File No. 33718

IN THE SUPREME COURT OF CANADA

IN THE MATTER OF Section 53 of the Supreme Court Act, R.S.C. 1985, c. S-26;

AND IN THE MATTER OF a Reference by the Governor in Council concerning the proposed Canadian Securities Act, as set out in Order in Council P.C. 2010, dated May 26, 2010

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(Pursuant to Rule 42 of the Supreme Court of Canada Rules)

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PART I - OVERVIEW AND STATEMENT OF FACTS

1. By Order dated June 14, 2010, the Chief Justice set down for hearing by this Court the Reference by the Governor in Council concerning the proposed Canadian *Securities Act*, as set out in Order in Council P.C. 2010-667, dated May 26, 2010; the Attorney General of British Columbia ("British Columbia") intervenes in the Reference pursuant to s. 53(5) of the *Supreme Court Act*.

2. British Columbia submits that the Reference Question should be answered in the negative.

3. British Columbia adopts the facts set out in the factum of the Attorney General of Canada except as noted and provides the following additional facts for consideration of this Honorable Court.

4. The Reference Question posed to this Court concerns itself with the Proposed Canadian *Securities Act (*the "Proposed *Act*"); the details of the subordinate regulatory regime have not yet been determined.

5. Although capital markets may have evolved to be primarily international and interprovincial, particularly in relation to larger issuers and the dollar value of securities, a local component remains important, and is particularly significant for British Columbia. The majority of issuers are small capital start-ups who often trade intraprovincially.

> **Expert Report by Jean–Marc Suret and Cecile Carpentier,** Sections 1.4-1.7, Consolidated Reference Record (hereinafter "R.R."), Vol. XIX (Alberta), pp. 65-84.

6. Although a local investor wishing to buy a part of a local company may be the exception to participation in the securities market, particularly if the parameter used is dollar value, this sort of investing is important to British Columbia's economy and to specific industries within British Columbia. Significant amounts of money are invested in a large number of venture and exempt market issuers.

7. British Columbia provides the following comments with respect to the significance of capital markets provincially. Although Ontario residents hold approximately 42% of the financial assets held by individual Canadians and 81% of total Canadian investment fund assets are held by companies based in Ontario, Ontario has only 27% of exchange listed companies. British Columbia and Alberta have 58% of exchange listed companies. British Columbia alone has 36%. Small and micro capital start-up companies play a significant role in the Canadian economy, particularly in Alberta and British Columbia.

> **Expert Report by Jean–Marc Suret and Cecile Carpentier,** Sections 1, 1.4-1.7, R.R., Vol. XIX (Alberta), pp. 60-84;
> See also Section 6 in relation to concentration of financial services, R.R., Vol. XIX (Alberta), pp. 141-150.

8. The Canadian market as a whole is essentially composed of very small companies.

> Together, the four provinces of British Columbia, Ontario, Alberta and Quebec account for 96% of companies and 90% of aggregate market capitalization. British Columbia represents 36% of listed companies. Companies from that province are essentially penny stocks (74%) and microcap companies (13%). Ontario is home to 27% of companies. Most Ontario companies are penny stocks (56%), but the province also includes 26% of companies that are medium-size, large or very large. Alberta is home to 22% of the companies listed at the end of 2007. They are mostly (75%) small companies. 10% of Alberta companies are large or very large. Quebec has 11% of the listed companies, and 74% of Quebec companies are small-cap.
>
> **Expert Report by Jean–Marc Suret and Cecile Carpentier**, R.R., Vol. XIX (Alberta), pp. 63 and 66.

9. In addition, there are significant regional differences by sector between provinces:

> The Canadian market seems to be very much specialized by province: British Columbia and Alberta are essentially active in the natural resource sector (mining and oil and gas respectively), Ontario has a very strong representation of large financial companies, and Quebec has a large number of small technology companies. Provincial securities commissions have been able to develop specific competencies in the most heavily represented sectors. This regionalization is even more apparent when

> viewed from the perspective of financings completed under the registration and prospectus exemption regime.
>
> **Expert Report by Jean–Marc Suret and Cecile Carpentier**, R.R., Vol. XIX (Alberta), p. 75.

10. British Columbia is also particularly affected by the venture capital market. As noted by Suret and Carpentier:

> There is a strong tendency for private equity investors to finance entrepreneurs that reside in the same province. The private equity market is therefore basically a provincial market.
>
> . . . 81.56% of venture capital investments were intraprovincial. Based on the investment amounts, the intraprovincial proportion stood at 77.13%. The situation varies according to province, which may reflect the uneven development of venture capital in Canada. In Quebec, 88.6% of investments are derived from investors based in the province, and 90.7% of Quebec venture capital investments are done locally. The corresponding proportions for Alberta are 53% and 60.9%. In Ontario, the home bias is also significant: 83.7% of investments derive from Ontario-based funds, and these Ontario investors conduct 78.6% of their investments in their home province.
>
> Private investment in Canada therefore constitutes a local market, even where investments involving specialized venture capital funds are taken into account. More often than not, the investments are made by individuals, who invest relatively small amounts and operate locally. These local transactions are very important for the financing of growth companies.
>
> **Expert Report by Jean–Marc Suret and Cecile Carpentier**, R.R., Vol. XIX (Alberta), pp. 79 and 82.

11. Ontario has indicated it would like to eliminate the exempt market rule that allows for raising significant amount of investment capital in British Columbia, including in relation to mining, oil and gas and mortgage financing.

> See Ontario Factum, para. 25;
> Supplemental Affidavit of William S. Rice, R.R., Vol. XXIII, Ex. "A", pp. 30-33.

12. Under the current passport system, there continues to be some responsiveness to distinct local issues and regulatory experimentation and innovation. It is the very nature of the passport system that allows for this responsiveness. Local jurisdictions are in a position to protect their policy interests as there is always the option of a local

carve-out. The Proposed *Act* provides no legal mechanism to protect local interests that may differ from interests in other parts of Canada. It is to be hoped that any national regulator will also be responsive to local conditions and issues; however, because the details of the subordinate regulatory regime are still to be determined, British Columbia is unable to comment on this issue under the Proposed *Act*.

13. Further to paragraph 15 of Ontario's factum, British Columbia notes that the authors of the Five Year Review Committee Final Report recommended that:

> . . . certain steps be undertaken by securities regulators to simplify the current regulatory regime in Canada:
>
> i) We recommend that securities regulators continue to harmonize securities regulation across Canada;
>
> ii) We recommend that securities regulators be given the authority to delegate any power, duty, function or responsibility conferred on them to another securities regulatory authority within Canada, and that they actively engage in delegation among themselves. We therefore recommend the Act be amended to give the Commission this delegation authority, and that the necessary consequential amendments to the immunity provisions in the Act be made;
>
> iii) We recommend that securities legislation across the country be amended to provide for "mutual recognition" so that the rules of the jurisdiction having the closest connection to a transaction or market participant will govern that transaction or market participant, and other affected jurisdictions will recognize and allow those rules to be applied in place of their own.

These recommendations were followed with the passport system, adopted by all jurisdictions of Canada other than Ontario.

> Affidavit of Robert Christie, Ex."C", **Five Year Review Committee Final Report**, R.R., Vol. XXIV (Ontario), p. 72;
> Affidavit of William S. Rice, R.R., Vol. XVIII, para. 101, p. 37.

14. In addition to Canada's comments in paragraph 40 in relation to the Hockin Panel, the report also recommended, in the event there is not sufficient participation from the provinces, that the federal government consider including a market-participant

opt-in provision in the *Act*. This would provide a mechanism for market participants in non-participating provinces to be regulated by the national regulator by "opting-in".

> **Expert Panel on Securities Regulation ("Hockin Panel"),** R.R., Vol. II (Canada), pp. 183-4, 214-6.

15. Also, as part of the second stage of implementation, the Report recommends unilateral imposition of federal regulation on non-participating provinces.

> **Expert Panel on Securities Regulation ("Hockin Panel"),** R.R., Vol. II (Canada), p. 185.

