In the Court of Appeal of Alberta

Reference re Securities Act (Canada), 2011 ABCA 77

Date: 20110308
Docket: 1003-0031-AC
Registry: Edmonton

Between:

Her Majesty the Queen In Right of Alberta

Appellant

- and -

Her Majesty the Queen In Right of Canada

Respondent

- and -

Attorney General of Québec and Canadian Bankers Association

Interveners

The Court:

The Honourable Mr. Justice Jean Côté
The Honourable Madam Justice Carole Conrad
The Honourable Mr. Justice Keith Ritter
The Honourable Mr. Justice Clifton O'Brien
The Honourable Mr. Justice Frans Slatter

IN THE MATTER OF a Reference by the Lieutenant Governor in Council to the Court of Appeal of Alberta for hearing and consideration of the questions set out in Order in Council 20/2010, as amended by Order in Council 181/2010, respecting the proposed federal *Securities Act*.

Reasons for Judgment Reserved of the Honourable Mr. Justice Slatter

Concurred in by the Honourable Mr. Justice Côté
Concurred in by the Honourable Madam Justice Conrad
Concurred in by the Honourable Mr. Justice Ritter
Concurred in by the Honourable Mr. Justice O'Brien

Reasons for Judgment Reserved
of the Honourable Mr. Justice Slatter

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[1] The Government of Canada proposes to pass legislation that would regulate the securities industry in Canada. The Government of Alberta challenges the constitutionality of this proposed legislation. The Alberta Lieutenant Governor in Council has referred the following questions to this Court:

> 1. Does the Parliament of Canada have the legislative authority under the *Constitution Act*, *1867*:
>
> > (a) to pass sections 295, 296 and 297 of the *Budget Implementation Act*, *2009* S.C. 2009, c.2,
> >
> > (b) to pass legislation that is co-extensive in substance with the Alberta *Securities Act* and similar to the draft Securities Act appended to the *Final Report and Recommendations* of the Expert Panel on Securities Regulation, and
> >
> > (c) to pass legislation that is the same as or similar to the Proposed Canadian Securities Act - Sessional Paper No. 8525-403-10?
>
> 2. Does the Parliament of Canada have jurisdiction under the *Constitution Act*, *1867* to pass legislation that would exclude the application of the Alberta *Securities Act*:
>
> > (a) to market participants who elect to be regulated under the federal regime only, as recommended in the *Final Report and Recommendations* of the Expert Panel on Securities Regulation,
> >
> > (b) to market participants who have a substantial connection to a jurisdiction other than Alberta, as recommended in the *Final Report and Recommendations* of the Expert Panel on Securities Regulation, or
> >
> > (c) by an express paramountcy clause or similar unilateral action, as recommended in the *Final Report and Recommendations* of the Expert Panel on Securities Regulation?

The Reference was made by Order in Council 20/2010, as amended by Order in Council 181/2010, pursuant to s. 26 of the *Judicature Act*, R.S.A. 2000, c. J-2.

Facts and Constitutional Background

[2] The securities industry is one of the "four pillars" of the financial sector of the economy. Three of those pillars (the securities industry, the insurance companies, and the trust companies) have historically been regulated by the provinces using their jurisdiction over "property and civil rights in the province". The fourth pillar, banking, falls under federal jurisdiction under s. 91(15) of the *Constitution Act, 1867*: ***Canadian Western Bank v. Alberta***, 2007 SCC 22, [2007] 2 S.C.R. 3 at para. 1.

[3] The various pieces of provincial legislation regulating the securities industry in Canada are very similar, due to the efforts of the provincial securities regulators to coordinate them; provincial regulation of securities is decentralized, but harmonized. The statutes regulating securities, and the related regulations, rules, and policy statements, are detailed, technical, and complex. The Alberta *Securities Act*, R.S.A. 2000, c. S-4, is representative of the type of provincial securities regulation in force. The *Securities Act* regulates the securities industry in several basic ways:

- It regulates the participants in the industry (advisers, insiders, dealers, promoters, registrants, exchanges, self-regulating organizations, etc.) by requiring the licensing of key players, and by controlling the activities of and setting standards of conduct for various participants (with respect, for example, to insider trading). This part of the regulatory regime is essentially "regulation of a profession".

- It establishes thresholds that must be met before money can be raised from the general public, by requiring extensive disclosure through regulated documents (such as the prospectus and offering memorandum), and by providing limits on when and how money can be raised. This part of the regime regulates contracts between the issuers and members of the public, as well as the corporate structures and activities of the issuers.

- Once a company (an "issuer") has entered the regulated system (by becoming a "reporting issuer"), the company is then under a continuing obligation so long as it remains within the system to provide various forms of continuous disclosure (such as annual financial statements, material change reports, etc.), and to meet various standards of conduct. This part of the regime regulates the way that the issuers conduct their business on a continuing basis.

- Once securities have been sold to the public via the initial offering, the trading of those securities in the secondary market is also regulated. This involves the ongoing regulation of contractual and property rights.

- The statute also regulates certain significant transactions that are out of the ordinary course of business of a reporting issuer (such as takeover offers, and issuer bids). This part of the regime regulates significant contracts and transactions.

- The statute contains provisions for investigation, enforcement, and civil liability, to encourage and ensure compliance with the regime. The civil remedies are not merely ancillary to the other valid provincial objectives, but arise directly from the contractual and property rights being regulated.

This brief summary of the provisions of the Alberta *Securities Act* only hints at the detailed regulation that is imposed on the industry, but it is sufficient to support the constitutional analysis.

[4] None of the provinces presently operates what is known as a "merit jurisdiction". Provincial security regulators do not pass on the merits of any particular investment; they do not attempt to pick winners or losers. Issuers are allowed to sell high risk investments. The focus of the present provincial (and proposed federal) securities regulation is on ensuring "full, plain and true" initial and continuous disclosure, leaving the investment decision up to the investor; it is the issuers and intermediaries who are the regulated participants, not the investors. After compliance with the regulatory thresholds, the trading in securities is a free market capitalist system where investors are entitled to make such investments as they see fit. The primary focus of the statutes is on the selling of securities; there are only a few provisions (such as Alberta's s. 93 on market manipulation) that regulate the buying of securities.

