

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. 2010-667, dated May 26, 2010

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Part I – Legislative and Background Facts

A. The Canadian Bankers Association

1. The CBA represents the Canadian banking industry. Its 51 member banks are substantial securities issuers and among the largest participants in national and international capital markets.
2. The CBA submits that the Canadian *Securities Act* falls within Parliament's power over general trade and commerce affecting Canada as a whole. The Act is addressed at a national economic concern: to assure the integrity and competitiveness of Canada's capital markets and to create a comprehensive and coordinated national securities enforcement regime. The Act also meets all five *General Motors indicia* of general trade and commerce.¹

B. The Federal Government's Policy Decision to Propose the Canadian *Securities Act*

3. After extensive study and broad consultation, the *Wise Persons' Committee* (2003), the *Crawford Panel on a Single Canadian Securities Regulator* (2006), and the *Expert Panel on Securities Regulation* ("Hockin Panel") (2009) each concluded that our fragmented system of provincial securities regulation is a national economic concern that warrants a national securities regulator.² These independent expert studies identified six key problems with the current system:
 1. ***Capital and securities markets are increasingly national and international.*** Provincial regulation no longer matches the national and international scope of capital markets activities or the firms regulated.³ This Court has noted that "the securities market has been an international one for years,"⁴ that "[c]apital markets and securities transactions

¹ *General Motors of Canada Ltd. v. City National Leasing*, [1989] 1 S.C.R. 641.

² These studies inform the constitutional analysis with the Act's background and context: see *Global Securities Corp. v. British Columbia (Securities Commission)*, [2000] 1 S.C.R. 494, ¶28; *Ward v. Canada (Attorney General)*, [2002] 1 S.C.R. 569, ¶8; *Law Society of British Columbia v. Mangat*, [2001] 3 S.C.R. 113, ¶60.

³ Committee to Review the Structure of Securities Regulation in Canada ("Wise Persons' Committee"), *It's Time* (2003) ("WPC Report") pp. vii, 4-6; Reference Record ("RR"), II, pp. 62, 70-72; Crawford Panel on a Single Canadian Securities Regulator, *Blueprint for a Canadian Securities Commission* (2006), ("Crawford Report"), p. 3; RR, II, p. 111; Expert Panel on Securities Regulation, *Final Report and Recommendations* (2009) ("Hockin Report"), p. 5; RR, II, p. 128; see also Report of Frank Milne ("Milne Report"), ¶12.1: RR, I, pp. 217-218; Report of Michael Trebilcock ("Trebilcock Report"), ¶¶7, 37: RR, I, pp. 227, 247; Reply Report of Michael Trebilcock, ¶7: RR, I, pp. 280-281; Report of Marion G. Wrobel ("Wrobel Report"), ¶¶10-18: RR, XXVIII, pp. 11-14.

⁴ *Global Securities Corp.*, above, note 2, ¶28; *Multiple Access Ltd. v. McCutcheon*, [1982] 2 S.C.R. 161, p. 173 ("the interprovincial and indeed international character of the securities industry"), p. 174 ("that the market is national in scope has long been acknowledged"); *General Motors*, above, note 1, p. 679 ("major regulation of the Canadian economy has to be national [...] The relative unimportance of provincial boundaries has become progressively more obvious [...] Improved communications and transportation have increased the mobility of [...] capital").

are becoming increasingly international,”⁵ and has acknowledged “the clearly interjurisdictional nature of securities regulation in general.”⁶