16. In response to paragraph 42 of Canada's Factum, it should of course be noted that the federal government is often faced with promoting Canadian interests internationally. It must often consider, and may not have control of the outcome, when those interests fall within areas of exclusive provincial legislative jurisdiction.

17. Various cooperative models of securities regulation, have been considered over the last several decades:

- In 1964, the *Report of the Royal Commission on Banking and Finance* (the Porter Report) proposed both provincial regulators and a federal regulator with provincial regulators administering provincial laws and the federal regulator administering federal laws. The report acknowledged that some provincial authority may need to be delegated to the federal regulator.

  Report of the Royal Commission on Banking and Finance, R.R., Vol. II (Canada), pp. 21-22.

- In 1967 CANSEC envisioned a model of a single national regulator that would administer provincial securities legislation of participating provinces using delegated authority. Under their proposal there would be no permanent surrender of power by the provinces to the federal government. Provinces could opt-out of the scheme if they chose to do so. The CANSEC proposal involved setting up a new independent entity to undertake the regulatory function.

  CANSEC, Legal and Administrative Concepts, R.R., Vol. II (Canada), pp. 34-39.

- In 1979, the federal government recommended the creation of a Canadian Securities Commission to regulate international and interprovincial issues of and trading in securities.

  Affidavit of Robert Christie, R.R., Vol. XXIV (Ontario), p. 62; **Proposals for a Securities Market Law for Canada**, R.R., Vol. II (Canada), pp.40-48.

- Further proposals in or about 1994 and following envisioned a model of a single national regulator that would administer provincial securities legislation of participating provinces using delegated authority. Under the proposals there would be no permanent surrender of power by the provinces to the federal government. Provinces could opt-out of the schemes if they chose to do so. The 1994 proposal involved delegation of regulatory authority to an entity established by federal government.

  Draft Memorandum of Understanding Regarding the Regulation of Securities in Canada (1994), R. R., Vol. II (Canada), p. 50-7, and in particular clauses 2 to 6, pp. 51-2.
  See also Five Year Review Committee Final Report, R.R., Vol. XXIV (Ontario), Ex. "C" p. 63.

- The Crawford Panel proposed a model focused on a provincially-run single regulator, with a limited federal role. The report recommended an opt-in feature with a common securities commission administering one set of "principles-based" laws. An arm's length mechanism for selecting and electing directors identical to that used by federal and provincial finance ministers to appoint directors at the Canada Pension Plan Investment Board (CPP/IB). The model provided the option for a province to remove itself from the scheme simply by repealing its securities legislation that incorporated the common legislation. The model contemplated adoption of the common securities legislation by reference.

  Crawford Panel on a Single Canadian Securities Regulator (2006), R.R., Vol. II (Canada), pp. 110-116.

18. The *Securities Act*, R.S.B.C. 1996, c. 418, captures a multiplicity of transactions within the province, including some not contemplated by the Proposed *Act*.

19. For example, the breadth of the definition of "security" in the current British Columbia regime casts a much wider net over transactions than what is contemplated by the federal definition:

  Securities Act, R.S.B.C. 1996, c. 418, s. 1(1);
  Proposed Canadian *Securities Act*, R.R. Vol. 1 (Canada) pp. 30-31.

20. Securities law is significantly intertwined with property law, contract law, and other matters for which British Columbia has legislative jurisdiction.

> **Expert Report by Eric Spink**, R.R., Vol. XIX (Alberta), paras. 7-9, pp. 6-7; paras. 40-41, pp. 16-17; paras. 69-76, pp 26-28.

21. There are other regulatory regimes intertwined with the current BC securities regime that deal, *inter alia*, with protection of investors (often described as being necessary due to vulnerability of investors who might not otherwise have all relevant information for decision making).

22. For example, the *Mortgage Brokers Act* and regulations thereunder contemplate disclosure to investors and lenders in the context of mortgages; exemptions from *Mortgage Brokers Act* requirements are available if *Securities Act* requirements for prospectus and offering memoranda are complied with.

> *Mortgage Brokers Act*, R.S.B. 1996, c. 313, ss. 17.1, 17.3, 17.4;
> *Mortgage Brokers Act Regulations*, B.C. Reg. 100/73, ss. 7, 16-18.

23. Within the province, agencies regulated provincially, such as credit unions and trust and insurance companies, can offer products which fall within the definition of "security." The Province regulates to protect the investor in these areas, in addition to protections provided in the *Securities Act (B.C.)*.

> See e.g. *Financial Institutions Act*, R.S.B.C. 1996, c. 141, ss. 91-96.

24. The interrelationship of regulation of various financial services is so significant that the Hockin Panel envisions that the imposition of a single securities regulator is only the first step in federal intrusion into provincial jurisdiction:

> **IV. Future Directions to Modernize Financial Sector Regulation**
>
> We believe that once the path to the Canadian Securities Commission has been established, a larger assessment should be undertaken to examine

> whether Canada should reform the regulation of its financial sector. Many of Canada's financial institutions engage in activities that cut across banking, insurance, and securities. Yet, the regulation of these financial institutions is often undertaken by separate regulators looking at separate parts, rather than examining the activities as a whole. This has had implications for the safety and soundness of the financial system and the general efficiency of regulation. There may be an opportunity, therefore, to reform the structure of financial sector regulation to better reflect the realities of the modern financial services industry. In this regard, we are intrigued by the recommendations of our research study on this topic that Canada should consider implementing an objectives-based regulatory approach, under either a single, consolidated financial sector regulator, or under a twin peaks model that would create separate agencies for prudential regulation and business conduct.
>
> **Expert Panel on Securities Regulation ("Hockin Panel"),** R.R., Vol. II (Canada), p. 172.

25. In addition, it should be kept in mind that securities laws often apply to private companies, limited partnerships, co-operative associations and trusts from the moment of their incorporation or formation. The formation of such entities involves issuing of securities (e.g. shares, warrants, debentures, instruments of indebtedness, limited partnership or membership units).

26. Currently in British Columbia, unless otherwise exempt, every person who is in the business of "trading" (i.e. selling or performing acts in furtherance of a sale of) securities or advising another with respect to an investment in securities must be registered (i.e. licensed) with the British Columbia Securities Commission.

> *Securities Act,* R.S.B.C. 1996, c. 418, s .34

27. Unless otherwise exempt, every person who "distributes" a security (i.e. trades a security being issued for the first time) must provide a purchaser with a prospectus previously filed and cleared by the Commission.

> *Securities Act*, R.S.B.C. 1996, c. 418, s.61.

28. We still do not have the full picture of how Canada intends to implement its proposed national regime; we have been provided only the framework of the legislation, and no draft regulations, etc. to provide comment on for the purposes of this Reference.

29. British Columbia is supportive of a national regulatory scheme, but there is clearly a provincial aspect to securities market regulation. British Columbia will continue to work with Canada to ensure that local concerns and protection of local investors and our venture capital market are met in any implementation of a national regime.

PART II- ISSUES
BRITISH COLUMBIA'S POSITION ON THE ISSUE

30. On May 26, 2010, pursuant to P.C. 2010-667, the Governor General in Council referred the following question to this Court for hearing and consideration:

> Is the annexed Proposed Canadian *Securities Act* within the legislative authority of the Parliament of Canada?

31. The position of British Columbia is that it supports the concept of a single federal securities regulator so long as the federal legislation establishing that single regulator respects the division of powers under ss. 91 and 92 of the *Constitution Act, 1867.*

32. It is the considered view of the Attorney General of British Columbia that the Proposed Canadian *Securities Act*, except Part II, sections 158-165, entrenches upon provincial constitutional jurisdiction under ss. 92(13), property and civil rights in the province, and 92(16), matters of a merely local and private nature in the province, and so is not under the legislative authority of the Parliament of Canada under the general branch of the trade and commerce power in s. 91(2) of the *Constitution Act, 1867.* Part II, sections 158-165, of the Proposed Canadian *Securities Act* is within Parliament's authority over the criminal law and criminal procedure in s. 91(27) of the *Constitution Act, 1867.*

33. The position of the Attorney General of British Columbia is that the answer to the question referred to this Court should be: "No".