[5] The involvement of the federal government in the securities industry has historically been minimal. There are a few related criminal provisions, such as s. 400 of the *Criminal Code*, R.S.C. 1985, c. C-46 which makes it an offence to issue a false prospectus. Some of the statutes that regulate companies and industries that fall under federal jurisdiction have provisions relating to the securities of those companies, for example s. 273 of the *Bank Act*, S.C. 1991, c. 46 relating to the distribution of shares of a bank.

[6] As the questions on this Reference reveal, the federal government now proposes, for the first time, to enact comprehensive legislation regulating the securities industry at the national level. The proposed federal legislation mirrors, from a functional point of view, the existing provincial securities regulation regimes: see proposed ss. 9 and 16. Occasional different policy choices in the content do not change the nature of the proposed legislation for constitutional purposes. It will license and regulate the conduct of participants in the securities industry. It will regulate the raising of money from the public in much the same way as the provincial legislation does, and will contain similar provisions for continuous disclosure. The federal legislation will also regulate extraordinary transactions, and provide for investigation, enforcement, and civil liability. The federal government bases the constitutionality of the core provisions of the proposed legislation on the "general" branch of the trade and commerce power. The Government of Alberta concedes that small portions of the proposed legislation, taken in isolation, are a valid exercise of the federal criminal law power.

[7] The Government of Canada suggests that the proposed federal securities legislation will also address "systemic risk". By "systemic risk" is meant widespread undesirable investment practices that might lead to wholesale disruptions of the capital markets. However, not being a "merit system", the legislation does not address the types of irresponsible investment practices that might create such risks, nor does it limit the types of investments that can be sold. The focus of the proposed federal securities legislation (like the provincial legislation) is the integrity of market participants, protection of public investors, and ensuring ethical practices in the capital markets.

[8] The proposed federal legislation will not initially, and may never, be in force throughout Canada. Section 250 provides that the legislation will only become effective in a particular province if that province consents to being included, and also agrees to suspend its jurisdictions over securities. The regime does not, however, involve the exercise of provincial jurisdiction by a federal tribunal, as occurred in ***P.E.I. Potato Marketing Board v. Willis***, [1952] 2 S.C.R. 392. Rather, it involves the exercise of asserted federal jurisdiction, but in geographically limited parts of the country. Indeed it is clear that a province cannot consent to the transfer of its constitutional powers to the federal government, and the constitutionality of the proposed federal securities statute cannot be supported on that basis: ***Attorney General of Nova Scotia v. Attorney General of Canada***, [1951] S.C.R. 31; ***Fédération des producteurs de volailles du Québec v. Pelland***, 2005 SCC 20, [2005] 1 S.C.R. 292 at para. 54.

The Efficacy of the Division of Powers

[9] The Government of Canada concedes in its factum that this Reference is not an exercise in picking the optimal system of securities regulation. But nevertheless it argues at length that the present system of securities regulation has not kept up with changing capital markets, and is fragmented, inefficient, and expensive. It argues that capital markets are no longer local, or even national, but are now international. It argues that from an economic and social point of view, it would be much better if Canada had one national securities regulator. The Government of Alberta (supported by the intervener Québec) argues that the present system works well, is efficient, and has been highly rated by international securities agencies as one of the best regulatory systems in the world: Affidavit of W.S. Rice, Q.C., Alberta Record Vol. I, p. 4, para. 8(k); Alberta's factum, paras. 34-5. It argues that a national securities regulator would be insensitive to local market conditions, needs and priorities. Each side filed evidence, reports and studies, and presented arguments, supporting their view. These arguments are of little assistance in answering the questions posed by the Reference.

[10] It is neither appropriate nor necessary for this Court to try and determine whether it is "better" for Canada to have a national, as compared to a provincial, system of securities regulation. While the *Constitution Act* should be interpreted in a contextual way having regard to changing social standards, advances in technology, and developments in the way business is conducted, there are limits to how far the courts should go in reallocating the constitutional powers divided up in ss.

91 and 92. As stated in ***Reference re Employment Insurance Act (Can.)***, 2005 SCC 56, [2005] 2 S.C.R. 669 at para. 76: "The evolution of the scope of a constitutional head of power cannot result in encroachment on the power assigned to another level of government". The courts cannot rewrite the *Constitution Act* under the guise of adapting constitutional law to perceptions of the most efficient way of operating the federation or its economy. Some inefficiency is one of the hallmarks of a federal system, but the resulting diversity and local autonomy some of its main strengths: ***Consolidated Fastfrate Inc. v. Western Canada Council of Teamsters***, 2009 SCC 53, [2009] 3 S.C.R. 407 at para. 39. Just because the federal government believes it would be advantageous to concentrate economic power nationally does not alter the terms of the *Constitution Act*.

[11] For example, convincing arguments can be made that the present division of powers over family law (with divorce and marriage in the federal sphere, and matrimonial property, solemnization of marriage, and child welfare in the provincial sphere) is inefficient or unfortunate, and perhaps anachronistic. Another example is the overlap between federal criminal jurisdiction over impaired driving, and provincial jurisdiction over the suspension of licences as a result. That, however, is the way jurisdiction is allocated under the *Constitution Act*, and it is not for the courts to rewrite it. The division of powers in a federal state may be inconvenient, but overall that is a strength of a federal system, not a weakness. The questions posed by the Reference must be answered in accordance with the principles of constitutional statutory interpretation, and not based on the Court's assessment of the ideal allocation of jurisdiction between the federal and provincial governments.

