enacted by both levels of government, where there are no conflicts among them.\(^{83}\)
Regardless, based on its identification of the pith and substance of the law, the crucial role of
the courts here will be to uncover whether the proposed *Act* comes within federal competence
at all – the key matter to which we now turn below.

### 4.3 The Federal Trade and Commerce Power

Once an impugned legislation or provision is (typically) characterized for its pith and
substance, the attention of a court will then shift to whether it can appropriately fall under a
certain head of power (or perhaps more than one, thus bringing the principles of paramountcy
and double aspect, for instance, to the fore). It is widely accepted (perhaps inevitable, now
that the Alberta and Quebec CA references already have) that when the Supreme Court
considers whether the federal government has the power to legislate in respect of the
regulation of the securities markets, they will do so by examining the scope of the federal
trade and commerce power, particularly its ‘general’ branch, given in s. 91(2) of the
*Constitution Act*. This is so, as the matter is often said to concern the federal government’s
power to regulate economic concerns of a general/national nature, under which the regulation
of the capital markets may fall. As the present paper seeks to determine how the SCC should
consider the national regulator proposal, analysis of the general trade and commerce power in
particular, and its guiding test (given in *GM*), is therefore of paramount importance.

As was alluded to earlier, s. 91(2) of the *Constitution Act* provides the federal government
with the authority to legislate on matters related to the regulation of trade and commerce, in
contrast to the provinces’ power over property and civil rights (under s. 92(13)) and “matters
of a local nature” (under s. 92(16)). The clause was first examined in *Citizen’s Insurance Co.
v. Parsons*, where two branches of the clause were identified: one concerning international

\(^{83}\) For reference to the doctrine, see e.g. *Westbank First Nation v. British Columbia Hydro and Power Authority*, [1999] 3 S.C.R. 134 at para. 18. And, to be sure, the doctrine was further discussed in the Alberta national
securities reference specifically, though the Court deemed that it was not necessary to actually apply it. *Supra* note 4 at paras. 43-46.
and interprovincial trade, and one concerning the ‘general’ regulation of trade affecting the whole of Canada. Though the scope of the first branch was always rather self-evident, the latter remained ambiguous and was not seen as a stand-alone support for federal jurisdictional power until clarification of its limits was given in *GM*, when federal jurisdiction over competition law was upheld under the branch.84

In particular, the *GM* case is recognized for the elucidation of a test for the scope and application of the trade and commerce power’s general branch. In *GM*, the Supreme Court enumerated five indicia of a valid law under the general branch. The first three, initially set out by Laskin C.J. in *MacDonald v. Vapor Canada Ltd.*85 require that (i) the law must be part of a regulatory scheme; (ii) there must be an agency to oversee the scheme, and; (iii) it must concern trade as a whole. Adding to this, the Court in *GM* required that (iv) the provinces, jointly or severally, should be incapable of enacting a similar scheme (the ‘provincial incapacity’ sub-test), and; (v) failure of a province to participate should be seen to jeopardize the scheme (the ‘extra-provincial consequences’ sub-test). As indicated by the test, the regulation of general trade and commerce must therefore be broad and sweeping, and cannot single out a particular trade or industry. It should be remembered, though, that while the factors provide a check-list of indicia, they are a non-exhaustive list of traits to be used on a case-by-case basis, and are not necessarily determinative.86 And if provincial legislation is already in existence in respect of some competency (as in the case of the national regulator proposal), principles of jurisdictional overlap would also presumably be relevant.

Looking at the *GM* factors in the context of the SCC national regulator reference – a worthwhile exercise to better understand the power, and further illuminate the issues presently before the Court in the case of the national regulator – it is likely that the first two will not pose exceptional difficulty for the federal government’s case, as there is a proposed regulatory scheme, to be monitored by an agency. The constitutional question will therefore presumably rest on the latter three indicia. And in this regard, a closer look at the ‘preliminary’ Alberta and Quebec Court of Appeal findings on the constitutionality of a

---

84 *Supra* note 13 at 339.
86 *Supra* note 41 at 127.
national securities regulator can confirm such an intuition. Firstly, the outcome of the SCC reference will likely turn on whether the regulation of the Canadian capital markets concern ‘trade as a whole’. Though the regulation of securities markets intuitively seems to be a ‘trade’ in itself, many have contended that these markets are not necessarily broad and sweeping.87 And in this regard, the Alberta and Quebec CA both agreed that securities regulation does not concern trade as a whole.88 Secondly, the outcome of the SCC reference will probably also turn on whether the provinces, jointly or severally, are incapable of enacting a similar scheme. This will most certainly be a tricky marker of jurisdiction for the federal government to substantiate, as there is already securities legislation in place in each province. This indicator did indeed prove damning in the Alberta and Quebec CA rulings, as they found that the provinces have successfully regulated the securities markets for decades.89 Finally, the ‘extra-provincial consequences’ indicator will also be quite important, and similarly problematic for the federal government, as the opt-in feature of the proposed Act does imply that the scheme could operate without participation of all the provinces. En route to their finding that the federal government’s proposal cannot be sustained by the GM criteria, the Alberta and Quebec judgments found on this matter too that the federal proposal could not hold water, as exclusion of some provinces from the regime would not undermine its operation.90

The above contemplation of the national securities regulator proposal using the GM criteria certainly displays that finding jurisdictional competence under the general trade and commerce power is no easy endeavour, especially when valid provincial law already exists, and the scope of the proposed federal law is in doubt. Yet, notwithstanding the difficulties of meeting the GM test’s requirements, and even in spite of the Quebec and Alberta courts’ negative findings of constitutionality, many commentators continue to suggest that the federal government can satisfy the requirements of the GM test in respect of the proposed Act. Such commentaries therefore intimate that there is no clear consensus on what the test

88 Supra note 4 at para. 40; supra note 80 at para. 35.
89 Alberta Reference, ibid. at para. 40; Quebec Reference, ibid. at paras. 36-39.
90 Alberta Reference, ibid. at para. 40; Quebec Reference, ibid. at para. 40.
truly asks for. When the SCC gives its final say on this (or a similar) matter, and though the GM test’s elements are non-exhaustive, any prospects for general trade and commerce jurisdiction will therefore presumably be reliant on how the GM factors are read, weighted and applied. In fact, depending on how this test is interpreted and applied, an array of non-legal factors might even be brought into consideration.

The possibility of extrinsic, non-legal considerations being involved in the application of the GM test is of particular interest in the national regulator reference. Namely, it has repeatedly been mentioned throughout this paper that many policy considerations orbit the national securities regulator issue, including those of an economic, social and political nature. Undoubtedly, these types of considerations, should they be incorporated into the GM indicia, could have a great impact on the reference’s outcome. The seemingly indeterminate nature of the test thus becomes of paramount importance, necessitating a closer look at it, in respect of the considerations that are able to be accounted for within it. ‘Characterization’ of the test is a final preparatory step in this paper’s endeavour to comment on the proper manner for the SCC to determine the constitutionality of a national regulator (and other like matters), in terms of whether policy considerations should inform its decision.

### 4.4 Characterizing the GM Test: An Indeterminate Role for Policy Considerations

What is it that the GM test actually requires in terms of considerations? Somewhat surprisingly, neither the Supreme Court in *GM*, nor in subsequent case law, has the test been decisively clarified. In fact, when parsing the *GM* judgment, it is quite noticeable that there is no protracted discussion of the elements of the test. Presumably, this is due to the disclaimer placed on the test which affirms that its indicia are non-exhaustive and non-determinative. Nonetheless, a degree of ambiguity as to how policy concerns might factor into consideration, if at all, is evident.\(^91\)

\(^91\) *Supra* note 9 at 77-79.
In terms of subsequent case law, really the only Supreme Court judgment to deal with the GM test in any amount of detail is that of Kirkbi AG v. Ritvik Holdings Inc. Yet, still the Court said very little about it. The case repeats that the five criteria are integrated into an assessment of Parliament’s authority over general trade and commerce. And, it notes that the test reflects principles which “help distinguish... [that] power from the provincial property and civil rights power”, so that federal legislation respects the constitutional balance of power. No substantial clarifying remarks beyond such general statements are given.

What jurisprudence we are left with, then, in respect of elucidation of the GM criteria, are the recent Alberta and Quebec reference judgments. Admittedly, the Courts, in no uncertain terms, dismiss their possible role as an evaluator of the superior system of securities regulation. On the surface, this clarification, at least within the CA judgments, settles whether extrinsic policy concerns (in this context, dealing with the relative merits of federal vs. provincially regulated securities markets) are relevant. Even still, the Alberta judgment’s direct treatment of the GM criteria (at paras. 38-41) does not depart from the treatment given in Kirkbi to any significant degree, by clarifying what is and is not to be specifically considered as part of the test’s non-exhaustive elements. And further, their (perhaps inadvertent) description of the provincial incapacity test as one that measures the relative “success” of provincial enactment of a regime is still one that uses language that can be construed in different ways. After all, by what standard one considers “success” can vary greatly. The Quebec judgment uses language that is even less definitive, by suggesting that tests of capacity/incapacity are correlative to tests of relative efficiency (i.e. the comparative effectiveness of federal vs. provincial regulation) – an apparently common characterization of this branch of the test discussed further below. It seems, then, that the appropriate considerations to be made via the GM test may still not be so clear. In any event, this judgment remains subject to the final say of the SCC, and is only rudimentary in this respect.

