COURT OF APPEAL

CANADA
PROVINCE OF QUEBEC
REGISTRY OF QUEBEC

No: 200-09-006746-090

DATE: March 31, 2011

CORAM: THE HONOURABLE **J.J. MICHEL ROBERT, C.J.Q.**
ANDRÉ FORGET, J.A.
PIERRE J. DALPHOND, J.A.
MARIE-FRANCE BICH, J.A.
JEAN BOUCHARD, J.A.

REFERENCE : RE POWER OF PARLIAMENT TO REGULATE SECURITIES.

THIS DOCUMENT DOES NOT CONSTITUTE A JUDGMENT OF THE COURT
BUT ONLY A SUMMARY OF THE JUDGMENT. THE TEXT OF THE JUDGMENT SHALL PREVAIL

Constitutional Law – Distribution of Legislative Powers – Proposed Canadian Securities Act - Reference – Opinion on the Constitutionality of the Proposed Act.

[1] On August 25, 2010, the Government of Québec under the *Court of Appeal Reference Act* requested the opinion of the Court on the following question:

> Do the provisions of the Proposed Canadian Securities Act and sections 295, 296 and 297 of the *Budget Implementation Act, 2009* exceed the legislative authority of the Parliament of Canada?

[2] A majority of the Court answers that the Proposal, except its criminal provisions, is *ultra vires* for the reasons hereinafter summarized, as well as s. 297 of the *Budget Implementation Act, 2009*.

[3] ***Per* Chief Justice Robert:** This reference was sought in the following procedural context: the Government of Alberta and the Federal Government have asked essentially the same question, respectively, to the Court of Appeal of Alberta and to the Supreme Court of Canada.

[4] The Court of Appeal of Alberta has answered the question affirmatively in a unanimous judgment and the Supreme Court will be hearing the case during the month of April.

[5] The role of the Courts in matters of distribution of powers is that of umpires of the federal system. This requires that they remain autonomous and completely independent from the executive branch of government.

[6] This judgment exposes the positions of the parties to this reference, the Attorney General of Quebec and the Attorney General of Canada, and those of the interveners, the Attorney General of Alberta, the Quebec Bar and the Canadian Bankers Association.

[7] In order to answer the question that we have been asked, we must first establish the substance of the Proposed Act, by examining both the purpose sought and its legal effects.

[8] After reviewing intrinsic and extrinsic elements of proof, I am of the opinion that the most important characteristic, the leading feature, or the true meaning of the Proposed Act is the regulation of trading in securities.

[9] I then examine the provincial jurisdiction in respect of property and civil rights and conclude that its substance is the enactment of private law, and that it may well constitute a quasi-residual clause counterbalancing the peace, order and good government jurisdiction attributed to the Parliament of Canada.

[10] For a very long period of time, the regulation of trading in securities has been subject to the provincial jurisdiction in respect of property and civil rights in the province.

[11] I am of the opinion that it does not fall under the Parliament of Canada's jurisdiction under the general branch of the trade and commerce power, because it fails to satisfy three of the five indicia established by the Supreme Court of Canada:

- The Proposed Act does not concern trade as a whole, but transactions limited to a particular industry.

- It has not been established that the provinces are constitutionally incapable of adopting a similar regime, especially in view of the existence of the current passport system.

- The fifth indicium requires examining whether the omission to include one or more provinces would compromise the successful application of the regime in other provinces. The Proposed Act provides an opting in procedure, which entails the very real possibility that the proposed scheme would apply only to certain provinces. Consequently, the text of the Proposed Act itself contradicts this indicium.

[12] I am also of the opinion that the provisions of the *Budget Implementation Act, 2009* are valid.

