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

FACTUM OF THE ATTORNEY GENERAL FOR SASKATCHEWAN, INTERVENER

Filed pursuant to Rule 42 of the *Rules of the Supreme Court of Canada*

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PART I

OVERVIEW AND FACTS

A. Overview

1. By any measure, Canada's economy weathered the recent global financial crisis better than most, if not all, of the industrialized nations in the Western World. Through the collaborative efforts of both the federal and provincial levels of government, Canada managed to stimulate the economy, protect jobs and counter the effects of the worst recession since the Second World War. The nation's financial system suffered only modest repercussions in large measure because of close regulation of its banking system and other areas of the financial sector. Capital markets including the trading in securities were subject to strict regulatory monitoring including a co-ordinate system of securities regulation achieved through the co-operation of the thirteen provincial and territorial securities commissions.

2. In 2010, responding to critics who have long lamented an apparent lack of regulatory cohesion respecting the trading in securities, and the absence of a single securities regulatory agency, the Government of Canada unveiled the Proposed Canadian *Securities Act*. However, rather than introduce this draft statute in the House of Commons, the Governor in Council chose to refer the entire draft to this Honourable Court for an advisory opinion as to its constitutionality.

3. Saskatchewan intervenes in this *Reference* because the issues which it raises are critical to the proper operation of the division of federal and provincial legislative powers in the 21st Century Canadian federation. Matters pertaining to securities generally are wide-

ranging and fall predominantly within provincial legislative authority. Yet, respecting the Proposed Canadian *Securities Act*, Parliament has principally invoked the general branch of the trade and commerce power located in section 91(2) of the *Constitution Act, 1867* to authorize a comprehensive regulatory regime regulating all aspects of securities, most of which relate to subject matters falling within provincial legislative power, most notably under section 92(13) of the *Constitution Act, 1867*. Admittedly, uniform national standards in economic matters such as the trading in securities may be a desirable end. However, in our mature federal system with its division of legislative powers it is not always possible to attain this end unilaterally through the enactment of a federal law.

Constitution Act, 1867, ss. 91(2), 92(13) and (16).

4. Saskatchewan submits that the comprehensive regulatory regime set out in the Proposed Canadian *Securities Act* represents an unprecedented extension of the general branch of the trade and commerce power. Were this Honourable Court to endorse such an unrestrained exercise by Parliament of its powers under section 91(2), it would seriously erode the scope of various heads of provincial jurisdiction, most notably sections 92(13) and (16) of the *Constitution Act, 1867*, and alter the balance between the two orders of government.

B. Facts

5. Saskatchewan intervenes in this appeal as of right pursuant to sub-section 53(5) of the *Supreme Court Act*, and the Order of the Chief Justice of Canada dated June 14, 2010.

Saskatchewan filed with the Registrar of this Honourable Court a formal Notice of Intention to Intervene dated July 8, 2010.

Supreme Court Act, R.S.C. 1985, c. S-26.

Notice of Intention to Intervene, dated July 8, 2010.

6. Saskatchewan accepts the Statement of Facts set out at paragraphs 7, 8 and 41 of the Factum of the Attorney General of Canada. In the course of the argument which follows Saskatchewan may identify when necessary specific factual assertions made by Canada, Alberta, Québec and other interveners which it accepts.

Factum of the Attorney General of Canada, at pp. 3-4, paras. 8 and 9; p. 18, para. 41.

7. Respecting paragraph 41, Saskatchewan acknowledges that it is one of the provinces participating co-operatively in the work of the Canadian Securities Transition Office. However, Saskatchewan's participation should not be taken as tacit approval of Canada's jurisdictional assertions advanced in this *Reference* for sustaining the constitutionality of the Proposed Canadian *Securities Act*.

PART II

POINT IN ISSUE

8. The issue upon which Saskatchewan intervenes is set out in P.C. 2010-667 dated May 26, 2010 and reads:

> Is the annexed Proposed Canadian *Securities Act* within the legislative authority of the Parliament of Canada?
>
> P.C. 2010-667 dated May 26, 2010; Reference Record, Volume I, Tab 3, p. 3.

9. The constitutional question does not identify a particular head of federal legislative power. Yet, Canada asserts that apart from a few sections, the Proposed Canadian *Securities Act* (the "Proposed *Act*") is constitutionally valid under the general branch of the trade and commerce power found in section 91(2) of the *Constitution Act, 1867*. Canada asserts further that a few provisions of the Proposed *Act*, especially sections 158 to 165, represent a legitimate exercise by Parliament of its exclusive jurisdiction under section 91(27) of the *Constitution Act, 1867* to enact criminal law.

Factum of the Attorney General of Canada, at p. 20, para. 45.

10. Saskatchewan submits that the constitutionality of the Proposed *Act* cannot be sustained under the general branch of the trade and commerce power. As this is the sole basis upon which Canada attempts to defend its constitutionality, Saskatchewan submits that in the context of this *Reference* the constitutional question set out in P.C. 2010-667 should be answered "no".

11. Saskatchewan concedes that those provisions of the Proposed *Act* which Canada chooses to defend under its criminal law power, namely sections 158 to 165, are *intra vires* Parliament.

12. Saskatchewan goes further and submits that Parliament is not constitutionally competent to enact unilaterally a comprehensive statute covering all aspects of securities regulation. However, it does not follow that in our federal system it is impossible to establish a single national securities regulatory agency.

13. In the final section of this factum, Saskatchewan will submit that such an objective is possible. Yet, to achieve it in a constitutionally acceptable manner respectful of well-established provincial legislative jurisdiction requires the joint exercise by both levels of government of their respective legislative authority over matters pertaining to securities regulation. The administration of these various powers would be delegated to a single regulator which may resemble the proposed Canadian Securities Regulatory Authority created in section 14 of the Proposed *Act*. However, its jurisdictional sources and its structural organization and supervision would be much different.