2. ***Provincial securities regulation does not provide for the regulation of systemic risk (i.e., the risk of the entire financial system failing).*** Currently, provincial securities regulation does not provide for the regulation of systemic risk to the broader financial system. The Wise Person’s Report warned that this problem “could severely impact Canada’s ability to respond to a serious financial system shock;”⁷ while the Hockin Report (which was written during the largest market meltdown since the Great Depression) expressed concern that “there is no national entity accountable for the stability of our national capital markets.”⁸ It is now widely recognized that the “domino effect” of a spreading financial contagion can cause the global financial system to collapse like a house of cards.⁹
3. ***Multiple provincial regulators increase regulatory costs and discourage investment.*** Regulatory fragmentation, overlap, and duplication inevitably increase regulatory costs and discourage investment, and partially explain Canada’s higher cost of capital over other countries.¹⁰ Global investment banks admit that they regularly delay or limit securities offerings in Canada in favour of countries with more streamlined regulatory regimes.¹¹
4. ***Multiple provincial regulators have slow regulatory responses.*** Because securities policy in Canada requires consensus among 13 autonomous provincial and territorial regulators, national policies cannot be developed quickly in response to the changing global marketplace.¹² The Hockin Report found that this regulatory gridlock “makes Canada vulnerable to market and reputational risks.”¹³
5. ***There is inadequate enforcement and inconsistent investor protection across Canada.*** Currently, fraudsters banned in one province simply move province and continue operating.¹⁴ Canada has a “securities enforcement mosaic,” where “each provincial commission has its own priorities, depth of resources, and level of expertise. Resources are spread thin and the benefits of coordination are diluted.”¹⁵ The Crawford Report expressed “profound concern about ineffective enforcement,” and stated pointedly that this is a “domestic and international embarrassment for Canada.”¹⁶

⁵ *Committee for the Equal Treatment of Asbestos Minority Shareholders v. Ontario (Securities Commission)*, [2001] 2 S.C.R. 132, ¶62.

⁶ *Global Securities*, above, note 2, ¶43.

⁷ WPC Report, p. 32: RR, II, p. 97.

⁸ Hockin Report, pp. 2, 5, 11: RR, II, pp. 125, 128, 134.

⁹ Trebilcock Report, ¶26: RR, I, p. 240; Milne Report, ¶1.2: RR, I, pp. 179-180; Wrobel Report, ¶¶6, 39-53: RR, XXVIII, pp. 9, 25-31.

¹⁰ WPC Report, p. viii: RR, II, p. 63; Crawford Report, p. 2: RR, II, p. 110; Hockin Report, p. 2: RR, II, p. 125; see also Trebilcock Report, ¶¶7, 49: RR, I, pp. 227, 253-4; Wrobel Report, ¶¶27-29: RR, XXVIII, pp. 19-20.

¹¹ Wrobel Report, ¶29: RR, XXVIII, p. 20 (referring to evidence of Goldman Sachs before the Hockin Panel).

¹² WPC Report, pp. viii, 31: RR, II, pp. 63, 96; see also Trebilcock Report, ¶61: RR, I, pp. 38-40; Trebilcock Reply Report, ¶25: RR, I, pp. 291-2; Wrobel Report, ¶¶27-29: RR, XXVIII, pp. 19-20.

¹³ Hockin Report, p. 40: RR, II, p. 163.

¹⁴ WPC Report, pp. 11, 28: RR, II, pp. 77, 93; Hockin Report, p. 2: RR, II, p. 125; see also Trebilcock Report, ¶48: RR, I, pp. 251-2; Affidavit of Stephen White sworn May 21, 2010, ¶9: RR, I, 271; Wrobel Report, ¶¶30-33: RR, XXVIII, pp. 21-23.

¹⁵ Wrobel Report, ¶31: RR, XXVIII, pp. 21-22.

¹⁶ Crawford Report, p. 2: RR, II, p. 110.

6. *Canada lacks a national voice on the international stage.* Canada is the only major industrialized country on earth without a national securities regulator. The Wise Persons' Report described Canada as "an international outlier," and noted that "of the more than 100 countries (including 20 with federal political structures) represented at IOSCO [the International Organization of Securities Commissions], only Canada and Bosnia-Herzegovina lack a national or supra-national regulator."¹⁷ Foreign regulators express concern about "who to call" when dealing with Canadian issues.¹⁸ While provincial securities regulators can perhaps be Canada's *ear* on the international stage, there is nobody who is Canada's *voice*.¹⁹ As a result, recently, both the IMF and the OECD urged Canada to create a national securities regulator.²⁰

Part II – Argument

A. Five Applicable Principles of Constitutional Interpretation

4. First, because the Constitution is a living tree subject to progressive interpretation, it must accommodate modern business realities, including the globalization of capital markets and the advent of systemic risk.²¹
5. Second, the Act benefits from a presumption of constitutionality: the challengers must show that the Act is outside Parliament's jurisdiction,²² and if faced with two plausible interpretations, the Court should choose the interpretation that supports its validity.²³
6. Third, the Court must not adjudicate the law's wisdom or efficacy.²⁴
7. Fourth, the evidentiary standard is the "rational basis" test: Parliament need only show a "rational basis" for the Act under heads of federal legislative power.²⁵ The Court must not adjudicate the law's underlying "social and economic policy," as this involves "governmental

¹⁷ WPC Report, pp. vii, 9, 11, 40; RR, II, pp. 62, 75, 77, 105; Crawford Report, p. 2; RR, II, p. 110; Trebilcock Report, ¶¶64-66; RR, I, pp. 42-43.