---

93 Ibid. at para. 16.
94 Supra note 4 at paras. 9-10; supra note 80 at para. 5. Note, though, that the Alberta CA is much more deliberate and explicit in its rejection of extrinsic policy concerns in its analysis than the Quebec CA.
95 Alberta Reference, ibid. at para. 40.
96 Supra note 80 at paras. 36-39.
In absence of any definitive judicial articulation, what can arguably be said about the GM test is that at its surface level, it seems to call for a rather ‘functional’ approach to determining jurisdiction under the general branch of the trade and commerce power. That is, it primarily seeks to uncover whether the federal government is/has been able (i.e. has the capacity) to implement and monitor a legislative scheme (per the first three indicia), and whether the provincial governments are incapable of doing the same (per the last two indicia), either by virtue of their respective incapacities, or through the opting-out of one of the provinces.

Of course, because neither GM nor subsequent case law have conclusively addressed how the test is to be interpreted and applied, the above superficial reading of the test cannot be the end of the story. Nor was it necessarily the intent of the SCC in GM to create a test measuring only functionality anyway. In this regard, scholarly commentary on the test has certainly forwarded a variety of understandings of it. From a narrow perspective, some commentators prefer to read the test along its superficial lines by seeing it as one measuring only the functional capacities/incapacities of a level of government. In this view, there would thus be little room for the consideration of policy. Only abilities and inabilities of government to functionally implement and monitor would be relevant. From a broader perspective though, many others read the test as requiring more than just an analysis of capacities and incapacities, but also of efficiencies. Indeed, the Quebec CA seems to have forwarded this view in respect of the fourth branch of the test. Read in this light, the tests of functionality might be characterized more appropriately as tests of functional efficiency; tests which do not only look to capacities and incapacities, but also to the level of government that could more efficiently implement and monitor a piece of legislation. If one were to analogize to a production context in order to explicate ‘functional efficiency’, one might speak of the ability or inability to achieve ‘appropriate’ outputs per units of inputs. In this view, the door to the consideration of at least some policy concerns begins to creep open.

97 It is a functional approach that seems to have followed the similarly functional one in R. v. Crown Zellerbach, [1988] 1 S.C.R. 401. See supra note 41 at 133.
98 See e.g., among others, Jean Leclair, “The Supreme Court of Canada's Understanding of Federalism: Efficiency at the Expense of Diversity” (2003) 28 Queen’s L.J. 411 at 420.
99 See e.g. Polyphony, supra note 87 at 16-19.
100 Recall supra note 80 at para. 36.
Further still, others do not restrict their reading of the test to only functional efficiency-related concerns, and instead continue to build on the possible utility of external (i.e. non-legal) considerations. Perhaps because the concept of functional efficiency can easily be confused with other concepts, including other variants of efficiency, such as economic efficiency, for example (which has to do with the efficient allocation of resources, or in this case, allocation of powers across government, so as to make someone better off without at the same time making someone else worse off), such commentaries take the view that a wider degree of policy issues can be relevant.\(^{101}\) In fact, with respect to the fourth branch of the *GM* test, Leckey & Ward (1999) note that they feel

> “the outcome of the provincial inability requirement depends on a policy decision *vis-a-vis* the best level for the regulation of a matter... [and it is] hard to see how the Court can assess terms like provincial inability... without looking beyond the text of the Constitution itself and the existing case law”.\(^{102}\)

Thus, functional and economic efficiencies, broader notions of the relative “effectiveness” of federal versus provincial legislation, and perhaps even notions of the “usefulness” or “appropriateness” of the legislation in question can easily be read in.\(^{103}\) On the whole, what is therefore evident is that there is no clear scholarly consensus as to the exact requirements for considering a matter according to the *GM* criteria; much imprecision remains.

In sum, in their important role considering constitutionality under the division of powers, the Court ia, in the matter of the proposed national securities regulator, expected to consider its fit under the general trade and commerce power, via a *GM* test that contains no decisively clear guide as to the considerations to be included in its indicia. Though a superficial reading of the test may suggest it is one focused on determining what level of government is functionally able to enact/implement legislation, its lack of clarity could conceivably permit the contemplation of various other policy-like considerations. This potential seems to remain in spite of the recent Alberta and Quebec CA reference judgments where the courts had an opportunity to further clarify the test, but did not do so with any convincing certainty. In this regard, the SCC determination of the constitutionality of the national securities regulator

---

\(^{101}\) See e.g. *supra* note 41 at 136.

\(^{102}\) *Supra* note 24 at 267, 279.

\(^{103}\) *Polyphony, supra* note 87 at 22.
proposal may very well depend on their particular reading and application of the GM test’s various elements.

Ultimately, though, what the lack of jurisprudential clarity or scholarly consensus on the GM test alludes to is a more general ongoing disagreement as to the proper nature of constitutional contemplation; disagreement revolving around consideration of only the ‘categorical’ boundaries of the constitution, or the inclusion of relevant policy considerations. Settling such a debate is no easy task, and is thus worthy of closer inspection, as its analysis bears directly on coming to a conclusion on the proper scope of authority of the Supreme Court to read and utilize the GM test either narrowly, or in such a way as to incorporate policy arguments on the relative efficiency, effectiveness and/or desirability (from cultural, social or other perspectives) of a national securities regulator.

5. Approaching an Analysis of the Constitution: Categorization versus Balancing

In no way only restricted to an application of the trade and commerce power (as is relevant in this paper), debate over the proper manner in which a judiciary should interpret and apply a constitution and the rights enshrined therein, is a common one. In fact, disagreement over the proper judicial approach to constitutional contemplation has occurred not just in Canada, but abroad as well, for many years. In general, the debate centers on two competing approaches to judicial scrutiny of the constitution: “categorization” and “balancing”. In simple terms, it is a debate that involves questioning whether principles and policies should be considered, as opposed to looking only to circumscribed categories; a difference between looking to “standards” vs. “rules”. Surveying this debate, particularly as it pertains to the application of constitutional norms, has much to offer in respect of determining the proper method for considering the constitutionality of the national securities regulator proposal, or other matters.

potentially falling under the trade and commerce power, in terms of the nature of considerations that a court employs under the $GM$ test.\textsuperscript{105}

When looking at the debate in greater detail, “categorization”, on the one hand, reveals itself to require treating legal questions “as residing in a determination of the category to which a given set of facts belong”,\textsuperscript{106} and is thus a ‘formalistic’ mode of thought.\textsuperscript{107} It is in the “nature of taxonomy”, in that it consists only of classification and labelling,\textsuperscript{108} and asks only whether something “falls inside certain predetermined, outcome-determinative lines”.\textsuperscript{109} In this regard, contemplation of the constitutionality of an impugned legislation or provision under a particular head of jurisdictional power would be an exercise for a court requiring only a strict classification of the given law within the boundaries of a relevant power, according to the limits of that category. If one was to accept that the $GM$ test calls only for measures of functionality, it is likely that this test could be described as a categorical type of inquiry, given its classification of legislation as being either functionally implementable or not, by a certain level of government. “Balancing”, on the other hand, requires the “weighing of competing considerations of policy and principle”.\textsuperscript{110} So, contemplating policy options would be possible for a court under a balancing approach, when considering jurisdictional fit under a head of power, for instance. This is more like “grocer’s work”, then, as it becomes a judge’s job “to place competing rights and interests on a scale, and weigh them”\textsuperscript{111}.

Over the years, neither approach, in Canada or elsewhere, has wholly dominated, though balancing seems to have become more fashionable over the last number of years. As Lee (2010) notes, while categorization prevailed from the late 19\textsuperscript{th} century through the 1930’s in

\begin{footnotes}
\footnotetext[105]{In fact, similar discussions were also held regarding the constitutionality of the U.S. \textit{Securities Act} passed in 1933, which allowed the U.S. federal government to usurp state power relating to the financial markets: see e.g. Nathan Isaacs, “The \textit{Securities Act} and the Constitution” (1933) 43: 2 Yale L.J. 218.}
\footnotetext[106]{\textit{Supra} note 9 at 80.}
\footnotetext[107]{See also Jeffrey M. Shaman, \textit{Constitutional Interpretation: Illusion and Reality} (Westport, CT: Greenwood Press, 2001) at 35.}
\footnotetext[109]{Joseph Blocher, “Categorical Balancing in First and Second Amendment Analysis” (2009) 84: 2 N.Y.U.L. Rev. 375 at 381.}
\footnotetext[110]{\textit{Supra} note 9 at 80.}
\footnotetext[111]{\textit{Supra} note 108.}
\end{footnotes}
Canada, the use of a balancing approach has been on the rise ever since. In fact, it is an approach that seems to apply quite widely to constitutional rights, as a commitment to doctrinal flexibility has continued to grow. This preference is held in other parts of the world as well, such as Germany, where balancing is a key aspect of their ‘proportionality principle’, which (similar to Canada’s ‘Oakes test’ regarding s. 1 of the Charter of Rights and Freedoms) is used in the limitation of their constitutional rights. In the U.S. too has balancing seemingly become more in vogue for their constitutional courts, especially with respect to First and Second Amendment protection litigation, and the proportionality analyses that they too require. Because such a principle serves the purpose of ‘optimizing’ constitutional rights so that “they can be realized to the greatest extent possible”, the ability to balance relevant considerations has become crucial to both German and U.S. constitutional rights analyses. Yet, one would of course be remiss to ignore the ferocity with which (mainly) American scholars continue to debate the superiority of balancing versus categorization, leading many to suggest that the rise of balancing is overstated. Indeed, American balancing tends to be utilized only for the application of only certain specific and determinate rules on a case-by-case basis. And otherwise, even some U.S. Supreme Court justices have shown a clear preference for categorization. Just as a formalist streak still clearly exists in the U.S., it would be foolish to presume it does not also in other countries as well. Essentially, whatever the trend may be in Canada or elsewhere, debate surely continues.