[13] For all these reasons, I answer affirmatively the question submitted to our Court by the Government of Quebec, subject to my remarks pertaining to the *Budget Implementation Act, 2009* and the *Canadian Securities Regulation Regime Transition Office Act*, and to Parliament's jurisdiction to adopt the provisions of the Proposed Act which are of criminal nature. The Proposed Act's centralised approach regarding regulation of trading in securities may validly be pursued by the governments of this country if they so desire. Possible avenues include an act of Parliament that would complement provincial regimes and that would regulate interprovincial, international and criminal aspects of trading in securities, a cooperative federal-provincial agreement, or a constitutional amendment. On the contrary, the jurisprudence interpreting paragraph 91(2) of the *Constitution Act, 1867* does not sustain implementing this endeavour without the consent of the provinces in cases where Parliament has not established their incapacity to regulate the part of the economic activity in question. To do so would hinder the federal compromise at the origin our country's creation. It would also threaten the balance of powers between the two levels of government, the continued existence of Quebec civil law and the durability of diversified common law in the other provinces and territories.

[14] ***Per* Forget, Bich and Bouchard, JJ. A.:** In order to answer the question raised by the Government of Quebec, one must undertake the two-pronged analytical approach developed by the Supreme Court of Canada in such matters. The first step is to determine the dominant "matter" (the "pith and substance") of the Proposed Act *i.e.* "[w]hat is the essence of what the law does and how does it do it?" (*Chatterjee v. Ontario (Attorney General)*, [2009] 1 S.C.R. 624, para. 16 (Binnie, J.). Once the "pith and substance" is ascertained, the second step requires that it be classified by reference to either the provincial or federal "classes of subjects" set forth in the Constitution. In some cases, a subject-matter will come within the jurisdiction of both legislatures, under different federal or provincial aspects: this is the double aspect doctrine, which we shall examine later. Finally, as Justices LeBel and Deschamps observed in *Reference re Assisted Human Reproduction Act*, 2010 SCC 61, para. 196 "care must be taken to maintain the constitutional balance of powers at all stages of the constitutional analysis".

[15] *Characterizing the pith and substance of the Proposed Act.* After having carefully reviewed the Proposed Act, we find that it aims at and is focused on both the regulation of the participants in securities markets and the regulation of information in those markets. Its purposes and anticipated effects are to protect investors from unfair, improper or fraudulent practices (which appears to be the predominant purpose, considering the thoroughness and comprehensiveness of its provisions on civil liability) and to maintain a fair, efficient and competitive securities markets, so that their stability and transparency shall be ensured as best as possible. It is this unique combination of objects, effects, means and mechanisms that defines the matter to which the Proposed Act relates and reflects the essence of what it does and how it does it.

[16] This being the case, the Proposed Act, in pith and substance, cannot be meaningfully distinguished from the provincial laws regulating securities, for instance those of Quebec and Alberta, which have the same purposes and deal whith the same subjects, in the same manner and using the same means and methods. As a matter of fact, the Proposed Act replicates provincial regulatory systems and is modelled after the Alberta statute. A comparison of the Proposed Act with the provincial statutes, as well as the expert evidence on file, make this strong similarity, indeed identity, plain.

[17] In our view, neither the interprovincial or international dimension of the securities market nor the dematerialization of securities, which have been amplified and intensified by information technology and the Internet, are relevant factors in the characterization of the "matter" of the Proposed Act.

[18] The interprovincial/international character of the securities market does not change the Proposed Act's pith and substance. It would have been a factor to consider if the Proposed Act had contemplated the regulation of the interprovincial or international aspects of the securities markets or trading in securities, under the first branch of the federal power over trade and commerce (s. 91(2) of the *Constitution Act, 1867*, see *infra*). This is not what the Proposed Act purports to do, however, which the Attorney General of Canada acknowledges.

[19] Similarly, the dematerialization of securities and securities trading has no significant impact on the characterization of the pith and substance of the Proposed Act. Dematerialization is not new in law. Intangible property is property, even if it is not palpable. Contracts can be entered into without the parties being in each other's presence, and this has been the case long before the age of information technology; payments can be made without exchanging actual banknotes or cheques; one can hold a title otherwise that in his or her hands, literally speaking. The pith and substance of the Proposed Act does not change because the investors that it seeks to protect invest in dematerialized titles that will not find their place in some strongbox, except in a virtual manner. It does not change because of distance or electronic transactions, even when those transactions are instantaneous. Dematerialization is not pertinent.