[12] Arguments were also made to the effect that issuers would find it much more convenient and efficient if they could raise money from the public after compliance with a single regulatory regime. Even with the "passport" system that has been implemented by the provincial securities regulators to expedite multi-jurisdictional approvals, an issuer in Canada must conceptually still demonstrate compliance with 13 regulatory regimes. (Ontario has declined to join the passport system, holding out for a national regulator, likely on the assumption its head office would be in Toronto: Affidavit of W.S. Rice, Q.C., Alberta Record Vol. I, p. 32, para. 111.) But as was noted in ***Canadian Western Bank*** at para. 94, commercial convenience does not transfer jurisdiction from one level of government to the other.

[13] There is some legal support for the argument that "impossibility" (not mere difficulty) of effectively regulating some activity other than at the national level would support federal jurisdiction. For example, in ***General Motors of Canada Ltd. v. City National Leasing***, [1989] 1 S.C.R. 641 at p. 680 the Court stated: "It is evident from this discussion that competition cannot be effectively regulated unless it is regulated nationally." That line of argument is not, however, applicable here. It is evident that the securities industry has been regulated for nearly a century by the provinces; no argument of the impossibility of continuing that regime can be made on this record: Affidavit of W.S. Rice, Q.C., Alberta Record Vol. I, p. 4, para. 8(k); Alberta's factum, paras. 34-5.

Pith and Substance

[14] A constitutional analysis of the division of powers between the federal and provincial governments starts with determining the "pith and substance" of the legislation: ***Reference re Assisted Human Reproduction Act***, 2010 SCC 61 at paras. 19, 184, 284. The parties agree that the pith and substance of the proposed legislation is the regulation of the participants in the public capital markets in Canada, and transactions relating to the raising of capital. Its general objects, like that of all securities legislation, are the protection of the investing public, and the establishment and support of vibrant yet stable public markets for capital: ***Pezim v. British Columbia (Superintendent of Brokers)***, [1994] 2 S.C.R. 557 at p. 589; ***Global Securities Corp. v. British Columbia (Securities Commission)***, 2000 SCC 21, [2000] 1 S.C.R. 494 at para. 33.

[15] In this Reference the Government of Canada does not dispute that the provinces have jurisdiction over the regulation of the securities industry under the "property and civil rights" head of power in the *Constitution Act*. Canada concedes (Factum, paras. 64-5) that the regulation of securities is in pith and substance a matter of property and civil rights, and that the proposed federal legislation therefore intrudes into a provincial head of power. Canada argues, however, that it has concurrent jurisdiction in the area. Because of the paramountcy principle any federal legislation would prevail over existing provincial legislation to the extent of any inconsistency, but that eventuality does not immediately arise because of the "opt in" feature of the legislation.

[16] The Government of Canada argues that it need only demonstrate a "rational connection" between the proposed federal securities legislation and one of the federal heads of power in order to demonstrate constitutionality. The authority cited is ***Reference re: Anti-Inflation Act (Canada)***, [1976] 2 S.C.R. 373 at pp. 422-3:

> When, as in this case, an issue is raised that exceptional circumstances underlie resort to a legislative power which may properly be invoked in such circumstances, the Court may be asked to consider extrinsic material bearing on the circumstances alleged, both in support of and in denial of the lawful exercise of legislative authority. In considering such material and assessing its weight, the Court does not look at it in terms of whether it provides proof of the exceptional circumstances as a matter of fact. The matter concerns social and economic policy and hence governmental and legislative judgment. It may be that the existence of exceptional circumstances is so notorious as to enable the Court, of its own motion, to take judicial notice of them with out reliance on extrinsic material to inform it. Where this is not so evident, the extrinsic material need go only so far as to persuade the Court that there is a rational basis for the legislation which it is attributing to the head of power invoked in this case in support of its validity.

This quotation does not support the general principle advanced. The anti-inflation legislation was upheld under the residual federal power over "peace, order and good government" on the basis that

there was a national crisis arising from inflation that had to be addressed at the federal level. The challenged legislation was described by the Supreme Court of Canada at p. 419 as "crisis legislation". An issue arose as to whether, in a case of that type, the government proposing the legislation had to support the existence of the "crisis" on a balance of probabilities. The Court held that the existence of the crisis was a political matter, and that the evidence only had to show a rational connection between the legislation and the crisis. The proposed federal securities legislation cannot reasonably be described as a response to a "crisis" in the constitutional sense. That there is no existing national crisis is shown by the "opt in" feature of the legislation, which would not be a feature of "crisis" legislation. The challenged legislation is to be enacted merely in the promotion of economic policy, not to avert a national crisis. Whether the "pith and substance" of proposed legislation falls within a particular head of power is a question of constitutional interpretation, which is a question of law, not evidence.

[17] The Government of Canada argues (Factum, para 70): "The pith and substance of the *Securities Act* is comprehensive national securities regulation, i.e., regulation of a type that is beyond the ability of any single province or group of provinces to achieve." This is not a proper application of the pith and substance doctrine. A matter does not fall under federal jurisdiction just because federal legislation happens to apply all across the country. Virtually all federal legislation on any subject would be of that character. Merely because something is of general interest throughout Canada is not enough to create federal jurisdiction: ***Canada (Attorney General) v. Canadian National Transportation Ltd.***, [1983] 2 S.C.R. 206 at pp. 265-6; ***General Motors v. City National Leasing*** at p. 660. For example, highway safety would not fall under federal jurisdiction just because a national statute governing streets and roads would apply all across the country. Nor would it matter that "no single province or group of provinces" could enact such legislation. This categorization of the pith and substance of the proposed legislation is essentially circular: any federal legislation would apply all across the country, and because it applies effectively and uniformly all across the country, it is federal. Such an interpretation would drain "of their content the provincial powers over civil law and matters of a local or private nature": ***Canadian Western Bank*** at para. 43.