112 Supra note 9 at 80.
115 Supra note 108 at 243.
119 Supra note 113 at 25.
120 Supra note 104 at 2. For instance, Justice Scalia of the U.S. Supreme Court is quoted as referring to balancing as “lawless”, and “roughly the equivalent of attempting to determine ‘whether a particular line is longer than a particular rock is heavy’”; see also supra note 107 at 48.
On the whole, discourse on the aforementioned debate sees categorization as having two (main) desirable features. Firstly, most proponents of categorization point to its inherent ability to restrain the judiciary.\footnote{121 See e.g. supra note 9 at 83.} Doing so is attractive, it is suggested, as not only is it more appropriate for the elected representatives of government to engage in ‘law-making’, but withholding discretion ensures that those in the judiciary that do not possess adequate levels of relevant expertise will not inappropriately use their position of power.\footnote{122 Ibid. As Lee writes, withholding discretion from officials can be useful if there are reasons to doubt their aptitude in the exercise of discretion.} Especially with respect to matters involving complex, multifaceted political, economic and social dimensions, categorization can put restrictions on the judiciary’s discretion. Secondly, analysis with reference to delineated categories can also provide predictability, consistency and efficiency in decision making. That is, clear rules can facilitate the ascertainment of one’s legal position (whether as a private citizen or group, or as a limb or agent of the government), foster consistency in the law, and allow the judiciary to economize on the determination and application of legal directives.\footnote{123 Supra note 113 at 1; see also Stefan Sottiaux & Gerhard van der Schyff, “Methods Of International Human Rights Adjudication: Towards A More Structured Decision-Making Process for the European Court of Human Rights” (2008) 31 Hastings Int’l & Comp. L. Rev. 115 at 115, 120 [Methods].}

The drawbacks of categorization, like its positives, are also rather intuitive. Because such an approach would have the judiciary engage in formalistic modes of thought, it accordingly can be seen as inflexible, excessively rigid, and overly indifferent to relevant policies and principles.\footnote{124 Methods, ibid. at 121.} In the language of the discourse on proportionality briefly examined above, categories may thus constrain decisions by “dictating outcomes that deviate from an optimal choice”.\footnote{125 Supra note 9 at 82.} Further, some critics also point out that categorization, in spite of its limitation of judicial discretion, is not so protective of democratic outcomes (i.e. the choices of elected officials) as one might think.\footnote{126 Supra note 118 at 611-612. Sullivan, for instance, surveys historical U.S. Supreme Court constitutional-related decisions, and finds that judgments displaying categorical reasoning do not display democracy-protecting results in all instances.} This is especially so, given that it may inadvertently include
balancing processes, often in the creation of categories themselves. And anyway, as with any other type of reasoning, so too can categorical reasoning be poorly done “when labels are offered as a substitute for analysis”, meaning that it will not necessarily put forward the consistency, coherency and certainty it is alleged to offer.

In light of the potential shortcomings of categorization, there are consequently no shortage of commentators that cite a preference for balancing. Given its opposing qualities to categorization, balancing is seen as having the attractive ability to allow flexibility and judicial discretion. It does not require the judiciary to be constrained by legal categories necessarily, but can allow them to import their judgment with respect to the weighing of different factors that are of relevance. As a result of this flexibility, balancing can therefore permit sensitivity to context, and hence, the tailoring of constitutional rules to specific situations. Adaptability to changing social conditions and the particular circumstances of each case are thus the cornerstone of the approach.

Naturally, several critiques of balancing have also arisen over the years. In contrast to the certainty offered by the categorical approach, balancing may lead to unpredictability in the reading and/or application of constitutional rules and boundaries – an important drawback in the context of a document that seemingly relies on rigidity and the supremacy of its rules. And additionally, given that balancing would allow the judiciary to import and weigh relevant policies and principles, such an approach is also held by some to confer an inappropriate amount of discretion to the bench, in contrast with what should be the requirements and limitations of their role, and the likely expertise that they posses. In this

---

127 Supra note 109 at 383; supra note 9 at 81. As Lee describes, “behind the application of categorical rules often lies surreptitious balancing”; see also Stephen E. Gottlieb, “The Paradox of Balancing Significant Interests” (1994) 45 Hastings L.J. 825 at 843.
128 Supra note 9 at 82.
129 Ibid. at 82-83.
130 Supra note 113 at 1.
131 Methods, supra note 123 at 115.
132 See e.g. Age of Balancing, supra note 116 at 972, which gives a good overview of the methodological challenges posed by balancing.
view, responsibility to balance the varied, multidimensional costs and benefits to society of any set of public policy options should belong exclusively to the legislative authority.\footnote{Alec S. Sweet, “All Things in Proportion? American Rights Doctrine and the Problem of Balancing” (2010) 30 Yale Law School Faculty Scholarship Series, online: Faculty Scholarship Series \url{http://www.digitalcommons.law.yale.edu} at 9.}

Further to the general evaluations of balancing, critics also point especially to the dangers of “ad-hoc balancing”, where balancing is done without boundaries, on a judge’s whim, and which may be seen as an inappropriate impromptu deviation from the legal rules in question.\footnote{Stephen E. Gottlieb, “Communities in the Balance: Comments on Koch” (2000) 37 Hous. L. Rev. 711 at 722; Charles H. Koch Jr., “A Community of Interest in the Due Process Calculus” (2000) 37 Hous. L. Rev. 635 at 655-656.} As well, it is also argued that balancing is not an adequately rational analysis, but is instead a rhetorical process that allows for unlimited subjectivity; a charade in which “conclusory statements and rhetoric are passed off as arguments”.\footnote{\textsuperscript{136} Supra note 9 at 82; supra note 114 at 573; Age of Balancing, supra note 116 at 974-979; supra note 133 at 194. As Habermas (1996) states, for instance, there are likely “no rational standards” for balancing. See Jurgen Habermas, Between Facts and Norms (Polity Press, 1996) at 259.} In fact, it has even been suggested that “balancing takes legal rulings out of a realm defined by such concepts as right and wrong, correct and incorrect”, and into a realm defined by judgment of value, where the concepts of adequate and inadequate prevail.\footnote{Supra note 114 at 573; see also supra note 118 at 610.} Balancing, is thus attacked on several levels, boiling down to the subjectivity and discretion it permits.

In sum, there is no question that there is no universally accepted analytical approach to judicial contemplation of the constitution. Indeed, the categorization versus balancing debate continues to thrive, relying heavily on its juxtaposition of rigidity and certainty with flexibility and discretion. While we must recall that such a debate pertains to such contemplation generally (and is often applied in the context of applying constitutional rights and liberties), it is certainly replicated,\footnote{For instance, recall supra note 24 at 267, where the authors implicitly acknowledge the debate, as they note that it is “hard to see how the Court can assess terms like provincial inability… without looking beyond the text of the Constitution itself and the existing case law”, but also recognize that it may not always be for the court to consider desirability of legislative provisions and rules from social and/or economic perspectives.} and can provide insight with respect to the proper method of considering jurisdictional fit under the general trade and commerce power, through the GM test as well. In the following section, the categorization versus balancing debate, in combination with the realities of Canadian federalism and the role of the courts, is
used to make a case for a suggested approach to the implementation of the GM test, and ultimately, the resolution of the SCC national securities regulator reference; an approach which would include the use of something akin to ‘structured’ use of balancing.

6. An Argument for Expressly Allowing (Structured) Balancing When Contemplating Jurisdiction under General Trade and Commerce: Updating the GM Test

It has been noted repeatedly that Canada’s federal system, based on a constitutional division of powers, evolves from time to time. And as one of the key actors who maintain, and sometimes help evolve that system, the courts play a crucial role. Without question, the SCC will play such a role in respect of the national securities regulator reference. Yet, it has also been described that when the Supreme Court considers the constitutionality of the proposed national regulator, it will be engaging with an issue that has long involved debate over competing policy concerns. And in determining jurisdictional fit under the general trade and commerce power (with reference to the pith and substance test, but primarily) via the GM test, as the matter will surely require, there has still been no decisive guide given upon which the judiciary can either dismiss such policy concerns, or consider them in turn. This appears to be so, even in spite of the stated aversion to any such considerations by the Alberta and Quebec CA securities reference judgments. It follows to question whether there is any cause to suggest that SCC should consider these competing policy arguments, and if so, how.

