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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PART I. - OVERVIEW AND STATEMENT OF THE FACTS

1. OVERVIEW OF THE POSITION OF THE ATTORNEY GENERAL OF ALBERTA

1. Parliament does not have constitutional jurisdiction to enact the proposed Canadian *Securities Act* ("the proposed *Act*"). The answer to Canada's Reference Question should be "no".

2. The proposed *Act*, in a careful examination of its true purpose "as opposed to its mere stated or apparent purpose"[1], is virtually identical to existing provincial securities regulatory legislation (with the exception of the criminal law substantive provisions[2]). Consistent with almost 80 years of jurisprudence and with the evidence filed in this Reference, the proposed *Act* is, in pith and substance, aimed at the regulation of trading in securities. The regulation of trading in securities is a matter of contractual, property and civil rights which falls squarely within the scope of "property and civil rights" under Section 92(13) of the *Constitution Act*, *1867*.

3. The proposed *Act* does not fall within the federal general trade and commerce power for compelling reasons:

   (a) There is nothing in the subject matter of the proposed *Act* that would distinguish it, in pith and substance, from the subject matter of existing provincial securities regulatory legislation that has been upheld authoritatively as falling within provincial property and civil rights jurisdiction;

   (b) The general trade and commerce power must be restricted to subject matters that are truly of "crucial importance for the national economy"[3] and are "qualitatively different from anything that could practically or constitutionally be enacted by the individual provinces either separately or in combination"[4]. This high threshold

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[1] *Canadian Western Bank v. Alberta*, [2007] 2 S.C.R. 3 at para. 27 [AGA Authorities, Tab 8].
[2] AGC Record, Vol. I, Tab 4, Sections 158-165, pp. 98-104.
[3] *General Motors of Canada Ltd. v. City National Leasing*, [1989] 1 S.C.R. 641 at p. 678 [AGC Authorities, Vol. I, Tab 13].
[4] *AG (Can.) v. Canadian National Transportation*, [1983] 2 S.C.R. 206 at p. 267 [AGA Authorities, Tab 2].

test is important to maintain the balance of federalism and to avoid intrusions into the degree of local autonomy for the provinces contemplated by the Constitution;

(c) There are five criteria set out in the leading authorities which help to distinguish between matters relating to trade and commerce and those of a more local nature. Three of these, on the facts of this Reference, cannot be met. The proposed *Act,* in pith and substance, deals with the regulation of contractual, property and civil rights of persons engaged in trading in securities and not "trade as a whole"[5] or "trade as trade"[6]. The fourth criterion cannot be met because the provinces have demonstrated their capacity to carry out effectively regulatory responsibilities set out in the proposed *Act*. The fifth criterion cannot be met because the proposed *Act* explicitly recognizes that many jurisdictions may not become participants so that the very scheme of the *Act* demonstrates that the failure of one or more jurisdictions to participate would not jeopardize the scheme.

4. The proposed *Act,* in pith and substance, is aimed at the regulation of trading in securities, and at no other subject matters, purposes and aspects. Accordingly, the double aspect doctrine does not apply.

5. The attempt of Canada to justify its proposed *Act* under the general trade commerce power using the double aspect doctrine is unprecedented and unsupportable. If successful, it would represent a massive intrusion into a well established subject matter of provincial jurisdiction. It would dramatically upset the “crucial” [7] balance of federalism. It would allow Parliament to enact legislation that would “unilaterally define the scope of its powers”[8] and have the effect of “draining of their content the provincial powers over civil law and matters of a local or private nature”.[9] It would represent “an exact overlapping and hence a nullification of a jurisdiction conceded to the provinces by the Constitution”.[10] Upholding the constitutionality of the proposed Legislation would

[5] *General Motors,* p. 661 [AGC Authorities, Vol I, Tab 13].
[6] *Reference Re The Farm Products Marketing Act*, [1957] S.C.R. 198 at p. 204 [AGA Authorities, Tab 25].
[7] *Canadian National Transportation*, p. 259 [AGA Authorities, Tab 2].
[8] *Canadian Western Bank*, para 91 [AGA Authorities, Tab 8].
[9] *Ibid,* para 43.
[10] *Canadian National Transportation,* p. 267 [AGA Authorities, Tab 2].

violate the "delicate balance between federal and provincial power" by permitting the federal trade and commerce power to "encroach on provincial Legislation".[11]

6. The proposed *Act* would entail serious, negative consequences for both participating and non-participating jurisdictions. Participating jurisdictions would be required to abandon their constitutionally protected ability to regulate trading in securities in their jurisdictions. Each would not be able to exercise its own "ultimate sovereignty"[12] or "pursue what it believes to be in the best interests of its respective capital market" [13]. All jurisdictions will experience divisions between the regulatory systems of those who participate under the proposed *Act* and those who do not. There will be the serious risk of the loss of the existing high level of harmonization of securities regulation across Canada under the CSA.

7. Of even greater concern are the consequences of upholding the constitutionality of the proposed *Act*. The proposed *Act* may later be amended to eliminate the opt-in provision and make its application mandatory across Canada based on federal paramountcy. This would result in "a nullification of a jurisdiction conceded to the provinces by the Constitution"[14].

[11] *General Motors*, p. 661 [AGC Authorities, Vol. I, Tab 13].
[12] MOU (2004), Alberta Record, Vol. XVIII, p. 156 (para. 4.2) and p. 159 (para. 5.10).
[13] Rice June 29, 2010 Affidavit, AGA Record, Vol. XVIII, para. 239, p. 80 and para. 244, p. 82.
[14] *Canadian National Transportation*, p. 267 [AGA Authorities, Tab 2].

2. POSITION ON CANADA'S STATEMENT OF FACTS

(a) **The Regulation of Trading in Securities in Alberta and through the CSA**

8. Since 1916 there has been legislation in Alberta to protect investors by regulating the securities industry and securities market.[15] The paramount or overriding purpose of Alberta securities laws is the protection of investors in Alberta. Additional purposes include "fostering a fair and efficient capital market in Alberta and the reduction of systemic risk."[16]

9. To achieve these purposes Alberta's securities laws regulate trading in securities in Alberta through the Alberta Securities Commission ("ASC"). The ASC has 157 highly qualified full-time staff, with revenues of $32.7 million.[17]

10. Alberta's securities legislation[18] provides for:

(a) Prospectus clearance and content requirements and continuous disclosure obligations for issuers who offer their securities for sale to the public in or from Alberta and whose securities are traded by sellers of securities in Alberta in order "to create and maintain a level playing field for purchasers and sellers of securities"[19];

(b) Registration requirements and ongoing oversight of "intermediaries who provide investment advice, effect trades, receive funds or hold securities" and who "intend to conduct their securities related business in Alberta" [20];

(c) The granting of conditional exemptions for certain specified trades in securities from normal registration and prospectus requirements[21];

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[15] Gartner Affidavit, AGA Record, Vol. XIX, paras. 4 and 14, pp. 224 and 227.
[16] Rice June 29, 2010 Affidavit, AGA Record, Vol. XVIII, paras. 8(a), 9, 28 to 29 and 79, pp. 10, 12, 18 and 29.
[17] Rice June 29, 2010 Affidavit, AGA Record, Vol. XVIII, paras. 10, 13 and 19, pp. 12, 13 and 15.
[18] Alberta *Securities Act*, Appendix Tab "A".
[19] Rice, June 29, 2010 Affidavit, AGA Record, Volume XVIII, para. 22, p. 16 and para. 31, p. 19.
[20] *Ibid,* para. 38-39, pp. 20-21.
[21] *Ibid,* para. 41, p. 21.

(d) Recognition and exercise of oversight responsibilities over self-regulatory organizations which (as delegates) regulate the operations, standards of practice and business conduct of investment dealers, mutual fund dealers and others who work within the capital markets[22];

(e) Recognizing and overseeing the activities and business practices of other entities that facilitate trading in securities such as exchanges, clearing agencies and quotation and trade reporting systems in Alberta[23]. The ASC is currently the lead regulator with the BCSC of the TSX Venture Exchange ("TSXV") and is the lead regulator of the Natural Gas Exchange Inc. ("NGX"), both of which have offices in Calgary[24]; and

(f) Conducting examinations, investigations, and prosecutions in respect of the conduct of issuers and market participants in relation to compliance with Alberta securities laws.[25]

11. While the Alberta *Securities Act* (Appendix Tab "A") is directed at the regulation of trading in securities within the province, the provinces and territories, through the 13 securities regulators, have for many years co-operated together and have achieved a high degree of harmonization of securities regulation across the country while recognizing and protecting local needs and priorities. As stated by Professor Rousseau:

> Securities regulation has been formulated over the years by legislatures and regulators in an environment characterized by a harmonization of rules and administrative practices across the country. Implementing an effective Canada-wide regulatory framework has been an essential goal of the securities authorities since they voluntarily combined to form the Canadian Securities Administrators (the "CSA") in the 1930's. The CSA has served as the preferred forum for channelling harmonization efforts in a spirit of teamwork and collaboration. … The CSA's harmonization

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[22] *Ibid*, paras. 59-61, pp. 24-25.
[23] *Ibid,* para. 65, p. 26.
[24] *Ibid,* paras. 65-70 and para. 73, pp. 26-27.
[25] *Ibid,* para 22, p. 16 and para 44, p. 22.

> initiatives have covered both the substantive provisions of regulation and administrative practices.[26]

12. Mr. Rice describes in detail the functioning of the CSA and its accomplishments. Not only is there co-operation between the provincial securities regulators, there is also cooperation between the chairs of the four largest commissions and the Governor of the Bank of Canada, the Superintendent of Financial Institutions and senior representatives of the Federal Department of Finance (together, referred to as the "Heads of Agencies"). Further, the chairs of the four largest commissions also meet twice annually with senior officials responsible for criminal fraud investigation and prosecution in Canada and exchange correspondence and have telephone calls to discuss emerging or current issues requiring discreet or immediate attention.[27]

13. Much of the harmonization of securities regulation is accomplished through Multilateral Instruments, National Instruments and National Policies that provide effective national regulation. Summary details of how these harmonized agreements establish an effective national regulatory regime for take-over bids, regulation of exchanges, cease-trade orders and registration of dealers and advisors is described in Appendix Tab "H".

14. Canada's securities regulators, through the CSA, have achieved a high level of regulatory co-operation with regulators outside of Canada. The most significant aspect of international securities regulation is the Multi-Jurisdictional Disclosure System ("MJDS") that was created by the CSA and the SEC to reduce duplicative regulation and facilitate cross border offerings of securities, issuer bids, take-over bids, business combinations and continuous disclosure and other filings through mutual recognition. The importance of this system for many large issuers and major industry players in both Canada and the United States cannot be understated. No other jurisdiction has such an agreement with U.S. securities regulatory authorities, demonstrating the confidence of the SEC in the current Canadian system. The CSA and ASC are also active in international organizations and Canadian regulators play a significant role in the International

[26] Rousseau, AGQ Record, Vol. VI, Tab 24, p. 22.
[27] Rice June 29, 2010 Affidavit, AGA Record, Vol. XVIII, paras. 78 to 98, pp. 28 to 36.