PART III

ARGUMENT

A. Federalism and the Requirement of Balance

14. At bottom, this *Reference* concerns the appropriate balance between federal and provincial heads of legislative power found in sections 91 and 92 of the *Constitution Act, 1867*. Should the constitutionality of the Proposed *Act* be confirmed, Saskatchewan submits the balance in our federal system will be significantly compromised. Federalism is the lynchpin of Canada's system of governance. In *Reference re Secession of Quebec*, this Court identified federalism as a fundamental organizing principle informing constitutional interpretation and "the lodestar by which the courts have been guided." The Court elaborated as follows:

> The principle of federalism recognizes the diversity of the component parts of Confederation, and the autonomy of provincial governments to develop their societies within their respective spheres of jurisdiction. The federal structure of our country also facilitates democratic participation by distributing power to the government thought to be most suited to achieving the particular societal objective having regard

> to this diversity. The scheme of the *Constitution Act, 1867*, it was said in *Re the Initiative and Referendum Act*, [1919] A.C. 935 (P.C.), at p. 942, was
>
> > not to weld the Provinces into one, nor subordinate Provincial Governments to a central authority, but to establish a central government in which these Provinces should be represented, entrusted with exclusive authority only in affairs in which they had a common interest. Subject to this each Province was to retain its independence and autonomy and to be directly under the Crown as its head.
>
> *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, at p. 251, para. 58.

15. Canada relies almost exclusively on the general branch of the trade and commerce power found in section 91(2) of the *Constitution Act, 1867* in its attempt to sustain the constitutionality of the *Act.* Saskatchewan submits that when assessing the merits of Canada's arguments, this Court must strive to preserve the balance of powers set out in sections 91 and 92 of the *Constitution Act, 1867.* Indeed, since Confederation the courts have repeatedly emphasized that both federal and provincial heads of power must be interpreted in a balanced fashion. Courts have frequently expressed this concern when dealing with the federal trade and commerce power and the federal criminal law power. This is because both subject matters are capacious and carry the greatest potential to absorb the grants of jurisdiction to the provinces enumerated in section 92 of the *Constitution Act, 1867.*

Constitution Act, 1867, ss. 91(2), (27), 92.

16. In *Canadian Western Bank*, this Court underscored the need for a balanced interpretative approach in 21st Century federalism disputes. Writing for the majority, Binnie and LeBel JJ. admonished that "the task of maintaining the balance of powers in practice falls primarily to governments, and constitutional doctrine must facilitate, not undermine

what this Court has called 'co-operative federalism' ". Indeed, balance and co-operation are essential to the continued viability of a mature, modern federation.

> *Canadian Western Bank Alberta*, [2007] 2 S.C.R. 3, at p. 26, para. 24.

17. Canada argues the Proposed *Act* is needed to ensure an efficient and timely national response to fluctuations in capital markets, as well as enabling the federal government to speak with one voice on the international stage. However, Saskatchewan submits these are essentially arguments about efficiency. Very recently, in *Reference re Assisted Human Reproduction Act* a majority of this Court rejected similar arguments advanced by Canada in the context of the criminal law power, noting that "administrative efficiency alone cannot be relied upon to justify legislative action by Parliament". This reasoning is apposite here for while efficiency in the financial system is desirable, the comprehensive and unilateral federal legislative action contemplated by the *Act* runs roughshod over the division of federal and provincial legislative powers enumerated in the *Constitution Act 1867*, and defies the primacy of the federal principle in constitutional interpretation.

> *Reference re Assisted Human Reproduction Act (Canada) (sub. nom. Québec (Procureur général) v. Canada (Procureur general)*, 2010 SCC 61 at para 244 per LeBel and Deschamps JJ. and at para. 287 per Cromwell J.
>
> See also: Noura Karazivan and Jean-Francois Gaudreault-DesBiens, "*On Polyphony and Paradoxes in the Regulation of Securities Within the Canadian Federation*" (2010), 49 Can. Bus. L.J. 1, at pp. 20-21 ("*Karazivan et al.*")

B. Introduction to The Pith and Substance Inquiry

18. It is trite to state that in all federalism disputes, the starting point is the "pith and substance" inquiry. Over the past 141 years, a large body of jurisprudence has been developed explaining — sometimes in excruciating detail — the intricacies and nuances of this inquiry. In *Reference re Firearms Act*, this Court summarized the essential elements of this inquiry as follows:

> The first task is to determine the "pith and substance" of the legislation. To use the wording of ss. 91 and 92, what is the "matter" of the law? What is its true meaning or essential character, its core? To determine the pith and substance, two aspects of the law must be examined: the purpose of the enacting body, and the legal effect of the law.
>
> *Reference re Firearms Act*, [2000] 1 S.C.R. 783, at para. 16.

19. The Court went on to describe the second stage of the inquiry this way:

> Having assessed the pith and substance or matter of the law, the second step is to determine whether that matter comes within the jurisdiction of the enacting legislature. We must examine the heads of power under ss. 91 or 92 of the *Constitution Act, 1867* and determine what the matter is "in relation to".
>
> *Reference re Firearms Act*, *supra*, at para. 25.

20. In *Canadian Western Bank*, Binnie and LeBel JJ. reminded us that the division of powers analysis is neither tidy nor, to quote this Court in the *Firearms Reference*, "an exact science". They explained:

> The "pith and substance" doctrine is founded on the recognition that it is in practice impossible for a legislature to exercise its jurisdiction over a matter effectively without incidentally affecting matters within the jurisdiction of another level of government. . .
>
> When problems resulting from incidental affects arise, it may often be possible to resolve them by a firm application of the pith and substance

> analysis. The scale of the alleged incidental effects may indeed put a law in a different light so as to place it in another constitutional head of power.
>
> *Canadian Western Bank*, *supra*, at pp. 28-9, paras. 29, 31. (Emphasis added, citation omitted.)
>
> *Reference re Firearms Act, supra*, at p. 802, para. 26.