PART III- STATEMENT OF ARGUMENT

A. Regulation of the Sale of Securities and Regulation of Persons and Entities Involved in the Trading of Securities is Within the Exclusive Jurisdiction of the Province under s. 92 of the *Constitution Act, 1867*

34. Provincial *Securities Acts* (in British Columbia the *Securities Act* R.S.B.C. 1996 c. 418) have developed in complexity and sophistication of regulation over the years. But the objective of such Acts in requiring registration of those persons engaged in the business of "trading" in securities remains the same as that of the *Security Frauds Prevention Act, 1930 (Alberta)*, S. A. 20 Geo 5, c. 8 considered by the Judicial Committee of the Privy Council in *Lymbum v. Mayland,* [1932] A.C. 318, shortly after its enactment. Delivering the judgment of their Lordships, Lord Atkin said (at p. 324):

> There is no reason to doubt that the main object sought to be secured in this part of the Act (the registration provisions) is to secure that persons who, carry on the business of dealing in securities shall be honest and of good repute, and in this way to protect the public from being defrauded.

35. Part II of the *Security Frauds Prevention Act, 1930,* provided that the Attorney General or his delegate could examine any person or company in order to ascertain whether any fraudulent act or any offence against the Act or regulations had been or was about to be committed. The examination was not confined to questions of registration nor was it confined to persons or companies that themselves trade in securities. It was argued that this open ended inquiry power was inconsistent with the powers of inquiry under the federal *Companies Act*. Lord Atkin responded to this argument (at p. 326) :

> The provisions of this part of the Act may appear to be far-reaching; but if they fall, as their Lordships conceive them to fall, within the scope of legislation dealing with property and civil rights the legislature of the Province, sovereign in this respect, has the sole power and responsibility of determining what degree of protection it will afford to the public. (emphasis added)

36. In other words, the protection of the public against fraudulent dealing in securities as an aspect of legislation dealing with property and civil rights is within the exclusive

jurisdiction of the provincial legislatures under s. 92(13) of the *Constitution Act, 1867*, the legislatures of a province, being "sovereign in this respect".

37. This Court, and other courts in Canada, have consistently recognized the paramount object of the *Securities Act* is protection of the investing public, thereby protecting the integrity of capital markets in the province and encouraging investment:

> The paramount object of the Act is to ensure that persons who, in the province, carry on the business of trading in securities or acting as investment counsel, shall be honest and of good repute and, in this way, to protect the public, in the province or elsewhere, from being defrauded as a result of certain activities initiated in the province by persons therein carrying on such a business.
>
> *Gregory & Co. v. Quebec (Securities Commission),* [1961] S.C.R. 584 at p. 588:
>
> It is important to note from the outset that the Act is regulatory in nature. In fact, it is part of a much larger framework which regulates the securities industry throughout Canada. Its primary goal is the protection of the investor but other goals include capital market efficiency and ensuring public confidence in the system: David L. Johnston, Canadian Securities Regulation (1977), at p. 1.
>
> *Pezim v. British Columbia (Superintendent of Brokers),* [1994] 2 S.C.R. 557 at p. 589.
>
> It seems clear that the true nature of provincial statutes above considered, no less than the *Securities Act* of our own province, is to provide protection to the public through a system of regulating and supervising the conduct of persons who engage in trading activities in securities within the province.
>
> *Regina v. W. McKenzie Securities Ltd.* (1966), 56 D.L.R. (2d) 56 (Man. C.A.) at p. 62; 1966 Carswell Man. 6 at para. 19.
>
> See also:
> *Global Securities v. British Columbia (Securities Commission),* 2000 SCC 21, [2000] 1 S.C.R. 494 at para. 33;
> *Committee for the Equal Treatment of Asbestos Minority Shareholders v. Ontario (Securities Commission)*, 2001 SCC 37, [2001] 2 S.C.R. 132 at para. 41;
> *Multiple Access v. McCutcheon,* [1982] 2 S.C.R. 161 at pp.184-185;
> *Smith v. The Queen,* [1960] S.C.R. 776 at pp. 780-781;
> *Bennett v. British Columbia (Securities Commission)* (1991), 82 D.L.R. (4th) 129 (B.C.S.C.) at p. 152; 1991 Carswell B.C. 791 at paras. 30-32; affirmed in *Bennett v. British Columbia (Securities Commission)* (1992), 94 D.L.R. (4th) 481 (B.C.C.A.) at pp. 356-358.

38. The central focus of provincial *Securities Acts* is protection of the purchaser of securities in the province and the result of that protection is the preservation of the integrity of capital markets:

> I take it that, as stated in Pezim v. British Columbia (Superintendent of Brokers) [1994] 2 S.C.R. 557, at 589, the "primary aim" of the provincial Securities Acts is the protection of the public from acts or conduct - particularly the solicitation of trades and the sale of securities - taking place within the respective provinces. As stated succinctly by Gillen, supra, at 122, ". . . it is the vendor that is the object of the [legislation], and it is the purchaser that the legislation is designed to protect." The other goals of securities legislation - ensuring the efficiency of capital markets and increasing public confidence in the markets (see Johnston and Rockwell, supra, at 2-4) - do not detract from this principle.
>
> *Pearson v. Boliden Ltd.*, [2002] BCCA 624; (2002) 222 D.L.R. (4th) 453; 2002 Carswell B.C. 2769 at para. 62.

39. Seen in this way, provincial *Securities Acts* are properly characterized as consumer protection legislation:

> In a very real sense, then, the *Acts* are analogous to consumer protection legislation. The conduct *in the province* of issuers, brokers and other market intermediaries, wherever they may reside or carry on business, is regulated in order to protect the public, and the integrity of the market, in that province.
>
> *Pearson v. Boliden Ltd.* at para. 63.

40. Section 34 of the B.C. *Securities Act* is at the heart of the regulatory regime established by that *Act.* It provides, among other things, that "a person must not trade in a security ... unless the person is registered in accordance with the regulations ...". Section 76 of the Proposed Canadian *Securities Act* contains a provision that is virtually identical to that contained in section 34 of the provincial *Act.* "Trade" is defined in section 1 of the provincial *Act* (there is an identical definition in section 2 of the federal *Act*) as including:

> **"trade"** includes
> (a) a disposition of a security for valuable consideration ... but does not include a purchase of a security ...,
>
> (a.1) entering into a futures contract,

> (b) entering into an option that is an exchange contract,
>
> (c) participation as a trader in a transaction in a security or exchange contract made on or through the facilities of an exchange or reported through the facilities of a quotation and trade reporting system,
>
> (d) the receipt by a registrant of an order to buy or sell a security or exchange contract ...

41. Fundamentally, regulating trading in securities constitutes regulating contracts made within the province for the purchase and sale of securities, whether or not that contract is made on or through the facilities of an exchange, whether or not that contract is arranged through or by an agent or other intermediary and whether or not the ultimate performance of that contract is carried out within the province or outside the province.

42. Mr. Justice Melnick in *Bennett v. British Columbia (Securities Commission)* correctly distinguished between the nature of trading in securities and the mechanism adopted for that trading (i.e. a computer system identified by the acronym CATS - Computer Assisted Trading System):

> Furthermore, CATS is simply the mechanics by which the securities have been traded in this particular instance. CATS is the "physical equipment" used to consummate the orders to sell placed in British Columbia. That has not changed the fundamental nature of the transaction, only the manner, speed and efficiency by which it is carried out. The sections of the Securities Act I am concerned with are aimed at the nature of the trade itself, not with how it was carried out.
>
> *Bennett v. British Columbia (Securities Commission)* at p. 138; Carswell at para. 46; affirmed by the Court of Appeal at p. 357.