[20] *Classification.* Having determined the essence of the Proposed Act, how do we classify this matter under the Constitution? Sections 91(2) ("Trade and Commerce") and 92(13) ("Property and Civil Rights in the Province") are the two relevant heads of power that shall be examined. The first is federal, the second is provincial.

[21] But, before going further, observations should be made in respect of the double aspect doctrine which, in other circumstances, allows for the coexistence of federal and provincial legislative provisions dealing with the same subject under different aspects or "matters". Irreconcilables inconsistencies may occur occasionally between both sets of provisions and are resolved through the doctrine of federal paramountcy. The double aspect doctrine (and its accessory, the federal paramountcy doctrine) has no application in the present case.

[22] The Attorney General of Canada and the Canadian Bankers Association argue in favour of a nationally regulated securities market. The Proposed Act sets the rules for a single and comprehensive regulatory regime that would apply across Canada, allowing for a centralized yet flexible management of securities markets, which form an essential and integral part of the Canadian financial system. Only in this manner can the interests of all regions of Canada be properly taken into account as well as the national interests of the country as a whole. In addition, such a system would enable Canada to voice and promote Canadian interests internationally, participate in the development of regulatory policies consistent with its priorities and deal efficiently with the requirements of international cooperation.

[23] This argument cannot be reconciled with the idea that, alongside of this comprehensive, single and uniform federal regime, 10 provincial regimes could coexist that seek to regulate the same securities markets, in the same manner.

[24] The double aspect doctrine is well-adapted to situations where a valid federal legislation intersects, in an occasional manner, with a valid provincial legislation. Both sets of laws can then coexist, since they do not regulate the same aspect of the subject-matter, even though they may contain some overlapping provisions. But such coexistence between the proposed federal regime and the existing provincial regimes is not possible in the present case. Why is this the case? Because they all claim to regulate the same securities markets and the same participants in the securities markets, in the same manner. There is no double aspect.

[25] Convergence and duplication may be the "ultimate in harmony", where it concerns a few isolated provisions. They become problematic, however, and even impossible, in the case of comprehensive regulatory systems pursuing the same objectives through the same means. The identity between the proposed federal system and the provincial systems clearly demonstrates that there is no double aspect and that all the laws have the same pith and substance. If the Proposed Act were to become law, Parliament and the legislatures would have legislated for the same matter under the same aspects, the only difference being the territorial reach of their respective statutes.

Applying the double aspect doctrine to this situation would be akin to creating a new concurrent field of jurisdiction, which is not provided for in the Constitution.

[26] For these reasons, we are of the view that the double aspect doctrine does not apply in the present case and that we must resort to the rule of exclusive legislative jurisdiction, measuring here s. 91(2) against s. 92(13) of the *Constitution Act, 1867*.

[27] Firstly, it should be noted that, for more than 80 years, the Judicial Committee of the Privy Council and the Supreme Court of Canada have recognized in numerous and differing instances the provincial jurisdiction over securities pursuant to s. 92(13) of the *Constitution Act, 1867* ("Property and Civil Rights in the Province").

[28] The fact that the regulation of securities should fall under the property and civil rights power, understood as power over private law according to s. 92(13), should not come as a surprise. Like any other market, securities markets are fundamentally contractual in character. Participants buy, sell or exchange property, in this case securities issued by companies seeking to raise capital, either directly or indirectly, on primary or secondary markets.

[29] The fact that the securities market has become interprovincial or international is not an obstacle to speaking of "Property and Civil Rights *in the Province*". Regulating the activities of participants situated within a given province's territory, even when those participants trade with parties outside the province, remains a provincial matter. By way of example, obliging an issuing company to abide by the prospectus requirements of the province where its head office is located or where it operates is also a provincial matter. Similarly, a stock exchange does not lose its local character simply because it provides a meeting space, physical or virtual, for persons situated in different jurisdictions. Finally, it is well known that provinces are capable of concluding collaboration or cooperation agreements with other provincial or foreign governments without infringing the Constitution.