[18] The existing case law clearly supports the proposition that the regulation of the securities industry is a matter of property and civil rights. The Government of Canada does not challenge that law. To the extent that it licenses and regulates participants in the industry, the securities legislation is a form of professional regulation that has traditionally been held to relate to "civil rights" in the province: ***Law Society of British Columbia v. Mangat***, 2001 SCC 67, [2001] 3 S.C.R. 113 at paras. 38-40; ***Multiple Access Ltd. v. McCutcheon***, [1982] 2 S.C.R. 161 at pp. 184-5; ***Gregory & Company Inc. v. Quebec Securities Commission***, [1961] S.C.R. 584 at p. 588; ***Lymburn v. Mayland***, [1932] A.C. 318 at p. 324 (P.C. (Alta.)); ***Smith v. The Queen***, [1960] S.C.R. 776 at pp. 780, 797-8; ***Cowen v. British Columbia (Attorney-General)***, [1941] S.C.R. 321; ***Krieger v. Law Society of Alberta***, 2002 SCC 65, [2002] 3 S.C.R. 372 at para. 33.

[19] The regulation of the raising of funds from members of the public has at its core the regulation of particular investment contracts. The securities that are traded are a form of property. Trading in that property involves a series of contractual and property arrangements, none of which involves the cross-border movement of property: Report of Eric Spink, Alberta Record Vol. I, p. 338, para. 2, pp. 360-1, paras. 60-5; Affidavit of W. S. Rice, Alberta Record Vol. I, pp.10-11, para. 25. The regulation of the raising of capital, the requirements of continuous disclosure, and the regulation of extraordinary transactions by reporting issuers, are also essentially matters of "property and civil rights": ***Canadian Western Bank*** at paras. 1, 80-1; ***Global Securities Corp.*** at paras. 40-1; ***Multiple Access*** at pp. 183-4; ***Smith v. The Queen*** at pp. 779-81; ***Duplain v. Cameron***, [1961] S.C.R. 693.

[20] Canada argues that the securities industry has changed, particularly in the last decade. That, in itself, would change neither the pith and substance of the legislation, nor the division of powers under the *Constitution Act*. Securities products may have become more varied, complex and sophisticated, but their fundamental character as matters of property and contractual rights has not changed. In any event, the premise of the argument is wanting. Canadian companies at Confederation, and since, have always relied upon access to international capital markets. While technology has greatly speeded up the exchange of information and facilitates modern trading, and capital markets are undoubtedly larger and more complex, these factors do not serve to transform the pith and substance of the matter from property and civil rights into the regulation of trade and commerce. At the end of the day the regime still regulates individual contractual and property rights, as sophisticated, complex and fast as they may now be.

[21] As noted, Canada suggests that the proposed federal securities legislation will also address "systemic risk" that might lead to wholesale disruptions of the capital markets, implying that regulation at the provincial level cannot address that problem. While that is one of the stated purposes of the proposed statute, it is noticeably short on content, much less detail. Section 9(c) of the proposed federal legislation merely declares that "integrity and stability of the financial system" is one of the purposes of the statute. Section 224(1) allows the sharing of information to promote "stability of the financial system" (something that ***Global Securities Corp.*** shows is presently done by the provinces). Section 232 allows the Governor in Council to act if there is a substantial risk to the stability of the capital markets. There is, however, nothing concrete in the statute about "systemic risk". The ***Anti-Inflation Reference*** supports the view that Canada has a "crisis jurisdiction", but that does not enable federal legislation in every area of property and civil rights on the expectation or risk that "one day a crisis may arise".

[22] The legislation is not primarily focussed on the types of irresponsible investment decisions or products that might create systemic risks. Some provisions directed at systemic risk can be postulated. For example, there are limits on the types of investments that banks and insurance companies may make, such as limits on the amount that can be invested in any one industry or issuer. Various financial enterprises are required to have capital reserves of different types and magnitude. The level of margin purchasing of securities is limited (see Alberta Rule 73), because

it has been suggested that some crises (such as the 1929 market crash) were contributed to by the purchase of securities on excessive margins. Likewise, the sale of uncovered options is regulated. It might be thought to be contrary to public policy to allow the sale of highly speculative securities (perhaps exotic derivatives, or some asset backed commercial paper). But nothing significant of this sort can be found in the proposed federal legislation, which is primarily aimed at the selling of securities, not bad investment products or practices. Neither the record nor a review of the draft statute support the suggestion that "systemic risk" is a significant consideration.

[23] In any event, to the extent that the proposed statute does address systemic risk, it does not do anything that is not already being done (in a coordinated and cooperative way) at the provincial level. It is not something that can intrinsically only be done at the national level. More to the point, there is no indication why this is a matter of general trade and commerce. "Systemic risk" is not a constitutional head of power. To the extent that the proposed federal legislation addresses systemic risk, merely because it does so at the national level does not make it federal.

[24] In any event, any regulation in this context of "systemic risk", like all securities regulation, comes down to regulating particular types of contracts or property rights, which is a matter of property and civil rights. The focus is still on protecting individual investors, by providing them with the information they need to make rational investment decisions. There is no indication why this is intrinsically any more a national concern than the rest of securities regulation. The pith and substance of the legislation is still an admitted attempt to impose a national level of securities regulation. The justification is said to be the streamlining of the system of approving the sale of securities. If the federal government does feel the need to control "systemic risk", there is no indication on this record why this cannot be done independently of taking over control of the entire securities industry from the provinces. There are existing federal institutions that do so, for example the Canadian Deposit Insurance Corporation and the Office of the Superintendent of Financial Institutions. Systemic risk at best is the tail in this Reference, not the dog.

[25] Likewise, the proposed federal legislation does not regulate "capital flows" as suggested by Canada. No securities legislation manages capital flows, be it the existing provincial acts or the proposed federal act. The proposed federal statute is orthodox traditional securities legislation; it mandates full disclosure, but does not control investing. The Bank of Canada controls and manages the money supply and money markets, e.g. by intervening with its own money to buy, sell, or loan, or by adjusting interest rates. No securities commission buys or sells shares to influence the market, or increases or manages the gross amounts of capital available in the economy. Further, the management or manipulation of the money supply done by the Bank of Canada is not generally what one would call "regulation" of a "regulated industry", as that term is used in the leading constitutional cases on the division of powers. The word "regulate" has many meanings.