¹⁸ Wrobel Report, ¶26; RR, XXVIII, p. 18.

¹⁹ Wrobel Report, ¶55; RR, XXVIII, p. 31.

²⁰ Hockin Report, p. 41; RR, II, p. 164.

²¹ *Canadian Western Bank v. Alberta*, [2007] 2 S.C.R. 3, ¶23; *Reference re Employment Insurance Act ss. 22 and 23*, [2005] 2 S.C.R. 669, ¶9; *Ward*, above, note 2, ¶30; see also P.W. Hogg, *Constitutional Law of Canada* (5th ed. supp.), sec. 15.9(f), pp. 15-47 to 15-51; *Consolidated Fastfrate Inc. v. Western Canada Council of Teamsters*, [2009] 3 S.C.R. 407, ¶89, Binnie J. dissenting in the result (emphasis added). See also *Reference re Same-Sex Marriage*, [2004] 3 S.C.R. 698, ¶22.

Reference re Firearms Act (Can.), [2000] 1 S.C.R. 783, ¶25.

²³ *Siemens v. Manitoba (Attorney General)*, [2003] 1 S.C.R. 6, ¶33.

²⁴ *Ward*, above, note 2, ¶¶18, 22, 26; *Reference re Firearms Act*, above, note 22, ¶¶18, 57; Hogg, above, note 21, vol. 1, pp. 15-18 to 15-19.

²⁵ *Re Anti-Inflation Act*, [1976] 2 S.C.R. 373, p. 423; see also *Reference re Assisted Human Reproduction Act*, 2010 SCC 61, ¶50, McLachlin C.J. ("reasonable basis" standard); *Provincial Court Judges' Assn. of New Brunswick v. New Brunswick (Minister of Justice)*; *Ontario Judges' Assn. v. Ontario (Management Board)*; *Bodner v. Alberta*; *Conférence des juges du Québec v. Québec (Attorney General)*; *Minc v. Québec (Attorney General)*, [2005] 2 S.C.R. 286, ¶¶35-37; Hogg, above, note 21, vol. 2, pp. 60-17 to 60-18.

and legislative judgment.”²⁶ The rational basis test is thus a deferential standard.²⁷ Professor Hogg notes that it “erects a presumption of constitutionality that is *exceedingly difficult* for the challenger of legislation to overcome. *It enables a court to resolve conflicting evidence without the need to make a definitive ruling on the conflict.*”²⁸

8. The rational basis test is especially appropriate where the evidence before the Court concerns “legislative facts”, which (unlike adjudicative facts) are predictions about the effect of legal rules and are imbued with policy considerations. Such matters are “invariably subject to dispute.”²⁹ As Alberta’s expert justly notes about the federal securities regulator debate, “[r]easonable views have been advanced on both sides of the argument and there is no consensus.”³⁰ The Court’s task is thus not to adjudicate who is “right”; it is rather to assess whether Parliament has a rational basis for adopting the Act.³¹

9. Fifth, the double aspect doctrine is critical in this case. “Canada’s federal system is a flexible one,” in which “the Constitution accords a degree of operational space” to each level of government.³² “It is rare that all the subjects dealt with in a statute fall entirely under a single head of power.”³³ Thus, the Court “should favour, where possible, the ordinary operation of statutes enacted by *both* levels of government. In the absence of conflicting enactments of the other level of government, the Court should avoid blocking the application of measures which are taken to be enacted in furtherance of the public interest.”³⁴ “Double aspect” permits concurrent application of federal and provincial laws: both levels of government can adopt valid legislation on a single subject depending on the various ‘aspects’ of the ‘matter’.³⁵ Thus, Parliament and the provinces can enact *virtually identical laws* for similar purposes,³⁶ because,

²⁶ *Re Anti-Inflation Act*, *id.*, p. 423.