[30] Have securities markets undergone any transformation such that they should today be subject to the jurisdiction of Parliament?

[31] Parliament has already made significant forays into the regulation of securities in the exercise of its powers over such matters as criminal law, company law or banks. The question we are invited to answer, however, is not whether Parliament may incidentally regulate certain aspects of trading in securities or of securities markets. We must establish if, as contemplated in the Proposed Act, Parliament may adopt a regulatory regime that is general, global and national in scope, pursuant to s. 91(2) of the *Constitution Act, 1867* ("Trade and Commerce").

[32] The jurisdiction conferred on Parliament by this section has two distinct branches: 1° the power over international and interprovincial trade and commerce, and 2° the power over *general* trade and commerce affecting Canada as a whole. A federal law

may include intraprovincial aspects of trade on the basis of this second branch. The Attorney General of Canada relies on this in the present reference.

[33] According to the Supreme Court, the following factors are indicative of a valid exercise of Parliament's general trade and commerce power: 1° the impugned legislation must be part of a regulatory scheme; 2° the scheme must be monitored by the continuing oversight of a regulatory agency; 3° the legislation must be concerned with trade as a whole rather than with a particular industry; 4° the legislation should be of a nature that provinces jointly or severally would be constitutionally incapable of enacting; and 5° the failure to include one or more provinces or localities in a legislative scheme would jeopardize the successful operation of the scheme in other parts of the country. These factors are not exhaustive and the federal legislation, in order to be valid, does necessarily need to satisfy all five conditions.

[34] The first two conditions are technical ones and they are easily fulfilled. They were not disputed by the parties and they appear to be satisfied, at least *prima facie*: the Proposed Act is part of a regulatory scheme (indeed it creates a comprehensive regulatory scheme); this scheme shall be monitored by the continuing oversight of a national regulatory agency, to wit the Canadian Securities Regulatory Authority.

[35] The third condition (the legislation must be concerned with trade as a whole rather than with a particular industry) the subject of a vigorous debate. We agree with Chief Justice Robert on this point: even if the Proposed Act seeks to protect and promote the access of all Canadians and Canadian companies to the capital markets, it purports to achieve this objective not by regulating trade and commerce in general, but by regulating a particular branch of trade, that of securities. In addition, it does so under certain very precise aspects, which we have already discussed. The Proposed Act does not satisfy the third condition.

[36] We are of the view that it does not satisfy the fourth condition either. Under this condition, one must examine both the constitutional capacity (or incapacity) of the provinces to act and their practical capacity (or incapacity) to act efficiently. Needless to say, the fact that provinces are incapable of enacting a national law, applicable throughout Canada, is not relevant. The condition would otherwise be without any interest or actual substance.

[37] The reality is that not only are provinces, under s. 92(13) of the *Constitution Act, 1867,* constitutionally empowered to enact the regulatory scheme contemplated by the Proposed Act, but they are also capable of acting with a sufficient measure of practical efficiency. They have done so for decades, their practices generally conform to the highest standards and, within the applicable constitutional framework, they have achieved a level of cooperation that maximizes their efficiency, both individually and as a group. Jointly and severally, they succeed in regulating securities and they perform with such aptness that the Proposed Act, in essence, borrows their model.

[38] The Supreme Court once wrote that "[i]t is evident [...] that competition cannot be effectively regulated unless it is regulated nationally" (*General Motors of Canada Ltd. v. City National Leasing*, [1989] 1 S.C.R. 641, p. 680). It is equally evident that securities contrary to competition, can be regulated provincially. This has been the case for many years and in such a way that the Canadian system is rated amongst the best in the world, including in matters relating to the prevention and management of systemic risk.