Organization of Securities Commissions ("IOSCO"), which is recognized as the international standard setter for securities markets.[28]

15. Part 17.1 of the Alberta *Securities Act* (Appendix Tab "A") relates to interjurisdictional co-operation (ss. 211.1-211.91) where broadly (s. 211.2) the ASC may delegate any Alberta authority to an extra-provincial securities commission, may accept a delegation of authority from an extra-provincial securities commission, may adopt by reference as Alberta securities laws provisions of extra-provincial securities laws (s. 211.4) and may make a decision based on a substantially similar decision rendered by an extra-provincial securities commission (s. 211.5). A summary of the interjurisdictional provisions is attached at Appendix Tab "E".

16. What has been summarized above as representing the regulation of trading of securities in Canada has gained a remarkably high reputation. The provincially based system has been ranked as "one of the best in the world"[29].

(b) <u>Regulation of Trading in Securities is a Matter of Property and Civil Rights</u>

17. Alberta agrees with those portions of Canada's Factum where it is said that in pith and substance the proposed *Act* is designed to establish a "regime of securities regulation"[30]. Alberta would rephrase this as a regime aimed at the regulation of trading in securities for the primary[31] purpose of protecting investors and for maintaining fair, efficient and transparent markets and reducing systemic risk. What is involved in regulating trading in securities in Alberta is described this way:

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[28] Rice June 29, 2010 Affidavit, AGA Record, Vol. XVIII, paras. 116 to 142, pp. 41 to 46.

[29] Council of Ministers Progress Report (2007), AGA Record, Vol. XX, p. 247; 2006 Crawford Panel *Blueprint*, AGC Record, Vol. II, Tab 6, p. 110; see also Rice Affidavit, Vol. XVIII, p. 11, para. 8(k), pp. 63-68, paras. 186-198 and p. 83, para. 248(a); Spink Report, AGA Record, Vol. XIX, p. 16, para. 39 and p. 35, footnote 52; Spink Rebuttal Report, Sept. 29, 2010, AGA Record, Vol. XXI, p. 278, para. 11, pp. 279, para. 14 and footnotes 12 and 13; Lortie AGQ Record, Vol. XV, Tab 62, p. 58; and Courchene AGA Record, Vol. XVIII, p. 274, para. 28 and p. 291, para. 61.

[30] Canada Factum, paras. 2, 4, 43, 71 and 72.

[31] Canada Factum, para. 16; and see Rice, Alberta Record, Vol. XVIII, p. 10, para. 8(a); Rice, AGA Record, Vol. XXIII, p. 2, para. 7; Spink, Vol. XIX, p. 6, para. 7; Securities Transition Office, July 12, 2010, AGC Authorities, Vol. III, Tab 80, pp. 3 and 9; Porter Report, Canada Record, Vol. II, p. 1; Rousseau, AGA Record, Vol. XXI, p. 247; and *Pezim v. British Columbia (Superintendent of Brokers)*, [1994] 2 S.C.R. 557 at p.587 [AGA Authorities, Tab 20].

> The ASC regulates all activities of capital market participants, whether based in Canada or elsewhere, to the extent that they involve trades of securities to Alberta investors. The ASC regulates those market participants who deal with Alberta investors and raise capital within the Alberta capital market.[32]

18. Canada admits that securities regulation has "a 'property and civil rights' aspect to it"[33] and acknowledges that cases "have upheld provincial jurisdiction over securities regulation"[34].

19. The regulated subject matter of trading in securities involves contractual, property and civil rights of those involved in activities connected with trading in securities within local jurisdictions. This is clear from the definitions of "security" and "trade" in the Alberta *Securities Act* and the proposed *Act* and in references to such things as sales, issues of securities, re-sale of securities and take-over bids.[35].

20. The evidence shows the close relationship between securities regulation and contract and property law. "All trading in securities involves contractual, property and civil rights relating to that property, governed by the common law and civil law systems in Canada and elsewhere"[36]. Professor Frankel is cited as saying, "the law regulating securities markets may be seen as a subset of property law because the property rules imposed by regulation are designed to satisfy the essential conditions for efficient markets, including the regulation of intermediaries and the contracts used in markets."[37]. The evidence describes the roles of intermediaries, clearing and settlement systems and *Securities Transfer Acts* in cross-border transactions[38]. It shows that a typical cross-border transaction is "actually a series of separate contractual and property arrangements, none of which involve any movement of property, cross-border or otherwise."[39] The rights and property interests of each participant in a series of securities transactions are

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[32] Rice June 29, 2010 Affidavit, AGA Record, Vol. XVIII, para. 161, p. 51.
[33] Canada Factum, para. 6.
[34] Canada Factum, para. 6.
[35] Rice June 29, 2010 Affidavit, AGA Record, Vol. XVIII, pp. 12-28, paras. 10, 23-27, 31-43 and 65-77.
[36] Spink, AGA Record, Vol. XIX, p. 2, para. 2(a) and para. 3(d), p. 3.
[37] Spink, AGA Record, Vol. XIX, para. 41, p. 16.
[38] Spink, AGA Record, Vol. XIX, p. 2.
[39] Spink, AGA Record, Vol. XIX, para. 2(d), p. 2, para. 3(k), p. 4.

restricted to the entitlement holder's rights against its own securities intermediary[40] so that a cross-border transaction:

> actually consists of a series of contracts and property arrangements, each of which is legally separate and compartmentalized from the others. There is no contract between Victoria Investor and Miami Investor. The transaction involves six separate intermediaries and at least six separate securities accounts, each governed by a separate contract.[41]

21. The operation and activities of exchanges and clearing agencies affirm this analysis. They are "entities that facilitate the trading of securities"[42]. The history of exchanges dates back into the 19th century where perhaps a nod was sufficient to establish "'an intelligible, full, living agreement'"[43]. Even for securities that are listed on multiple markets in several countries, "The price determination and the generation of firm-specific information related to the security will remain local"[44].

(c) <u>Capital Markets - Contractual and Property Rights Based with Significant Local Components</u>

22. Neither the proposed *Act* nor Canada in its Factum attempt to define "capital markets". The Systemic Risk Committee of the CSA has, however:

> **Capital markets** refers to the markets in which issuers access investors' money through the purchase and sale of securities and exchange contracts (other than bank deposits and outside the traditional banking sector), and the secondary market in which such securities and exchange contracts are resold among investors.[45]

23. Mr. Rice defines the "Alberta Capital Market" as:

> the market in Alberta in which trades of securities are made to Alberta investors and to the participants (i.e. investors, registrants,

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[40] Spink, AGA Record, Vol. XIX, para. 55, p. 22.
[41] Spink, AGA Record, Vol. XIX, para. 63, p. 25.
[42] Rice June 29, 2010 Affidavit, AGA Record, Vol. XIX, para. 65, p. 26.
[43] Spink, AGA Record, Vol. XIX, para. 21, p. 11.
[44] Macey, June, 2010, AGQ Record, Vol. XII, Tab 36, p. 62.
[45] Rice Affidavit, June 29, 2010, AGA Record, Vol. XVIII, para. 229, p. 75.

> issuers, exchanges, clearing houses and SROs) that participate in that market.[46]

24. Mr. Spink states:

> "Capital Market" … is a general term … [S]ecurities regulation does not attempt to regulate capital markets *per se*, it regulates 'trades' in 'securities' by defining certain contractual, property and civil rights of persons who trade in securities. Each regulated trade is a single component of what may be generally referred to as the capital market or the local, interprovincial, national, international or global capital markets, depending on the context.[47]

25. Professor Milne in his report, filed on behalf of Canada, "focuses narrowly on those assets conventionally referred to as 'securities'"[48]. In the footnote cited he states:

> The term 'securities markets' refers to the markets that exist to allow investors to buy and sell securities, and will, for economy of expression, include the markets for derivatives. In this paper, the term 'capital market' refers to the universe of all investment products, whether or not those products are securities.

26. In paragraphs 2.1-2.4[49], Professor Milne refers to various securities transactions that involve essentially buying, selling and trading securities. He refers to stock exchanges as "a familiar example where securities are traded at prices that the public can access through various media."

27. What the foregoing evidence supports is that capital markets is a term that can be used to describe the aggregation of all types of individual trades in securities that take place in a particular market. What is regulated under the proposed *Act* and under existing provincial securities regulatory legislation, are the contractual, property and civil rights of the persons involved in the trading in securities within local jurisdictions. Capital markets *per se* are not regulated.

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[46] Rice Affidavit, June 29, 2010, AGA Record, Vol. XVIII, para. 143, p. 46.
[47] Spink, October 27, 2010 Rebuttal Report, AGA Record, Vol. XXII, p. 135, para. 4; see also Spink, June 28, 2010 Report, AGA Record, Vol. XIX, paras. 7-8, p. 6.
[48] Milne, AGC Record, Vol. I, Tab 5, footnote 1, p. 179 and para. 2.1, p. 182.
[49] Milne, AGC Record, Vol. I, paras. 2.1-2.4, pp. 182-183.

28. Canada submits that capital markets have "evolved to be primarily national and international in character"[50]. There are, of course, interprovincial and international elements in securities and capital markets, which have existed for a long time and which have been recognized by the provinces and the CSA, but securities and capital markets also function in an important way at the local level. Provinces, through the CSA, have responded to these elements. The CSA has a "mandate to develop an improved and harmonized approach to securities regulation across the country".[51] The CSA has achieved agreement on 44 Canada-wide rules and 44 national policies[52] that cover all significant areas of securities regulation. It established in 1999 a mutual reliance review system to improve interprovincial co-operation and co-ordination[53]. In 2004 all of the provinces and territories, except Ontario, entered into what is called the Passport Memorandum of Understanding which created a Council of Ministers of Securities Regulation who agreed to work towards a system providing "a single window of access to market participants" for all participating jurisdictions[54]. By March 2008, the Passport System was established which enabled one securities regulator (the principal regulator) to conduct analysis and render decisions for prospectus clearances, disclosure and discretionary exemptive relief applications on a Canada-wide basis (with an Ontario interface). The Passport System was then expanded in September 2009 to include registration of participants. [55]

29. It is clear from the evidence that provincial regulators and the CSA, while aiming for harmonization, do not mandate uniformity or unanimity. While they have achieved "unprecedented levels of co-ordination and consensus"[56], provincial regulations and the CSA recognize that there are important and indeed unique local features and differences among investors and issuers in different regions of Canada so that participating

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[50] Canada Factum, para. 10.
[51] Rice June 29, 2010 Affidavit, AGA Record, Vol. XVIII, para. 78, p. 28.
[52] Rousseau, AGQ Record, Vol. VI, p. 26.
[53] Rice June 29, 2010 Affidavit, AGA Record, Vol. XVIII, para. 100, p. 36.
[54] Rice June 29, 2010 Affidavit, AGA Record, Vol. XVIII, pp. 153, 157.
[55] Rice June 29, 2010 Affidavit, AGA Record, Vol. XVIII, paras. 104-107, pp. 37, 38; Rice, November 28, 2010 Affidavit, AGA Record, Vol. XXIII, paras. 13 to 15, p. 4; Rousseau, AGQ Record, Vol. VI, pp. 113 to 122.
[56] Council of Ministers Progress Report, AGA Record, Vol. XX, pp. 263, 264.

jurisdictions must "retain ultimate sovereignty"[57]. As was stated in the 2009 CSA Enforcement Report, "While Canadian securities regulators collaborate under the CSA framework, each regulator also has its own unique features, reflecting the nature of the capital markets in that province or territory."[58] To the same effect, Mr. Rice stated that, "The CSA structure … to accommodate the different points of view … is one of the main strengths of the existing system – that each jurisdiction has the right to its own point of view and to pursue what it believes to be in the best interests of its respective capital market."[59]

30. Alberta's commitment to harmonization under the CSA was on the expressly qualified basis that it would support harmonization "whenever possible and when consistent with local interests" with a provincial system of regulation that preserved "each province's ability to protect its interests and respond to regional circumstances"[60].