In pondering the proper approach to the contemplation of the general trade and commerce power in terms of the potential inclusion of policy considerations, the debate regarding categorization versus balancing is undoubtedly brought to mind. Having explored this debate above, it is now argued that the current, rather categorical, but still indeterminate approach to considering jurisdiction under the general trade and commerce power is inadequate on its own, and is instead in need of an explicit allowance for balancing, within certain confines. That is (as is elaborated on below), it is suggested that in their application of constitutional norms, the courts should expressly be able to consider relevant policies and principles when
they contemplate if an impugned law (in this case, the draft national securities legislation) can be found to be a federal competence under the general trade and commerce power. This express allowance can be achieved by updating the \( GM \) test to explicitly allow balancing-type analyses within the fourth and fifth limbs of the current test. Such balancing should be limited by procedural safeguards, however, by requiring direct acknowledgment of a balancing process, and an open, deliberate and clear weighting of any policies and principles to be considered, against the other categorical necessities of interpreting the power. This argument is made through reference to the ‘categorization vs. balancing’ discourse, as well as by recalling certain features of the dynamism of the federal system, the needs of the constitution, and the role of the judiciary as key players in the Canadian federation.

6.1 The Current Approach to the Use of ‘General Trade and Commerce’ is Inadequate

Before arguing for an allowance for balancing in respect of the application of the trade and commerce power, it must first be recognized that the current approach to its use is inadequate. As noted earlier, the \( GM \) test, which sets the standards for jurisdictional analyses pertaining to the general trade and commerce, leaves significant indeterminacy as to the exact nature of permitted considerations under the test. Though its surface reading implies the need for a categorical inquiry (by ostensibly seeking to uncover only functional (in)abilities), it is entirely possible depending on the situation, and a court’s reading of its indicia, for the test to be utilized to allow a balancing inquiry as well. This is so, particularly in respect of the fourth and fifth limbs of the test, which seem to allow for the consideration of various policy matters, albeit in an imprecise and likely implicit manner. Further, given that the \( GM \) test includes only a non-exhaustive set of criteria, a balancing-\( esque \) enterprise of weighing the test’s otherwise categorical indicia may be an inherent reality. In any event, wavering between a categorical and balancing type of inquiry appears to be a reality, allowing the potential for both a fixed or plastic application of the general trade and commerce power.

Yet, a certain degree of clarity and consistency is necessary for the application of the division of powers; utter procedural uncertainty is improper in this context, making the current
manifestation of the GM test unacceptable. Admittedly, some ambiguity in a legal test can create some advantages in terms of maintaining flexibility and a degree of decision-maker discretion. Yet, the ambiguity here is of a nature that allows contemplation of matters (i.e. policy concerns) that are often outwardly chastised for their irrelevance, but yet are still apparently freely considered. This inconsistency is inappropriate; while leeway as to the allowable considerations under a legal test can be advantageous, it is not proper to allow such leeway under the guise of considering matters only narrowly. In this regard, greater consistency and coherency are desirable.

Presumably, most legal tests to be applied by the courts can benefit from consistency, coherency and clarity so that citizens can ‘know the law’ and so that they can be applied evenly. Such traits are especially important, however, in the context of applying the division of powers, ultimately for the sake of a robust Canadian federation. As Benoît Pelletier (former Minister for Canadian Intergovernmental Affairs) noted in 2004, federalism requires some clarity and consistency in how its constitutionally delineated lines of divisional powers are utilized. In fact, “the very notion of federalism presupposes the adoption of and respect for clear rules”. This is so, according to Pelletier, since federations exist specifically because constituents grant portions of their power to a central government with the understanding that certain boundaries will be respected. The division of powers thus needs to be enforced by clear and coherent rules that are “followed by [all] parties, and that neither can modify at their will”, in order to ensure respect for this bargain. On this view, it can therefore be abstracted that any contemplative approach to the division of powers requires clarity and consistency.

On a more general level, Benz (2008) also similarly intimates that a clear understanding and application of a constitution (and its division of powers) is particularly useful in a federal

---

139 The Hon. Benoît Pelletier, Minister for Canadian Intergovernmental Affairs and Native Affairs, Province of Quebec (Address at a conference on the theme of “Redistribution within the Canadian Federation” held at the Faculty of Law, University of Toronto, 6 February 2004), online: http://www.saic.gouv.qc.ca.

140 The Hon. Benoît Pelletier, Minister for Canadian Intergovernmental Affairs and Native Affairs, Province of Quebec, “Federal asymmetry: let us unleash its potential” (Speech given during a conference entitled “Constructing tomorrows federalism: new routes to effective governance”, organized by the Saskatchewan Institute of Public Policy, 25 March 2004), online: http://www.saic.gouv.qc.ca.
context, as it can offer stability to that system.\(^\text{141}\) Certainly, such stability is in part offered by the rigidity that is lent by a constitution in itself, as it is a document that is meant to be a state’s enduring, even unbending, supreme law.\(^\text{142}\) The enduring character of a constitution is valuable, according to Benz, as it performs a steadying function with respect to the continued existence and functioning of a federation. Accordingly, it can further be abstracted that given their “fundamental role as guardians of the Constitution”, the judiciary’s usage of that supreme document must also necessarily be directed by clear and consistent guidelines.\(^\text{143}\) So, just as a clear and consistent approach to the analysis of a state’s supreme law may be necessary to ensure the ‘federal bargain’ in the eyes of the state’s constituents, so too is such constancy and clarity required in order to provide a steadying function for the benefit of the health of the federation more generally. In respect of the current \(GM\) test which guides the judiciary in its contemplation of jurisdiction under the general trade and commerce power, there is therefore an inappropriate degree of indeterminacy. A clearer set of guidelines is preferable to lend this analytical process lucidity and precision. Indeed, even though it was never meant to be a necessary, exhaustive test (and the importance of the \(GM\) criteria are regularly exaggerated according to some\(^\text{144}\)), a well-articulated set of guidelines has much to offer in this context.

6.2 The Inadequacy of an Exclusively Categorical Inquiry into the Division of Powers and the Utility of Balancing in this Context

Further to the shortfalls of an indeterminate approach to contemplating fit under the general trade and commerce power (or the application of constitutional norms more generally), an entirely categorical inquiry into the use of this power is also lacking, if we abstract from the needs of interpreting as well as applying the Constitution and the division of powers. As we have seen, the rationale for a formalistic categorical approach lies in the judicial constraint, rigidity and predictability it can offer to an application of Constitutional norms. And


\(^{142}\) Ibid.

\(^{143}\) Supra note 140.

\(^{144}\) Supra note 9 at 93.
admittedly, given that the Constitution is Canada’s supreme law, meant to be rather stiff and lasting, \(^{145}\) and which is to be applied in a way that is not amenable to modification-at-will, categorization seems suitable. Further, to the extent that an exclusively categorical approach can allow for clarity and consistency, rather than the indeterminate approach which currently hampers it, it is commendable. Such a logic can be applied to the contemplation of the division of powers more specifically as well. Yet, while approaching the Constitution as a document to be applied in a strict, categorical way may be somewhat intuitive, drawing from the various needs of interpreting and applying the Constitution, we can surmise that any jurisdictional analysis also requires the ability for responsiveness to changing circumstances; there is a need for some sort of balance between rigidity and flexibility. This intimates that a completely categorical approach (to determinations of constitutionality under the general trade and commerce power, or otherwise) is inadequate.

For the purposes of constitutional interpretation – a related, but preceding analytical process to the application of constitutional norms – we can recall that the Constitution is to be regarded as a “living tree”. Essentially, the living tree doctrine holds that the Constitution is an organic document that must be interpreted broadly and progressively by the courts, so that it can adapt to changing times; \(^{146}\) it must be capable of “growth and expansion within its natural limits”, according to Lord Sankey. \(^{147}\) Indeed, “it is in the nature of [a] constitution [as an organic document] to establish norms at one moment for the governance of a community that extends into the future”. \(^{148}\) Importantly, it is \textit{progressive} interpretation that is the key, so that the Constitution can be read to ensure that it adapts to Canadians’ changing needs, and is not “frozen” at the time the framers of the Constitution drafted it. \(^{149}\) In spite of the benefits of rigidity within Canada’s supreme law, there must therefore be a balance with interpretive flexibility as well, to ensure the Constitution’s evolutionary needs. \(^{150}\) Abstracting from the requirement for progressive interpretation, this flexibility must presumably also factor into the application of constitutional norms too, so that progressivity is not just paid lip service,

\(^{145}\) \textit{Supra} note 141.
\(^{146}\) \textit{Supra} note 76.
\(^{147}\) \textit{Ibid}.
\(^{148}\) \textit{Supra} note 9 at 83.
\(^{150}\) \textit{Supra} note 41 at 125.
but finds its way to the implementation of the progressively interpreted norms as well. In fact, greater reliance on flexibility and progressivity at the implementation stage may even be more desirable than at the interpretation stage, so that the discretion to interpret the Constitution is not over-used, with possible distortive effects.\textsuperscript{151}

Similarly, it has also been suggested that constitutional laws are of a nature that require optimization; they require being realized to the greatest extent possible. So, when reaching decisions based on these laws, they must be applied in such a way as to achieve these ends.\textsuperscript{152} From this perspective as well, then, contemplating matters according to the Constitution requires flexibility, so that its provisions can reach their ever-changing optimality. And likewise, it should also be acknowledged that constitutional rights and norms are routinely held to be limitable, when in conflict “with certain weighty and important policy objectives”.\textsuperscript{153} That is, some policies and principles are important enough to override defined constitutional rules, as they are currently set. This is acceptable, as limitation can result in superior outcomes in certain cases, which is thus in accord with the democratic necessity of having society’s rights, needs, interests and desires reflected in its state’s laws, and especially within its constitution.\textsuperscript{154} Broadly speaking, then, an exclusively categorical approach to the use of the Constitution would seem to be unable to achieve the required flexibility, so as to allow its ongoing need for progression, optimization, and proper limitation.