43. The general regulation of contracts of a particular business or trade, such as the business of trading in securities or the business of providing fire insurance, is a matter *prima facie* within exclusive provincial jurisdiction and not within the federal trade and commerce power:

> It is enough for the decision of the present case to say that, in their (Lordships') view, its (the federal Parliament's) authority to legislate for the regulation of trade and commerce does not comprehend the power to regulate by legislation the contracts of a particular business or trade, such as the business of fire

> insurance in a single province, and therefore its legislative authority does not in the present case conflict or compete with the power over property and civil rights assigned to the legislature of Ontario by No. 13 of sect. 92.
>
> *Citizens Insurance Company of Canada v. Parsons* (1881), 7 A.C. 96 at p. 113; 1881 Carswell Ont. 253 at para. 26;
> *Canada (Attorney General) v. Canadian National Transportation Ltd.,* [1983] 2 S.C.R. 206 at pp. 257-258 per Dickson J.;
> *General Motors of Canada Ltd. v. City National Leasing Ltd.*, [1989] 1 S.C.R. 641 at p. 656.

44. As well, "business ethics" in making contracts is properly the focus of provincial legislation under s. 92(13) of the *Constitution Act, 1867*, being a matter of property and civil rights:

> The definition of "consumer transaction" given in the Act (the *Trade Practices Act,* being considered by the Court in this case) makes it clear that what the Legislature is talking about is contracts of those kinds which fall within the definition. My conclusion is that legislation is in relation to matters which fall within the class of subjects encompassed within s. 92(13), *viz.*, "Property and civil rights in the Province". This is so because the conduct sought to be regulated by the statute (business ethics in making contracts) clearly relates to making contracts. ...
> Clearly, in my view, the legislation in pith and substance is in relation to property and civil rights in the Province.
>
> *Stubbe v. P.F. Collier & Son Ltd.* (1977), 74 D.L.R. (3d) 605 (BCSC) at p. 643; 1977 Carswell B.C. 348 at para. 115.

45. Mr. Justice Aikins in *Stubbe* also noted that (at p. 644; para. 119):

> Many interprovincial trading transactions are affected by provincial legislation which is clearly not in relation to trade and commerce and is intra vires the province.

46. And further (at p. 644; para. 120):

> ... it may properly be said that all the Legislature has done in the *Trade Practices Act* is to prescribe that every supplier entering into or attempting to enter into a consumer transaction in the Province must comply with provincially enacted limitations which set standards of business conduct.

47. The same can be said of the British Columbia *Securities Act*. Every issuer and owner of securities entering into or attempting to enter into a contract for the sale of those securities, and every person assisting as agent, intermediary or adviser, must comply with

provincially enacted limitations on that contract and that sale which set ethical standards for the conduct of their securities business.

48. Putting aside considerations based on the trade and commerce power in s. 91 of the *Constitution Act, 1867* (which will be addressed later in this factum), the federal Parliament has no constitutional jurisdiction under s. 91 to enact the Proposed Canadian *Securities Act* in its present form which virtually replicates the British Columbia *Securities Act*, and the *Securities Acts* of other provinces. Parliament may only pass limited and specific legislation dealing with particular aspects of securities law insofar as those aspects are related to otherwise valid federal legislation. Examples of the exercise of this limited jurisdiction are regulation of insider trading as an aspect of company law enacted by Parliament for federally incorporated companies (*Multiple Access v. McCutcheon*) and creating an offence of knowingly publishing a false prospectus as an aspect of criminal law enacted by Parliament (*R. v. Smith*).

49. While the focus above has been on registration of persons involved in trading in securities as a means of a province enforcing ethical business standards by means of its *Securities Act*, the analysis is equally valid and applicable for all of the other mechanism for establishing and enforcing ethical business standards found in the various *Securities Acts* and replicated in the Proposed Canadian *Securities Act*, in whole or in part. Some examples of those mechanisms are:

a) Oversight of auditors (BCSA- ss. 32.1 to 32.4; PCSA- ss. 66(2), 69);

b) Prohibition on representations that have the effect of understating risk or overstating future prospects, and misrepresentations and unfair sales practices generally (BCSA- s. 50; PCSA- ss, 115, 121);

c) Prohibiting trading in securities on an exchange in the province not recognized by the securities commission (BCSA - s. 58; PCSA s. 65);

d) Prohibiting distribution of securities until a preliminary prospectus and a prospectus providing full, plain and true disclosure of all material facts relating to the securities have been filed (BCSA - ss. 61, 63; PCSA - ss. 80, 82);

e) Requiring continuous disclosure by a reporting issuer of securities, its business and affairs and any material change in that business or affairs expected to have a significant effect on the market price of its securities (BCSA - ss. 1, 85; PCSA - ss. 2, 93,94);

f) Providing insiders' reports by a reporting issuer (BCSA - s. 87; PCSA - s. 97);

g) Prohibitions against insider trading, tipping, recommending and front-running (BCSA - ss. 57.2; PCSA - 117, 118);

h) Prohibitions against market manipulation and fraud (BCSA - s. 57; PCSA - s. 116);

i) Duty to act honestly, in good faith and in the best interests - investment fund manager (BCSA - s. 125; PCSA- s. 111). The same duty exists for registrants generally but is found in the province's regulations (s. 14 of the Securities Rules, B.C. Reg. 194/97; PCSA- s. 110);

j) Civil liability and rights of action for misrepresentation in a circular or notice, misrepresentation in a prescribed disclosure document, failure to deliver documents, insider trading, tipping and recommending (BCSA - ss. 132-136; PCSA - ss. 169-193, 196-209);

k) Accounting for improper benefits (BCSA- s. 136.1; PCSA - s. 181);

l) Restitution by court order (tribunal for PSCA): disgorgement of illegal profits or losses avoided, by court or commission order, with process for persons harmed by conduct to make claims against the money disgorged (BCSA - ss. 155.1, 157 and 15.1; PCSA – 140 and 52(5));

m) Administrative penalty ordered by the securities commission (BCSA - s. 162; PCSA - s.140);

n) Enforcement order issued by the securities commission (BCSA - s. 161; PCSA - s.139).

50. All of the mechanisms for establishing and enforcing ethical business standards in the securities trading business found in the B.C. *Securities Act* are, it is submitted, within the exclusive jurisdiction of the province of British Columbia to legislate in respect of property and civil rights and matters of a merely local and private nature in the province under sections 92(13) and 92(16) of the *Constitution Act, 1867*.

B. The Proposed Canadian Securities Act Impairs the Core Competence of the Province to Regulate the Sale of Securities and Regulate Persons and Entities Involved in the Trading of Securities

51. In *Canadian Western Bank,* this Court held that there is a continuing role, albeit constrained somewhat, for constitutional interjurisdictional immunity which the Court described in the following terms:

> Equally, s. 92 (headed "Exclusive Powers of Provincial Legislatures") is introduced by the words "In each Province the Legislature may exclusively make Laws in relation to Matters coming within the Classes of Subjects next herein-after enumerated", including "Property and Civil Rights in the Province" (s. 92(13)) and "Generally all Matters of a merely local or private Nature in the Province" (s. 92(16)). The notion of exclusivity and the reciprocal notion of non-encroachment by one level of legislature on the field of exclusive competence of the other gave rise to Lord Atkin's famous "watertight compartments" metaphor, where he wrote of Canadian federalism that "[w]hile the ship of state now sails on larger ventures and into foreign waters she still retains the watertight compartments which are an essential part of her original structure" (*Attorney-General for Canada v. Attorney-General for Ontario*, [1937] A.C. 326 (P.C.), at p. 354). Its modern application expresses a continuing concern about risk of erosion of provincial as well as federal competences (*Bell Canada (1988)*, at p. 766).
>
> *Canadian Western Bank v. Alberta,* 2007 SCC 22; [2007] 2 S.C.R. 3 at para. 34.

52. The Court recognized that when the pith and substance of a law, defined as its "dominant and most important characteristic", falls within the jurisdiction of the legislature that enacted it, that law may affect certain matters beyond the legislature's jurisdiction without necessarily being unconstitutional: "merely incidental effects will not disturb the constitutionality of an otherwise *intra vires* law" (citing *Global Securities* at para. 23).

> *Canadian Western Bank v. Alberta* at para. 28;
> Hogg Constitutional Law of Canada 5th ed. Vol. 1 pp. 15-7 to 15-10.