²⁷ *Provincial Court Judges’ Assn. of New Brunswick v. New Brunswick (Minister of Justice)*, above, note 25, ¶¶30, 35.

²⁸ Hogg, above, note 21, vol. 2, sec. 60.2(f), pp. 60-17 (emphasis added).

²⁹ *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199, ¶79; *R. v. Spence*, [2005] 3 S.C.R. 458, ¶58; see also Mr. Justice Ian Binnie, “Judicial Notice: How Much Is Too Much?”, Law Society of Upper Canada, *Special Lectures 2003: The Law of Evidence*, pp. 543-567, at pp. 553-554.

³⁰ Rebuttal Report of Eric Spink, Q.C., dated September 29, 2010 on behalf of Her Majesty the Queen in Right of Alberta, ¶8, footnote 7: RR, XXI, pp. 277-278.

³¹ See, to similar effect, Ian B. Lee, “Balancing and Its Alternatives: Jurisprudential Choice, Federal Securities Legislation and the Trade and Commerce Power” (2010) 50 Can. Bus. L.J. 72, pp. 73, 98.

³² *Westbank First Nation v. British Columbia Hydro and Power Authority*, [1999] 3 S.C.R. 134, ¶¶18, 33.

³³ *Reference re Employment Insurance Act*, above, note 21, ¶8.

³⁴ *Canadian Western Bank*, above, note 21, ¶37 (emphasis in original).

³⁵ *Id.*, ¶30.

³⁶ *Multiple Access*, above, note 4, p. 165 (upholding under double aspect doctrine “*very similar sections* in provincial and federal statutes which deal with the use of confidential information by insiders” (emphasis

in a federal system, duplication between federal and provincial laws is the “ultimate in harmony.”³⁷ This fosters cooperative, win-win federalism, and avoids forcing the court “to kill one [law] and let the other live.”³⁸ And, because the “power of one level of government to legislate in relation to one aspect of a matter *takes nothing away* from the power of the other level of government to control another aspect within its own jurisdiction,”³⁹ the constitutionality of a federal law “*must be determined without heed*” to provincial legislation.⁴⁰

10. Securities regulation has both provincial and federal aspects. In *Multiple Access*, Dickson J. held that “securities legislation *clearly* has a double character,”⁴¹ supported by “ample precedent.”⁴² Indeed, this Court has noted that “[t]here are a myriad of overlapping regulatory jurisdictions governing securities transactions.”⁴³ To date, courts have recognized *provincial aspects* of securities regulation under “property and civil rights” (s. 92(13))⁴⁴ and the “incorporation of companies with provincial objects” (s. 92(11));⁴⁵ and *federal aspects* under criminal law (s. 91(27))⁴⁶ and the incorporation of companies with other than provincial objects (s. 91, opening words).⁴⁷ The pivotal question is thus whether *another* federal aspect is in relation to general trade and commerce. To date, this Court has left this question open.⁴⁸

added); at p. 175 “*almost identical provisions*” (emphasis added); at p. 180, “*a statute* may be characterized as coming within a federal as well as a provincial head of power” (emphasis added); and at p. 189, noting that the federal and provincial insider trading provisions upheld in *Smith v. The Queen*, [1960] S.C.R. 766 were “*virtually identical in substance*” (emphasis added); Hogg, above, note 21, vol. 1, sec. 15.5(c), pp. 15-11 to 15-12; Patrick J. Monahan, *Constitutional Law* (2nd ed., 2002), p. 121.

³⁷ *Multiple Access*, *id.*, p. 190.

³⁸ *Id.*, p. 182.

³⁹ *Reference re Employment Insurance Act*, above, note 21, ¶8 (emphasis added); see also Hogg, above, note 21, vol. 1, p. 20-7, footnote 37 (“[u]nder the double aspect doctrine, an expanded federal power need not entail a diminished provincial power”).

⁴⁰ *Multiple Access*, above, note 4, p. 175 (emphasis added); *General Motors*, above, note 1, pp. 681-682; see also Monahan, above, note 36, p. 288 (“In terms of constitutional principle, the validity of federal legislation should not depend on the enactment or repeal of a related provincial law”).