Though the concept of analytical flexibility is not necessarily controversial with respect to contemplation of the Constitution generally, an ability to allow adaptation seems especially important in a division of powers context (and hence, for the trade and commerce power). This is so, not only because society tends to scorn the idea of a constitution delineating watertight compartments of jurisdictional power since they soon grow outdated and may at some point under-represent some aspect of society or segment of the population, but also because the very idea of a division of powers compels constant mediation between a nation’s

\textsuperscript{151} \textit{Ibid.} at 126. For instance, Swinton and others point out that far too often has progressive interpretation of the division of powers meant ‘centralization’, which has been met with criticism by many.\textsuperscript{152} Supra note 117 at 66-69.\textsuperscript{153} Stephen Gardbaum, “A Democratic Defense Of Constitutional Balancing” (2010) 4 Law & Ethics of Human Rights at 3.\textsuperscript{154} \textit{Ibid.} at 13.
players. So, while flexibility and adaptability is important for the sake of maintaining the usage of the Constitution as a progressive document, the division of powers, and federalism generally, also require that the application of the Constitution’s norms not remain wholly stagnant, so that the changing desires of the federation’s constituents can be recognized.

This necessity for a balance of rigidity and flexibility in respect of the division of powers was recognized, for example, in *Canadian Western Bank v. Alberta*. In that case, the SCC noted that among the fundamental objectives of federalism, the recognition of the many needs of the constituent members of the federation is included. And though it was admitted that to attain its objectives a certain degree of rigidity and predictability (in interpretation and application of the Constitution) is needed, which is in fact why the division of powers was enumerated in the *Constitution Act*, such needs are not absolute. Rather, both from the perspective of interpreting the Constitution progressively, and application of the Constitution with its progressive fundamental principles in mind, an appropriate balance must be struck. So, this SCC judgment serves to confirm that flexibility in constitutional division of powers interpretation and application is crucial, as balanced with the maintenance of its rigid understandings and boundaries. This may be doubly so in the context of the trade and commerce power, given its central role as a counterpart to the provincial civil rights and property power. As a result of its nature, a categorical approach, on its own, may therefore not be able to offer the required flexibility (as balanced with rigidity) to judges when applying constitutional norms. Namely, it is an approach that may be too mechanical and restrictive to strike the aforementioned balance. Especially in the context of determining jurisdictional fit under the division of powers and considering the requirements for adaptability in order to maintain the federal bargain, the critiques of categorization – that it is excessively rigid, indifferent to relevant issues, and not overly protective of democratic outcomes – are particularly salient.

Given the need to balance rigidity and flexibility in the application of the Constitution, and particularly the division of powers/trade and commerce power – a task with which a strictly

---

155 *Supra* note 17 at 15.
156 *Ibid*.
157 2007 SCC 22.
categorical approach would seem to have a susceptibility for struggle – a balancing inquiry may therefore have much to offer. This is so, not just because balancing may be inevitable (as it may be used as part of the formation of categories, or because judicial tests like the one given in *GM* can be vague as to the required considerations it allows). Rather, it can offer a meaningful way to manage the evidentiary demands of the evolution of the Constitution and its enumerated jurisdictional powers that surely should exist. That is, there is presumably a need for sufficiently substantiated justification for any degree of constitutional evolution, and balancing can seemingly offer a methodology for doing so.

Intuitively, given that its entire nature and purpose is to weigh various concerns, balancing can offer a method to ensure the health of the federal system, along the lines of the various constitutional needs – responsiveness, optimization, limitation, and respect for constituent wishes, as balanced with rigidity – explored above. But more to the point, if judicial tests are to be utilized which have the potential for constitutional evolution, to whatever degree, the Courts should undoubtedly have strong justification for doing so. Balancing, if undertaken in a systematic way, can therefore provide some framework for considering all relevant matters in turn, and thus, substantiating any court-allowed evolution of the Constitution and its uses; a balancing inquiry can supply a methodological approach for weighing relevant matters so as to consider the ‘big picture’.  

Further to the granting of an ability to consider relevant policies and principles towards a proper grounding of possible constitutional evolution, any utilization of a judicial test for this purpose must also presumably make specific reference to the values and imperatives that are necessary for a proper balance of powers in a federal system. Again, such an apparent necessity can be happily satisfied by a balancing inquiry, as it suits (and can provide a methodology for) consideration of these particular imperatives.

---

158 *Supra* note 127.
159 *Supra* note 41 at 136.
It was rather famously suggested by Simeon (1983) that when debating the merits of the makeup of a federal system, certain features or imperatives should be considered, as there are a number of yardsticks by which we can “assess, evaluate, justify, defend or attack the structure and operation of a federal system” as either a success or failure.162 Because federalism, as a doctrine, is associated not only with legal boundaries, but also political values, such ‘criteria for federal design’ take on a broad character. Specifically, Simeon suggested that federalism can be evaluated from the perspectives of ‘community’, ‘democratic theory’, and ‘effectiveness’. By ‘community’, a federal structure can be assessed by how closely it aligns itself with the different images of an ideal society with which people identify. Evaluation based on democratic theory would inquire as to how a federal structure promotes democracy. And from a vantage point of effectiveness, federalism can be assessed with reference to whether it enhances or frustrates a government’s capacity to “generate effective policy and respond to citizen needs”.163

Though Simeon primarily intended these criteria as an evaluative tool, they can likely provide more than just an ex-post assessment mechanism. Rather, they have the potential to serve as an ex-ante judicial guide for the evolution of the division of powers as well. Swinton (1992), for instance, concurs with Simeon’s evaluative model, and implies further that given the repercussions of judicial interpretation on the health of the federal system, consideration of jurisdictional matters must be thorough. In her eyes, this thorough analysis should therefore include reference to imperative-like considerations, such as economic efficiencies, responsiveness to citizen preferences, aspirations of Quebec and the other provinces, and the claims of the Canadian ‘nation’.164 This position coincides too with the recently affirmed ‘objectives of federalism’, as given in Canadian Western Bank, where the SCC noted that federalism seeks to “reconcile unity with diversity, promote democratic participation... and foster co-operation among [regional] governments and legislatures for the common good”165

163 Ibid. at 132.
164 Supra note 41 at 132.
165 Supra note 157 at para. 22.
Along these lines, there is therefore good reason to see a need for the judiciary to consider all the elemental imperatives of federal design (which reflect the ‘virtues’ of federalism) in order to preserve and/or promote the overall health of the federal system.166

In the context of the national securities regulator, there is no question that its various relevant policy concerns relate to the evaluative criteria proposed by Simeon. And while any ex-post evaluation of the installation/denial of such a regulator would certainly be carried out with reference to those policy concerns, it is logical, therefore, that they should be considered in its constitutional contemplation as well (when contemplating fit under the trade and commerce power that will be at the root of its success or failure), notwithstanding the abovementioned Alberta and Quebec CA judgments that it is not the role of the courts to comment on the regime that is ‘best’ for Canada. A balancing approach, it seems, would allow for the consideration of the necessary imperatives, rather than a completely categorical inquiry which might ignore them. In fact, balancing may not just be a possible judicial methodology in the context of the division of powers, but a necessary methodology for the court to employ to ensure that such imperatives for a proper federal design are appreciated.

All told, because of the Constitution and its division of powers’ needs for responsiveness, optimization, proper limitation and respect for constituent wishes, a solely categorical approach to determinations of jurisdiction seems deficient. Instead, and especially given the need for substantiating any evolution of jurisdictional power, particularly with reference to certain key imperatives (in order to ensure the health of the federal system), a balancing-type inquiry could have a great deal to offer as a flexible and progressive analytical approach. As part of the division of powers, determining fit under the trade and commerce power would therefore likely benefit from an allowance for balancing, towards the abovementioned ends. Especially given the current imprecise approach to classifying jurisdiction under that power (via the GM test), and the many relevant imperative-like policy concerns surrounding the

166 See also supra note 98. Leclair is especially receptive to accounting for a full array of values, due to the risk in using only a narrow analytical lens. For instance, in his view, seeing federalism as only a “quest for efficiency” (as the SCC apparently has a proclivity to do) ignores values like the need for responsiveness to diversity, thus diminishing the inherent worth of community interests in the functioning of the federation. Thus, a holistic accounting of factors would likely be appropriate in this author’s eyes as well. See also Polyphony, supra note 87 at 26-29.
proposed national securities regulator which will turn on the consideration of this federal power, balancing offers the right methodological fit.