53. The pith and substance of the B.C. *Securities Act* as stated in *Pezim* and other cases is the goal of protection of the securities investor but other goals include capital

market efficiency and ensuring public confidence in the system. This is also the stated purpose of the Proposed Canadian *Securities Act* in s. 9, its pith and substance:

a) To provide protection to investors from unfair, improper or fraudulent practices;
b) To foster fair, efficient and competitive capital markets in which the public has confidence; and
c) To contribute, as part of the Canadian regulatory framework, to the integrity and stability of the financial system.

54. The doctrine of interjurisdictional immunity arises when the legislation of one level of government, in this case the federal government, impairs the "core" jurisdiction of the other level of government:

> It is when the adverse impact of a law adopted by one level of government increases in severity from "affecting" to "impairing" (without necessarily "sterilizing" or "paralyzing") that the "core" competence of the other level of government (or the vital or essential part of an undertaking it duly constitutes) is placed in jeopardy, and not before.
>
> *Canadian Western Bank v. Alberta* at para. 48.

55. The "core" of the provincial jurisdiction is its "basic, minimum and unassailable content". In the *Parsons* case, the "core" of the property and civil rights was identified as "regulate(ing) by legislation the contracts of a particular business or trade". This "core" was expansively described by Lebel and Deschamps J.J. for themselves and for Abella and Rothstein J.J., concurring judgement by Cromwell J., in the *Assisted Human Reproduction Act Reference*:

> The other two heads of power relied on by the Attorney General of Quebec are property and civil rights, and local matters. These two powers, which are often invoked together, are broad. The expression "civil rights" is now understood in association with fundamental freedoms. In the context of s. 92(13) of the *Constitution Act, 1867*, however, it refers to the field of private law ... More specifically, this head of power covers property, the status and capacity of persons, the family, matrimonial agreements, extracontractual and contractual liability, privileges, hypothecs, liberalities and successions, and prescription. ... Because of its broad scope, this head of power is often referred to as a partial residual jurisdiction.
>
> *Reference re Assisted Human Reproduction Act,* 2010 SCC 61 at para. 262;
> See also:*Canadian Western Bank v. Alberta* at para. 50;
> *Citizens Insurance Company of Canada v. Parsons* at pp.109-110.

56. With the greatest of respect, the Proposed Canadian *Securities Act* virtually replicates the B.C. *Securities Act* and so impairs the "core" of the provincial constitutional authority over property and civil rights. In the *Assisted Human Reproduction Act Reference* the majority looked to existing provincial legislation for an indication of impairment of the "core" of provincial jurisdiction over property and civil rights and matters of a merely local or private nature:

> In reviewing the effects of the impugned provisions, we observed that the provisions affect essential aspects of the relationship between a physician and persons who require assistance for reproduction. The fact that several of the impugned provisions concern subjects that are already governed by the *Civil Code of Québec*, the AHSSS, the *Medical Act* and the rules of ethics applicable to the professionals in question is an important indication that in pith and substance, the provisions lie at the very core of the provinces' jurisdiction over civil rights and local matters.
>
> *Reference re Assisted Human Reproduction Act* at para. 265.

57. The impugned provisions in this case found in the Proposed Canadian *Securities Act* likewise affect essential aspects of the relationship between the purchaser of securities and persons involved in the promotion, distribution and trading of securities which are extensively and minutely regulated by the British Columbia *Securities Act*, Regulations and directions and other guidance to those persons engaged in the securities industry from the securities commission. This case, it is submitted, is an easier case than the *Assisted Human Reproduction Act Reference* in which to find a massive and deliberate impairment of the core of provincial constitutional authority under ss. 92(13) and 92(16) of the *Constitution Act, 1867.*

58. Put another way, by legislating in the "core" of ss 92(13) and 92(16) there is an constitutionally unacceptable "overflow" of the exercise of the federal legislative power:

> In short, the fact that the impugned provisions have a significant effect on activities that generally fall within the exclusive jurisdiction of the provinces confirms that those provisions represent an overflow of the exercise of the federal criminal law power. At this point, it might be tempting to declare that the impugned provisions are unconstitutional on this basis alone, as the Quebec Court of Appeal did. But it is necessary to complete the analysis and consider whether the ancillary powers doctrine applies.
>
> *Reference re Assisted Human Reproduction Act,* at para. 267.

59. In order to complete the analysis in the present case, the Court must go on and consider whether or not the general branch of the trade and commerce power can "rescue" the Proposed Canadian *Securities Act*, which is otherwise unconstitutional as impairing the core of provincial constitutional authority over property and civil rights and matters of a merely local and private nature.

C. The Proposed Canadian Securities Act cannot be "Rescued" as an Exercise of the General Trade and Commerce Power in s. 91(2) of the *Constitution Act, 1867*

General Considerations Appropriate to the Interpretation and Application of the Trade and Commerce Power

60. It is vital to the maintenance of the federal nature of the Canadian Constitution's division of powers that judicial restraint be exercised in the interpretation and application of the federal trade and commerce power in s. 91(2) of the *Constitution Act, 1867*:

> By s. 91(2) of the British North America Act, authority with reference to "the regulation of Trade and Commerce" was assigned without qualification or explanation to Parliament. Without judicial restraint in the interpretation of this provision, the provincial areas of jurisdiction would be seriously truncated. It is not surprising, therefore, to find the Privy Council stating within 15 years of Confederation:
>
> > The words "regulation of trade and commerce," in their unlimited sense are sufficiently wide, if uncontrolled by the context and other parts of the Act, to include every regulation of trade ranging from political arrangements in regard to trade with foreign governments, requiring the sanction of parliament, down to minute rules for regulating particular trades.
>
> *Labatt Breweries of Canada Ltd. v. Attorney General of Canada,* [1980] 1 S.C.R. 914 per Estey J. at p. 935 quoting *Citizens Insurance Company v. Parsons* at A.C. at p. 112;
> *Bennett v. British Columbia (Securities Commission)* per Melnick J. at pp.154-155; Carswell at para. 38.

61. The Proposed Canadian *Securities Act* clearly prescribes "minute rules" for regulating the trade of trading in securities. If it were to be found to be in accordance with the general trade and commerce power by this Court, the provincial authority to exclusively

legislate in respect of property and civil rights within the province and matters of a merely local and private nature would be "seriously truncated". The Attorney General of Canada in his factum is not arguing that the Proposed *Act* can be supported in some clearly federal aspects on the trade and commerce power as being legislation in respect of federally incorporated companies or interprovincial and international trade. The Proposed Canadian *Securities Act* has no such limitations. It is intended to replace and supplant provincial *Securities Acts* in their entirety.

62. The dangers to the federal nature of our Constitution of an unbridled application of the trade and commerce was recognized as well in the *Canadian National Transportation* case by Dickson J., as he then was:

> The reason why the regulation of a single trade or business in the province cannot be a question of general interest throughout the Dominion, is that it lies at the very heart of the local autonomy envisaged in the Constitution Act, 1867. That a federal enactment purports to carry out such regulation in the same way in all the provinces or in association with other regulatory codes dealing with other trades or businesses does not change the fact that what is being created is an exact overlapping and hence a nullification of a jurisdiction conceded to the provinces by the Constitution.
>
> *Canada (Attorney General) v. Canadian National Transportation Ltd.,* [1983] 2 S.C.R. 206 at p. 267.

63. The federalism principle underlying the Canadian Constitution finds expression in the principle of subsidiarity, i.e. "that decisions are often best [made] at a level of government that is not only effective, but also closest to the citizens affected".

> *114957 Canada Ltee (Spraytech, Societe d' arrosage) v. Hudson (Town),* [2001] 2 S.C.R. 241 at para. 3;
> *Reference re Assisted Human Reproduction Act* at para. 273;
> *Canadian Western Bank v. Alberta* at para. 45;
> *Reference re Secession of Quebec,* [1998] 2 S.C.R. 217 at pp. 250-252.