⁴¹ *Multiple Access*, above, note 4, p. 181 (emphasis added), citing Jacob Ziegel, “Constitutional Aspects of Canadian Companies,” in *Canadian Company Law* (1967), chapter 5, at p. 167.

⁴² *Multiple Access*, *id.*, p. 182; see also *Global Securities*, above, note 2, ¶46; *Mangat*, above, note 2, ¶49.

⁴³ *Committee for the Equal Treatment of Asbestos Minority Shareholders*, above, note 5, ¶62.

⁴⁴ *Multiple Access*, above, note 4, p. 185 (civil remedy for insider trading); *Global Securities*, above, note 2, ¶40 (power to seize documents in the province to assist in the administration of the securities laws of another jurisdiction); *Lymburn v. Mayland*, [1932] A.C. 318 (P.C.) (securities dealers to be honest and of good repute).

⁴⁵ *Multiple Access*, *id.*, p. 174 (civil remedy for insider trading); *Esso Standard (Inter-America) Inc. v. J.W. Enterprises Inc.*, [1963] S.C.R. 144, p. 153 (power of compulsory acquisition of minority shares).

⁴⁶ *Smith*, above, note 36, p. 781 (false prospectus offence), cited approvingly in *Multiple Access*, *id.*, p. 182.

⁴⁷ *Multiple Access*, *id.*, p. 174 (civil remedy for insider trading), citing *Citizens Insurance Co. of Canada v. Parsons* (1881), 7 App. Cas. 96, at p. 117 (P.C.); *Attorney-General for Manitoba v. Attorney-General for Canada*, [1929] A.C. 260 (P.C.) (capacity of federal company to raise capital through share subscription).

⁴⁸ *Multiple Access*, *id.*, pp. 173-174, Dickson J., and pp. 224-225, Estey J. dissenting; *Global Securities*, above, note 2, ¶46.

11. In answering this question, two points should be remembered. First, although provincial securities laws have a long history and have been interpreted broadly, this does not preclude Parliament from exercising its legitimate constitutional authority. Chief Justice Lamer cautioned that “[t]here is no doctrine of *laches* in constitutional division of powers doctrine; one level of government's failure to exercise its jurisdiction, or failure to intervene when another level of government exercises that jurisdiction, cannot be determinative of the constitutional analysis.”⁴⁹ He noted that “[t]he fact that constitutional jurisdiction remains unexercised for long periods of time or is improperly exercised for a long period of time [...] does not mean that there is thereby created some sort of constitutional squatters rights.”⁵⁰ Second, as Dickson J. noted in *Multiple Access*, “provincial securities acts have been given a wide constitutional recognition,” partly because there has been “no federal securities law,” and invalidating provincial law “would create a potential gap in the existing regulatory scheme that might be exploited by the unscrupulous.”⁵¹

B. The Act Is Valid Under The General Branch of the Trade and Commerce Power

(a) General trade and commerce affecting Canada as a whole

12. This Court has preserved a constitutional balance between property and civil rights in the province (s. 92(13)) and federal trade and commerce (s. 91(2)), by limiting trade and commerce to two branches (international/interprovincial and general trade and commerce),⁵² and by identifying five *indicia* or hallmarks (which are “not exhaustive” but provide a “preliminary checklist”) of general trade and commerce.⁵³ The general trade and commerce power gives Parliament *concurrent authority* with the provinces to regulate purely *intraprovincial* trade.⁵⁴

13. This Court has also taken a purposive approach to general trade and commerce. The *General Motors* criteria help to identify whether “what is being addressed in a federal enactment is genuinely *a national economic concern* and *not just a collection of local ones*.”⁵⁵ The federal anti-combines legislation was *intra vires* because the “regulation of competition is so clearly *of*

⁴⁹ *Ontario Hydro v. Ontario (Labour Relations Board)*, [1993] 3 S.C.R. 327, p. 357.

⁵⁰ *Id.*, adopting Reed J.'s statements in *Alberta Government Telephones v. Canadian Radio-television and Telecommunications Commission*, [1985] 2 F.C. 472 (T.D.), p. 488.

⁵¹ *Multiple Access*, above, note 4, pp. 183-184, citing P. Anisman and P. Hogg, “Constitutional Aspects of Federal Securities Legislation” in *Proposals for a Securities Market Law for Canada* (1979), vol. 3, chap. III, pp. 144-145. See also Hogg, above, note 21, sec. 21.10(a), p. 21-24 (“In these cases where the provincial legislation has been applied to operations which, overall, are interprovincial, the court may have been influenced by the absence of federal securities legislation”).