31. The Crawford 2006 Blueprint Panel[61], recognized that "Canadian capital markets are in many respects among the best regulated in the world", and proposed a shared governance model for its proposed national regulator that would be built on existing provincial strengths and safeguarded against domination by the OSC and the federal government. This Panel stated[62]:

> … Provinces that have invested in regulatory innovation and responsiveness are rightfully proud of the expertise, specialized knowledge and professionalism they have created. These strengths must be preserved within the new regulator …

32. The evidence is unchallenged in demonstrating that there are distinct and sometimes unique local markets in Canada which reflect the high degree of diversity within

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[57] MOU (2004), AGA Record, Vol. XVIII, para. 2.1, p. 155 and para. 4.2, p. 156; see also Rice, June 29, 2010 Affidavit, AGA Record, Vol. XVIII, paras. 78-111, pp. 28-39; March 6, 1995 Working Group document of the CSA, AGA Record, Vol. XX, p. 154 at p. 168, para. 3.3.3.
[58] 2009 CSA Enforcement Report, AGA Record, Vol. XVIII, p. 213 at p. 241; see also Gartner Affidavit, AGA Record, Vol. XIX, para. 5, p. 224; see also Mr. Anderson in the Legislature in 1989, p. 229 and Gartner's para. 21 on p. 232- para. 24, p. 233; see also Rice, June 29, 2010 Affidavit, paras. 173-178, pp. 58-62; Para. 178, p. 62.
[59] Rice June 29, 2010 Affidavit, AGA Record, Vol. XVIII, para. 78, pp. 61-61.
[60] Gartner Affidavit, AGA Record, Vol. XIX, para. 5, p. 224; see also Mr. Anderson in the Legislature in 1989, p. 229 and Gartner's para. 21 on p. 232- para. 24, p. 233; see also Rice, June 29, 2010 Affidavit, AGA Record, Vol. XVIII, paras. 173-178, pp. 58-62.
[61] AGC Record, Vol. II, Tab 6.
[62] *Ibid,* p. 110.

Canadian capital markets. Many of these distinct features are detailed by Mr. Rice[63], in the 2010 Alberta Capital Market Report[64] and by the two reports of Professors Suret and Carpentier.[65] Some of the major differences identified by Suret and Carpentier and others include[66]:

(a) Four provinces (British Columbia, Alberta, Ontario and Québec) account for 96% of listed companies and 90% of aggregate market capitalization;

(b) Approximately 220 companies in Canada are categorized as "large" or "very large" by capitalization. However, approximately 2,400 companies, close to 80% of listed Canadian companies, correspond to the U.S. definition of microcap securities and these companies initiate most of the financings. Their scope is most often local and their financing transactions generally only involve a limited number of jurisdictions;

(c) Of 3,031 active Canadian companies listed on the TSX and TSX Venture Exchange (at the end of December, 2007) only 34 companies would be categorized as "very large", and their total capitalization represented 59% of the total market capitalization in Canada;

(d) 64% of the listed companies are categorized as "penny stocks" and could not be listed in the United States on account of their size. The Canadian market is therefore composed of very small companies, 64% of which are so small that they could not be listed in the United States;

(e) The two western provinces, Alberta and British Columbia, are home to 58% of listed issuers, although they are mostly small issuers. Ontario is home to 27% of exchange listed issuers;

[63] Rice, June 29, 2010 Affidavit, AGA Record, Vol. XVIII, paras. 143-169, pp. 46-53.
[64] Exhibit to the Rice Affidavit, AGA Record, Vol. XVIII, pp. 170-192.
[65] Suret, English Translation of Report, AGQ Record, Vol. IX, Tab 28, pp. 22 to 31; 35 to 44; Second Report October 27, 2010, AGA Record Vol. XXIII, p. 163.
[66] Suret, AGQ Record, Vol. IX, Tab 28, pp. 22-30 and 35-44; 2010 Capital Market Report, AGA Record, Vol. XXXII, p. 170; Rice June 29, 2010 Affidavit, AGA Record, Vol. XVIII, paras. 147 to 160, pp. 47 to 51.

(f) Natural resource companies represent 57% of listed Canadian companies and 42% of total market capitalization;

(g) Only 4% of exchange listings are from the financial sector, but that sector represents more than 28% of total capitalization. A subgroup of 13 very large financial companies accounts for 26% of total market capitalization in Canada, or 91% of the financial sector capitalization;

(h) While few large issuers are listed in Canada, most are also cross-listed on a United States exchange. These companies represented over 60% of total Canadian capitalization at the end of 2007;

(i) The Canadian market differs from other markets because of the relative importance of financing transactions conducted under the private placement or exempt market regime (issues made subject to prospectus exemptions). Private placements are issued by small private or public companies, usually on a local basis;

(j) There is in Alberta a high reliance on junior issuers and particularly those who raise capital in the exempt market and by private placements. The total annual amount raised in Alberta through private placements has been estimated at $16.5 billion per year. Further, private placements in Alberta are usually sold to individual investors, not institutional investors;

(k) 61.15% of the investment value in venture capital issues is intraprovincial. In terms of the number of investments, 84.42% were intraprovincial. There is a strong tendency for private equity investors to finance entrepreneurs that reside in the same province and the private equity market is therefore basically a provincial market. Local transactions are very important for the financing of growth companies;

(l) Among the provinces, Ontario represents 41% of the aggregate market capitalization, of which 12 large companies (primarily banks and life insurance companies) account for 26% of the aggregate Canadian market capitalization (and 63% of Ontario's market);

(m) Alberta represents 27% of Canadian market capitalization and has the highest average market capitalization of the four largest provincial markets; and

(n) One of the most distinct characteristics of Alberta's capital market is its high proportion (85% of its market capitalization) of oil and gas issuers which represent 97% of total market capitalization of the Canadian oil and gas sector.

33. Professors Suret and Carpentier summarize the "unique … segmentation and dynamics of the Canadian market"[67] and state:

> Canada's securities market has little in common with most other markets because of its size and the distribution of issuers and transactions, and its provincial-based industry specialization

34. The expert panels cited by Canada as supporting the evolution of capital markets to be primarily national and international in character[68], have not all excluded the importance of local and regional markets and local expertise in the Canadian securities market. The 1994 draft MOU stated in its Preamble:

> WHEREAS Canada and the participating provinces agree that the regional characteristics of Canada's capital markets must be recognized and fostered.[69]

35. Doug Hyndman, the former chair of the British Columbia Securities Commission, recognized the local characteristics of Canada's securities markets, and the fact that many securities regulatory reforms adopted nationally were first introduced and proven in one or a few provinces.[70] Mr. Hyndman further stated:

> Despite all the talk about money zipping around at the speed of light, what we regulate is the conduct of people, and that requires on-the-ground knowledge. I could rattle off a list of issues of cases that have been very important to the BCSC but would have no

[67] Suret & Carpentier, AGQ Record, Vol. IX, p. 14.
[68] Canada Factum, para. 10.
[69] AGC Record, Vol. II, Tab 4, p. 50
[70] Choi Report, AGQ Record, Vol. XI, p. 41.

> resonance with the OSC or most people in this room. A national organization would have to work hard at keeping in touch with and responding to regional activity.[71]

36. To put the local, national and international elements of the capital markets in perspective, Professor Rousseau has stated that, "The Canadian securities market in the 19th century already had an international dimension" and that according to a study, "the securities market at the time could not be considered from a strictly national perspective because the exchanges in London and New York provided competitive financing sources for governments and railway companies …".[72]

37. The evidence cited above shows the continuing and extensive local elements to the Canadian capital markets, as well as international elements dating back to the 19th century. This combined evidence of local, national and international securities and capital markets helps to put in perspective Dickson J.'s (as he then was) observation considering the interprovincial and indeed international character of the securities industry.[73]

(d) Systemic Risk

38. Canada refers to the "dangers of systemic risk" as underscoring "the need for national, if not international, regulation"[74]. The proposed *Act* in the Preamble, the Purposes clause and Sections 109(3) and 224[75] refers to "the integrity and stability of the financial system" which the Preamble says would be "enhanced by the presence of a single Canadian securities regulator".

39. Systemic risk arises from "linkages across different institutions in a market or economy" where "the failure of a single entity (or a subset of entities) can lead to a cascading failure across all institutions linked together."[76] The 2007 Financial Crisis involving subprime

[71] Choi Report, AGQ Record, Vol. XI, footnote 100.
[72] Rousseau, AGQ Record, Vol. VI, Tab 24, p.34.
[73] *Multiple Access*, p. 173 [AGC Authorities, Vol. II, Tab 21], and *Global Securities Corp. v. British Columbia (Securities Commission)*, [2000] 1 S.C.R. 494, para. 28 [AGC Authorities, Vol. I, Tab 14].
[74] Canada Factum, para. 29.
[75] AGC Record, Vol. I, Tab. 4, pp. 17, 36, 72, 147.
[76] Choi, June, 2010 Report, AGQ Record, Vol. XI, para. 124, p. 92; see also Rice, June 29, 2010 Affidavit, AGA Record, Vol. XVIII, para. 229(b), p. 76.

mortgages in the United States is an example of systemic risk[77]. Canada largely escaped the Financial Crisis but did experience a related loss of confidence of investors in non-bank, asset-backed commercial paper (ABCP) where $32 billion worth of unsecured promissory notes, which had been granted prospectus exemptions, were frozen[78].

40. Of the ABCP, Professor Courchene has stated:

> First of all, given how close the economic and financial links are to those in the US, it is most impressive that we effectively escaped the financial carnage that befell the Americans, the UK, and much of Europe. Second, the ABCP episode was successfully contained. Third, and most important in terms of the lessons for the [proposed central Canadian securities regulator], it is most unlikely that a single national regulator would have made any difference[79].

41. In the existing Canadian securities regulatory system there is oversight of the financial strength of intermediaries. There is protection afforded by clearing and settlement systems and *Security Transfer Acts* that address modern electronic realities and market processes. There are compensation funds protecting registrants and dealers. These securities regulatory provisions reduce systemic risk from a securities regulatory point of view[80]. The CSA in January, 2010 established a Systemic Risk Committee addressing systemic risks in Canadian capital markets which reported in November, 2010 to the CSA. IOSCO has appointed the AMF and the OSC as co-chairs of its review of systemic risk.[81]

42. Primary responsibility for protecting against systemic risk lies with federal institutions, not securities regulators. As Professor Macey states, "Central banks (and deposit insurance) are the central bulwarks against the panics that manifest systemic risk" and continues, "In Canada, there is a strong central bank that is capable of executing whatever

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[77] Choi, June, 2010 Report, AGQ Record, Vol. XI, para. 125, p. 93; see also Milne, May 19, 2010 Report, AGC Record, Vol. I, paras. 10.1-10.9, pp. 207-212.
[78] Milne, May 19, 2010 Report, AGC Record, Vol. I, paras. 11.1-11.4, pp. 212-215.
[79] Courchene Report, October 27, 2010, AGA, Vol. XXII, p. 126; see also Choi, June, 2010 Report, AGQ Vol. XI, para. 143, pp. 104-105 and para. 147, p. 108; both of these cite Purdy Crawford as saying of the ABCP crisis that "a single agency would not have changed anything."
[80] Rice Affidavit, June 29, 2010, AGA Record, Vol. XVIII, paras. 221-232, pp. 73-76; Spink June 28, 2010 Report, AGA, Vol. XIX, paras. 2(e) and (f), p. 2, paras. 3(e)-(o), pp. 3-5 and paras. 33-85, pp. 15-30.
[81] Rice June 29, 2010 Affidavit, AGA Record, Vol. XVIII, paras. 227-232, pp. 74-78; Rice November 28, 2010 Affidavit, AGA Record, Vol. XXIII, paras. 41, 73 to 75, pp. 15 and 25.

monetary policy might be necessary in times of crisis. Further centralization beyond the significant framework that already exists simply is not necessary."[82] As Professor Choi stated in respect of systemic risk:

> The majority of the regulatory response is best left to the prudential regulators in Canada – with the expertise and macro-level overview to assess systemic risk – including most prominently the Office of the Superintendent of Financial Institutions ["OSFI"] as well as the Bank of Canada[83].