21. Saskatchewan submits that both the purpose of the law and the means used by the law to achieve this purpose must be analyzed from this perspective. Thus, the question presented in this *Reference* may be formulated as follows: overall, and taking the purpose and means into account, can the Proposed *Act* be characterized as primarily a matter falling under the general branch of the trade and commerce power? Saskatchewan submits that it cannot.

C. How the Trade and Commerce Power Should Be Applied in this *Reference*

22. To begin, there exists a venerable line of judicial precedent – much of it from this Court – holding that comprehensive legislation regulating securities falls squarely within provincial legislative authority over property and civil rights found in section 92(13) of the *Constitution Act, 1867*. The seminal precedent remains *Lymburn v. Mayland*, a pre-World War II decision of the Judicial Committee of the Privy Council. To date, *Lymburn*'s holding has never been seriously disputed.

> *Lymburn v. Mayland*, [1932] A.C. 318.
>
> See also: *Karazivan et al.*, *supra*, at pp. 8-10.

23. This Court has consistently recognized the legitimacy of provincial legislative jurisdiction over securities, even where the exercise of this power may have extra-provincial

or international aspects. It is true that in *Multiple Access Ltd. v. McCutcheon*, the Court expressly declined to consider "the constitutional right of Parliament to enact a general scheme of securities legislation pursuant to its power to make laws in relation to inter-provincial and export trade and commerce". Saskatchewan submits, however, Dickson J.'s *obiter* observation signals only that he was alive to the possibility of such an argument being advanced in the future. If anything can be divined from it, it is that such a legal regime likely would not be sustainable under the general branch of the trade and commerce power.

> *Multiple Access Ltd. v. McCutcheon*, [1982] 2 S.C.R. 161, at p. 173 per Dickson J. (as he then was).
>
> See also: *Global Securities Corporation v. British Columbia (Securities Commission)*, [2000] 1 S.C.R. 494.

24. Saskatchewan submits, therefore, when applying the general branch of the trade and commerce power in this *Reference*, this Court must constantly be mindful of the well-established jurisprudence supporting extensive provincial jurisdiction over securities regulation in order to "preserve sufficient predictability in the operation of the division of powers".

> *Canadian Western Bank, supra*, at p. 26, para. 24.

25. The general branch of the trade and commerce power has received scant judicial attention or elucidation. For example, it was only in *General Motors of Canada v. City National Leasing* that this Court speaking through Dickson C.J. settled upon five criteria courts should utilize when determining if an impugned federal law qualified as a valid exercise of Parliament's general trade and commerce power under section 91(2). These indicia are:

- The law must be part of a general regulatory scheme;

- The scheme must be monitored by the continuing oversight of a regulatory agency;
- The law must be concerned with trade as a whole rather than a particular industry;
- The law should be of a nature that the provinces jointly or severally would be constitutionally incapable of enacting, and
- The failure to include one or more provinces or localities in a legislative scheme would jeopardize the successful operation of the scheme in other parts of the country.

> *General Motors of Canada v. City National Leasing*, [1989] 1 S.C.R. 641, pp. 661-662.

26. In *General Motors*, Dickson C.J. characterized these five criteria as a "preliminary checklist of characteristics" and not an "exhaustive list of traits" of valid federal legislation. He observed further that neither the "presence [nor] absence of any of these five criteria [is] necessarily determinative". Yet in language which Saskatchewan submits is especially significant in the context of this *Reference*, Dickson C.J. concluded his analysis of the general legal principles with this admonition:

> On any occasion where the general trade and commerce power is advanced as a ground of constitutional validity, a careful case-by-case analysis remains appropriate.
>
> *General Motors of Canada*, *supra*, at p. 671.

27. Saskatchewan submits that it should not be forgotten the application of these criteria comes only at the second stage of the *General Motors* analysis, not the first. The first stage investigates "whether the impugned provision can be seen as encroaching on provincial powers and, if so to what extent". The extent of the federal intrusion is a key component of the balancing test which may follow. The greater the intrusion into provincial legislative jurisdiction, the heavier the burden on the federal government to justify this intrusion through the application of the five criteria

> *General Motors of Canada*, *supra*, at p. 672.

28. Clearly, context is critical. As a consequence, Saskatchewan submits that a stringent application of the *General Motors* litany is warranted in this *Reference*. At the very least, this demands that all five criteria must be satisfied supported by a strong evidentiary foundation. Saskatchewan submits this is so for three reasons.

See: *Karazivan et al.*, *supra*, at p. 14.[1]

29. First, this *Reference* represents a radical departure from those cases where the general branch of the trade and commerce power has hitherto been applied. At issue in both *General Motors* and *McDonald v. Vapor Canada Ltd.*, where the genesis of the five-part test is found, was the constitutionality of a single civil remedial provision located within a federal statute the constitutional legitimacy of which was otherwise beyond reproach. Contrastingly, in this *Reference* it is the constitutionality of the entire Proposed *Act* that is disputed. Indeed, this is the first time this Court has been asked to measure a complete statutory regime against the *General Motors* criteria. The contextual difference could not be starker.

General Motors of Canada, *supra*.

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[1] *Karazivan et al.* go so far as to argue that elements of a subsidiarity analysis should to be incorporated into the *General Motors* test. Their reformulated test is as follows:

1. The impugned legislation is part of a general regulatory scheme.
2. The scheme is monitored by the continuing oversight of a regulatory agency.
3. The legislation is concerned with trade as a whole rather than with a particular industry.
4. It is demonstrated, on a balance of probabilities and based on qualitative (including comparative) evidence, and where available, quantitative evidence that action at the federal level would produce tangible benefits compared with action at the provincial levels and, more precisely:
   (a) that the problem that the legislation seeks to address has supra-provincial aspects which cannot be satisfactorily and efficiently regulated by provinces acting jointly or severally;
   (b) that the objectives sought by the legislation cannot be satisfactorily achieved by the provinces acting jointly or severally and, by reason of the scale or effects of the legislation can better be achieved by Parliament; and
   (c) That the failure to include one or more provinces or localities in the legislative scheme will jeopardize the successful operation of the scheme in other parts of the country.
5. Where appropriate and subject to the need for proper enforcement, the legislation provides provinces with alternative ways to achieve the objectives of its measures or incorporates provincial input in the management and enforcement of the scheme; and
6. The scope of the legislation does not exceed what is necessary to achieve the objectives sought and does not disproportionally upset the balance of power between the federal and provincial governments.