64. The principle of subsidiarity strongly favours provincial regulation of trading in securities since the citizens who are affected are those members of the public in a province who invest in securities through an exchange in that province or otherwise. Those members of the public are directly affected by the maintenance of ethical standards by

persons who for a fee trade in securities on their behalf and arrange for purchase and sale of securities in the province. The citizens in a province are also directly affected by the maintenance of the integrity of the securities markets in that province.

Three of *General Motors* Five Indicia are Not Met by the Proposed Canadian *Securities Act*

65. In *General Motors,* this Court identified a non-exhaustive list of traits that tends to characterize general trade and commerce legislation. They are:

> i. The impugned legislation must be part of a general regulatory scheme;
> ii. The scheme must be monitored by the continuing oversight of a regulatory agency;
> iii. The legislation must be concerned with trade as a whole rather than a particular industry;
> iv. The legislation should be of such a nature that the provinces would be jointly and severally incapable of enacting;
> v. The failure to include one or more provinces in the legislative scheme would jeopardize the operation of the scheme in other parts of the country.
>
> *General Motors of Canada Ltd. v. City National Leasing Ltd.* at pp. 661-663;
>
> *Kirkbi AG v. Ritvik Holdings Ltd.*, 2005 SCC 65; [2005] 3 S.C.R. 302 at para. 17.

66. It is submitted that the Proposed Canadian *Securities Act* is legislation that only exhibits the first two traits identified in *General Motors*: presence of a regulatory scheme and oversight by a regulatory agency.

67. This Court has said that this list of traits is non-exhaustive and federal legislation need not meet all five criteria to be constitutionally valid. However, in light of the serious and complete usurpation of provincial jurisdiction over regulation of securities, the most exacting standard must be met. This is not a case of merely incidental effects by ancillary overlapping legislation. Rather, it is a case of complete replacement of valid provincial legislation by federal legislation which virtually replicates the provincial legislation. Although this Court in *General Motors* was concerned with an ancillary intrusion into

provincial jurisdiction it enunciated a sliding scale for justification of the federal intrusion that is appropriate to apply in this case:

> As the seriousness of the encroachment on provincial powers varies, so does the test required to ensure that an appropriate constitutional balance is maintained.
>
> *General Motors* at p. 671.

68. Accordingly, since the seriousness of the encroachment on provincial powers in this case is at or near the highest level, the test required to validate the Proposed Canadian *Securities Act* under the general trade and commerce power should be at or near the most exacting test. That is, it is submitted, the *Act* must possess all five of the *General Motors* indicia of validity and those indicia must be proven at least on the preponderance of probabilities and not simply be merely arguable. There is, it is submitted, no other way to preserve the appropriate balance between provincial powers over property and civil rights and matters of merely local and private nature and federal power over matters involving trade and commerce generally.

The Legislation is Concerned with a Particular Industry; not Trade as a Whole

69. As discussed earlier in this factum, decisions of the courts have been remarkably consistent in characterizing the aim of *Securities Acts* in general as providing protection to the public through a system of regulating and supervising the conduct of persons who engage in trading activities in securities within the province (paragraphs 34-39 *supra*).

70. In *Bennett v. British Columbia (Securities Commission),* the Petitioners who were being investigated by the Securities Commission for alleged insider trading of Doman Industries Limited securities argued that the application of the provincial insider trading provisions fell exclusively within federal jurisdiction over interprovincial/international trade and commerce under s. 91(2) of the *Constitution Act, 1867*. The DIL shares were only traded on the Toronto Stock Exchange and were traded by a computer system, CATS, over dedicated lines leased by the TSE from provincial and international telephone companies. CATS traders all over Canada and the world simply type in the information

relating to their transactions which are then completed when there is an offsetting entry elsewhere in Canada or the world. Melnick J. rejected the Petitioners' argument saying with reference to *General Motors*:

> Nor can it come to rest on the second branch (ie general trade and commerce power) because it does not meet a number of the five indicia set out by Chief Justice Dickson, notably, it is not concerned with trade as a whole rather than with a particular industry. It would be stretching the words of the Chief Justice out of all proportion to suggest that he could be referring to something as narrow as international trading on a system like CATS when he referred to the necessity of the legislation being "concerned with trade as a whole".
>
> *Bennet v. British Columbia (Securities Commission)* at p.156; Carswell at para. 40;
> *Pearson v. Boliden* at para. 62.

71. As was observed in the *Labatt's* case:

> Several indicia of the proper tests have evolved. For example, if contractual rights within the province are the object of the proposed regulation, the province has the authority. On the other hand, if regulation of the flow in extraprovincial channels of trade is the object, then the federal statute will be valid.
>
> *Labatt Breweries Canada Ltd. v. Attorney General of Canada* at p. 943.

72. While the Attorney General of Canada's factum extensively argues that the national and international character of capital markets brings the Proposed Canadian *Securities Act* within Parliament's general trade and commerce power (see paras. 42, 109-115 and 119-121), the Proposed *Act* contains no provisions specifically aimed at the "flow in extraprovincial channels of trade". Rather, the aim and focus of the Proposed *Act* is the same as the provincial statutes it is meant to replace: regulation of contractual rights within the province, those rights arising from contracts for the purchase and sale of securities within the province. Indeed, the purpose section of the Proposed *Act*, s. 9, confirms this:

> 9. The purposes of this Act are:
> (a) to provide protection for investors from unfair, improper or fraudulent practices ...

73. The types of matters which have been upheld as being "concerned with trade as a whole", regulation of trademarks and regulation of competition, have a generality and

breadth of application in the economy that far exceeds regulation of a specific type of business or industry such as trading in securities:

> This generality of application distinguishes the Act from the legislation which was found ultra vires in Labatt Breweries of Canada Ltd. v. Attorney General of Canada, [1980] 1 S.C.R. 914. In that case the legislation regulated a single trade or industry. As I noted earlier, the purpose of the Act is to ensure the existence of a healthy level of competition in the Canadian economy.
>
> *General Motors Canada Ltd. v. City National Leasing* at p. 678.
>
> The *Trade-marks Act* is clearly concerned with trade as a whole, as opposed to within a particular industry. There is no question that trade-marks apply across and between industries in different provinces.
>
> *Kirkbi AG v. Ritvik Holdings Ltd.* at para. 29.

74. Thus, it is submitted, that the Proposed Canadian *Securities Act* is not concerned with trade as a whole but rather is concerned with regulating contractual relationships and rights within a single business or industry, trading in securities.

The Proposed Canadian Securities Act is Not of Such a Nature that the Provinces are Jointly and Severally Incapable of Enacting

75. The Proposed Canadian *Securities Act* is a virtual replication of the provincial *Securities Acts* as they have been harmonized for the operation of the "passport system".

76. British Columbia has amended its *Securities Act* several times in recent years in order to be able to participate in the passport system. For instance, Bill 20 in 2006, amended definitions and substantive provisions to harmonize the wording with that in other provinces, repealed unnecessary regulatory provisions, enacted new provisions for consumer protection such as prohibitions on false or misleading statements, insider trading and similar misconduct, provided for civil liability for illegal insider trading and similar contraventions and authorized the enactment of subordinate legislation to further the process of harmonization (see Explanatory Notes to first reading of Bill 20). Bill 28 in 2007 continued the process of harmonization and improved securities laws in two other ways: (1) strengthening compliance enforcement powers; and (2) by protecting investors by

allowing the commission to order disgorgement of illegal profits and for victims to make claims for the disgorged money.

> *Securities Amendment Act*, 2006, Bill 20, 2006; S.B.C. 2006 c. 32;
> *Securities Amendment Act*, 2007, Bill 28, 2007; S.B.C. 2007 c. 37;
> Hansard, April 24, 2006, p.m. Vol. 9, No. 7 pp. 3888-3890;
> Hansard, October 16, 2007, a.m. Vol. 22 No. 6 pp. 8537-8540.