[26] The investigation and enforcement provisions of the provincial securities legislation are collateral to the other provisions of the statute. While some of them have a punitive aspect to them, they are not in pith and substance criminal in nature.

[27] The provisions that create civil remedies clearly relate to property and civil rights. The federal government concedes as much in its factum:

> 62. The [proposed federal] *Act* harmonizes the existing civil liability regimes. Part 12 sets out when various types of misrepresentation are actionable, and what defences apply. Part 13 contains extensive provisions governing civil liability for secondary market disclosure, including formulae for calculating damages.

The federal government has a limited ability to create civil remedies that are collateral to an established head of federal jurisdiction (for example, trademarks: ***Kirkbi AG v. Ritvik Holdings Inc.***, 2005 SCC 65, [2005] 3 S.C.R. 302 at para. 35). There is, however, no constitutional foundation for the extensive civil remedies contained in the proposed federal legislation. The pith and substance of the regulatory regime is property and civil rights, not any established federal head of power. There is no federal power to "harmonize" civil remedies.

The Structure of the *Constitution Act* on Economic Issues

[28] Any conclusion on the constitutional allocation of any particular jurisdiction should have regard to the overall structure of the *Constitution Act*. It has been recognized that the division of powers in the *Constitution Act* on economic subjects was designed to permit the provinces to develop their local economies in the way they choose: ***Canadian National Transportation Ltd.*** at p. 267; ***Consolidated Fastfrate*** at paras. 33, 39; ***Reference re Secession of Quebec***, [1998] 2 S.C.R. 217 at paras. 58, 66; ***R. v. Advance Cutting & Coring Ltd.***, 2001 SCC 70, [2001] 3 S.C.R. 209 at paras. 275-6.

[29] It is significant that banking, one of the four pillars of the financial sector of the economy, is specifically mentioned in s. 91. In 1867 there were concerns with the proliferation of local banks in the United States, and the express mention of banking indicates that this head of power would otherwise have fallen under "property and civil rights". Exclusion of the other three financial pillars of the economy from s. 91 is also significant. Likewise, the specific mention in s. 91 of other economic topics (such as bankruptcy and insolvency, bills of exchange, interest, patents, and copyrights) points to the width of the property and civil rights power, and the intended narrowness of the trade and commerce power.

The Criminal Law Power: s. 91(27)

[30] The Government of Canada supports a small part of the proposed federal securities legislation based on the criminal law power. The proposed legislation includes a number of offences, with corresponding penalties, to ensure and encourage compliance with the regulatory regime. They are framed in criminal terminology, and some of the penalties are clearly punitive in nature. There is a significant overlap with many existing *Criminal Code* offences, such as those relating to

fraudulent conduct. These provisions, taken in context, are not qualitatively different from the sanctions found in the provincial securities statutes, which are authorized under s. 92(15). In this context they are merely collateral to the regulatory regime. The preamble to the proposed federal statute concedes as much.

[31] The proposed federal legislation could not, as a whole, be properly classified as criminal law. Raising capital has not traditionally been seen to be criminal, and the focus of the statute is not to create prohibitions, followed by penalties: ***Reference re Firearms Act (Can.)***, 2000 SCC 31, [2000] 1 S.C.R. 783 at para. 27. It is not designed to address "evil", but rather to promote economic policy: ***Reference re Assisted Human Reproduction Act*** at paras. 232-4, 251, 287. The *Firearms Act*, S.C. 1995, c. 39 was upheld under the criminal law power on the basis that it was not an "attempt to protect or regulate industries or businesses associated with guns", nor was it an attempt to achieve "total regulation of firearms production, trade and ownership": ***Reference re Firearms Act*** at para. 24. The proposed federal securities legislation has both of those characteristics.

[32] On this record it is clear that the federal securities legislation is not a response to perceived widespread criminality in Canada. It is motivated by economic and competitive considerations. Even though it is conceded that on a stand-alone basis the sanctions in the proposed legislation for fraudulent conduct can be supported under the criminal law power, it would amount to constitutional bootstrapping to use them to justify the regulatory regime which is the true pith and substance of the legislation: ***Reference re Assisted Human Reproduction Act*** at paras. 242, 270-1, 276-80.

The Trade and Commerce Power: s. 91(2)

[33] The basis upon which the Government of Canada supports the constitutionality of the core of the proposed legislation is the "trade and commerce" power.

[34] The power over "trade and commerce" given to the federal government in the *Constitution Act* is, on its face, very widely stated. In other countries an equivalent grant of jurisdiction has been used to give the holder of that jurisdiction wide ranging power over every aspect of the economy. That has not been the Canadian constitutional tradition. In Canadian constitutional law it was recognized early on that too wide an interpretation of the trade and commerce power would render meaningless provincial power over property and civil rights. The prospect of the trade and commerce power subsuming the power over property and civil rights was noted and rejected as early as ***Citizens Insurance Co. of Canada v. Parsons*** (1881), 7 App. Cas. 96 (P.C. (Can.)). As was noted in ***Canadian Western Bank*** at para. 43:

> For example, while the courts have not eviscerated the federal trade and commerce power, they have, in interpreting it, sought to avoid draining of their content the provincial powers over civil law and matters of a local or private nature. A generalized application of interjurisdictional immunity related to "trade and

> commerce" would have led to an altogether different and more rigid and centralized form of federalism.

By relying on the trade and commerce power in this Reference, the Government of Canada seeks to achieve that "more rigid and centralized" regulation of the securities industry. A major shift of jurisdiction from the provinces would result, not only in the areas of security regulation, but potentially in many other areas such as the regulation of the professions, the regulation of the insurance industry, and so forth.