[39] It is not because a topic is of general interest to all Canadians or concerns their well-being that it will inevitably fall under federal jurisdiction. In our view, this kind of reasoning was clearly rejected in *Reference Re: Anti-Inflation Act*, [1976] 2 S.C.R. 373 (Beetz J.), and also in *R. v. Crown Zellerbach Canada Ltd.*, [1988] 1 S.C.R. 401, p. 432. The latter confirmed that the national concern (national dimension, national interest) doctrine applies only when the subject-matter has "a singleness, distinctiveness and indivisibility that clearly distinguishes it from matters of provincial concern" ("une unicité, une particularité et une indivisibilité qui la distinguent clairement des matières d'intérêt provincial"). Clearly, this is not the case of such a topic as "the economy" or "the national economy". Furthermore, no necessary exclusive constitutional authority for Parliament can be inferred from the fact that Canada, amongst other things, is an economic union. Speaking of "markets" instead of economy does not alter the perspective, since markets, be they provincial, national or international, do not have the intrinsic singleness, distinctiveness and indivisibility that are required to justify federal jurisdiction.

[40] We have little to say about the fifth condition (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). We will simply observe that the Proposed Act, while claiming to be national and comprehensive, and therefore exclusive, still allows the provinces not to adhere to the federal system. This appears to be contradictory.

[41] The third and fourth conditions, which are the most important, not being satisfied, as well as the fifth, the Proposed Act does not constitute a valid exercise of the general trade and commerce power.

[42] Is there another factor that could validate the Proposed Act, notwithstanding the fact that it does not satisfy the required conditions? None was submitted or discussed by the parties.

[43] For these reasons, we are of the view that the Proposed Act is not valid under s. 91(2) of the *Constitution Act, 1867*. Neither is s. 297 of the *Budget Implementation Act, 2009*, which is ancillary to the Proposed Act. By exception, ss. 158 to 168 of the Proposed Act are valid under s. 91(27) of the *Constitution Act, 1867* ("Criminal Law"). Most of these provisions are similar to those that already appear in the *Criminal Code* and they clearly fall under the federal jurisdiction over criminal matters. Similarly, ss. 148 to 152 are also valid but to the extent only that they relate to criminal offences.

[44] ***Per* Dalphond, J.A. (dissenting):** It is not up to us as judges to advise on what would be in the best interest of the country, nor to decide if having a single federal agency would be more efficient than the existing thirteen provincial and territorial authorities. Our role is limited to determining if Parliament has the right to adopt the Proposed Canadian Securities Act pursuant to the powers conferred to it by the Constitution.

[45] The powers granted to this country's two levels of government are not necessarily mutually exclusive. Overlaps occur regularly in numerous areas. Thus, Parliament may enact provisions forbidding driving with above a certain blood alcohol level, if their pith and substance is criminal law – that is, the prohibition of a public evil – while a province can adopt similar provisions if their pith and substance is the regulation of traffic within that province. The same is the case with the regulation of tobacco products. Provincial and federal statutes can have the same objectives, and carry these out through similar means. In no case does this duplication affect the validity of the legislation involved, and persons and enterprises must comply with both. What matters is the pith and substance of each of these laws and their connection to a power granted under the Constitution to the legislature that adopted them.

[46] With regard to securities, this is not a subject matter dealt with by *The Constitution Act*. The fathers of Confederation were not concerned with stock exchanges and securities because the securities industry was in its infancy at the time in Canada.

[47] Since 1867, the regulation of activities associated with securities has occurred gradually through federal and provincial legislation. In most cases, these laws have as their purpose the protection of shareholders/investors. It would therefore be incorrect to claim that since Confederation the protection of investors has been the exclusive domain of the provinces.

[48] Until now, Parliament has intervened mainly through the enactment of provisions dealing with criminal and corporate law. The current federal corporate law statute, the *Canada Business Corporations Act*, contains numerous provisions applicable to public corporations, that deal with insider trading, proxy solicitation, financial disclosure, annual and special meetings of shareholders, the election of directors, going private and squeeze-out transactions, compulsory and compelled acquisition of shares, takeover bids, etc. Similar provisions are found in special statutes such as the *Bank Act*.