See: *Karazivan et al.* at pp. 31-32.

McDonald v. Vapor Canada Ltd., [1977] 2 S.C.R. 134.

30. Second, the Proposed *Act*'s intrusion or its "overflow" into provincial legislative jurisdiction is substantial. Indeed, Canada acknowledges that the Proposed *Act* duplicates many if not most provisions found in provincial securities statutes. Saskatchewan submits this degree of intrusion dictates that the *General Motors* test be applied rigorously. Even Dickson C.J. in *General Motors* accepted this when he stated: "As the seriousness of the encroachment of provincial powers varies so does the test required to ensure that an appropriate constitutional balance is maintained."

General Motors of Canada, *supra*, at p. 671.

See also: *Reference re Assisted Human Reproduction Act*, *supra,* at para. 193 per LeBel and Deschamps JJ. and at paras. 286-287 per Cromwell J.

31. Canada relies upon the double aspect doctrine to justify this duplication. Saskatchewan submits that in the context of this *Reference* reliance upon this doctrine is ill-founded and adopts the arguments of the Attorney General of Manitoba ("Manitoba") on this issue.

Factum of the Attorney General of Manitoba.

32. Third, Saskatchewan submits that for purposes of this *Reference* the low evidentiary threshold of "simple rationality" as applied by this Honourable Court in *Reference re Anti-Inflation Act* is not adequate and adopts Manitoba's arguments on this issue. In addition, Saskatchewan makes the following submissions.

Factum of the Attorney General of Manitoba.

Reference re Anti-Inflation Act, [1976] 2 S.C.R. 373

33. Saskatchewan submits it is not entirely accurate to assert that in all federalism disputes the effectiveness of the impugned legislative regime at issue is irrelevant. In *Kitkatla Band*, for example, LeBel J. stated that "[e]ven in a division of powers case, rights must be asserted and their factual underpinnings demonstrated." This becomes significant in this *Reference* as a fundamental aspect of the *General Motors* analysis concerns the incapacity of provinces to regulate a specific trade matter efficiently. Indeed, Saskatchewan endorses the following comments of Professor Jean LeClair in his recent article: *'Please Draw Me a Field of Jurisdiction': Regulating Securities, Securing Federalism*:

> According to the reasoning expounded in *Kitkatla Band*, the factual underpinnings of a claim of inefficiency must therefore be established by the party alleging it. And to paraphrase LeBel J., because of this assertion of inefficiency, the nature and quality of the evidence offered will have to be assessed and discussed. Such a claim will have to be established on a balance of probabilities, by persuasive evidence. Even more so in a context where, once proven, such inefficiency will endow Parliament with jurisdiction to legislate over matters that traditionally fell within the provinces' exclusive sphere of power.
>
> Jean LeClair, *'Please Draw Me a Field of Jurisdiction': Regulating Securities, Securing Federalism* (2010), 51 S.C.L.R. (2d) 555, at pp. 593-594 ("*LeClair*"). (Emphasis added.)
>
> *Kitkatla Band v. British Columbia (Minister of Small Business, Tourism and Culture)*, [2002] 2 S.C.R. 146, at para. 46.

D. Identifying the Pith and Substance of the Proposed *Act*

34. An orthodox pith and substance analysis begins by identifying both the purpose and effect of the impugned legislation. Canada submits that the Preamble to the Proposed *Act* as well as the purpose clause found in section 9, offer considerable guidance as to its purpose. Saskatchewan acknowledges that a purpose clause or "a statement of legislative intent is often a useful tool", provided it can be demonstrated that the impugned statutory

regime "corresponds to what is required to address the stated purpose". A clear and discernable linkage between the avowed purpose of the impugned legislation and "the machinery created by [it]" is, therefore, essential.

> *Ontario (Attorney General) v Chatterjee*, [2009] 1 S.C.R. 624, at para. 17.
>
> Factum of the Attorney General of Canada, at pp. 22-24, paras. 49-53.

35. Saskatchewan submits that when engaging in this exercise a reviewing court must attempt to identify the purpose "as precisely as possible" and eschew "vague characterizations of the pith and substance of the provisions". As LeBel and Deschamps JJ. stated in the *Reference re Assisted Human Reproduction Act*:

> A vague or general characterization of the pith and substance could have perverse effects on more than one level: first on the connection with an exclusive power and then on the extent of the overflow. For example, a finding that a provision is in pith and substance in relation to health or to the environment would be problematic. Those subjects are so vast and have so many aspects that, depending on the angle from which they are approached, they can support the exercise of legislative powers of either level of government. It is therefore necessary to take the analysis further and determine what aspect of the field in question is being addressed. Logically, except in cases of highly specific powers, the pith and substance of a provision or a statute will be less general than that of the power itself. If the characterization of the pith and substance of a provision is too general, there is a danger of its being superficially connected with a power of the other level of government. Moreover, in such a case, because of the numerous aspects of the more general subject matters, the extent of the overflow will also necessarily be exaggerated. The identification of the pith and substance of a provision or a statute is therefore subject to the same requirement of precision as the identification of the purpose of a provision establishing a limit in the context of the infringement of a right in an analysis under s. 1 of the *Canadian Charter of Rights and Freedoms*. In both cases, properly identifying the purpose forms the cornerstone of the analysis.

> *Reference re Assisted Human Reproduction Act*, *supra,* at para. 190 per LeBel and Deschamps JJ. (Citations omitted, emphasis added.)