[35] From ***Citizens Insurance Co. v. Parsons*** through to ***General Motors v. City National Leasing*** the courts have refrained from (or given up on) stating a comprehensive test for the precise delineation of the trade and commerce power. All of the leading cases emphasize the need for a "case-by-case" analysis, although some principles or guidelines have been suggested along the way. ***Citizens Insurance v. Parsons*** has been interpreted as setting out some general propositions:

> (a) the trade and commerce power does not correspond to the literal meaning of the words "regulation of trade and commerce";
>
> (b) it includes not only arrangements with regard to international and interprovincial trade but "it may be that . . . (it) would include general regulation of trade affecting the whole dominion";
>
> (c) it does not extend to regulating the contracts of a particular business or trade.

See ***Canadian National Transportation Ltd.*** at p. 258, quoted in ***General Motors v. City National Leasing*** at p. 656.

[36] The trade and commerce power was recognized in ***Citizens Insurance v. Parsons*** as encompassing international or interprovincial trade. The trade and commerce power was also interpreted as having a "general" branch authorizing legislation over "general" trade and commerce, which is sometimes referred to as the "second" branch of the power. The Government of Canada does not seek to support the proposed legislation under the first branch: interprovincial and international trade. It notes (Factum, para. 72) that the proposed legislation is not limited to international and interprovincial trade, that it covers intra-provincial trading in securities, and that indeed one of its hallmarks is its comprehensive nature. In any event even if the international component of an industry dominates, or is increasing in importance, regulation of international trade is not a justification for regulation of a related local trade: ***Dominion Stores Ltd. v. The Queen***, [1980] 1 S.C.R. 844 at p. 854; ***R. v. Eastern Terminal Elevator Co.***, [1925] S.C.R. 434.

[37] Guidelines in addition to those mentioned in ***Citizen Insurance v. Parsons*** have been identified in an attempt to delineate what falls into the "general" trade and commerce power:

(a) merely because something is of general interest throughout Canada is not enough, and that suggestion in ***John Deere Plow Co. v. Wharton***, [1915] A.C. 330 (P.C. (B.C.)) "is clearly overly expansive, sweeping all general economic issues into the grasp of s. 91(2)": ***General Motors v. City National Leasing*** at pp. 659-60.

(b) interpreting the trade and commerce power involves an "attempt to maintain a delicate balance between federal and provincial power": ***General Motors v. City National Leasing*** at p. 661; ***Kirkbi AG*** at para. 16.

(c) at least with respect to ancillary matters, "if the impugned provision is highly intrusive *vis-à-vis* provincial powers then a stricter test is appropriate": ***General Motors v. City National Leasing*** at p. 669; ***Kirkbi AG*** at para. 32; ***Reference re Assisted Human Reproduction Act*** at para. 275.

(d) provincial jurisdiction should not be undermined because the "fundamental objectives of federalism were, and still are, to reconcile unity with diversity, promote democratic participation by reserving meaningful powers to the local or regional level and to foster co-operation among governments and legislatures for the common good" and to that end "a certain degree of predictability with regard to the division of powers between Parliament and the provincial legislatures is essential": ***Canadian Western Bank*** at paras. 22-3.

[38] In ***General Motors v. City National Leasing*** the Court emphasized that a statute-by-statute analysis is called for, but it endorsed at pp. 661-3 five indicia of legislation validly enacted under the general trade and commerce power:

(a) the impugned legislation must be part of a general regulatory scheme;

(b) the scheme must be monitored by the continuing oversight of a regulatory agency;

(c) the legislation must be concerned with trade as a whole rather than with a particular industry;

(d) the legislation should be of a nature that the provinces jointly or severally would be constitutionally incapable of enacting; and

(e) 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.

The use of these factors as a starting point in the analysis was confirmed in ***Kirkbi AG*** at para. 17. Canada argues that the application of this five part test is the key to this Reference.

[39] Under the first two parts of this test the general branch of the trade and commerce power is engaged when the impugned federal legislation is "part of a general regulatory scheme" and "under the continuing oversight of a regulatory agency". As the parties to this Reference essentially conceded, some parts of the proposed federal securities legislation meet those two criteria as they apply to the securities industry itself, but they do not necessarily do so in so far as they purport to "regulate" systemic risk and capital flows. As previously noted, the proposed legislation does not attempt to directly manage either systemic risk or capital flows, even if those are stated purposes of the legislation. In any event, merely because legislation "manages" an aspect of the economy does not mean that it "regulates" as that term is used in ***General Motors v. City National Leasing***. The word "regulate" has many meanings. That is not to suggest that "managing" fiscal and monetary policy at the national level is not within federal jurisdiction. It is, however, a constitutionally separate subject from setting up and then "regulating" a "regulated industry". Those broad fiscal and monetary economic objectives can be accomplished without the federal government taking over regulation of the securities industry. It follows that a federal takeover of the securities industry cannot be justified as being ancillary to general economic management of the Canadian economy. The two are constitutionally distinct functions. Just because one portion of the federal legislation meets the first two parts of the ***General Motors v. City National Leasing*** test does not mean that all of it meets those parts, nor does it justify using collateral objectives of the legislation to justify the constitutionality of its core.