[49] With regard to the provinces, they have intervened first by licensing brokers and dealers and requiring information relative to the securities offered, and later by adopting provisions regulating various events in the corporate life of public issuers. Quebec's current *Securities Act* contains over 350 sections, an undeniable sign that it has expanded since its first enactment in 1930 when it contained only 25 sections and since the creation of the Quebec Securities Commission in 1955 when it contained 97 sections.

[50] It is necessary to highlight a recent characteristic of provincial legislation: its harmonisation. Well aware that the capital market has become a single, integrated, pan-Canadian market, and thus radically different from the market which existed in 1867 or even 15 years ago, the provinces have agreed to adopt uniform legislation and practices to avoid local practices likely to cause harm, such as localisation in the less demanding jurisdiction or the one providing less protection to investors. As is demonstrated by its current legislation, Quebec did not escape this necessary harmonisation commanded by market forces.

[51] It clearly follows from the evolution of provincial legislation dealing with securities that the provinces have undertaken to take over a maximum number of aspects of the capital market, and not only trading and dealing in securities in their respective provinces.

[52] For its part, Parliament has followed a similar movement. Starting from one of its heads of power, like banks or federal corporate law, it has enacted more and more provisions relating to the rights of shareholders, the obligations of directors towards investors, the take over of corporations, the compelled acquisition of shares, etc. In other words, it is gradually developing a federal securities regulation. With its 266 articles, the Proposed Act is the ultimate outcome of the federal movement.

[53] The possibility for Parliament to adopt a general legislation dealing with securities was never excluded. On the contrary, the Supreme Court of Canada left the door open to this as a possibility in recent judgments (*Multiple Access Ltd. v. McCutcheon*, [1982] 2 S.C.R. 161, p. 173-174; *Global Securities Corp. v. British Columbia (Securities Commission)*, [2000] 1 S.C.R. 494, 2000 CSC 21, par. 46). Now the time has come to decide this issue.

[54] The pith and substance of the Proposed Act is the regulation of all the participants in a capital market that has become a single, integrated, pan-Canadian market, characterized by mainly inter-provincial and international transactions. The purposes of the Proposed Act, if it becomes law, are varied: protecting investors (through sporadic and continuing information, preventing fraud, ensuring the quality of intermediaries, improving sanctions, providing for civil remedies), fostering a fair, efficient and competitive capital market (ensuring uniform rules, facilitating access to capital), minimizing systemic risks and improving international cooperation. The Proposed Act is thus a component of an economic policy favourable to the maintenance of a strong and healthy capital market in Canada, a critical tool for the growth of thousands of businesses, large and small.

[55] It is true that the goals of current provincial acts are the same and that the means to achieve them are similar. But so is the case in the rest of the world. Anyhow, this is not relevant here. The validity of the Proposed Act must be determined without heed to the existing provincial acts (*General Motors of Canada Ltd. v. City National Leasing*, [1989] 1 S.C.R. 641, p. 682; *Multiple Access*, p. 175).

[56] Parliament could validly adopt the provisions of the Proposed Act relating to offences and their prosecution pursuant to its criminal law power, a conclusion shared by my colleagues. As well, Parliament could render applicable its provisions relating to the relationships between investors and corporations and their directors and officers, for all federally incorporated corporations. Moreover, pursuant to its power over international and inter-provincial trade and commerce, Parliament could render the Proposed Act applicable to inter-provincial and international aspects of trading in securities as acknowledged by the Attorney General of Alberta. In their joint opinion, my three colleagues ignore this point that jeopardize their thesis as to the exclusiveness of the regulation of securities by the provinces and the lack of any double aspect. Since approximately 95 % of the Canadian public offerings of securities involve more than one province and since each of the three Canadian stock exchanges is used to trade exclusively specific classes of securities for the whole country and the world, Parliament could render the Proposed Act applicable to most transactions and to the three exchanges.