36. Concluding their doctrinal analysis LeBel and Deschamps JJ. admonished that whenever the *General Motors* criteria are to be applied, "care must be taken to maintain the constitutional balance of powers at all stages of the constitutional analysis" and "courts must bear the importance of the unwritten constitutional principles in mind and must adhere to them". One of these unwritten principles is federalism; another is democracy.

> *Reference re Assisted Human Reproduction Act*, *supra*, at para. 196.
>
> *Reference re Secession of Quebec, supra*, at para. 56 and 61.

37. Saskatchewan submits that those aspects of the Proposed *Act* which Canada asserts reveal its purposes, namely the Preamble and section 9, are vague and at times exceedingly general. For example, the Preamble speaks variously of Parliament's desire to "effectively protect and promote Canadian interests internationally including through the development of consistent regulatory policies for capital markets"; to enhance "the integrity and stability of Canada's financial system...by the presence of a single Canadian securities regulator", and "to create a single Canadian securities regulator, supported by a comprehensive statutory and regulatory regime that applies across Canada".

> Proposed *Act,* Preamble, Reference Record, Volume I, Tab 4, at p. 17.

38. The purpose clause in section 9 is somewhat less general. It enumerates three purposes as follows:

- To provide protection to investors from unfair, improper or fraudulent practices;

- To foster fair, efficient and competitive capital markets in which the public has confidence; and
- To contribute, as part of the Canadian financial regulatory framework, to the integrity and stability of the financial system.

> Proposed *Act,* s. 9, Reference Record, Volume I, Tab 4, at p. 36.

39. Saskatchewan submits that the first of the three purposes enumerated in section 9 is arguably the most precise. Yet, at least since *Lymburn v. Mayland* investor protection has been accepted as one of the animating purposes of valid provincial legislation regulating the trading in securities. As already acknowledged in paragraph 11 above, Saskatchewan does not dispute that Canada can prohibit fraud and other unscrupulous trading practices through the exercise of its criminal law power contained in section 91(27) of the *Constitution Act, 1867*. However, only a limited number of the Proposed *Act*'s provisions may be so characterized. This enumerated purpose is inadequate to sustain the constitutionality of the vast bulk of the regulatory framework and mechanisms contemplated in the Proposed *Act*.

> *Lymburn v. Mayland*, *supra,* at p. 324.
>
> See also: *Smith v. The Queen,* [1960] S.C.R. 776.
>
> *R. v. W. McKenzie Securities* (1966), 56 D.L.R. (2d) 56 (Man. C.A.), at pp. 60-63.

40. The two remaining purposes enumerated in subparagraphs 9(b) and (c), respectively—"to foster fair, efficient and competitive capital markets" and to contribute "to the integrity and stability of the financial system"—are vague and unfocussed. Saskatchewan submits that the second purpose is more an aspirational statement than a quantifiable legislative objective. The third purpose is a significant responsibility of all provincial governments, one that Saskatchewan submits was fulfilled admirably during the recent global

financial crisis through the co-operative efforts of Canada's thirteen provincial and territorial securities commissions.

41. Saskatchewan submits that these various statutory statements of legislative purpose are actually quite breathtaking in scope for they hold the potential to subsume within the general trade and commerce power virtually all aspects of provincial legislative jurisdiction over the economy and the financial sector. As Professors Karazivan and Gaudreault-DesBiens assert:

> [I]f we are really serious about responding more quickly and efficiently to financial meltdowns, it is arguable that it is not through the prism of a national securities regulator that it can be done, but through the centralization in the hands of Parliament of *all* macro-economic powers pertaining to the financial sector broadly defined. This would include securities issues, but also banks, credit unions, insurance companies and all sorts of financial intermediaries. It is fair to characterize such a project as practically unachievable as it would require a massive constitutional change depriving provinces of several of their constitutional powers.
>
> *Karazivan et al.*, *supra*, at p. 21 (emphasis in original).

42. Indeed, Dickson C.J. was very aware of this danger in *General Motors*. He rejected the Privy Council's interpretation of the trade and commerce power advanced in *John Deere Plow Co. v. Wharton* as "clearly overly expansive, sweeping all general economic issues into the grasp of s. 91(2)". He concluded that:

> The true balance between property and civil rights and the regulation of trade and commerce must lie somewhere between an all pervasive interpretation of s. 91(2) and an interpretation that renders the general trade and commerce power to all intents vapid and meaningless.
>
> *General Motors of Canada*, *supra*, at p. 660.
>
> *John Deere Plow Co. v. Wharton*, [1915] A.C. 405.

43. As a consequence, these purposes manifest the flaw identified by LeBel and Deschamps JJ. in the *Reference re Assisted Human Reproduction Act*, namely they identify subject matters so vast and imprecise, it becomes necessary "to take the analysis further and determine what aspects of the field in question is being addressed".

> *Reference re Assisted Human Reproduction Act*, *supra*, at para. 196.

44. At paragraph 71 of its factum, Canada attempts to advance a more modest characterization of the Proposed *Act*'s purpose and effect. There Canada asserts that the "pith and substance of the *Securities Act* is comprehensive national securities regulation" with the clear intention "to create a single national securities regulator, not a fourteenth". Saskatchewan submits that even this characterization is not precise enough for purposes of the pith and substance inquiry.

> Factum of the Attorney General of Canada, at p. 31, para. 71 (emphasis in original).

45. First, it is not accurate to describe the Proposed *Act* as being national in its reach. By its very terms, Parliament contemplates that the Proposed *Act* likely will not apply in one or more jurisdictions. Section 250 creates what is described as an "opt in" clause that requires each province voluntarily to seek the approval of the Governor in Council to participate in this regulatory regime. At the present time, it is apparent that at least three provinces – Alberta, Manitoba and Québec – will not seek such approval, and it is entirely possible that other jurisdictions may follow their lead. Saskatchewan will have more to say about section 250, a provision that for federalism purposes Professor LeClair colourfully characterized as an act of "constitutional harakiri", under its discussion of the fifth and final criterion of the *General Motors* test. For present purposes it is sufficient to state that this curious feature

defeats Canada's attempt to characterize the Proposed *Act* as legislating a "comprehensive national securities regulator".