[40] The proposed federal securities regulation does not meet the last three of the criteria set out in ***General Motors v. City National Leasing***, and summarized *supra*, para. 38:

> (a) It does not concern trade as a whole. It is concerned with a particular industry, namely that which raises money from the general public. For constitutional purposes, the securities industry has been recognized as a particular segment of the economy: ***Canadian Western Bank*** at para. 1; ***Lymburn v. Mayland*** at pp. 324-5; ***Pezim*** at p. 589. The securities industry does not concern "trade as a whole", because the record discloses that only a small proportion of businesses need to raise capital from the general public. In any event, just because many participants in the economy seek to raise capital does not mean there is no securities industry, any more than the fact that all sectors of the economy need insurance would mean there is no insurance industry, or that because all businesses need accountants there is no accounting profession.
>
> (b) The provinces are not incapable of regulating the securities industry. Collectively, the provinces have been successfully regulating it for decades (see *supra*, paras. 9 and 13). The test is not whether any or all of the provinces could enact a national securities act; the test is whether the industry can be successfully

> regulated at the provincial level. It is a given that the provinces cannot enact legislation outside their borders; merely because the proposed federal statute applies all across the country is not sufficient: ***General Motors v. City National Leasing*** at pp. 659-60. Any province can (if it chooses) give full faith and credit to permissions or prohibitions imposed by any other province, in the same way that a suspended provincial driver's licence prevents driving anywhere in Canada: see Part 17.1 of the Alberta statute. Nor does it matter that there are differences between how the proposed federal legislation would regulate the securities industry, and the way the provinces presently do so. Policy choices in the legislation do not transfer jurisdiction.
>
> (c) Exclusion of some provinces from the regime will not undermine its operation in other provinces. The securities business is not (like competition or inflation) something that can only effectively be regulated nationally. The fact that s. 250 of the new federal legislation contemplates some, but not all, provinces opting in shows that the regime need not be pervasive to be effective, and that it can operate successfully without the inclusion of all the provinces.

[41] The proposed federal securities legislation therefore cannot be sustained, even if the five part test in ***General Motors v. City National Leasing*** is the one to be applied. However, as that case stated at p. 663, the five listed factors are not definitive, but "merely represent a principled way to begin the difficult task of distinguishing between matters relating to trade and commerce and those of a more local nature". Even if the federal government could show merely superficial or mechanical compliance with the five part test, that could not obscure the fact that the federal government is seeking to displace a whole body of existing valid provincial legislation with a federal enactment. Examining the proposed federal legislation in isolation in accordance with the five part test cannot distract the analysis from the recognition that securities regulation has for decades been constitutionally characterized as a matter of property and civil rights. No authority has been cited which sanctions such a wholesale transfer of constitutional jurisdiction.

[42] Given the Canadian constitutional tradition, any analysis must also have regard to prior judicial decisions. For many years the federal government mounted a repeated campaign to assume the national regulation of the insurance industry: C. Armstrong, *Federalism and Government Regulation: the Canadian Insurance Industry 1927-34* (1976), 19 Can. Pub. Admin. 88. The federal efforts were rejected on every occasion, and regulation of insurance remains largely and primarily a matter of provincial jurisdiction:

> (a) ***Citizens Insurance Co. of Canada v. Parsons*** raised the issue of whether provincial legislation setting the terms of insurance policies applied to federally incorporated insurance companies. The Privy Council held this to be a matter of property and civil rights, and not something falling in the federal "trade and commerce" power.

(b) ***Canada (Attorney General) v. Alberta (Attorney General)*** (sub nom. ***Reference re Insurance Companies***), 48 S.C.R. 260, [1916] 1 A.C. 588 (P.C. (Can.)) concerned federal legislation that required provincially incorporated insurance companies to obtain a federal licence if they did business outside their home province. This legislation was also supported under the "trade and commerce" power. The Privy Council found the legislation to be an intrusion on provincial jurisdiction and *ultra vires*.

(c) Having lost the ***Insurance Companies Reference*** in 1916, the next year Parliament amended the *Criminal Code* to make all types of insurance activities a crime, subject to certain exceptions. One exception was for provincially incorporated insurance companies. In 1922 Ontario passed legislation that applied to federally incorporated insurance companies. The Privy Council upheld the provincial legislation, and found the federal legislation to be a colourable use of the criminal law power: ***Re Reciprocal Insurance Legislation***, [1924] 1 D.L.R. 789, [1924] A.C. 328 (P.C. (Ont.)).

(d) Parliament then attempted to licence and tax foreign insurance companies only, using its powers over immigration, aliens and taxation as justification. This legislation was stuck down, and it was struck down again when Parliament amended the legislation in an attempt to bring it on side: ***Re Insurance Act and Special War Revenue Act***, [1932] 1 D.L.R. 97, [1932] A.C. 41 (P.C. (Que.)) and ***Re s. 16 of the Special War Revenue Act***, [1942] S.C.R. 429, leave to appeal refused [1943] 4 D.L.R. 657n (P.C. (Can.)).

(e) In 1977 the Supreme Court of Canada confirmed that provincial jurisdiction over insurance extended as far as prohibiting private insurance (in favour of a public automobile insurer) even though interprovincial trade was impacted, and the capacity of the federally incorporated insurers to do business was affected: ***Canadian Indemnity Co. v. British Columbia (Attorney-General)***, [1977] 2 S.C.R. 504.

(f) In ***Canadian Pioneer Management Ltd. v. Saskatchewan (Labour Relations Board)***, [1980] 1 S.C.R. 433 at pp. 438-9, 443-4 the Court rejected an argument that an interprovincial insurance company did not fall under provincial legislation, without calling on the respondents to argue the point.

(g) In ***Reference re Employment Insurance Act*** at para. 37 the Court confirmed that insurance is a provincial matter, subject to the exception for unemployment insurance created by an amendment to the *Constitution Act*.

(h) In ***Canadian Western Bank*** the Court confirmed at para. 80 that insurance falls under provincial jurisdiction, and that federally chartered banks that promote insurance products must comply with provincial insurance legislation.

All of the arguments now presented by the Government of Canada in support of the proposed federal securities legislation could be applied equally to the insurance industry: compare ***Canadian Indemnity Co.*** at pp. 510-11. If the federal government can add jurisdiction over the securities pillar to that of the banking pillar, there would appear to be nothing stopping it from adding the insurance pillar as well. But what of the numerous cases holding that insurance is provincial? The present Reference in reality involves an attempt to overturn all those earlier cases, and to rewrite Canadian constitutional history in a way that would disrupt the predictability required in constitutional law: ***Canadian Western Bank*** at para. 23; ***Consolidated Fastfrate*** at para. 45.