43. The strength of the current Canadian system in protecting against systemic risk has been influenced by the ownership of most Canadian-based securities firms by chartered banks and the merger of the Office of the Inspector General of Banks and the Department of Insurance to form OSFI which oversees both the banks and their subsidiary securities firms. OSFI is a federally regulated institution[84] and its role is described in the *Office of the Superintendent of Financial Institutions Act* attached as Appendix Tab "G".

44. The existing Canadian securities system, in respect of systemic risk, has received commendations from a number of sources. Mr. LePan, the former Deputy Superintendent of OSFI, stated, "I am confident that, when it comes to sharing information with provincial regulatory authorities, we have an adequate system."[85] The Milken Institute, which in 2010 for the second year in a row ranked Canada's entrepreneurial access to capital first ahead of the U.K. (fourth) and the U.S. (sixth)[86], stated, "The excellent performance (relative to other developed countries) of the Canadian financial sector in the aftermath of the global financial crisis proves the Canadians are on the right track."[87] IOSCO, an association of securities regulators who regulate more than 95% of the world's securities markets, set out objectives that include those addressing the reduction of systemic risk[88]. The International Monetary Fund ("IMF") has assessed Canada as against these objectives and indicated, "The regulatory

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[82] Macey June, 2010 Report, AGQ Record, Vol. XII, Tab 36, p.78.
[83] Choi June, 2010 Report, AGQ Record, Vol. XI, Tab 33, para. 151, p. 110.
[84] Courchene June 26, 2010 Report, AGA Record, Vol. XVIII, paras. 20-26, pp. 270-273; see also Courchene October 27, 2010 Report, AGA Record, Vol. XXII, pp. 125-126.
[85] Courchene October 27, 2010 Report, AGA Record, Vol. XXII, p. 126.
[86] Rice June 29, 2010 Affidavit, AGA Record, Vol. XVIII, para. 187(a), p. 64.
[87] Choi June, 2010 Report, AGQ Record, Vol. XI, footnote 323, pp. 110-111.
[88] Spink June 28, 2010 Report, AGA Record, Vol. XIX, paras. 4-5, p. 5.

framework for the securities market of Canada exhibits high levels of implementation of the … IOSCO … Principles”[89]. In respect of the Canadian clearing and settlement system, an area susceptible to systemic risks, the IMF found “that the system is sound, efficient and reliable and it complied with almost all” of IOSCO’s *Recommendations for Securities Settlement Systems*[90].

45. The evidence is clear[91]. Major responsibility for protecting against systemic risk lies with federal government institutions and they have been performing at a high level in this regard. The role of provincial securities regulators and the CSA are at a much lower but contributing level, and they too have performed at a very high level. With this extrinsic evidence and the absence of any substantive provisions in the proposed *Act* dealing with systemic risk, there can be no basis for concluding that in pith and substance the subject matter of the proposed *Act* has anything to do with systemic risk, much less bringing it within the scope of the general trade and commerce power. There is no evidence that a single securities regulator would have any advantage over a provincial regulator, or that the federal government's perceived need for a single securities regulator to combat systemic risk has any basis, rational or otherwise.

(e) <u>Enforcement</u>

46. The Preamble of the proposed *Act* says only that “It is important for Canada to have … a strengthened, comprehensive and co-ordinated enforcement regime” for capital markets[92]. In its Factum, Canada’s references to enforcement are largely tied to criminal activity. Canada refers to “new evidence-gathering tools” to support criminal investigators, as well as an “independent adjudicative arm”[93].

47. Criminal law is obviously a matter of exclusive federal jurisdiction and empowers the federal government to enact Sections 153-166 of the proposed *Act* which deal with

[89] Executive Summary of the IMF February, 2008 Report, AGA Record, Vol. XXI, p. 157.
[90] Spink June 28, 2010 Report, AGA Vol. XIX, paras. 38-39, p. 16.
[91] Rice November 28, 2010 Affidavit, AGA Record, Vol. XXIII, para. 41, 73-74, pp. 14 and 24; Rice June 29, 2010 Affidavit, AGA Record, Vol. XVIII, paras. 227 to 232, pp. 74, 75; Choi, AGQ Record, Vol. XI, para. 149 to 160, pp. 109 to 118.
[92] AGC Record, Vol. I, Tab 4, p. 17.
[93] Canada Factum, paras. 31-32, 55 and 104.

criminal law offences and punishment. The criminal law provisions relating to the gathering of evidence (Sections 148-152) would also fall within the criminal law jurisdiction of the federal government but create a "contamination" risk by permitting the compelling of evidence from witnesses which might violate the rights of an accused in criminal law matters. In any event, combining criminal law enforcement with administrative regulatory law enforcement could introduce significant risks where different rules of evidence gathering apply to the two regimes[94]. This does not have any direct bearing on the issue of constitutionality before this Court.

48. There is evidence that "criminal enforcement appears to be particularly weak" in Canada.[95] There are also allegations that securities enforcement under the existing system has been "subject to criticism".[96] Countering this allegation is evidence that "securities enforcement in Canada is responsive, collaborative and effective"[97], that co-operation and communication with other jurisdictions and criminal enforcement agencies takes place[98] and that "enforcement of securities laws is best undertaken locally"[99].

49. None of this evidence is relevant in support of Canada's argument that the proposed *Act* is constitutional under the general trade and commerce power.

(f) <u>Similarity of the Acts</u>

50. Canada says that the proposed *Act* "builds upon existing provincial and territorial legislation" and lists major areas of similarity between the proposed *Act* and the Alberta *Securities Act*[100]. Canada does not deny the similarity between the proposed *Act* and provincial securities regulatory legislation. It argues that double aspect applies "even

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[94] Rice June 29, 2010 Affidavit, AGA Record, Vol. XVIII, paras. 212-213, pp. 71-72; LePan, AGQ Record, Vol. XIII, Tab 49, pp. 108, 109, 123.

[95] IMF Detailed Assessment Report, exhibited to Gartner July 7, 2010 Affidavit, AGA Record, Vol. XXI, p. 181; see also BCSC July 15, 2008 Report: "It is no secret that Canada's overall track record in criminal enforcement of investment fraud is dismal …": exhibited to Rice June 29, 2010 Affidavit, AGA Record, Vol. XVIII, p. 211; Rice June 29, 2010 Affidavit, AGA Record, Vol. XVIII, para. 210, p. 71.

[96] IMF Detailed Assessment Report, exhibited to Gartner July 7, 2010 Affidavit, AGA Record, Vol. XXI, p. 180.

[97] Rice June 29, 2010 Affidavit, AGA Record, Vol. XVIII, p. 217; Rice June 29, 2010 Affidavit, AGA Record, Vol. XVIII, paras. 199-217, pp. 68-72.

[98] Rice June 29, 2010 Affidavit, AGA Record, Vol. XVIII, paras. 204-205, p. 69.

[99] Rice June 29, 2010 Affidavit, AGA Record, Vol. XVIII, paras. 200-201, p. 68; *Wisepersons Report* (2003), AGC Record, Vol. II; p. 84. BCSC Submissions to the Expert Panel, AGA Record, Vol. XVIII, p. 193 at p. 202.

[100] Canada Factum, para. 54.

when the two laws are similar"[101] and says "the fact of similarity does not in any way affect Parliament's jurisdiction to enact a more comprehensive law"[102].

51. A detailed comparison of the proposed *Act* with the Alberta *Securities Act* is attached as Appendix Tab "C" to this Factum. This comparison supports the conclusion that the substantive provisions of both *Acts* are virtually identical (with the exception of the criminal law provisions). Canada says that, "There are significant ways in which the statute goes beyond existing provincial/territorial schemes"[103]. Other than the criminal law provisions, the proposed *Act* does not in any substantive way go "beyond" existing provincial legislation. It replicates the fundamental regulatory requirements for registration of securities dealers, prospectus filing requirements, continuous disclosure requirements and duties of market participants. There are some minor, technical differences that are addressed in the Comparative Chart (Appendix Tab "C"). None of these differences support a different purpose and a different aspect in order to allow a general trade and commerce, double aspect characterization of the proposed *Act*.

52. One obvious difference is the stated intention that the proposed *Act* creates a single national regulator applying a comprehensive securities regulatory regime across Canada, although participation is not mandated. As is set out below,[104] merely declaring an intention that legislation extends across the country provides no basis for a trade and commerce characterization.

53. Another difference is that "capital markets" are mentioned five times in the Preamble, once in the Purpose clause and once in Section 16[105]. Nowhere in the proposed *Act*, however, are there any substantive provisions that purport to regulate capital markets. There are no new powers or responsibilities directed at the regulation of capital markets, whether local, national or international. Capital markets are not even defined in the proposed *Act*. In this vacuum, the Preamble and Canada's Factum describe capital markets as affecting "the well-being and prosperity of all Canadians" and being

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[101] Canada Factum, para. 67.
[102] Canada Factum, para. 68.
[103] Canada Factum, para. 55.
[104] See para. 76(ii) below.
[105] AGC Record, Vol. I, Tab 4, pp. 17, 36 and 38.

"increasingly national and international in scope"[106]. In support of what is stated in the Preamble, Canada argues that capital markets no longer have "an important local component, but they have evolved to be primarily national and international in character."[107] They have experts who argue that local capital markets have virtually disappeared[108].

54. The evidence on capital markets already referred to in this Factum demonstrates the following:

(a) Capital markets have been well recognized as being one of the purposes for the regulation of trading in securities[109];

(b) Capital markets in Canada involve distinct and important local elements[110]; and

(c) Capital markets in the context of trading in securities involve at their core contractual, property and civil rights that fall within provincial property and civil rights powers[111].