77. On second reading, the Attorney General explained the purpose behind Bill 20, which purpose was furthered a year later by Bill 28:

> The proposed changes to the B.C. Securities Act support the improvement of securities law in three key areas: (1) by implementing the passport system, (2) by harmonizing securities laws across the country and (3) by protecting investors. Once implemented, these changes will facilitate easier access to capital markets within Canada through a single-window passport system. This will allow market participants from British Columbia to be subject only to British Columbia requirements so they do not have to comply with the equivalent requirements in other provinces.
>
> . . .
>
> The council of ministers responsible for securities met in February in Victoria and reconfirmed their commitment to principles of the memorandum of understanding they signed in September 2004. That memorandum introduced a passport system. Nine provinces and three territories have now agreed to implement the passport system. The passport system streamlines the securities regulations by allowing issuers and registrants to deal exclusively with the regulator in their principal jurisdiction, thereby providing a single window of access to capital markets in 12 Canadian provinces and territories based generally on their home jurisdiction's regulation.
>
> Ongoing development of harmonized, streamlined and simplified securities laws offers further opportunities for enhancing regulation of capital markets. As evidenced by the proposed amendments and the progress of the passport system implementation, the ministerial council, the British Columbia government and the B.C. Securities Commission remain committed to working together to continue to improve securities regulation and investor protection in Canada.
>
> Hansard, April 24, 2006, p.m. Vol. 9, No. 7, pp. 3888-3890.

78. The Attorney General of Alberta has filed extensive evidence with respect to cooperative efforts that have been made to harmonize securities regulation and to create the passport system. The Attorney General of British Columbia agrees with and adopts the submission of the Attorney General of Alberta that the facts he has presented demonstrate

that the provinces, acting severally under their own legislation and acting jointly and cooperatively through the harmonization efforts of the CSA, have demonstrated that they are eminently capable of legislating effectively in this field. The most convincing proof, however, is that the Proposed Canadian *Securities Act* substantially duplicates existing provincial securities laws.

> Affidavit of William S. Rice, Q.C., June 29, 2010; R.R. Vol. XVIII, paras. 78-111, pp. 28-39, Exhibit 8, pp. 213-256;
> Affidavit of Dennis Gartner, July 7, 2010; R.R. Vol. XIX, paras. 25-35, pp. 233-235, R.R. Vol. XX, Exhibits "L" and "M", pp. 219-271;
> Supplemental Affidavit of William S. Rice, Q.C., November 28, 2010; R.R. Vol. XXIII, paras. 10-37, pp. 3-12.

79. *General Motors* requires that the Attorney General of Canada must show that the Proposed Canadian *Securities Act* is of such a nature that provinces are incapable of enacting similar regulatory legislation acting jointly or severally. That means the legislation must be shown to be such that the provinces are "constitutionally incapable" of passing such legislation.

> *General Motors of Canada Ltd. v. City National Leasing Ltd.* at p. 680.

80. "Constitutionally incapable" was explained by Dickson J., as he then was, in *Canadian National Transportation* as involving legislation that if not enacted by the federal government would lead to a gap in the constitution:

> If there is no federal power to enact a competition policy, then Canada cannot have a competition policy. The consequence of a denial of federal constitutional power is therefore, in practical effect, a gap in the distribution of powers.
>
> *Canada (Attorney General) v. Canadian National Transportation Ltd.* at p. 278 quoting Hogg and Grover, The Constitutionality of the Competition Bill (1977), 1 Can. Bus. L.J. 197 at p. 200;
> *General Motors of Canada Ltd. v. City National Leasing Ltd.* at p. 683.

81. Such a situation would violate the principle of exhaustive distribution of legislative powers underlying the Canadian Constitution. For that reason, there simply cannot be a gap in the distribution of powers and so if one level of government is incapable under the Constitution of legislating with respect to a particular matter, the other level of government

must as a matter of constitutional law be capable of legislating with respect to that matter (see paragraph 96, *infra*).

82. The corollary to the *General Motors* incapacity requirement is that the burden of persuasion on the Attorney General of Canada is very onerous: he must show that on the evidence and as a matter of law the provinces, acting jointly or severally, are incapable of regulating the securities market place where there is an extra-provincial dimension to the trading in securities in that market place. It is submitted that on the evidence before the Court this onerous burden has not been met.

83. Thus, it is submitted that the provinces are not jointly and severally incapable of enacting legislation such as the Proposed Canadian *Securities Act.*

The Failure to Include one or More Provinces in the Legislative Scheme would not Jeopardize the Operation of the Scheme in Other Parts of the Country

84. The last of the *General Motors indicia* for validating federal legislation that "overflows" into exclusive provincial constitutional territory is that the failure to include one or more provinces in the legislative scheme would jeopardize the operation of the scheme in other parts of the country

85. The Proposed Canadian *Securities Act* is not mandatory; it is an opt-in scheme. Sections 250 and 251 of the draft *Act* provide that the *Act* in its entirety, sections 1-10 and Parts 1 to 14, does not apply (save for some provisions that establish criminal offences, provide for document production and uniform definitions) in a province unless that province has been designated by the Governor General in Council. That designation may not be made unless the province consents in writing to the *Act* applying to that province.

86. Hence, the *Act* itself establishes a patchwork quilt of regulation across the country of one or more designated provinces with conceivably a number of provinces outside continuing with their passport system of harmonized securities enforcement. The *Act*, on

its face, does not meet the *General Motors* requirement that failure to include one or more provinces would jeopardize the operation of the scheme in other parts of the country.

87. Indeed, the Proposed *Act* fails the *Lymburn v. Mayland* description of the general trade and commerce power: "general regulation of trade and commerce **affecting the whole dominion**". The general trade and commerce power cannot be used to establish piecemeal schemes of regulation that do not apply uniformly throughout the whole country.

88. There has not been a single case where federal legislation has been upheld under the general trade and commerce power where that legislation did not apply uniformly across the country. The characteristic of uniform application was emphasized in *General Motors*:

> As I noted earlier, the purpose of the Act is to ensure the existence of a healthy level of competition in the Canadian economy. The deleterious effects of anti-competitive practices transcend provincial boundaries. Competition is not an issue of purely local concern but one of crucial importance for the national economy.
>
> *General Motors of Canada Ltd. v. City National Leasing Ltd at* p. 678;
> See also *Kirkbi AG v. Ritvik Holdings Inc.* at para. 29; *Labatt Brewing Co. v. Canada* at pp. 943-944; *Canada (Attorney General) v. Canadian National Transportation Ltd.* at pp. 276-277.

89. Thus, it is submitted, that the operation of the Proposed Canadian *Securities Act* is not jeopardized by the failure to include one or more of the provinces in its scheme of regulation.

D. Creation of a Single Federal Regulator to Regulate the Sale of Securities and Regulate Persons and Entities Involved in the Trading of Securities can be Accomplished as an Exercise of Federal Provincial Cooperation

90. As already noted, the position of British Columbia is that it supports the concept of a single federal securities regulator so long as the federal legislation establishing that single regulator respects the division of powers under ss. 91 and 92 of the *Constitution Act, 1867*.

91. While, as submitted above, the means adopted by Canada in the Proposed Canadian *Securities Act* does not respect the division of powers under ss. 91 and 92 of the *Constitution Act, 1867*, that does not mean that creation of a single federal securities regulator and a harmonized securities regulatory structure is impossible under the Constitution of Canada. Indeed, the contrary is the case.

92. There can be no question that the federal government has the constitutional authority under its trade and commerce power to regulate the interprovincial, and to some extent the international, aspects of trading in securities:

> Construing therefore the words "regulation of trade and commerce" by the various aids to their interpretation above suggested, they would include ...regulation of trade in matters of inter-provincial concern ...
>
> *Citizens Insurance Company of Canada v. Parsons* at p. 113.

93.. The regulation of matters related to international aspects of trading in securities is qualified ("to some extent") since Canada suffers many of the same limitations to the application of its law outside the country's borders as the provinces face in application of their laws outside of their boundaries. While there is not a "within the province" corresponding limitation to Canada's legislative reach, there is a *de facto* limitation in that Canada's securities laws are only effectively enforceable within the country.

94. It is difficult to definitively define what matters fall within Canada's power to regulate inter-provincial and international trading in securities; at a minimum it must include the "transmission of information and the capital itself, (which) move(s) instantaneously and often with minimal cost from coast to coast to coast" (factum of the Attorney General of Canada at paragraph 96).