LeClair, *supra*, at p. 573.

46. Second, Saskatchewan submits it follows from this that while the Canadian Securities Regulatory Authority may not be the nation's "fourteenth" securities regulator, it most assuredly will be its third or even fourth. Moreover, since the vast majority of the Proposed *Act*'s provisions duplicate those already existing in the various provincial securities statutes, it is not possible to characterize this proposed statute as one creating a scheme of "comprehensive national securities regulation".

47. In conclusion on this issue, Saskatchewan submits that the Proposed *Act*, save for those sections containing criminal offences which either have migrated from the *Criminal Code* or are otherwise sustainable under Parliament's criminal law power, seeks to create a comprehensive securities regulatory regime administered by a securities regulator that purports to have pan-Canadian jurisdiction.

E. Application of the *General Motors* Criteria to the Proposed *Act*

E.1 The First Two Criteria – Regulatory Scheme and Oversight

48. Saskatchewan submits that the Proposed *Act* likely satisfies the first two *General Motors* criteria, namely (1) the presence of a regulatory scheme which is (2) monitored by the continuing oversight of a regulatory agency. As already discussed, the Proposed *Act* purports to establish a comprehensive regulatory regime in relation to securities.

Furthermore, this extensive regulatory structure is intended to be monitored by the Canadian Securities Regulatory Agency.

49. However before turning to the remaining criteria, it should be noted that the fact these two threshold requirements may so easily be satisfied in this *Reference* illustrates the artificiality of an uncritical application of the *General Motors* criteria. Previous applications of these criteria took place in relation to statutes where only a single provision located within a broader regulatory regime was in issue and not the entire regulatory regime itself, including the regulatory agency created to monitor it. For example in *General Motors* only section 31.1 of the *Combines Investigation Act* was impugned. This provision created a civil cause of action for certain infractions of that legislation. The constitutionality of section 31.1 was assessed against the backdrop of a general regulatory regime the constitutionality of which was undoubted. Yet, Saskatchewan submits it is circular to reason that an entire regulatory regime may be constitutional because it creates an entire regulatory regime. This bears out the criticism of these criteria made by Professors Karazivan and Gaudreault-DesBiens that they are "self-serving, rendering them almost impossible to fail for the federal government".

Karazivan et al., *supra*, at p. 24.

General Motors of Canada, *supra*, (upholding the constitutionality of then section 31.1 of the *Combines investigation Act*, R.S.C. 1970, C-23.)

E.2 <u>The Third Criterion – Trade as A Whole Instead of a Single Industry</u>

50. The third criterion asks whether the federal legislation at issue relates to trade as a whole instead of a single industry. In *General Motors*, Dickson C.J. elaborated that this

consideration seeks to ensure that the purpose of the regulatory scheme is "genuinely a national economic concern and not just a collection of local ones".

General Motors of Canada, supra.

51. Saskatchewan submits that this criterion is not met as the Proposed *Act* purports to establish a comprehensive securities regulatory regime at the national level, duplicating in many ways provincial and territorial regulatory regimes already operating across the country. In *Smith v. The Queen*, for example, Martland J. described these various provincial statutes as regulating "the securities business". This regulation was achieved "through two main forms of control, the first of which is directed towards the persons or companies selling the securities and the second of which is directed to the securities being sold". This characterization of securities regulation has not been superseded by more contemporary and sophisticated methods of trading in securities.

Smith v. The Queen, supra, at p. 797. To similar effect, see: *Smith, ibid,* at p. 779 per Kerwin C.J.

52. Saskatchewan submits that the industry or business of trading in securities is not an all pervasive subject matter in the same way competition policy and trademarks are.

E.3 The Fourth Criterion – Provincial Incapacity

53. The fourth criterion asks whether the Proposed *Act* is of a nature that the provinces jointly or severally would be constitutionally incapable of enacting. As is immediately apparent a finding in favour of Canada on this criterion would devastate well-established and long standing provincial legislative jurisdiction over securities. In effect, it would compel the conclusion that provinces no longer possess the constitutional capacity to

regulate securities, a result that could have significant repercussions on other aspects of the analysis, for example the operation, if any, of the paramountcy doctrine.

54. It must be remembered that the principle of exclusive jurisdiction continues to apply in Canadian constitutional law. Should this Court conclude that securities regulation generally is now a matter of federal legislative jurisdiction under section 91(2), there is the possibility that provinces would be divested of their jurisdiction entirely. This possibility flows from the closing words of section 91:

> And any Matter coming within any of the Classes of Subjects enumerated in this Section shall not be deemed to come within the Class of Matters of a local or private Nature comprised in the Enumeration of the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces.
>
> *Constitution Act, 1867*, s. 91.

55. Saskatchewan submits that in view of the serious impact an affirmative holding on this criterion would have on the division of powers, a high degree of certainty about the answer is not only warranted, it is required.

56. On this aspect of the *General Motors* test, Saskatchewan endorses the following conclusions of Professors Karazivan and Gaudreault-Desbiens:

> [I]t could be challenging to plead that the provinces are *incapable* of regulating an efficient securities regime as they have been doing exactly that for almost 100 years (Manitoba enacted the Sale of Shares Act in 1912). During these years, Canada's securities market has not been fraught with major impairments; in fact, in the 2008 World Bank Survey, Canada occupies the fifth place for investor protection, placing it ahead of Great Britain and on the same footing as the United States. More recently the passport regime agreed to by all the Securities Administrators with the exception of Ontario's makes it difficult to argue for provincial incapacity and this even taking into

> account the absence of Ontario. The provinces and territories' efforts have culminated in the harmonization and simplification of many of the securities regulation requirements.
>
> *Karazivan et al.*, *supra*, at p. 18 (emphasis in original, citations omitted).