55. The reference in the proposed *Act* to capital markets is no qualification for a general trade and commerce characterization. The proposed *Act* includes substantive criminal law provisions which Alberta does not challenge. The proposed *Act* includes provisions relating to derivatives, new evidence gathering tools[112], and the harmonization of existing civil liability regimes[113]. The proposed *Act* also contains reference to a Council of Ministers and a Regulatory Policy Forum[114] which on a review of the proposed *Act* are consultative only with no provincial power or control. The proposed *Act* also contains provisions for an independent adjudicative arm,[115] which currently exists in Québec

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[106] Preamble, AGC Record, Vol. I, Tab 4, p. 17.
[107] Canada Factum, para. 10.
[108] Trebilcock, AGC Record, Vol. I, para. 37, p. 247; Milne, AGC Record, Vol. I, para. 12.1, p. 217.
[109] Rice, AGA Record, Vol. XVIII, para. 9, p. 12, paras. 28-29, p. 18.
[110] Rice, AGA Record, Vol. XVIII, paras. 143 to 160, pp. 46 to 51.
[111] Spink, AGA Record, Vol. XIX, p. 2; paras, 19 to 27 above.
[112] Canada Factum, para. 55.
[113] Canada Factum, para. 63.
[114] Canada Factum, para. 56.
[115] Canada Factum, paras. 55 and 62.

under its securities legislation[116]. None of these so-called differences have anything remotely to do with matters that are of crucial importance for the national economy and cannot be effectively regulated unless regulated nationally. They do not elevate the proposed *Act* to a general trade and commerce characterization.

[116] Rousseau, AGQ Record, Vol. VI, p. 21

PART II. - REFERENCE QUESTION

56. In response to the question identified by Canada in its Factum at paragraph 44, the position of the Attorney General of Alberta is that the answer to that question is “no, except for the criminal law provisions (Sections 158-165).

PART III. - ARGUMENT

1. THE PROPOSED *ACT* IS DIRECTED AT THE REGULATION OF TRADING IN SECURITIES AND FALLS SQUARELY WITHIN "PROPERTY AND CIVIL RIGHTS" JURISDICTION

57. The proposed *Act*, in accordance with almost 80 years of jurisprudence and the evidence filed in this Reference, is, in pith and substance, aimed and directed at the regulation of trading in securities. The jurisprudence and the evidence demonstrate that the regulation of trading in securities involves at its core contractual, property and civil rights that fall squarely within the scope of "property and civil rights" powers under Section 92(13) of the *Constitution Act, 1867*[117].

58. Canada does not deny the close similarity of the proposed *Act* with existing provincial/territorial schemes[118]. Further, and importantly, Canada appears to agree that the proposed *Act* is "in pith and substance designed to establish a comprehensive regime of securities regulation …"[119].

59. Consistent with the evidence[120], the case law demonstrates that, in pith and substance, securities regulatory legislation is aimed at the regulation of trading in securities. Trading in securities, while involving extra-provincial elements, is at its core founded on contractual, property and civil rights. The primary purpose of regulating trading in securities is to protect investors, but its purposes also include maintaining fair and efficient capital markets for the benefit of all who use them, ensuring public confidence in the system (reducing systemic risk) and obtaining inter-jurisdictional co-operation and reciprocal assistance.

60. There is strong academic support for the property and civil rights characterization of the regulation of trading in securities:

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[117] Schedule "G" to Canada's Factum; see also Appendix Tab "E" to Alberta's Factum
[118] See para. 50 above.
[119] Canada Factum, para. 2, see also paras. 4, 43, 71 and 72.
[120] See paras. 17 to 21, above.

> Both securities and security entitlements are forms of property. The holding and transfer of securities located in a province is thus fundamentally a matter coming within 'Property and Civil Rights in the Province.' [121]

Professor Hogg has stated:

> In line with the insurance cases and the marketing cases, the provinces have the power to regulate the trade in corporate securities. This is a matter within property and civil rights in the province.[122]

and:

> A provincial power … [referring to a finding in two cases] came from the characterization of the provincial laws as regulating the trade in securities, which is a matter coming within 'property and civil rights in the province'.[123]

61. The Privy Council in 1932 upheld provincial securities legislation, in the face of an unsuccessful challenge that it, in pith and substance, related to federal companies and criminal law powers. Lord Atkin stated:

> There is no reason to doubt that the main object sought to be secured in this part of the Act 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.[124]

Lord Atkin concluded:

> 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.[125]

62. In *Smith v. The Queen*, Kerwin, C.J. said, "The general aim of the Act is to regulate the security business … with power to [the Ontario Securities Commission] to supervise the

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[121] Geva, *Legislative Power in Relation to Transfers of Securities: The Case for Provincial Jurisdiction in Canada* (2004), 19 B.F.L.R. at 40 [AGA Authorities, Tab 13].
[122] Hogg, *Constitutional Law of Canada* (5th ed. supp) (Vol. 1) at p. 21-23 [AGA Authorities, Tab 15].
[123] Hogg at p. 15-13 [AGA Authorities, Tab 14].
[124] *Lymburn v. Mayland,* [1932] A.C. 318 (P.C.), p. 324 [AGC Authorities, Vol. I, Tab 19].
[125] *Ibid,* p. 326.

trading in securities …"[126]. In the same case, Martland, J. said that, "The *Securities Act* exists to regulate the securities business"[127].

63. In *Gregory & Company Inc.* v. *The Québec Securities Commission* there were interprovincial communications and solicitations directed at investors outside of Québec, but the Québec Securities Commission's jurisdiction over the broker was upheld with this statement:

> 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.[128]

64. In *Duplain v. Cameron* Kerwin, C.J. stated of the Saskatchewan *Securities Act* that, "Its pith and substance is the regulation of trading in securities"[129].

65. In *R. v. W. McKenzie Securities*[130], leave to appeal to the Supreme Court of Canada denied[131], there were also extra-provincial elements. There an Ontario broker was held to be subject to Manitoba securities enforcement actions for communicating solicitations and offers to a Manitoba investor. It was held that "the true nature" of provincial securities regulatory legislation "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"[132]. This case is important because it upheld the Manitoba *Securities Act* as competent provincial legislation in the face of a federal trade and commerce argument. The *Act* could not "justly be considered as designed in any way for the regulation of inter-provincial trading" so that it "accordingly does not invade the domain of trade and commerce reserved to the Dominion by the provisions of s. 91(2) of

[126] *Smith v The Queen*, [1960] S.C.R. 776, p. 779 [AGC Authorities, Vol. III, Tab 39].
[127] *Ibid.*, p. 797.
[128] [1961] S.C.R. 584 at pp. 587-8 and 590 [AGC Authorities, Vol. I, Tab 15].
[129] [1961] S.C.R. 693 at p. 700; see also pp. 708 and 712 [AGA Authorities, Tab 12].
[130] (1966), 56 D.L.R. (2d) (Man. C.A.) [AGC Authorities, Vol. II, Tab 30].
[131] *West v. R.*, [1966] S.C.R. IX [AGA Authorities, Tab 19].
[132] *W. McKenzie.*, p. 62 [AGC Authorities, Vol. II, Tab 30].

the *B.N.A. Act*."[133] Justice Freedman, J.A. (as he then was) dealt with the acknowledged extra-provincial elements this way:

> Although offences are local, the nature of some offences is such that they can properly be described as occurring in more than one place. This is particularly the case where a transaction is carried on by mail from one territorial jurisdiction to another, or indeed by telephone from one such jurisdiction to another. This has been recognized by the common law for centuries.[134]

66. In *Multiple Access Ltd. v. McCutcheon*[135] the constitutionality of comprehensive provincial securities legislation and a narrow overlapping insider trading provision of the *Canada Corporations Act* were upheld under the double aspect doctrine. Justice Dickson (as he then was) stated in respect of securities legislation:

> Trading in securities is an essential subject of comprehensive provincial legislation. No doubt there will be instances where the national and provincial schemes overlap. Where this occurs the preservation of the integrity of the provincial scheme should be of prime importance, in the absence of a contrary expression by Parliament, in harmony with the general rule that a law should not be held invalid or inoperative unless that result is unavoidable.[136]

67. He also said:

> It is well established that the provinces have the power, as a matter of property and civil rights, to regulate the trade in corporate securities in the province, provided the statute does not single out federal companies for special treatment or discriminate against them in any way.[137]

And:

> In my opinion ss. 113 and 114 of *The Securities Act* of Ontario constitute valid legislative provisions in relation to the subject matter of property and civil rights in the province, with respect to trading of the capital securities of a company.[138]

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[133] *Ibid.*, p. 63.
[134] *Ibid.*, p. 63.
[135] [1982] 2 S.C.R. 161 [AGC Authorities, Vol. II, Tab 21].
[136] *Ibid.*, p. 170.
[137] *Ibid*, p. 183.
[138] *Ibid,* p. 185; see also Estey J. at pp. 219-220.

68. Justice Dickson stated that he did not wish "to affect prejudicially the constitutional right of Parliament to enact a general scheme of securities legislation pursuant to its power to make laws in relation to interprovincial and export trade and commerce. This is of particular significance considering the interprovincial and indeed international character of the securities industry."[139]

69. In *Bennett v. British Columbia (Securities Commission),*[140] British Columbia residents sold their shares in a company that was traded exclusively on the Toronto Stock Exchange using brokers employing a computer-assisted trading system. The British Columbia Securities Commission initiated investigative proceedings and issued orders on the grounds that the purchasers violated insider trading provisions of the British Columbia *Securities Act*. The petitioners were unsuccessful in arguing that the proceedings brought against them were *ultra vires* because the securities transactions were in pith and substance a matter of interprovincial and international trade and commerce. As with the *McKenzie* case[141], this argument was rejected[142]. Justice Melnick described the aim and purpose of the section of the *Securities Act* in question as laying down "specific ethical standards for those engaged in the trading of the securities of a reporting issuer and for those individuals in a special relationship with a reporting issuer. It is to promote a level playing field for those engaged in the buying and selling of shares."[143]

70. In *Québec v. Ontario (Securities Commission)*[144], the Ontario Court of Appeal upheld the jurisdiction of the Ontario Securities Commission to adjudicate on a class action suit brought by Ontario resident minority shareholders against the government of Québec and its Crown corporation. It was alleged that Québec and its Crown corporation had failed to make a follow-up offer to minority shareholders after obtaining control of a federally incorporated company whose shares traded on both the Toronto and Montreal Stock

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139 *Ibid*, p. 173; and see para. 37 above.
140 (1991), 82 D.L.R. (4th) 129 (B.C.S.C.) [AGA Authorities, Tab 4]; affirmed (1992), 94 D.L.R. (4th) 339 (B.C.C.A.) [AGA Authorities, Tab 5].
141 [AGC Authorities, Vol. II, Tab 30].
142 [AGA Authorities, Tab 4], pp. 154-156.
143 *Ibid*, p. 152.
144 (1992), 97 D.L.R. (4th) 144 (Ont. C.A.) [AGA Authorities, Tab 23].

Exchanges. The Court held that "there can be no doubt that the pith and substance of the legislation involved in this case concerns property and civil rights in the province of Ontario" and that, "The legislative objective is to regulate the operation of the capital markets in Ontario for the protection of all who use them", even though there may have been incidental or consequential effects on extra-provincial rights[145].