Admittedly, it has been noted that there are ways other than by allowing balancing to achieve constitutional flexibility. For instance, a court can take a relaxed attitude to constitutional precedent, it can take ‘large and liberal interpretations’ of fixed limits, and it can allow indirect doctrinal evolution (as opposed to evolution via judicial proclamation).\textsuperscript{167} To be sure, it is not the intent of this paper to invalidate these other methods of achieving flexibility. Rather, the purpose here is only to note that given categorization’s limitations in respect of the Constitution and its various needs, and a balancing inquiry’s suitability to them, the latter is a viable and sensible analytical option. Of course, these alternatives do point to the need to re-visit the concerns and critiques of a balancing inquiry, if applied to a judicial test for determinations of jurisdiction under the trade and commerce power. It is in respect of these concerns, while further elaborating on the type of balancing inquiry that would be beneficial (for determining the jurisdictional fit of the proposed national securities regulator), that the paper now turns.

6.3 ‘Structured Balancing’: A Sensible Way to Consider Jurisdiction under ‘General Trade and Commerce’

To this point, it has been argued that given the various needs of the Constitution and its division of powers, allowing a balancing inquiry when analyzing jurisdictional powers (and the general trade and commerce power in particular) seems desirable. This is especially the case due to the imprecision currently inhabiting the \textit{GM} test, and the drawbacks to using an exclusively categorical approach in that context, given the need for balancing rigidity with flexibility, as well as because of the ‘imperative-like’ policy concerns surrounding an issue like the national regulator proposal that are likely central to an evaluation for a properly functioning federal state.

\textsuperscript{167} \textit{Supra} note 9 at 85-92.
Admittedly though, notwithstanding the merits of judicial balancing (in its own right and in respect of the division of powers), we have seen previously that it can suffer from several potential drawbacks. These possible drawbacks can be grouped into two main (though related) categories, dealing with (i) the dangers inherent to the lack of analytical structure that balancing would produce, and (ii) the inappropriateness of the amount of discretion that this approach would grant to the judiciary. Namely, the first category of issues suggest that a balancing inquiry’s lack of rigidity and determinacy, particularly if carried out in an ad-hoc manner, would plague the analytical process by allowing indeterminate, unpredictable, non-neutral results that may provide outcomes not in the nature of ‘correct’ and ‘incorrect’. In the second category, the issues revolve around the judiciary’s role in that analytical process and the excess amount of discretion that balancing would perhaps allow them. In this regard, the judiciary may either be usurping the role of the legislature using a balancing approach, or they may be utilizing discretion to make determinations on matters that they are unequipped to consider. Assuming one can accept its necessity, for balancing to be appropriate as applied to determinations of jurisdiction under the trade and commerce power (and the national regulator issue specifically), and not just desirable, these criticisms must therefore be addressed.

Even though the above criticisms of balancing raise valid concerns, it is possible to ensure that such an approach is not defeated by them. Balancing can be appropriate in the circumstances, and resistant to its general criticisms, if the proper approach to its use is taken; a *structured* approach that appreciates the merits of placing a judicial inquiry within certain confines, and the critical role of the judiciary in constitutional evolution. It is such a structured balancing approach which can then reasonably be applied to the process of determining whether an impugned law can appropriately be classified under the federal government’s general trade and commerce power, using the *GM* criteria. It should be noted that such an approach, as compared to balancing in a more ‘classical’ sense, is not meant to be entirely revolutionary. Rather, what is proposed below is a balancing process with procedural requirements, safeguards and restraints imposed upon it that are typically not explicitly required by the approach’s various proponents. The goals of this proposed
approach, as we will see, are the removal of hidden contemplation and ambiguity in the decision-making process, towards a process that is both flexible and sufficiently rigid.

Contrary to the first grouping of criticisms of balancing (which criticize the indeterminacy in such an analytical process), there is no reason to think that a balancing inquiry cannot be carried out within certain boundaries, so as to overcome the problems that are otherwise raised. This is so, as it should be appreciated that there need not be a strict dichotomic choice made between balancing and categorization. Instead, these two approaches reside on a continuum, which should allow balancing to be carried not just through a process of standards-based, subjective adjudication, but also in a way that tends toward rules-based, categorical adjudication. In this regard, something akin to a ‘structured’ balancing approach could be implemented, where there is still acquiescence to the precision and consistency that is necessary when applying constitutional norms, achieved via the concretizing and regimenting of the consideration of relevant policy concerns.

Specifically, a middle ground between categorization and balancing can conceivably be taken in a way that expressly allows consideration of relevant policy concerns, if needed, but only when there is explicit recognition of the balancing that is being undertaken, and there is a rigorous and clearly communicated weighting of the factors to be considered (comparatively subordinated to any categories that may exist). As applied to determinations of jurisdiction under the general trade and commerce power, for instance, a structured balancing approach might be taken by expressly permitting the courts to consider policy concerns within the fourth and fifth branches of the GM test, at their discretion. Capacity or incapacity, and success or failure, as ostensibly dealt with in these limbs of the test, could be explicitly read

---

168 Methods, supra note 123 at 119.
169 Supra note 113 at 5.
170 See e.g. Methods, supra note 123 at 136, where the argument is made to instil structure into balancing-like inquiries at the European Human Rights Court. In doing so, the authors feel that there could be a meaningful degree of leeway injected into the otherwise rigid processes for settlement of certain human rights matters.
171 It should be noted that this ‘structured balancing’ approach is intended to be something more than just what has been described as “categorical balancing”, which would allow balancing only towards the creation of some given categories: see e.g. supra note 107 at 48. Importantly, it should also be noted that proper normative weighing of policies in relation to other more concrete categories is certainly within the realm of possibility: see e.g. David Bilchitz, “Does Balancing Adequately Capture the Nature of Rights” (Paper presented at the ‘Is this Seat Taken? Conversations at the Bar, the Bench, and the Academy’ Constitutional Law Colloquium, 11 October 2009) [unpublished], recall also supra note 114.
to include different federal design criteria-like considerations, including efficiency, cultural, social and democracy-related concerns that could impact the satisfaction of these capacity/incapacity tests, broadly understood. However, in doing so, a court would have to forthrightly recognize their importation of matters foreign to a strict legal analysis, and rigorously as well as openly weight any factors considered, recognizing their relative (likely lesser) importance in comparison to the constitutionally defined boundaries of s. 91(2). Essentially, a rigid procedural process would have to accompany the use of balancing.

Updating and clarifying the GM test in this way would effectively remove the ambiguity as to the allowable nature of considerations within the test (which currently involves either ad-hoc balancing or categorization, under the guise of what seems like strict categorical analysis), and ensure that relevant concerns are accounted for in a process of constitutional development. But further, without any ability for a court to mask their reasoning as purely categorical, a recognition of balancing, and an open weighting of the relevant factors, would lend some structure and accountability to a process that can otherwise be rather free-form. Namely, the potential for ad-hoc balancing would be removed, as this type of process would not be permitted on a whim, without its express recognition. Also, outcomes would not necessarily be unpredictable under a structured balancing approach, as relevant legal categories would still be held as paramount, through their higher weighting. Policy override would thus not be automatic or haphazard, as only sufficiently weighted policy matters could displace or modify the conventional application of categorical legal rules. And, when critics blast balancing for the utter subjectivity it allows, thus removing outcomes from the realm of right and wrong (and instead producing biased judgment calls) in their eyes, adding explicit structure to the process can only further support those who already believe balancing can be a neutral process.\textsuperscript{172} In fact, the ability of structure to ensure rational analysis (and therefore, the ability to provide ‘right’ answers) has been pointed to in other balancing-like processes, including judicial review proceedings and proportionality analyses.\textsuperscript{173} In this regard, Schauer

\textsuperscript{172} Notably, Alexy and Sullivan both argue that it is possible for balancing to be a neutral process which contributes outcomes in the nature of right and wrong, in the same way as categorization. Balancing is simply a different way of achieving neutrality as to a result. See e.g. \textit{supra} note 108 at 251-252; \textit{supra} note 114 at 574, 580; \textit{supra} note 118 at 610, 622; see also \textit{supra} note 107 at 48.

\textsuperscript{173} See e.g. \textit{supra} note 114 at 574, 580.
(2009) suggests that those who feel balancing is a non-neutral, irrational process may really just see it as inappropriately “unconstrained”.174

Admittedly, in respect of the second collection of critiques of balancing (pertaining to the inappropriateness of the degree of judicial discretion it would allow), it may not be possible to completely quell such reservations using a structured balancing approach. Without a doubt, adding structure to a balancing process, at best, only minimizes the amount of discretion that judges can make use of when they apply the Constitution (or the general trade and commerce power, specifically). Yet, fears regarding the degree of discretion judges are afforded are likely overstated in this context.

Certainly, it is worthy of recognizing that the courts already appear to engage in constitutional balancing in respect of important rights-based matters. To be precise, whenever the courts apply a proportionality analysis through the ‘Oakes test’ in respect of section 1 of the Charter (which allows limitations on Charter rights, within certain boundaries), they are engaging in a form of balancing.175 This suggests that balancing is already an accepted hallmark of Canadian constitutional adjudication, and need not be resisted against to the extent that it typically is.