⁵² *General Motors*, above, note 1, p. 660; *Kirkbi AG v. Ritvik Holdings Inc.*, [2005] 3 S.C.R. 302, ¶¶15-17.

⁵³ *General Motors*, *id.*, pp. 661, 662, 689; *Kirkbi*, *id.*, ¶16.

⁵⁴ *General Motors*, *id.*, pp. 682, 692-693; Hogg, above, note 21, vol. 1, sec. 20.3, p. 20-16.

⁵⁵ *Id.*, p. 663 (emphasis added).

national interest,”⁵⁶ while the *Trade-marks Act* likewise showed a “*concern* with trade in general.”⁵⁷ Professor Monahan notes that the “overriding consideration” is “whether the underlying economic problem being addressed is truly national in scope.”⁵⁸

(b) The Act is in relation to general trade and commerce affecting Canada as a whole

14. Viewed purposively, the Canadian *Securities Act* is undoubtedly directed at a national economic concern: to assure the integrity and competitiveness of Canada’s capital markets and to create a comprehensive and coordinated enforcement regime (as stated in the Preamble and s. 9). In addition, the Act meets the five *General Motors indicia*.

1. The Act contains a regulatory scheme

15. The Act contains a comprehensive regulatory scheme, including mandated and prohibited market conduct requirements (ss. 16(2), 76-130), the Chief Regulator’s investigation powers (ss. 131-138), and broad enforcement mechanisms such as public interest orders (ss. 139-152), civil remedies (ss. 169-219), and criminal offences and penalties (ss. 153-166).

2. The regulatory scheme is monitored by the continuing oversight of a regulatory agency

16. The Act will be enforced by a Chief Regulator of the Canadian Securities Regulatory Authority’s Regulatory Division (ss. 22-25, 131-138).

3. The Act is concerned with trade as a whole

17. The Act is concerned with trade as a whole (rather than a particular industry or commodity).⁵⁹ It will regulate the capital markets as a single integrated unit, rather than as a collection of separate local enterprises, ensuring healthy capital markets throughout the Canadian economy. The Act identifies a national economic concern (“*capital markets affect the prosperity of all Canadians*”); outlines Parliament’s national economic policy to address that concern (“*to effectively protect and promote Canadian interests internationally*” and to enhance “*the integrity and stability of Canada’s financial system*”); and establishes Parliament’s national policy tool (“*a single Canadian securities regulator, supported by a comprehensive statutory and regulatory regime that applies across Canada*”). In short, like competition matters, capital markets transcend provincial boundaries and have assumed national scope and importance.

⁵⁶ *Id.*, p. 681 (emphasis added).

⁵⁷ *Kirkbi*, above, note 51, ¶28 (emphasis added).

⁵⁸ Monahan, above, note 36, pp. 293-294.

⁵⁹ *General Motors*, above, note 1, pp. 678, 680; *Kirkbi*, above, note 51, ¶29.

18. Nor can it be said that the Act is concerned with a particular industry or commodity. While one may speak loosely or colloquially of the “securities industry,” what this Act does is regulate the raising of capital (through issues of debt, equity, and other securities) and secondary market trading across all industries and sectors of the Canadian economy.⁶⁰ It targets this national economic concern because securities markets “form an integral part of the infrastructure of the Canadian economy,” and capital is the economy’s “lifeblood.”⁶¹ As David Johnston and Kathleen Doyle Rockwell explain in their leading treatise: “if the securities markets begin to fail and investors begin to lose confidence in them, then every other market in the country is affected. ... Capital markets provide the financing that is necessary for all kinds of companies to provide the goods and services for what we like to think about as a developed society”.⁶²