[43] The division of powers in the *Constitution Act* does envision that some legislative provisions will overlap. The "double aspect doctrine" recognizes that similar provincial and federal legislation may all be constitutional, because they fall within both a provincial and a federal head of power: ***Bell Canada v. Québec (Commission de santé et de la sécurité du travail du Québec)***, [1988] 1 S.C.R. 749 at p. 765. In this Reference the provincial securities legislation, and the proposed federal securities statute, are all in pith and substance about "regulation of the securities industry". Nevertheless, they might all be valid if they could be situated within an appropriate head of power. The provincial legislation is well established as a valid exercise of the jurisdiction over property and civil rights. Canada seeks to validate the proposed federal statute under the trade and commerce power, and if it could do so the statute would be constitutional. Any conflict would be dealt with by the paramountcy doctrine.

[44] The double aspect doctrine depends on establishing that both the provincial and federal legislation are valid. As previously discussed, the proposed federal securities statute cannot be supported under the trade and commerce power, and it would therefore be unconstitutional if enacted. As such the double aspect doctrine does not apply.

[45] The double aspect doctrine has to date been applied in cases where the federal legislation and the competing provincial legislation only overlap at the periphery. The doctrine has not been applied where the federal and provincial legislation are wholesale duplications of each other. The doctrine is usually applied where the federal and provincial legislation is "enacted for different purposes and in different legislative contexts which give them distinct constitutional characterizations": ***Bell Canada*** at p. 765. In this Reference the "purposes" and the "legislative contexts" are the same. This is a situation where "it is wrong" to apply the double aspect doctrine because "both legislators are pursuing exactly the same objective by similar techniques and means": ***Bell Canada*** at p. 852. There is no distinct and different federal purpose; the purpose of the federal statute is the comprehensive regulation of trading in securities, which has consistently been interpreted as coming under provincial jurisdiction.

[46] Further, even though our Constitution recognizes the double aspect doctrine, it is not a particularly desirable situation to have both levels of government regulating in a particular area. The problem is less acute where it is just an isolated provision of a larger statute that overlaps. Where, as here, the proposed federal legislation is "an exact overlapping and hence a nullification of a jurisdiction conceded to the provinces by the Constitution" that raises different considerations: ***Canadian National Transportation Ltd.*** at p. 267. In such a situation, the courts should not too readily find a double aspect to the legislation. As the Court noted in ***Bell Canada*** at p. 766:

> The double aspect theory is neither an exception nor even a qualification to the rule of exclusive legislative jurisdiction. Its effect must not be to create concurrent fields of jurisdiction, such as agriculture, immigration and old age pensions and supplementary benefits, in which Parliament and the legislatures may legislate on the *same* aspect. On the contrary, the double aspect theory can only be invoked when it gives effect to the rule of exclusive fields of jurisdiction. As its name indicates, it can only be applied in clear cases where the multiplicity of aspects is real and not merely nominal. (Underlining added)

In applying the double aspect doctrine the courts have proceeded "with great caution" in "clear cases", because pervasive concurrent fields of powers governed solely by the rule of paramountcy are "directly contrary to the principle of federalism underlying the Canadian Constitution": ***Bell Canada*** at pp. 766, 852-4; ***Multiple Access*** at p. 170.

[47] In summary, the proposed federal securities legislation would enter an area of regulation long occupied by the provinces, and long considered to be clearly within provincial jurisdiction. The proposed legislation does not meet the traditional tests for inclusion in the "trade and commerce" power, nor is it consistent with the guidelines that have been suggested from time to time for defining the scope of that power. It is inconsistent with numerous prior decisions of the highest courts delineating the division of power over specific industries. The proposed legislation would, if enacted, be unconstitutional.

Conclusion

[48] In conclusion, the proposed federal securities legislation represents the intrusion of the federal government into an area long occupied by the provincial governments. Regulation of the professions, regulation of specific industries, regulation of particular types of contracts, and regulation of forms of property have always been considered to fall under provincial powers. The Government of Canada obviously feels that national regulation of the securities industry would be in the national interest. A number of the provinces object, on the basis that regional autonomy, diversity, and priorities will be sacrificed. One of the fundamental principles of the Canadian federation was to preserve local powers and local diversity, to enable the promotion of local interests: ***Consolidated Fastfrate Inc.*** at paras. 29-30. As the Supreme Court has noted, fostering co-operation among governments and legislatures for the common good is a key feature of

successful federalism. The division of power represents an understanding reached on the nature of Canadian federalism that should not lightly be disrupted by any one level of government or the courts. If the Government of Canada wants a paradigm shift in the power to regulate the securities industry, the way to accomplish that is through negotiation with the provinces, not by asking the courts to reallocate the powers under the *Constitution Act* through a radical expansion of the trade and commerce power: ***Canadian Western Bank*** at para. 24; ***Reference re Employment Insurance Act*** at para. 10.

[49] Question 1(c) posed in the Reference should be answered in the negative. While the criminal law prohibitions likely would survive on a stand-alone basis, the proposed national securities act only seeks to implement them as part of the overall unconstitutional regulatory regime. In light of that answer, questions 1(a) and (b) need not be answered. The second question posed in the Reference relates to certain recommendations of the Expert Panel. There is no clear indication on this record that the federal government proposes to enact legislation to implement the recommendations of the Expert Panel, and there is no draft legislation available to the Court to demonstrate exactly how those recommendations would be implemented. The argument on the Reference was primarily directed at the first question, and in all the circumstances it is inappropriate to attempt to answer the second question at this time.

Special Hearing heard on January 24, 2011

Reasons filed at Edmonton, Alberta
this 8th day of March, 2011

Slatter J.A.

I concur: Côté J.A.

I concur: Authorized to sign for: Conrad J.A.

I concur: Ritter J.A.

I concur: Authorized to sign for: O’Brien J.A.

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