57. Saskatchewan submits that even though Ontario has declined to "sign on" to the passport system, this does not alter the fact that the passport system's existence goes a long way to defeating Canada's arguments respecting provincial incapacity. Indeed, it would be perverse for this Court to conclude that the decision of one province – even a rogue province – to refrain from participating in a co-operative arrangement achieved by the other provinces is sufficient to establish provincial incapacity for purposes of the *General Motors* inquiry.

58. Moreover, despite the fact that Ontario declined to participate formally in the passport system, nevertheless it appears to hold a privileged position in its operation. In his factum, the Attorney General of Ontario describes this as "the one way passport" which means that Ontario "retains its ability to review the decisions made by any passport jurisdiction when the passport jurisdiction is acting as principal regulator, but the converse is not true". Saskatchewan submits that this reality dispels any lingering concerns respecting the practical effectiveness of the passport system in Canada because of Ontario's reluctance to participate fully in it.

> Factum of the Attorney General of Ontario, at p. 8, para. 23.

59. In *General Motors*, Dickson C.J. equated provincial incapacity to a "gap in the distribution of powers" which necessitated federal legislative action. Saskatchewan submits that no such "gap" exists in relation to securities. The Proposed *Act* duplicates most of the

provisions currently found in provincial and territorial securities statutes. Furthermore, through the auspices of the Canadian Securities Administrators ("CSA"), provinces and territories have largely been successful in harmonizing their regulatory requirements.

> *General Motors of Canada*, *supra*, at p. 683 (referring to *Attorney General of Canada v. Canadian National Transportation Limited*, [1983] 2 S.C.R. 206, at p. 278.)

60. Accordingly, when measured against the critical fourth criterion Canada is unable to demonstrate the Proposed *Act* is essential as a consequence of the provinces' incapacity to legislate in this area.

E.4 The Fifth Criterion – The Need for All Provinces to Participate

61. The fifth and final *General Motors* criterion invites this Court to give careful consideration to whether the failure to include one or more provinces in the legislative scheme jeopardizes its operation in other parts of the country. Saskatchewan submits that Canada is unable to satisfy this criterion because section 250, the "opt-in" clause, demonstrates that the Proposed *Act* is not intended to operate nationally, save for those few sections sustainable under the criminal law power. Rather, it will operate only in those provinces which voluntarily seek to participate in this new regime and are permitted to do so by Governor in Council. Little wonder Professor LeClair characterized the inclusion of section 250 as "constitutional harakari".

> *LeClair*, *supra*, at p. 573.

62. Canada counters this argument by asserting that the objective of section 250, namely to encourage voluntary provincial participation, is consonant with the objectives of

co-operative federalism. Saskatchewan submits that this position is disingenuous for the "opt-in" provision displays sufferance on the part of the federal government more than a desire to foster co-operation between both levels of government.

Factum of the Attorney General of Canada, at p. 58, para. 132.

63. Indeed, should this Court sustain the constitutionality of the Proposed *Act* on the basis of the general trade and commerce power, section 250 could more aptly be described as the velvet glove over the iron fist of complete federal legislative jurisdiction in relation to securities. Nothing would prevent the federal government from removing the "opt in" clause and asserting complete regulatory authority relying upon the doctrine of federal paramountcy to displace traditional provincial legislative authority, assuming paramountcy remains after a finding under the fourth criteria that provinces are *incapable* of enacting laws regulating securities.

64. It is true the Proposed *Act* does not expressly allow a province which has "opted into" the federal regulatory regime to exit it, should it determine the national scheme is insufficiently responsive to local requirements and conditions. At this time, however, there is no legal impediment to such an event occurring. A province does not cede its jurisdiction over securities regulation when it chooses voluntarily to participate in the federal regime. Moreover, the presence of section 250 in the Proposed *Act* means the federal government could not invoke the doctrine of paramountcy against an exiting province so as to render its local securities laws inoperative. The paramountcy doctrine is a judicial construct and it would be discriminatory, to say the least, to withhold its application in relation to non-participating provinces but enforce it against exiting provinces.

65. In conclusion on the fifth criterion, the presence of section 250 in the Proposed *Act* and the curious effects which flow from its operation demonstrate categorically that the regulatory regime is not truly national in scope. Accordingly, the failure to include within it a number of provinces cannot remotely be said to jeopardize its operation elsewhere in Canada.

F. A Single National Securities Regulator – An Achievement of 21st Century Co-operative Federalism

66. At paragraph 13 above, Saskatchewan submitted that a single national securities regulator may be achieved in a way which respects the proper operation of the division of legislative powers located within sections 91 and 92 of the *Constitution Act, 1867* and, as well, recognizes the need for diversity, including legal diversity, to accommodate local concerns relating to securities trading. Diversity, it must be recalled, is an integral element of the unwritten constitutional principle of federalism.

> *Reference re Secession of Quebec*, *supra*, at p. 251, paras. 57-58.

67. In this concluding section, Saskatchewan will elaborately briefly on this submission. To begin, Saskatchewan acknowledges that it shares views similar to those expressed by the Attorney General of British Columbia ("British Columbia") at paragraphs 90 and 91 of his factum.

> Factum of the Attorney General of British Columbia, at pp. 30-31, paras. 90-91.

68. A robust concept of co-operative federalism has been on the ascendancy in the 21st Century. Generally, the term has been utilized to describe the necessary co-operation between the federal and provincial levels of government to accommodate the "inevitability of overlap between the exercise of federal and provincial competencies". Saskatchewan submits that there are at least two other important components of co-operative federalism which are relevant in this *Reference*: (1) co-operation and collaboration between and among various provincial and territorial governments, and (2) creative federalism.