71. In *Global Securities Corp. v. British Columbia (Securities Commission)*[146] an amendment to the B.C. *Securities Act* required production of records by a registrant to assist in the administration of securities laws in other jurisdictions. This amendment was upheld constitutionally. Iacobucci, J., speaking for a unanimous Court, concluded that the "pith and substance" of the section in question fell within provincial property and civil rights and that the section's "dominant purpose is the effective regulation of domestic securities, a task that has long been recognized to fall within provincial authority …"[147]. In reaching this decision, the Court quoted with approval from Dickson, C.J. in the *General Motors* case where he had stated, "'The first step should be to consider whether and to what extent the impugned provision can be characterized as intruding into provincial powers'" [148]. Inter-jurisdictional co-operation among securities regulators was held to be "indispensible", with the recognition that "the securities market has been an international one for years"[149] and that, with the internet and electronic trading, "regulators must equally be able to respond, and surmount borders where legally possible"[150]. Iacobucci, J. stated:

> I therefore agree with the Commission that one of the dominant purposes of s. 141(1)(b) is obtaining reciprocal co-operation from other securities regulators, thus enabling the Commission to carry out its domestic mandate effectively.[151]

[145] *Ibid.*, p. 154; see also p. 157.
[146] [AGC Authorities, Vol. I, Tab 14].
[147] *Ibid.*, p. 515.
[148] *Ibid*, p. 505.
[149] *Ibid.*, p. 509.
[150] *Ibid.*, p. 510.
[151] *Ibid.*, p. 512.

He stated that the "extra-provincial effects" of the section in question are "clearly incidental to the dominant purposes" of provincial securities legislation[152]. In reviewing the purpose of securities regulation, the Court cited with approval *Smith*[153], *Lymburn*[154], and *Gregory*[155] and added that "another obvious purpose of s. 141(1)(b) is uncovering violations of foreign law by domestic registrants"[156].

72. In *Committee for the Equal Treatment of Asbestos Minority Shareholders v. Ontario (Securities Commission)*[157] a section in the Ontario *Securities Act* giving jurisdiction to the Ontario Securities Commission to intervene in activities related to Ontario capital markets was upheld constitutionally. This case, again a unanimous decision of the Supreme Court of Canada, upheld the importance of the Securities Commission's purposes of both providing protection to investors and fostering fair and efficient capital markets and confidence in capital markets.[158]

73. *Pearson v. Boliden Limited*[159] involved class action proceedings in British Columbia arising out of allegations of misrepresentations in an initial public offering of shares in a mining company where prospectus clearance had occurred in ten provinces and shares were subsequently sold both within and outside of Canada and on stock exchanges. In limiting those who could participate in the British Columbia class action, the Court noted "that most of the *Acts* state that 'distribution' in each case requires a 'trade' or 'transaction', and that 'trade' includes the receipt by a registrant of an order to buy or sell a security."[160] Newbury J.A., for the Court, stated:

> 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. A dealer

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[152] *Ibid.*, p. 514.
[153] [AGC Authorities, Vol. III, Tab 39].
[154] [AGC Authorities, Vol. II, Tab 19].
[155] [AGC Authorities, Vol. I, Tab 15].
[156] [AGC Authorities, Vol. I, Tab 14], pp. 512-513.
[157] [2001] 2 S.C.R. 132 [AGA Authorities, Tab 10].
[158] *Ibid.*, p. 149.
[159] (2002), 22 D.L.R. (4th) 453 (BCCA) [AGC Authorities, Vol. II, Tab 24].
[160] *Ibid.*, p. 481, para. 44.

> or broker may not trade in British Columbia unless it is registered to do so under the British Columbia *Act*. It matters not where the intermediary (or its customer) resides or carries on business. Similarly, an issuer that wishes to distribute shares in New Brunswick must comply with the prospectus requirements of the *New Brunswick Act*. This is so regardless of where the document is prepared or where the issuer has its head office. In this way, each province protects the investing public from misconduct in its territory, but at the same time, honours the principle of comity by respecting the legislative authority of other provinces to do likewise.[161]

74. In *Pezim v. British Columbia (Superintendent of Brokers)*[162] Iacobucci, J., for the Court, stated:

> 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.

2. PITH AND SUBSTANCE PRINCIPLES

75. The principles involved in the application of the pith and substance doctrine have been discussed extensively in leading cases[163]. In a general sense, these authorities require an inquiry into "the true nature of the law in question for the purpose of identifying the 'matter' to which it essentially relates",[164] what is "the dominant or most important characteristic of the law"[165] or "what is the essential character of the law"[166].

76. There are important principles in the application of the pith and substance doctrine that have particular relevance to this Reference:

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[161] *Ibid.*, p. 490, para. 63; see also paras. 65 and 66 at pp. 491-2.
[162] [1994] 2 S.C.R. 557 at p. 589 [AGA Authorities, Tab 20].
[163] *Re Firearms Act (Can.)*, [2000] 1 S.C.R. 783, pp. 796-801 [AGC Authorities, Vol II, Tab 37]; *Global Securities*, para. 22 [AGC Authorities, Vol. I, Tab 14]; *Ward v. Canada (Attorney General)*, [2002] 1 S.C.R. 569, paras. 16-17 [AGA Authorities, Tab 27]; *British Columbia v. Imperial Tobacco of Canada Ltd.*, [2005] 2 S.C.R. 473, paras. 28-29 [AGA Authorities, Tab 6], *Québec (Attorney General) v. Canadian Owners & Pilots Association*, 2010 SCC 39, paras. 16-17 [AGA Authorities, Tab 21], *Reference Re Assisted Human Reproduction Act*, 2010 SCC 61, paras. 189-191 [AGA Authorities, Tab 24].
[164] *Canadian Western Bank*, para. 26 [AGA Authorities, Tab 8].
[165] *Global Securities*, para. 22 [AGC Authorities, Vol. I, Tab 14].
[166] *Ward*, para. 16 [AGA Authorities, Tab 27].

(i) The balance of federalism requires the recognition of diversity and a degree of provincial autonomy which is to be protected from intrusion and encroachment. This has particular application to cases involving the general trade and commerce power. As was stated by Dickson, J. (as he then was) in the *Canadian National Transportation* case[167], "The difficult underlying task facing a court determining the constitutional status of federal economic regulation is, without passing on the substantive merits of the legislation, to assess whether and how far it encroaches on the degree of local autonomy contemplated by the Constitution." In the *General Motors* case[168], in referring to three hallmarks for the general trade and commerce power, Dickson, C.J. stated:

> Each of these requirements is evidence of a concern that federal authority under the second branch of the trade and commerce power does not encroach on provincial jurisdiction.

At pages 666-667, he stated:

> The first step should be to consider whether and to what extent the impugned provision can be characterized as intruding into provincial powers … The purpose is merely to ascertain the degree to which the provision could be said to intrude on provincial powers, so that this intrusion can be weighed in light of the possible justification for the section.

At pages 668-669, Chief Justice Dickson stated:

> The same test will not be appropriate in all circumstances. In arriving at the correct standard the court must consider the degree to which the provision intrudes on provincial powers. The case law … shows that in certain circumstances a stricter requirement is in order, while in others, a looser test is acceptable. For example, if the impugned provision only encroaches marginally on provincial powers, then a 'functional' relationship may be sufficient to justify the provision. Alternatively, if the impugned provision is highly intrusive *vis-à-vis* provincial powers then a

[167] [AGA Authorities, Tab 2], p. 260; see also pp. 263 and 267.
[168] [AGC Authorities, Vol. I, Tab 13], p. 661; see also pp. 662, 667-674.

> stricter test is appropriate. A careful case by case assessment of the proper test is the best approach.[169]

(ii) While preambles and purposes clauses may be considered[170] as providing insight as a "sign post"[171], the courts have instructed themselves to go behind the words that have been used and "must seek to ascertain the true purposes of the legislation, as opposed to its mere stated or apparent purposes"[172]. This is particularly important because of the references in the proposed *Act* to capital markets, to "the integrity and stability of the financial system" (essentially systemic risk) and protecting and promoting Canadian interests internationally. As was stated by the Chief Justice for seven members of the Supreme Court in the *Canadian Owners & Pilots Association* case[173], "The first step in determining if the law is *ultra vires* is to determine its 'matter'. The matter of law is in essence 'an abstract of the statute's content' …" and a pith and substance "analysis requires the court to ask '[w]hat in fact does the law do and why?'".

(iii) Precedent and consistency are important in dealing with the division of constitutional powers. As was stated in *Canadian Western Bank*[174], "A certain degree of predictability with regard to the division of powers … is essential." In the *Bell Canada* case[175] it was stated:

> The classification stage is simplified where, as is the case here, the question has been canvassed over a period of about 40 years in several leading cases which have determined its parameters and solutions.

(iv) Precision is imperative in characterising the pith and substance of impugned legislation. In *Reference re: Assisted Human Reproduction*

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[169] See also *Kirkbi*, p. 324, para. 32 [AGC Authorities, Vol. I, Tab 16], and *Consolidated Fastfrate*, pp. 424-425 and 430 [AGA Authorities, Tab 11].
[170] *Canadian Western Bank*, para. 27 [AGA Authorities, Tab 8].
[171] *Moses v. Québec (Attorney General)*, 2010 SCC 17, para. 101 [AGA Authorities, Tab 22].
[172] *Canadian Western Bank*, para. 27 [AGA Authorities Tab 8]; see also *Central Potash*, para. 76 [AGC Authorities, Vol. I, Tab 8].
[173] [AGA Authorities, Tab 21], paras. 16 and 17.
[174] [AGA Authorities, Tab 8], paras. 23-24; see also *Re Firearms*, para. 32 [AGC Authorities, Vol. II, Tab 37].
[175] [AGA Authorities, Tab 3], p. 815.

Act, LeBel and Deschamps JJ stated that the identification of the pith and substance is "subject to ... the requirement of precision".[176] To hold otherwise, they cautioned, could have "perverse effects on more than one level", including the "dilution of and confusion of constitutional doctrines" and "an erosion of the scope of provincial powers"[177] Just as references to the environment and health are too vague and general to support a pith and substance characterization[178], so too must be references to capital markets or "every economic issue".[179]

(v) Draft legislation, such as the proposed *Act*, cannot be said to represent Parliament's will and is not, therefore, entitled to the same deference often accorded to operative government policies and decisions. It follows that the purpose and effect of draft legislation must be carefully scrutinized and its constitutionality cannot be presumed. These interpretive guidelines are particularly apt in the context of a reference which, by the very nature of the process, signals Parliament's uncertainty as to the constitutionality of its draft legislation and constitutes an invitation for the Court to make such a determination.

(vi) There is in the case of a purported use of the general trade and commerce power which intrudes into provincial jurisdiction over property and civil rights a reverse onus which lies on Canada. As set out above, the intrusion must be "weighed in light of the possible justification for the section" and a "stricter test" may be appropriate.[180]

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176 [AGA Authorities, Tab 24], para. 190.
177 *Ibid.*
178 *Ibid.*
179 *Canadian National Transportation*, p. 262 [AGA Authorities, Tab 21].
180 See para. 76(i), above; and see para. 86 to 89, below.