More significantly though, it is likely that any worries regarding the judiciary employing a balancing approach should be deemed secondary, in comparison to the important duties the courts face in respect of the division of powers. Recall that regarding the division of powers, the courts play an important role by maintaining, and even helping to evolve the federal structure, through the application of their adjudicative powers.176 Undeniably, as part-managers of the federal system, their decisions on jurisdictional fit greatly impact the health of that federal system.177 Yet, the judiciary does not just play a role, they play a critical, almost primary role in the federal system, since formal amendment to the Constitution is

174 Supra note 104 at 7.
175 See e.g. Margit Cohn, “Three Aspects of Proportionality” (Paper presented at the VIII World Congress of the International Association of Constitutional Law, 8 December 2010) [unpublished] at 5; Towards, supra note 116 at 412.
176 Supra note 41 at 137-138.
177 Ibid. at 132.
rare, and informal adjustments sidestep the legal aspects of evolution in the division of powers. The courts will play this critical role when considering the constitutionality of a Canadian securities regulator, which certainly has the potential to lead to constitutional evolution. With an appreciation for the impact of the courts in the division of powers context, it should therefore be seen as reasonable to tolerate a degree of judicial discretion in the consideration of relevant policies and principles, when the recognition, creation, dismantling or reallocation of jurisdictional powers is a possibility. This is so, even when the legislatures have not taken the initiative, or the judiciary does not have the proper expertise. After all, if they are not permitted to do so, given the realities of the management of the federal system, it is likely no one will. Instead, the courts should be given the discretion to take into account all factors that may influence the health of the system. Surely, the national securities regulator issue is one such instance where it should be seen as incumbent upon the courts to consider all angles as to the constitutionality and appropriateness of allowing the novel exercise of jurisdictional power that the draft Act would require.

Notwithstanding the key role of the judiciary in the division of powers context, seemingly necessitating their ability to consider policy issues in the resolution of these matters, it should further be appreciated that the courts are not exactly insulated from the influences and decisions of elected representatives regarding the evolution of the division of powers, anyway. Namely, in the context of Charter rights, it is commonly cited that there is a ‘dialogue’ between the judiciary and the legislatures. Though it is itself the subject of debate, this dialogue is said to function where the policies of a legislature and rulings of the judiciary (even if to limit legislative pronouncements) work in a circular fashion to influence each other. As a result, many feel that concerns regarding judicial discretion and activism in the Charter context are exaggerated. Given the closeness of the constitutional context, one can likely abstract that with regard to division of powers matters as well, judicial decisions based partly on policy considerations need not be seen as final, or without the

---


179 Charter Dialogue, ibid.

influence of the elected branches of government. In fact, Goldsworthy (2010) argues that while federalism requires the judiciary to choose between competing conceptions of the federal structure, their decisions are still susceptible to legislative revision.\footnote{See Jeffrey Goldsworthy, “Structural Judicial Review and the Objection from Democracy” (2010) 60 U.T.L.J. 137.} No consideration of policy by the judiciary, therefore, need be seen as devoid of accountability and higher-level review. As such, concerns over the extent of judicial discretion are likely exaggerated in the division of powers context as well, as the courts can be seen to take part in the evolution of Canada’s supreme legal instrument without breaching democratic principles.

All told, for the sake of remedying the shortfalls of the $GM$ test, and allowing the benefits of a balancing approach (that may even be necessary in the circumstances) to take hold, it is suggested that a procedurally \textit{structured} balancing approach, if explicitly implemented, can resist the inherent drawbacks of balancing. It would do so by appreciating the merits of placing a judicial inquiry within certain confines, and the critical role of the judiciary in the process of constitutional evolution. Indeed, it is reasonable to think that such a structured approach can suitably be applied to adjudication concerning the general trade and commerce power, in a way that respects its needs and requirements. And though, as alluded to above, the Alberta and Quebec Courts of Appeal have certainly not endorsed the use of such an approach in its determination on the unconstitutionality of a national securities regulator, the door is still open to implementation of this sort of model, in this context. For purposes of the SCC’s determination of the constitutionality of the national securities regulator, then, especially given the many long-debated competing policy considerations involved, a structured balancing approach may have much to offer when the limits of the Canadian federal structure are once again tested.

\section*{7. Conclusion}

For numerous reasons, and by way of different mechanisms, the federal system in Canada evolves from time to time. With a possible ruling by the SCC in favour of the
constitutionality of a national securities regulator, this may certainly be one of those instances where the federal structure is given a push in a new direction, at least in terms of a novel exercise of jurisdictional power. In this regard, the judiciary will play a fundamental role in this possible evolution, in fulfillment of their duty as part-managers of the federal system, through their powers of constitutional adjudication. They will do so primarily be revisiting the general branch of the trade and commerce power, using the guidelines set out in GM. Fulfillment of this duty, however, is complicated by the many policy positions surrounding the proper approach to Canadian securities regulation. Not only has the proposal been challenged for its constitutionality, so too has it been critiqued from the perspective of its possible economic, social, political and regional consequences. As a result, the question surely becomes whether or not such concerns should be part of the judicial analysis when federal evolution is at stake; a pertinent query given the ambiguity in direction supplied by the GM indicia that guide determinations of jurisdiction under general trade and commerce.

Invariably, it is argued that it is not the role of the courts to engage with these sort of policy concerns – a position recently affirmed by the Alberta and Quebec Courts of Appeal in their reference judgments on the national securities regulator proposal. And, undeniably, it is a position not without merit, as democratic systems are quite reliant on the critical separation between executive, legislative and judicial branches. Judicial discretion, therefore, has important limits. The matter of the national securities regulator proposal, however, highlights that limits on judicial discretion cannot be perpetually assumed. Indeed, particularly because much is at stake with such a proposal, policy arguments regarding the proper makeup of the regulatory structure cannot be taken lightly. Without a doubt, this reality invokes an oft-discussed debate regarding the merits of categorization compared to balancing as judicial approaches to the contemplation of the Constitution. In the context of the trade and commerce power, then, one must decide whether a balancing of relevant policy factors can be allowed to override the application of strictly delineated jurisdictional powers. An examination of this debate, along with an appreciation of the nature and evolution of the division of powers, and the role of the courts therein, reveals that a middle-ground may be applicable, when evolution of the federal structure is in the balance.
It has been argued that when the SCC considers the constitutionality of the proposed national securities regulator, allowing the consideration of relevant policy arguments is desirable. Accordingly, a balancing-type approach should be seen as appropriate for the judiciary to take when it engages in this sort of analysis of jurisdictional competency. Specifically, it has been forwarded that the current muddled approach to determinations of constitutionality under the trade and commerce power, via the GM test, is inadequate, and in need of an imbue ment with clarity and coherency. A decisively categorical approach to determinations of fit under this power, however, appears to be insufficient. This is so, due to the need for responsiveness to the changing necessities and desires of Canadians, the ability to optimize Canadian constitutional laws, and the capacity for meeting the federation’s constitutional bargain, all of which are especially necessary in a division of power/federal state context. Instead, balancing has much to offer, as it can appreciate this strong need for flexibility, not to mention the critical imperatives for federal design, while also providing a means for elucidating justification for an instance of constitutional division of powers evolution.

Notwithstanding the obvious reservations one might have with imparting to the judiciary the power to weigh policy matters, it has further been opined that an application of the division of powers – as will be carried out to decide the constitutionality of the national securities regulator – is a special scenario especially worthy of this added latitude. In their role as part-managers of the federal system, particularly given the scant use of formal legal mechanisms for evolution of the division of powers, the judiciary must be given the leeway needed to ensure the health of the federal system. This ability is tolerable also because it should be recognized that the judiciary already engages in certain forms of accepted balancing (such as the section 1 Charter limitation analysis), and can likely avail itself of the Constitutional dialogue that presumably occurs, if a judicial decision is deemed intolerable.

Furthermore, if the proposed balancing process is properly structured, concern can be limited by adding defined procedural restrictions, and thus, a degree of accountability to the adjudicative process. That is, the consideration of relevant policy matters can be appropriately allowed, if there is a firm requirement that a court be explicit about the process it is engaged in, and it openly weighs the given policy matters against any relevant legal
categories. Adding this sort of required structure will address the traditional critiques of constitutional balancing, including its inherent ability to permit ad-hoc contemplation and excessive flexibility. The GM test, used for determining constitutionality under the general trade and commerce power, unquestionably has the potential to reflect such an approach.

Based on the perceptible viability of the proposed structured balancing approach, it is therefore suggested that the SCC does have recourse to appropriately consider the various policy concerns raised regarding the draft national securities legislation. After all, ignoring economic, social and political well-being in an important area like the regulation of the capital markets is not sensible. Indeed, a modified GM test should be utilized towards this end, to not only provide a clearer and more consistent approach to the contemplation of jurisdictional competence under the general trade and commerce power, but also to ensure that this instance of constitutional evolution moves forward in a suitable way.