4. The Act is of a nature that provinces jointly or severally would be constitutionally incapable of enacting

19. In *General Motors* and *Kirkbi*, the Court addressed the fourth and fifth criteria in conjunction.⁶³ In *General Motors*, Dickson C.J. approached these issues in two ways. First, he found that the provinces were constitutionally incapable of addressing the economic problem targeted by the federal legislation (a healthy level of competition in the Canadian economy as a whole), even though he acknowledged that provinces have concurrent authority to regulate competition. The consequence of denying federal constitutional power, Dickson C.J. said, would be a “gap in the distribution of legislative powers.”⁶⁴ Second, he held that limiting anti-combines legislation to interprovincial trade alone and allowing the provinces to regulate intraprovincial trade (as Quebec had argued) would undermine the effectiveness of the federal legislative

⁶⁰ Lee, above, note 31, p. 94 (“The proposed Securities Act regulates capital raising by issuers across the entire economy, as well as secondary market transactions in the securities of all issuers. It is not a collection of individualized schemes relating to the raising of capital for ventures in particular industries.”); P. Anisman and P.W. Hogg, “Constitutional Aspects of Federal Securities Legislation,” in *Proposals for a Securities Market Law for Canada* (1979), vol. 3, 135, at pp. 165-166 (“A federal securities act would be directed not at a particular business or trade in the provinces but rather at the capital-raising function by issuers throughout Canada and would be designed to facilitate the allocational efficiency of the primary market, the capital-raising mechanism, by increasing investor confidence in the securities market generally.”); Monahan, above, note 36, p. 296 (“Federal securities legislation would also be concerned with trade in general (*i.e.*, the capital raising function of the securities markets in general.”); Franco Barbiero, “Federalizing Canada’s Securities Regulatory Regime: Insights from the Australian Experience” (2008-2009), 24 N.J.C.L. 89, p. 111 (“The extensive breadth of market participants involved in the public issuance and trade in securities suggests that securities regulation is indeed concerned with ‘trade as a whole’ and does not apply to a ‘particular industry’”).

⁶¹ Robert Leckey and Eric Ward, “Taking Stock: Securities Markets and the Division of Powers” (1999), 22 Dalhousie L.J. 250, p. 272.

⁶² David Johnston, C.C. and Kathleen Doyle Rockwell, *Canadian Securities Regulation* (4th ed., 2006), p. 5, citing D. Boies, “Integrity in the Capital Markets,” Goodwin Seminar (2004) 28 Nova L. Rev. 261 at pp. 261-262.

⁶³ *General Motors*, above, note 1, pp. 678-683; *Kirkbi*, above, note 51, ¶¶28-29.

⁶⁴ *General Motors*, *id.*, p. 683.

scheme. He found that “[b]ecause regulation of competition is so clearly of national interest and because competition cannot be successfully regulated by federal legislation which is restricted to interprovincial trade, the Quebec argument must fail.”⁶⁵ As Professor Monahan notes, Dickson C.J. focussed “on how to ensure that the federal law will operate effectively, as opposed to the somewhat different question of whether a particular matter could be regulated piecemeal by the provinces enacting dovetailing legislation.”⁶⁶ The Court in *Kirkbi* similarly found that the *Trade-marks Act* would be ineffective without national coverage.⁶⁷

20. The Canadian *Securities Act* meets the fourth criterion under either approach. First, because the provinces are constitutionally incapable of addressing comprehensively several aspects of the national economic problem targeted by the federal legislation, denying federal authority would create a gap in the distribution of powers: (1) the provinces have no constitutional authority to legislate in respect of interprovincial or international trade;⁶⁸ (2) their jurisdiction is limited territorially to property and civil rights “in the province,” a restriction that is “fundamental to our system of federalism;”⁶⁹ (3) they cannot establish a national regulator with the authority to speak or make commitments for Canada internationally;⁷⁰ (4) they cannot integrate securities regulation into the broader Canadian financial regulatory framework (*i.e.*, they cannot regulate systemic risk to the Canadian financial system as a whole);⁷¹ and (5) they cannot enact criminal law in relation to securities, an increasingly serious problem since effective criminal enforcement is critical for investor confidence. Just as diverse competition policies would undermine a common Canadian economic market, diverse provincial securities laws and policies (which persist despite harmonization efforts) undermine a common Canadian capital market.

⁶⁵ *Id.*, p. 681.

⁶⁶ Monahan, above, note 36, pp. 295-6 (emphasis added).

⁶⁷ *Kirkbi*, above, note 51, ¶29 (“[d]ivided provincial and federal jurisdiction could mean that the provincial law could be changed by each provincial legislature. This could result in unregistered trade-marks that were more strongly protected than registered trade-marks, undermining the efficacy and integrity of the federal Parliament’s *Trade-marks Act*”).