3. THE PROPOSED *ACT* DOES NOT FALL WITHIN THE FEDERAL GENERAL TRADE AND COMMERCE POWER

77. Since the *Citizens Insurance Company of Canada v. Parsons*[181] case, it has been recognized that the words "regulation of trade and commerce" are not to be used in their "unlimited sense". Attempts to define and limit the meaning of the general trade and commerce power have been discussed in the authorities. Before referring to the five *indicia* (which alone is all that is addressed in Canada's Factum), there are important judicial pronouncements on what generally does and does not fall within the general trade and commerce power. This is in recognition that an overly broad interpretation of the general trade and commerce power would 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".[182] A federal enactment that purports to carry out the regulation of a single trade or business "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."[183]

78. Authorities have excluded from the general trade and commerce power "'matters connected with the enjoyment and preservation of property in the province, or matters of contract between parties in relation to their property or dealings, although the exercise by the local legislatures of such powers may be said remotely to affect matters connected with trade and commerce …'"[184] "The concept of trade and commerce, the regulation of which is confided to Parliament, is entirely separate and distinct from the regulation of mere sale and purchase agreements".[185] "It seems plain that the Province may regulate a transaction of sale and purchase in Ontario between a resident of the Province and one

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[181] (1881), 7 A.C. 96 (P.C.), p. 112 [AGC Authorities, Vol. I, Tab 9].
[182] *Parsons*, p. 112 [AGC Authorities, Vol. I, Tab 9].
[183] *Canadian National Transportation* at p. 267 [AGA Authorities, Tab 2].
[184] *MacDonald v. Vapor Canada Ltd.* at p. 161 [AGA Authorities, Tab 18], citing Ritchie, J. in the Supreme Court of Canada decision in the *Parsons* case.
[185] *Reference re The Farm Products Marketing Act*, p. 205 [AGA Authorities, Tab 25], quoted with approval in *Carnation Co. v. Québec*, [1968] S.C.R. 238 at pp. 244-245 [AGA Authorities, Tab 9] and *CIGOL v. Saskatchewan*, [1978] 2 S.C.R. 545, p. 567 [AGA Authorities, Tab 7].

who resides outside its limits … That is a matter of the regulation of contracts and not of trade as trade".[186] In *Labatt Breweries,*[187] Estey, J. stated:

> … 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.

79. The general trade and commerce power does not apply to the regulation of insurance[188], even though "the business of insurance has grown to great proportions".[189] The business of automobile insurance is interprovincial and international in scope with branch offices in various provinces and a steady flow of money passing from branch offices to the head office and executive office. There is the creation of a pool of capital which enables insurers to carry on nation-wide business to serve the requirements of policy-holders in all parts of Canada[190]. Nevertheless, "the business of insurance in general falls within the authority of the provinces as a matter of property and civil rights".[191]

80. Simply because federal legislation indicates an intention to create a "single" Canadian securities regulator under a regime that "applies across Canada" does not create federal constitutional competence under the general trade and commerce power or otherwise. Similarly, the intention of the proposed Act to apply to "every industry", to "every investor", to "companies in all industries" or to "all Canadians" does not create federal constitutional competence.[192] Purporting to legislate nationally on a subject matter that falls within provincial jurisdiction (whether trading in securities or, for example, insurance, the legal profession, education, healthcare, highway safety or other contractual, property and local business activities) invades exclusive provincial jurisdiction and is unconstitutional. As was said by Laskin, C.J., "It is not a sufficient peg on which to support the legislation that it applies throughout Canada when there is

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[186] *Reference Re The Farm Products Marketing Act*, p. 204 [AGA Authorities, Tab 25].
[187] *Labatt Breweries of Canada Limited v. AG of Canada*, [1980] 1 S.C.R. 914 at p. 943 [AGA Authorities, Tab 17].
[188] *Parsons* [AGC Authorities, Vol. I, Tab 9]; *Re Insurance Act 1910* (1913), 48 S.C.R. 260 [AGA Authorities, Tab 16]; *AG Canada v. AG Alberta*, [1916] A.C. 588 (P.C.) [AGA Authorities, Tab 1]; *The Canadian Indemnity Co. v. AG British Columbia*, [1977] 2 S.C.R. 504 [AGA Authorities, Tab 26]; *Canadian Western Bank* [AGA Authorities, Tab 8].
[189] *Re Insurance Act 1910,* pp. 304-305 [AGA Authorities, Tab 16].
[190] *Canadian Indemnity Co.*, pp. 510-11 [AGA Authorities, Tab 26].
[191] *Canadian Western Bank* at para. 80 [AGA Authorities, Tab 8].
[192] Canada Factum paras. 89-91.

nothing more to give it validity."[193] In *Canadian National Transportation* the same point was made in the context of economic issues. There it was stated that, "There is hardly an economic issue which, if only by virtue of its recurrence in locations around the country, could not be characterized as a matter of general interest throughout the Dominion."[194] Dickson J. rejected as an "equally unacceptable proposition that economic legislation qualifies under the general trade and commerce rubric merely because it applies equally and uniformly throughout the country."[195]

81. The regulation of anti-competitive practices across Canada has been upheld as a valid exercise of the general trade and commerce power. In the *General Motors* case, Dickson C.J. said:

> 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. [196]

He cited authority that discussed "the diverse economic, geographical, and political factors which make it *essential* that competition be regulated on the federal level" (emphasis added) and said that competition was "designed to control an aspect of the economy that must be regulated nationally if it is to be successfully regulated at all."[197]

82. Other examples of the valid general trade and commerce jurisdiction involve the regulation of "the control and guidance and the flow of articles of commerce through the distribution channels"[198] or address a province's "figurative sealing of its borders to entry of goods from others".[199]

83. The *Office of the Superintendent of Financial Institutions Act*[200] provides a useful example of legislation directed at the reduction of systemic risk. The proposed *Act*, when

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[193] *Vapor Canada*, p. 156 [AGA Authorities, Tab 18]; see also p. 159.
[194] *Canadian National Transportation*, p. 262 [AGA Authorities, Tab 2].
[195] *Ibid*, p. 266
[196] *General Motors* at p. 678 [AGC Authorities, Vol. I, Tab 13].
[197] *Ibid.*, p. 682; see also pp 680-681.
[198] *Labatt*, p. 939 [AGA Authorities, Tab 17].
[199] *A.G. Manitoba v. Manitoba Egg & Poultry Ass.*, [1971] S.C.R. 689 at p. 717 [AGC Authorities, Vol. I, Tab 2].
[200] Appendix Tab "G" to the Alberta Factum.

contrasted with the *OFSI Act*, contains none of the powers and co-ordination of activities that could address systemic risk.

84. The authorities supply useful language establishing restrictive requirements for the general trade and commerce power in order to maintain the crucial balance of federalism and avoid encroachment and intrusion into provincial areas of competence. This is discussed in part in paragraph 76(i), above.

85. In *Labatt Breweries*, Estey, J. stated in general terms, based on earlier case references, that they "are all predicated upon the requirement that the purported trade and commerce legislation affected industry and commerce at large or in a sweeping, general sense."[201] He rejected on the facts of that case the application of the trade and commerce clause because of the absence of "a regulation of trade and commerce in the sweeping general sense"[202].

86. In *Canadian National Transportation*, Dickson, J. agreed that the words "regulation of trade and commerce" in the *Parsons* case "necessitate a restrictive reading of the *Wharton* test of 'general interest throughout the Dominion'".[203] Dickson, J. described in general terms what in his view would qualify under the general trade and commerce clause:

> A different situation obtains, however, when what is at issue is general legislation aimed at the economy as a single integrated national unit rather than as a collection of separate local enterprises. Such legislation is qualitatively different from anything that could practically or constitutionally be enacted by the individual provinces either separately or in combination. The focus of such legislation is on the general, though its results will obviously be manifested in particular local effects …[204]

87. In *General Motors*, Dickson, C.J., now speaking for a unanimous Court, assessed whether a specific provision could be constitutionally upheld within an overall constitutionally valid act. He asked whether the impugned provision intruded on the

[201] *Labatt Breweries*, p. 943 [AGA Authorities, Tab 17].
[202] *Ibid,* p. 944.
[203] *Canadian National Transportation* at p. 263 [AGA Authorities, Tab 2].
[204] *Ibid,* p. 267.

provincial powers "so that this intrusion can be weighed in light of the possible justification for the section."[205] He continued that if there were only a marginal encroachment then a "functional" relationship may be sufficient to justify the provision. "If the impugned provision is highly intrusive *vis-à-vis* provincial powers then a stricter test is appropriate. A careful case by case assessment of the proper test is the best approach."[206] In addressing the three *indicia* that were added to assist in interpreting the general trade and commerce clause, Dickson, C.J. said that those criteria "share a common theme: all three are indications that the scheme of regulation is national in scope and that local regulation would be inadequate."[207] He said that, "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."[208]

88. In *Kirkbi AG v. Ritvik Holdings Inc.*[209], LeBel, J., for the Court, stated, "If the provision is highly intrusive, a stricter test is applied: the provision must be 'truly necessary' or 'integral' to the federal scheme …".

89. Professor Hogg has supported these restrictive requirements in appropriate circumstances by stating:

> For minor encroachments, the rational connection test is appropriate. For major encroachments, a stricter test (such as 'truly necessary' or 'essential') is appropriate."[210]

90. There is nothing in the proposed *Act,* or in its context properly viewed, that could, in pith and substance, be aimed or directed at a subject matter justifying the application of the general trade and commerce power. No subject matter in the proposed *Act* could be characterized as addressing "genuinely a national economic concern" or be "aimed at the economy as a single integrated national unit" that "is qualitatively different from anything that could practically or constitutionally be enacted by the individual provinces

[205] *supra*.
[206] *Ibid,* p. 669.
[207] *Ibid,* p. 678.
[208] *Ibid,* p. 678; see also pp. 681 and 682.
[209] [AGC Authorities, Vol. I, Tab 16], p. 32, para. 32.
[210] Hogg, p. 15-42 [AGA Authorities, Tab 14].

either separately or in combination."[211] Referring to capital markets, systemic risk, international representation and other matters, does not change this result. A careful analysis of the wording of the proposed *Act* and its true purpose demonstrates that the proposed *Act* is virtually identical to existing provincial securities regulatory legislation and, in accordance with established precedent, should be characterized as falling within property and civil rights jurisdiction. The provinces acting separately and in combination through the CSA have demonstrated both practically and constitutionally that they can regulate trading in securities at a very highly regarded co-operative and harmonized level.

91. In support of the foregoing, both the *McKenzie*[212] and the *Bennett*[213] cases represent strong precedents rejecting the trade and commerce jurisdiction for securities regulatory legislation.

92. Canada submits that the five *indicia* of the general trade and commerce power set out in the leading cases[214] have been met on the facts of this Reference. Alberta strongly disagrees and submits that none of the final three *indicia* can be met.

93. Before examining those final three *indicia*, it is important to recognize their qualified use in comparison to the broader general principles referred to above. In *General Motors*, Dickson C.J. stated:

> In total, the five factors provide a preliminary check-list, the presence of which in legislation is an indication of validity under the trade and commerce power. These *indicia* do not, however, represent an exhaustive list of traits that will tend to characterize general trade and commerce legislation. Nor is the presence or absence of any of these five criteria necessarily determinative …
>
> The five factors articulated in *Canadian National Transportation* merely represent a principled way to begin the difficult task of distinguishing between matters relating to trade and commerce and those of a more local nature.[215]

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211 *Canadian National Transportation*, pp. 267-268 [AGA Authorities, Tab 2].
212 [AGC Authorities, Vol. II, Tab 30].
213 [AGA Authorities, Tabs 4 and 5.]
214 *Canadian National Transportation*, pp. 267-268 [AGA Authorities, Tab 2]; *General Motors*, pp. 662-663 [AGC Authorities, Vol I, Tab 13]; *Kirkbi*, para. 17 [AGC Authorities, Vol. I, Tab 16].
215 *General Motors*, pp. 662-663 [AGC Authorities, Vol. I, Tab 13].