95. Once the information is received in a province or the capital has been paid over in the province for the purchase of the securities listed for sale on the exchange or the securities market there, the Attorney General of British Columbia says it is equally clear that a province has the exclusive authority to regulate those aspects of trading in securities

that occur within that province, both as matters of property and civil rights and matters of a merely local and private nature.

96. The principle of exhaustive distribution of legislative powers means that acting cooperatively and conjointly the provincial governments and the federal government, each legislating within its proper sphere of constitutional authority, can completely regulate all matters related to trading in security, whether they be characterized as local and intra-provincial, interprovincial or international. The continuing vitality of the principle of exhaustive distribution of legislative powers was recently affirmed in the *Same Sex Marriage Reference:*

> The principle of exhaustiveness, an essential characteristic of the federal distribution of powers, ensures that the whole of legislative power, whether exercised or merely potential, is distributed as between Parliament and the legislatures: *Attorney-General for Ontario v.. Attorney-General for Canada*, [1912] A.C. 571 (P.C.) at p. 581; and *Attorney-General for Canada v.. Attorney-General for Ontario*, [1937] A.C. 326 (P.C.). In essence, there is no topic that cannot be legislated upon, though the particulars of such legislation may be limited by, for instance, the *Charter*.
>
> *Reference re Same-Sex Marriage,* 2004 SCC 79; [2004] 3 S.C.R. 698 at para. 34;
> See also: Hogg, Constitutional Law of Canada at pp. 12-4 to 12-5, 15-46 to 15-47.

97. As the Attorney General of Canada notes in his factum, the solution to the inability of the provinces to regulate interprovincial and international trade, and we add to the inability of the federal government to regulate property and civil rights and matters of a merely local and private nature, "has been found in complex federal-provincial marketing plans that have been constructed with interlocking federal and provincial laws." Such a scheme was upheld in the *Agricultural Products Marketing Act Reference*, although the Court did strike down one aspect of that scheme whereby the federal government attempted to grant to provincial board the power to impose levies on local marketing of natural products. In striking down that aspect Laskin C.J. had this to say:

> It is one thing for the Parliament of Canada to legislate in relation only to interprovincial and export trade with consequential effects upon the local or intraprovincial market, or for a provincial Legislature to legislate in relation to

> local and intraprovincial trade with consequential, with unplanned even if foreseen effects upon extraprovincial trade; it is a different thing for the Parliament of Canada to legislate to embrace expressly interprovincial, export and local or intraprovincial trade and to do so, as here, by expressly recognizing the separate sources of legislative power for the extraprovincial and intraprovincial regulatory authority. Assuming that there may be situations where the case for overall federal regulatory authority is so overwhelming as to justify sweeping into a federal scheme all phases of a marketing plan, including local transactions, s. 2(2) of the federal Act is not posited on any such basis.
>
> *Reference re Agricultural Products Marketing Act,* [1978] 2 S.C.R. 1198 at p. 1232.

98. Pigeon J.'s Reasons for Judgement provides positive encouragement for this form of federal-provincial cooperation in areas of divided jurisdiction:

> Those quotas are fixed by the provincial board so the total will equal what the plan, established under the federal Act, provides for Ontario in respect of extraprovincial trade in addition to what comes under intraprovincial trade. The Board is properly empowered by provincial authority to regulate the interprovincial trade and it has delegated authority from the federal in respect of the extraprovincial trade. I fail to see what objection there can be to overall quotas established by a board thus vested with dual authority, unless it is said that our constitution precludes any businesslike marketing of products in both local and extraprovincial trade except under a federal assumption of power, something which I think, is directly contrary to the basic principle of the B.N.A. Act.
>
> *Reference re Agricultural Products Marketing Act* at p. 1297.

99. In the *Agricultural Products Marketing Reference,* the delegation was from Parliament to local or provincial natural products marketing boards. The delegated powers involved regulating marketing of natural products in extra-provincial trade in a like fashion to those powers of regulating marketing of natural products conferred on them by the provincial legislatures. With respect to regulation of trading in securities, those provinces that wished to participate in a scheme involving a single federal securities regulatory body could make provision within their respective harmonized *Securities Acts* for delegation of provincial powers. The powers delegated to the single federal regulatory body would be those ordinarily exercised by the provincial securities commission under the *Securities Act* in force in the province. So, under this scheme, the federal legislation then would establish and empower the federal regulator with powers in respect of matters related to the

103. It is not surprising that several suggestions for a single securities regulator contemplated either federal provincial cooperation and interlocking federal and provincial legislation or uniform provincial legislation adopted by the provinces by reference:

a) CANSEC Proposal of the Ontario Securities Commission, December 1967; R.R. Vol. II pp. 29-39;

b) Atlantic Premiers' Proposal June 1994; R.R. Vol. II pp. 50-57;

c) Crawford Panel Final Paper –Blueprint for a Canadian Securities Commission June 7, 2006; R.R. Vol. II pp 106-118.

104. It is not surprising since these methods of establishing a single securities regulator respect the division of powers in the Constitution of Canada. Thus, if this Court finds that the federal Parliament lacks constitutional authority to enact the Proposed Canadian *Securities Act* as we say it should, it is open to the federal government and the provinces to work together to create a harmonized securities regulatory scheme under the administration of a single federal regulator which does respect the constitutional division of powers. Answering the constitutional question in the negative is not the end of the matter; it is simply the beginning.

interprovincial and international aspects of trading in securities and would empower that federal regulator to accept powers from participating provinces.

100. Given that such a scheme would respect the division of powers and would operate much like the passport system does today, the reluctance of the provinces to opt in would likely be nowhere near as pronounced as it is with the present unilaterally imposed Proposed Canadian *Securities Act* which is before this Court.

101. This Court commented on the unilateral imposition of federal standards in legislation in the *Assisted Human Reproduction Act Reference*:

> As we mentioned above, federal and provincial powers are co-ordinate and not subordinate. In s. 68, Parliament has given the federal government a legal tool to impose its own standards on the regulation of assisted human reproduction. Provincial regulatory action will be tolerated only if the provinces in question adhere to the federal scheme. The federal government alone is to determine whether the two schemes are consistent. Subordinating the statutes and regulations in question in this way would be possible only if the federal legislation were itself valid because it was anchored in a specific federal power ...
>
> *Assisted Human Reproduction Act Reference* at para. 272.

102. The cases are replete with judicial statements in support of federal-provincial cooperative administrative and/or legislative action to achieve common goals in areas as diverse as the environment, health, marketing schemes and harbours. For instance, in *LaFarge* this Court said:

> A successful harbour in the 21st century requires federal provincial cooperation. The courts should not be astute to find ways to frustrate rather than facilitate such cooperation where it exists if this can be done within the rules laid down by the Constitution.
>
> *British Columbia (Attorney General) v. Lafarge Canada Inc.*, 2007 SCC 23, [2007] 2 S.C.R. 86 at para. 86;
> *Federation des producteurs de volailles du Quebec v. Pelland,* 2005 SCC 20, [2005] 1 S.C.R. 292 at para. 38;
> *R. v. Hydro-Quebec,* [1997] 3 S.C.R. 213 at paras. 86 and 131;
> *Canadian Western Bank v. Alberta* at para. 42;
> *Vander Zalm v. British Columbia (Finance),* 2010 BCSC 1320 per Bauman C.J. at paras. 35-37.

PART IV- COSTS

105. The Attorney General of British Columbia does not seek costs nor should costs be awarded against him.

PART V- ORDER SOUGHT

106. The Attorney General of British Columbia respectfully requests that the question referred to the Court by the Governor in Council on May 26, 2010, be answered: "No".

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Dated at Victoria, B.C., this 7 day of February, 2011.

George Copley QC,
Counsel for the Intervener
The Attorney General of British Columbia

Nancy E. Brown,
Counsel for the Intervener
The Attorney General of British Columbia

PART VI - TABLE OF AUTHORITIES

PART VII – STATUTES, REGULATION, RULES, BY-LAWS "IN BOOK OF AUTHORITIES VOLUME I AND II"

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