⁶⁸ See, for example, *Attorney-General for Manitoba v. Manitoba Egg and Poultry Association*, [1971] S.C.R. 689, pp. 701-703 (province could not regulate the interprovincial trade in eggs); *Burns Foods Ltd. v. Attorney General for Manitoba*, [1975] 1 S.C.R. 494, pp. 502-503 (province could not regulate interprovincial trade in hogs). While a provincial law may have incidental extraprovincial effects, its dominant purpose cannot be to regulate interprovincial or international trade: *Global Securities*, above, note 2, ¶38. See Hogg, above, note 21, vol. 1, sec. 13.3(d), pp. 13-10 to 13-15.

⁶⁹ *Unifund Assurance Co. v. Insurance Corp. of British Columbia*, [2003] 2 S.C.R. 63, ¶¶50-51; Hogg, *id.*, vol. 1, sec. 13.3(d), pp. 13-13 to 13-14.

⁷⁰ Hogg, *id.*, vol. 1, sec. 11.6, pp. 11-19 to 11-20.

⁷¹ For example, banking, which is the other main source of systemic risk for the Canadian financial system as a whole, is under Parliament’s exclusive jurisdiction: *Constitution Act, 1867*, s. 91(15).

21. Second, limiting the Act to interprovincial and international trade would undermine the effectiveness of the federal scheme. Because each provincial law could be changed by a provincial legislature at will, market participants would be unevenly protected across Canada, thereby damaging the effectiveness of federal legislation aimed at protecting the health of the Canadian capital market as a whole. A patchwork scheme would also undermine the creation of a responsive national securities policy to deal with urgent emerging issues and systemic risk.

5. The failure to include one or more provinces in the legislative scheme would jeopardize its successful operation in other parts of the country

22. In *General Motors* and *Kirkbi*, the Court found that patchwork schemes excluding certain provinces would jeopardize the successful operation of the federal enactment. In both cases, there was a “necessity for national coverage.”⁷² As noted, the same is true for the proposed Act.

23. Nor does the Act’s opt-in feature (s. 250) render it unconstitutional. The mere *possibility* that some provinces might not participate cannot deny Parliament’s constitutional authority: federal legislation can apply in some provinces but not in others.⁷³ The opt-in feature just means that Parliament has chosen to implement its goal of a national scheme through a process that respects provincial autonomy and promotes cooperative federalism. This policy choice to implement the federal legislative scheme progressively cannot undermine its constitutionality.⁷⁴ Otherwise, the Act would be unconstitutional *even if* every province chose to opt-in (since it would still not be mandatory). Nor can the Act’s constitutionality depend on whether a province chooses to opt in: it cannot be unconstitutional today, because two provinces choose not to opt-in, but constitutional tomorrow, if they change their minds and decide to participate.

24. Finally, upholding this Act will not undercut other provincial powers. This Court has expressly “refrained from trying to define the possible scope of such powers [as trade and commerce] in advance and for all time,” and instead, has proceeded “with caution on a case-by-case basis.”⁷⁵ In the future, as in the past, each case will fall to be decided on its merits.

⁷² *Kirkbi*, above, note 51, ¶28.

⁷³ *Canadian Egg Marketing Agency v. Richardson*, [1998] 3 S.C.R. 157, ¶61 (“Federal legislation, or cooperative federal-provincial legislative schemes, may also apply only in some provinces”); e.g., the *Personal Information Protection and Electronic Documents Act*, S.C. 2000, c. 5 does not apply in the private sector in Quebec, Alberta, or British Columbia.

⁷⁴ *Siemens*, above, note 23, ¶15 (“Unless the legislation is otherwise unconstitutional, the particular means chosen by the legislature cannot be used as a basis to declare it invalid”).

⁷⁵ *Canadian Western Bank*, above, note 21, ¶43; *General Motors*, above, note 1, p. 663 (trade and commerce requires “a careful case by case analysis”).

Part III – Order Sought

25. The CBA respectfully asks the Court to declare that Parliament has the constitutional authority to enact the proposed Canadian *Securities Act*. It also asks for leave to present oral argument at the hearing of this reference.

January 7th, 2011



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