94. The third *indicia* is that “the legislation must be concerned with trade a whole rather than with a particular industry.”[216] The phrase “a particular industry” should not be given a narrow meaning. It should include businesses and activities that would not fit within the category of “trade as a whole”, where "trade as a whole" must accord with matters of “crucial importance for the national economy that cannot be enacted by the provinces separately or in combination.” In this context the courts have referred to “the securities industry”[217], “the securities business”,[218] “the business of dealing in securities”[219] and “the business of trading in securities or acting as investment counsel”[220]. In *Parsons* it was said that "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’”.[221] Lord Atkin has been cited as saying “‘the regulation of trade and commerce does not permit the regulation of individual forms of trade or commerce confined to the province’”.[222] Witnesses in this case and academic and securities-related sources have frequently used the phrase “securities industry”[223]. Even the Attorney General of Ontario describes the existence of “securities industries” in its Factum[224]. All of these phrases support the conclusion that the regulated activities associated with trading in securities fall within the scope of "a particular industry" as opposed to "trade as a whole." Strong support for classifying the subject matter of trading in securities as falling within a particular industry and hence outside the third *indicia* is the analogy to insurance. The cases have held that “the business of insurance”

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[216] *Ibid*, p. 661; *Kirkbi*, p. 315 [AGC Authorities, Vol. I, Tab 16].
[217] *Multiple Access*, p. 173 [AGC Authorities, Vol. II, Tab 21]; *Pezim*, p. 589 [AGA Authorities, Tab 20].
[218] *Smith*, pp. 777 and 797 [AGC Authorities, Vol. III, Tab 39].
[219] *Lymburn*, p. 324 [AGC Authorities, Vol. I, Tab 19]; *Duplain*, pp. 708-709 [AGA Authorities, Tab 12].
[220] *Gregory*, pp. 588 and 590 [AGC Authorities, Vol. I, Tab 15].
[221] *Parsons*, p. 113 [AGC Authorities, Vol. I, Tab 9]; *Canadian National Transportation*, p. 258 [AGA Authorities, Tab 2].
[222] *Canadian National Transportation,* p. 265 [AGA Authorities, Tab 2].
[223] Rice June 29, 2010 Affidavit, AGA Record, Vol. XVIII, paras. 233-236, pp. 76 to 78; Hogg at pp. 21-23 to 21-24 [AGA Authorities, Tab 15]; B.C.S.C. Submissions in Rice June 29, 2010 Affidavit, AGA Record, Vol. XVIII, Exhibit 7, p. 193; CSA Enforcement Report in Rice June 29, 2010 Affidavit, AGA Record, Vol. XVIII, Exhibit 8, p. 243; IMF Main Report in Gartner Affidavit, AGA Record, Vol. XXI, p. 99 where reference is made to “Canada’s sophisticated securities industry”; Wrobel Affidavit, CBA Record, Vol. XXVIII, p. 30; Rousseau, AGQ Record, Vol. VI, p. 16; Suret & Carpentier, AGQ Record, Vol. IX, pp. 108 and 139; and in numerous places in the Courchene Report, AGA Record, Vol. XVIII, for example, at p. 264, para. 7, p. 269, para. 18.
[224] Ontario Factum, para. 10.

does not fall within the general trade and commerce power.[225] It is submitted that the insurance cases are an excellent precedent. Activities involved in trading in securities, just like insurance, should be treated alike. The third indicia cannot be met on the facts of this Reference.

95. The fourth *indicia* also cannot be met. It requires that the legislation should be of a nature that the provinces jointly or severally would be practically or constitutionally incapable of enacting[226]. The facts in this Reference demonstrate overwhelmingly that the provinces, acting severally under their own legislation and acting co-operatively through the harmonization efforts of the CSA, are eminently capable of legislating in this field. Canada's Factum argues that there are some deficiencies under the existing provincial securities regulatory system and that the proposed *Act* addresses those deficiencies by extending beyond existing legislation. Alberta does not accept these allegations (as set out above[227]) but, whether true or not, those allegations do not remotely support a finding that the provinces are practically or constitutionally incapable of addressing them.

96. The fifth criterion also cannot be met. It requires that "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"[228]. The proposed *Act* (except for the criminal law and a few other minor provisions), on a plain reading, does not apply to any province or territory unless and until such province or territory applies to become a participant and satisfies the federal government that opt-in conditions have been met. By its very structure and opt-in intent the proposed *Act* recognizes that at the start (and perhaps indefinitely) it will apply only to those jurisdictions that choose (and are allowed) to participate. This demonstrates unequivocally Canada's recognition that the failure of one or more provinces or territories to participate would not jeopardize the scheme. By

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[225] See para. 79 above; *Re Insurance Act* 1910, pp. 304-5 [AGA Authorities, Tab 16], *A.G. for Canada v. A.G. for Alberta*, p. 597 [AGA Authorities, Tab 1], *Parsons* [AGC Authorities, Vol. I, Tab 9], *Canadian Western Bank* [AGA Authorities, Tab 8].

[226] *Canadian National Transportation* p. 268 [AGA Authorities, Tab 2]; *General Motors* pp. 661-662 [AGC Authorities, Vol. I, Tab 13].

[227] See paras 50 to 55 above and Appendix Tab "C".

[228] *General Motors* p. 662 [AGC Authorities, Vol. I, Tab 13].

necessary implication, it cannot be said that the proposed *Act* is addressing a "genuinely national economic concern" or is "aimed at the economy as a single integrated national unit".[229]

97. Canada says that "the voluntary participation of provinces and territories" as the means chosen to achieve the intent of the proposed *Act* somehow helps to meet the requirements of the fifth criterion.[230] Voluntary participation or the agreement of certain jurisdictions to the scheme of the proposed *Act* does not provide constitutional competency to Parliament. "If the power asserted is not found in the Constitution, it cannot be given by agreement".[231]

4. THE DOUBLE ASPECT DOCTRINE DOES NOT APPLY

98. Canada states that the proposed *Act*, in pith and substance, is aimed and directed at the establishment of "a comprehensive regime of securities regulation administered by a single national regulator"[232]. In fact, the proposed *Act* has virtually identical subject matters, purposes and aspects compared to existing provincial and territorial securities regulatory legislation. The proposed *Act* has no different subject matter and no different purposes and aspects. The double aspect doctrine cannot apply.

99. The substantial similarity between the proposed *Act* and existing provincial regulatory legislation has been detailed above[233] and is not seriously challenged by Canada. This similarity extends to the subject matter, the purposes, the aspects and the techniques and means employed. The regulation of trading in securities, like the regulation of the health and safety of workers and their working conditions, is "a global concept which cannot be divided"[234].

100. The *Bell Canada* case rejected the application of the double aspect doctrine and ruled against the constitutionality of a comprehensive provincial occupational health and safety

[229] *Canadian National Transportation*, pp. 267-268 [AGA Authorities, Tab 2].
[230] Canada Factum, para. 132.
[231] *Re Agricultural Products Marketing*, [1978] 2 S.C.R. 1198 at p. 1232.
[232] Canada Factum, para. 2.
[233] See paras. 50 to 55 above and Appendix Tab "C".
[234] *Bell Canada v. Québec (Commission de la santé et de la sécurité du travail),* [1988] 1 S.C.R. 749 at p. 854 [AGA Authorities, Tab 3].

enactment when applied to federal undertakings where those federal undertakings were also subject to equally comprehensive federal occupational health and securities provisions. The two Acts "contained striking analogies"[235] and the provincial Act was partly based on the federal Act. The two Acts were "similar in letter and spirit" and "differences certainly exist between the two statutes but, both in letter and spirit, they have much more in common than separating them".[236] Justice Beetz (speaking for a unanimous Court) set out the underlying principle of the double aspect theory. It can only apply when legislation is enacted "for different purposes and in different legislative contexts which give them distinct constitutional characterizations"[237]. He cited two securities cases, *Smith*[238] and *Multiple Access,*[239] as valid examples of double aspect[240]. Justice Beetz cited Viscount Haldane as warning that the double aspect theory "'ought to be applied only with great caution.'"[241] He explained that the reason for caution was the risk that "two fields of exclusive powers will be combined into a single more or less concurrent field of powers governed solely by the rule of paramountcy of federal legislation. Nothing could be more directly contrary to the principle of federalism underlying the Canadian Constitution…." He said "the double aspect theory can only be invoked when it gives effect to the rule of exclusive fields of jurisdiction. As its name indicates, it can only be applied in clear cases where the multiplicity of aspects is real and not merely nominal."[242]

101. In the proposed *Act* the Purposes clause[243] is virtually identical with the purposes of existing securities regulatory legislation. The Preamble contains numerous references to "capital markets" but again (as discussed above)[244] on a careful examination of the substantive provisions of the proposed *Act,* capital markets (along with systemic risk and

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[235] *Ibid,* p. 795.
[236] *Ibid,* p. 797.
[237] *Ibid,* p. 765.
[238] [AGC Authorities, Vol. III, Tab 39].
[239] [AGC Authorities, Vol. II, Tab 21].
[240] *Bell Canada*, pp. 765-766 [AGA Authorities, Tab 3**].** In *Smith* [AGC Authorities, Vol. III, Tab 39] it was stated at p. 781 there that "the purposes of the two enactments are entirely different" and "it is not the same conduct being dealt with by the two legislative bodies."
[241] *Ibid,* p. 766.
[242] *Ibid,* p. 766.
[243] [AGC Record, Vol. I, Tab 4, p. 36]
[244] See paras. 50-55, above.

international representation) are not dealt with in any significant way and could not create, in pith and substance, a general trade and commerce jurisdiction.

102. Alberta distinguishes the substantive criminal law provisions from the preceding discussion. Those alone, in accordance with *Smith*[245] and *Multiple Access,*[246] are capable of a proper application of the double aspect doctrine. Alberta wishes to be clear, however, that merely including some criminal law provisions does not validate the remaining provisions of the proposed *Act,* which have no relationship to the criminal law power and can only be seen to be directed at the subject matter of trading in securities. Alberta acknowledges the hypothetical possibility of the federal government legislating "in relation to interprovincial and expert trade and commerce," as has been recognized in the authorities[247]. However, the proposed *Act* does not expressly or by implication contain any provisions that could be said to relate remotely, much less be confined,[248] in pith and substance, to "interprovincial and export trade and commerce". Canada does not purport to defend the proposed *Act* under the "interprovincial and export trade and commerce power".

5. CONCLUSION

103. The proposed *Act* is unconstitutional and does not fall within the general branch of the trade and commerce power. The answer to the Reference question is "no".

104. Substantially similar reference questions have been addressed before hearings of the Courts of Appeal of Québec and Alberta with the request that those Courts endeavour to expedite their decisions in order to provide this Court with the benefit of their views. This Honourable Court is respectfully invited to defer its decision until it has had an opportunity to consider the decisions of those Courts of Appeal and receive submissions from counsel in respect to those decisions.

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[245] [AGC Authorities, Vol. III, Tab 39].
[246] [AGC Authorities, Vol. II, Tab 21].
[247] *Ibid,* at page 173.
[248] *Vapor Canada* [AGA Authorities, Tab 18] at p. 166, citing *A.G. Ontario v. AG Canada,* [1937] A.C. 405.

PART IV. - COSTS

105. The Attorney General of Alberta does not seek costs nor should any be awarded against Her.

PART V. - DISPOSITION

106. The answer to the question posed on this Reference should be "no" for the reasons given above.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 10th DAY OF FEBRUARY, 2011.

FRASER MILNER CASGRAIN LLP

Per: ______________________

E. David D. Tavender, Q.C.
D. Brian Foster, Q.C.
L. Christine Enns
Jordan C. Milne

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