> *NIL/TU,O Child and Family Services Society v. B.C. Government and Service Employees' Union*, 2010 SCC 45, at para. 42.

69. First, extensive co-operative inter-provincial initiatives in relation to securities regulation already exist in large measure due to the collaborative efforts of the Canadian Securities Administrators ("CSA") established and supported by the thirteen securities regulators. As already stated, these extensive collaborative efforts served Canada well during the recent global financial crisis.

70. Second, contemporary co-operative federalism demands creativity from both levels of government to resolve important policy and legislative problems for the nation. Most certainly, unilateralism on the part of the Government of Canada no longer is an acceptable default position, if it ever was.

71. Taking up these two components of co-operative federalism, Saskatchewan submits that governments need not search too far or too wide for a mechanism which could assist in resolving this issue. A template may be found in the "tried and true solution"

utilized in agricultural products marketing involving "a cooperative scheme of interlocking federal and provincial legislation, using techniques such as administrative delegation and incorporation by reference". Indeed, in *Fédération des producteurs de volailles du Québec v. Pelland* this Court most recently endorsed this approach when it sustained the constitutionality of legislation conferring upon a Quebec administrative body jurisdiction over both intra- and extra-provincial marketing of chickens.

> *LeClair, supra*, at p. 584.
>
> *Fédération des producteurs de volailles du Québec v. Pelland*, [2005] 1 S.C.R. 292.

72. In his article referenced above, Professor LeClair advocates utilizing this same arrangement to regulate securities. He states:

> The federal government's draft Securities Act, in contrast, chooses to assert federal jurisdiction over both the intra- and extra-provincial aspects of securities regulation, with no legislative support from the provinces. Rather than push the limits of [the general branch of the trade and commerce power] and strain the federal principle, if the federal government truly wants to pursue a constitutionally sound, cooperative approach to endowing a single regulator with jurisdiction over all aspects of securities regulation, it should follow the "well-established body of precedent upholding the validity of administrative delegation in aid of cooperative federalism".

Saskatchewan commends this approach as a viable way forward that is both respectful of the federal principle and consistent with the spirit of co-operative federalism.

> *LeClair, supra*, at p. 585, quoting *Pelland, supra*, at para. 55.
>
> To similar effect, see: Factum of the Attorney General of British Columbia, at pp. 33-34, paras. 99-102.

73. Saskatchewan acknowledges this approach is not new. The earliest proposal endorsing the creation of a single national securities regulator to be achieved through

delegated legislative authority appeared in 1967. This particular initiative led to federal draft legislation being prepared but never placed before Parliament.

Factum of the Attorney General of Canada, at p. 15, para. 38.

CANSEC Proposal of the Ontario Securities Commission, December 1967, Reference Record, Volume II, pp. 29-39.

74. The most recent and, admittedly, the most elaborate proposal for a single national securities regulator achieved through delegation of legislative authority is found in the "Final Paper of the Crawford Panel on a Single Canadian Securities Regulator" entitled *Blueprint For a Canadian Securities Commission.* This Paper envisioned a national securities commission that "preserves the best of provincial expertise and specialized knowledge, administers a single Canadian Securities Act" and "respects jurisdictional constitutional rights". The Crawford Paper adopted as its exemplar the Canada Pension Plan Investment Board which, it declared, displayed "federal/provincial ingenuity in creating a solution to a challenge shared by multiple jurisdictions". This objective would be achieved through "uniform regulation", *i.e.* "all participating jurisdictions would adopt by reference legislation enacted by one province as the Canadian Securities Act".

Final Paper of the Crawford Panel on a Single Canadian Securities Regulator - *Blueprint For a Canadian Securities Commission,* at pp. 4, 7.

75. Saskatchewan does not advocate the adoption of either of these models. Rather, Saskatchewan recounts these proposals as evidence that within Canada careful thought and consideration has already been given to the question of how to achieve a single national securities regulator in a way that creates the least disruption to the division of legislative powers and to the federal principle.

76. Saskatchewan suggests that one area which is particularly amenable to joint federal and provincial legislative co-operation pertains to enforcement and investor protection. To be sure, the protection of investors is a core function of provincial legislative jurisdiction over securities. Yet this subject matter clearly has a federal aspect under the criminal law power. There would appear then to be no constitutional impediment to the federal government delegating the enforcement of the criminal law aspects of securities regulation to a national securities regulator. Provincial governments could delegate to that same regulatory agency their administrative and supervisory jurisdiction over participants in the securities industry. In this way a comprehensive enforcement regime – a matter of concern not only to Canada but also a number of the interveners supporting it – may be achieved in a manner consistent with, and not in contravention of, the division of powers.

77. Saskatchewan recognizes that in a federation achieving this goal may not be easy and requires good will and sincere effort on the part of all governments. However, in the complex area of securities regulation, significant advances in legislative and regulatory harmonization have already been accomplished through "sincere co-operative effort" and "it would really be unfortunate if this was all brought to naught" through unilateral federal action.

> *Reference re Agricultural Products Marketing Act*, [1978] 2 S.C.R. 1198, at p. 1296 per Pigeon J.

78. In conclusion, Saskatchewan submits that in this *Reference* should this Court answer "no" to the constitutional question presented to it, this will not turn the objective of a single national securities regulator into an elusive dream. Instead, it will simply signal to the Government of Canada that it must seek creative yet constitutional solutions to achieving it.

PART IV

COSTS

79. Saskatchewan does not seek costs, and submits that it is not liable for costs.

PART V

NATURE OF ORDER SOUGHT

80. Saskatchewan respectfully submits that the constitutional question set out in P.C. 2010-667 should be answered "no". The constitutionality of the *Act* cannot be sustained under the general branch of the federal trade and commerce power.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

DATED at Regina, Saskatchewan, this 10th day of February, 2011.

Graeme G. Mitchell, Q.C.
Counsel for the Attorney General for Saskatchewan

PART VI

LIST OF AUTHORITIES

Other