On a final note, though the arguments presented in this paper have been directed towards the adjudication over the constitutionality of the proposed national securities regulator (to be decided with reference to the general trade and commerce power), they would conceivably extend to an analysis over any law challenged on the basis of constitutional jurisdiction. It might therefore be suggested that a process of structured balancing would be desirable for judicial determinations of jurisdictional constitutionality, and hence, the management of the federal system, more generally. This may be so, especially given the many policy issues that arise in these varied contexts. Of course, whether such an approach will be accepted, in the national regulator context or otherwise, remains to be seen.

8. Post-Script: Preliminary (Pre-Decision) Reflections on the SCC’s Reference Hearing

In the wake of the SCC national securities regulator reference hearing, and though a judgment to be handed down by the SCC is, at the time of this paper’s submission, reserved (and with it, a possible final say regarding the manner in which the GM test is to be applied),
a number of reflections can be made in respect of the treatment of the issues raised that bear relevance to those discussed in the present paper. This post-script, added subsequent to the writing of the main body of the present paper, therefore briefly analyzes the facta submitted to the SCC, the arguments focused on at the Court, and the reaction to them by the Court’s Justices. Attention is paid mostly to the major themes that seemed to emerge at the hearing, and the treatment of policy matters, as considered via the $GM$ test.

Within the various submissions to the SCC, it is important to recognize that, as predicted above, the general trade and commerce power does take center stage in the different parties’ arguments, as does the $GM$ test. In fact, virtually all facta submitted to the Court, save for those of some interveners who tackled only certain sub-issues, include analysis of: the character of the securities markets, the pith and substance of the proposed legislation (as a preliminary matter), and the confines of the property and civil rights power vs. the general trade and commerce power. Incidental arguments relating to the double aspect doctrine also abound. Such argumentation is certainly to be expected, and therefore, incorporates no substantial departures from what one would anticipate in an exploration of a proposed law and its potential fit under the trade and commerce power, pitted against the property and civil rights power.

But what of the treatment of the social, political and economic concerns previously identified as crucial policy matters pertaining to the installation of a national securities regulator? Unsurprisingly, the various parties arguing against the constitutionality of a national regulator either ignore the potential for consideration of policy as pursuant or incidental to consideration of the $GM$ test’s criteria, or bluntly seek to remind the Court that the matters at hand are not to be infused with the contemplation of those policy concerns. For example, a clear instance of an explicitly worded rejection of policy contemplation is given by the Attorney General (AG) of Manitoba, where the choice for the SCC in respect of the fourth branch of the $GM$ test is described as being one of measuring a strict constitutional
imperative for jurisdiction and not the “desirability of legislative policy”.182 To be sure, this is a predictable sort of perspective to take, given the typical reluctance in imbuing any court with too much discretion. And indeed, regardless of whether the parties avoid the matter of if policy concerns should come to bear on considering the boundaries of the general trade and commerce power, or there is explicit rejection of such possible inclusions, the purpose of such omissions/arguments is likely self-evident: assert a recognition that the GM test is, and perhaps should be maintained as one that is not to be infused with concern over policy. The statements, or lack thereof, likely also intimate the position that constitutional contemplation is a process that should be carried out without reference to issues meant for the elected.

Unquestionably, though, the most intriguing treatment of the potential contemplation of policy concerns within the GM criteria is found within the arguments of the Attorney Generals for Canada and Ontario – parties in favour of a national initiative. In both sets of submissions, the parties’ quite clearly assert – more clearly even than by those parties opposing the national regulator – that the role of the Court is not to decide whether the proposed Act is good policy.183 Again, one might glean from such remarks that these parties, like those opposing them, read the GM test as one that is categorical in nature, and admits no allowance for policy contemplation. And further, the position could also intimate that these parties are in agreement that policy decisions are best left to the legislatures.

Notwithstanding the rejection of policy contemplation, though, what is most fascinating about the aforementioned parties’ arguments in favour of the federal initiative is that both the AG Canada and AG Ontario still tangentially assert the supposed superiority of a national regulator in their submissions. In fact, they both go to great lengths in their ‘statements of fact’ to describe the evolution of the capital markets, investors and securities products, and

182 In the Matter of a Reference by Governor in Council concerning the proposed Canadian Securities Act, as set out in Order in Council P.C. 2010-667, dated May 26, 2010 (13-14 April 2011), Ottawa 33718 (S.C.C.) [Factum of the Attorney General for Manitoba at para. 107 (FAGM)].

accordingly, the various contemporary challenges to securities market regulation; matters which lead to the view that a national regulatory body is superior to the current provincial structure.\textsuperscript{184} Primarily, this picture is painted in such a way as to show that given the current nature of the capital markets, there could be no better a way to regulate them than through a federal initiative. And likewise, so too is a preference for a national regulator given within discussion of the perceived efficiencies of the current vs. prospective set of securities regulations for purposes of the fourth branch, where it is asserted that the current system lacks the requisite effectiveness in areas where it is meant to apply (such as for the minimization of systemic risk).\textsuperscript{185} In general, then, while being careful to maintain that policy is irrelevant to the court’s considerations, the arguments still drip with prescriptive language.

Even with the express acknowledgment that policy contemplation is not for the Court in this matter, it is thus possible to confirm (as suggested earlier in this paper) that some ambiguity regarding the appropriate manner of constitutional analysis still permeates some readings of the \textit{GM} test. Admittedly, the perceived ambiguity here may not be due to what the parties actually think the \textit{GM} test requires in terms of considerations, nor what it should require. Such seemingly conflicting approaches may simply be strategic sleight of hand to influence the Court, through the use (i.e. persuasiveness) of defensible policy preferences. In any event, that the confines of the trade and commerce may be manipulated, intentionally or not, by considerations of ‘desirability’, the required clarity needed to consider and apply the \textit{GM} test may still therefore be, at least to a degree, lacking.

Upon considering the various arguments, the panel of SCC justices seemed to hone in on one particular aspect of the \textit{GM} test. Namely, in the two day hearing that saw no less than 15 submissions, the issue that seemed to be of critical importance was whether the proposed \textit{Act} can be understood to cover only a particular industry, or a trade as a whole – i.e. the third branch of the test.\textsuperscript{186} Within this analysis, considerations regarding the nature of securities,

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{184} \textit{FAGC}, \textit{ibid.} at paras. 10-30; \textit{FAGO}, \textit{ibid.} at paras. 4-27.
\item \textsuperscript{185} See e.g. \textit{FAGC}, \textit{ibid.} at para. 123; \textit{FAGO}, \textit{ibid.} at para. 51.
\item \textsuperscript{186} Of course, although the third branch of the \textit{GM} test appeared to be of paramount importance to the Court, the test’s other indicia were certainly discussed and contemplated by the Court in numerous instances as well.
\end{enumerate}
\end{footnotesize}
their regulation, and the aims and purposes of the draft Act took center stage. Of particular significance was also whether the proposed Act actually deals with systemic risk – a stated goal, but one which was argued to be missing from its provisions in actuality. This matter was of crucial importance, it seemed, as it would speak to the draft Act being of greater regulatory importance than just for a mere industry. Admittedly, discussion surrounding the third branch of the test was largely confined to the characterization of the proposed Act, and did not really touch on any associated policy agendas.

Aside from the main preoccupation of the Court, however, the panel was certainly not oblivious to the fact that certain submissions did not confine their arguments only to a strict categorical analysis of constitutional jurisdiction, even though this may have been their stated desire. As a result, in recognition of the various prescriptive remarks in the AG Canada submissions (among others), for instance, particularly in respect of the fourth branch of the GM test, Lebel J. quickly queried within minutes of the hearing’s commencement whether the apparently conflicting attitudes towards policy were deliberate, and whether this was a matter for the Court to consider. Indeed, throughout the hearing questions and comments of a similar nature also arose, centering mostly on the nature of a party’s arguments in respect of the fourth branch of the GM test. Naturally, the response in most cases was to downplay and deny in short order any assertion that it is for the Court to prescribe policy, and the submissions would proceed. However, that time and time again the Court still seemed to permit and discuss argumentation revolving around rather policy-centric justifications for federal jurisdiction over securities regulation maintains a feeling that even the SCC has not yet determined its preferred approach to the GM test.

Perhaps in recognition of their rather mixed treatment, there were a number of instances toward the end of the hearing where the panel wondered aloud whether the GM test should be tweaked, and what role the Court should have in adjudicating over the Constitution. Though these questions largely went unanswered, by the Court itself or the different parties, and the proper method of determining jurisdictional fit under the general trade and commerce power/division of powers was not conclusively given, ideally such quandaries imply that the Court will consider them in greater depths upon forging its reference judgment. Admittedly,
it is most realistic to foresee a continuation of (what has been argued in this paper to be) an improperly ambiguous approach to the contemplation of the division of powers when the SCC renders its judgment, without the clarification of the $GM$ test that seems needed. Specifically, it is likely that while the SCC will outwardly reject the contemplation of policy-related matters in favour of categorical reasoning, one can also expect the continuation of implicit policy-like considerations to be allowed to creep into the analytical process. Indeed, the indeterminacy of $GM$, and the categorization vs. balancing debate will probably live on. Still, while only time will reveal the direction the Court will take, one should hope for the sake of a lasting health and success of the federal bargain, that the direction given will be clear and determinative.