[57] To make the Proposed Act applicable to all participants and transactions, whether local or extra-provincial, Parliament needs to rely on its general trade and commerce power under section 91(2) of the *Constitution Act, 1867*. In order to determine if Parliament could validly exercise this power, courts consider the following five *indicia*: i) would the Proposed Act be part of a regulatory scheme? ii) would the scheme be monitored by the continuing oversight of a regulatory agency? iii) would the Proposed Act be concerned with trade as a whole rather than with a particular industry? iv) would the Proposed Act be of such a nature that the provinces jointly or severally be constitutionally incapable of enacting? v) would the failure to include one or more provinces jeopardize the successful operation of the scheme in other parts of the country?

[58] The existence of the first two indicia cannot be seriously contested. As for the third, the Proposed Act is not seeking to regulate a local transaction, a particular industry or diverse local industries that are not interrelated, but rather all the participants in the Canadian capital market (close to 4,000 issuers and their directors and officers, the three Canadian stock exchanges, the securities industry - institutional and retail firms, individual brokers and their self regulatory body - the rating agencies, the external auditors of the issuers, the mutual funds, the investors and their legal remedies). With respect to my colleagues, to assert that the Proposed Act is not concerned with trade as a whole in these circumstances is to sterilise the general trade and commerce power under section 91(2) and to revert to an old line of cases that was reversed long ago.

[59] Under the fourth criteria, the fact that the provinces are capable through efforts at harmonization to regulate numerous aspects of the Canadian capital market is not determinative. Rather, it is necessary to ask whether the Proposed Act can achieve things that the provinces, jointly or severally, cannot constitutionally accomplish. Here this is the case: decisions of a federal agency would be applicable across the country; a federal agency would not be limited in its choice of appropriate punitive measures; in

the case of an economic crisis, a quick and uniform response would be possible, including one jointly made by the federal Department of Finances, the Bank of Canada, the Superintendent of Financial Institutions and foreign organizations, binding upon all Canadian participants.

[60] The fifth indicia can be summarized as asking if the sustainability of the proposed system requires an act that must be applied uniformly across the country, like is the case with competition and trademarks. In other words, since the capital market is now pan-Canadian and integrated, if we want to regulate it in a viable legal way, do we need a single statute? The response is clearly yes, as is demonstrated by the provinces' recent efforts at uniformity and coordination.

[61] With regard to the formula proposed for bringing into force gradually the Proposed Act, if it becomes law, this would allow the avoidance of duplication between federal and provincial laws. In effect, if a province decides to opt-in, only the new federal regime will apply; if it refuses to opt-in, only its law will continue to apply. For the provinces opposed to a single agency, the pressure for uniform rules applicable to the Canadian capital market will not stop with the coming of a federal agency, for which seven or eight provinces and the territories opt-in. A refusal to opt-in at the moment does not mean that this will be the case over time, and that the objective proclaimed in the preamble of the Proposed Act – to have a single commission for the entire country – will never be attained. Rather, it can be predicted that all the provinces will opt-in voluntarily or at least will adopt similar provisions to those of the federal regime with regard to its norms, responsibilities, authorizations and bans. A uniform system of regulation will therefore result across the whole country, even if this turns out to be less efficient, in certain ways, than had been originally envisioned.

[62] To sum up, all the relevant indicia of a valid exercise of Parliament's general trade and commerce power are present.

[63] I wish to add that if the Proposed Act becomes law, this would not be a hostile takeover by Parliament of a provincial power, but rather a normal legal consequence of a gradual, albeit radical, transformation of the state of the Canadian capital market – a market that has become unique, integrated, pan-Canadian, and characterized essentially by inter-provincial and international transactions.

[64] In conclusion, I am of the opinion that Parliament can validly adopt the Proposed Act pursuant to its general trade and commerce power under section 91(2) of the *Constitution Act, 1867*. As for the contested provisions of the *Budget Implementation Act, 2009*, there are perfectly valid under the spending power of the Parliament.