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File No.: WIS00030

WPC – Committee to Review the Structure of
Securities Regulation in Canada
25th Floor
700 West Georgia Street
Vancouver, B.C. V7Y 1B3

Attention: Michael Phelps, Chair

Dear Sirs/Mesdames:

Re: Constitutional Opinion on Securities Regulation

You have asked for my opinion on two questions relating to the proposal for the creation of a Canadian Securities Commission (“CSC”):

1. Does the federal government have the legislative authority to enact legislation implementing the CSC model? Do the provinces and territories correspondingly have legislative authority to enact legislation that: (a) incorporates by reference the new federal securities legislation; (b) delegates administrative powers to the CSC; and (c) dissolves their respective existing provincial and territorial securities regulators?
2. If one or more provinces or territories decides not to enact the legislation described above, and the federal government concludes that this would jeopardize the successful operation of the scheme in other parts of the country, would the federal government nevertheless have the legislative authority to implement the CSC model on a national basis by including in its legislation an express paramountcy clause that plainly demonstrates an intention to enact a complete code and which states that federal legislation alone would govern, to the exclusion of provincial and territorial regulation, on prescribed matters, including amongst other matters: (a) prospectus review; (b) registration of market intermediaries; (c) take-over bid regulation; (d) continuous disclosure by public companies; (e) prospectus exempt financings; (f) international securities agreements; and (g) securities regulatory enforcement actions?

Introduction

I have been asked to consider a proposed model for securities regulation in which a single regulator (the CSC) would administer a single law providing a securities regulatory structure for Canada. The relevant features of the model include:

- (a) The new structure would involve a collaborative approach on the part of the federal and provincial governments.
- (b) Parliament would enact a new Canadian Securities Act providing a comprehensive scheme of capital markets regulation for the whole country. The new statute would be based on the Uniform Securities Law which has been under development.
- (c) The new statute would be administered by a single commission, the CSC.
- (d) The mandate of the CSC would reflect the objectives of securities regulation.
- (e) A Securities Policy Ministerial Committee would be established, consisting of the responsible federal and provincial ministers.
- (f) A Nominating Committee would be established to provide for provincial and industry input into the choice of Commissioners for the CSC.
- (g) The new statute would incorporate a mechanism under which amendments to the statute would require a defined level of provincial approval.

I have not seen any drafts of any proposed federal legislation or any drafts of the Uniform Securities Law. My opinions regarding the proposed model are therefore necessarily general in nature.

In the course of preparation of this opinion, I was provided with a number of interesting background papers dealing with the nature of capital markets. However, I have not been asked to assume any particular facts. For the purpose of this opinion, I have not attempted to resolve any of the points which might be the subject of contested evidence.

1. Does the federal government have the legislative authority to enact legislation implementing the CSC model? Do the provinces and territories correspondingly have legislative authority to enact legislation that: (a) incorporates by reference the new federal securities legislation; (b) delegates administrative powers to the CSC; and (c) dissolves their respective existing provincial and territorial securities regulators?

In summary, it is my opinion that Parliament has the legislative authority to enact legislation implementing the CSC model. Further, the provinces and territories have legislative authority to enact legislation that incorporates federal securities legislation by reference, delegates administrative powers to the CSC and dissolves the existing provincial and territorial securities regulatory bodies.

In particular, in my view:

- (a) the provincial jurisdiction over securities regulation has been consistently upheld by the courts;
- (b) the territories exercise a delegated jurisdiction from Parliament;
- (c) Parliament also has legislative jurisdiction over securities legislation under the trade and commerce power, which would give Parliament the authority to implement the CSC model;
- (d) the interdelegation of powers contemplated in this model would be upheld by the courts.

I will discuss these points in turn.

In the discussion which follows, it is important to appreciate that “securities regulation” is a complex matter with multiple aspects. The raising of capital for business ventures involves (among other things) the share structure of corporations; a range of types of securities – equity, debt, derivatives and interests in real estate; the private distribution of securities; primary distribution to the public and the secondary market in such securities; intraprovincial, interprovincial and international trade in securities; the regulation of market conduct; the regulation of substantive matters, such as takeovers, insider trading, compensation to promoters and governance issues; the regulation of those offering to sell securities; prospectus and other disclosure requirements; a general concern for the protection of investors; and a general concern for the efficiency and integrity of the capital markets.

(a) Provincial Jurisdiction

The courts have consistently upheld the provincial jurisdiction over securities regulation. I would agree with Hogg’s comment that the provincial jurisdiction has been given a “broad scope” by the courts. The constitutional basis has almost always been given as section 92(13) of the *Constitution Act, 1867*, “Property and Civil Rights in the Province”. The line of cases which have established this are well known and often cited, and it is not necessary to set out the chronology here.

The extent of the provincial power to regulate interprovincial and international securities transactions, however, does require analysis of the reasoning given in those court decisions.

If the securities regulation cases were based solely on a marketing analysis, then one might think that a case such as *Attorney-General of Manitoba v. Manitoba Egg and Poultry Association*, [1971] S.C.R. 689, would apply, which found that the province lacked the jurisdiction to regulate all egg sales in Manitoba since, by regulating inter-provincial sales as part of these, the legislation invaded Parliament’s authority over trade and commerce. Although there are some references in the decisions to intraprovincial trading in securities, the courts have generally not applied the analogy of the marketing cases to securities regulation.

From the cases, I have identified four lines of reasoning which have been applied to the characterization of legislation in this area:

- (a) the earliest and many subsequent court decisions emphasized provincial jurisdiction over the protection of investors;
- (b) a number of the cases involved the power of the provinces to regulate the people who promote or sell securities within the province;
- (c) the cases on federal companies emphasized that certain matters which bear on securities regulation (the share structure of companies, takeover legislation, insider trading) should be seen as part of the jurisdiction over the incorporation of the company. Although no cases have had to rely on this point, this principle could also provide a basis for regulating similar areas for provincially incorporated companies.
- (d) the ancillary doctrine allows provinces to regulate matters which are incidental to otherwise valid provincial jurisdiction.

All of these provide a basis on which provinces can, directly or indirectly, deal with transactions which are interprovincial or international in nature. I will deal with them in turn.

(i) Investor Protection

From the earliest cases, the courts have avoided characterizing securities regulation as similar to marketing legislation. Securities regulation has been seen as closer in character to insurance regulation. The courts have seen the legislation as directed to public protection, rather than to issues of supply and pricing.

In *Attorney General of Manitoba v. Attorney General of Canada*, [1929] A.C. 260, Viscount Sumner found that the provincial securities legislation could not prevent a federally incorporated company from selling its own shares. He said:

Their Lordships were informed, and the Acts clearly bear it out, that among the objects with which this legislation was framed was the protection of inexperienced residents in the Province from the temptation to participate in enterprises ill-designed, ill-equipped, and ill-conducted, and from subsequent losses of their savings and disappointment of their hopes. The subject was one well worthy of the attention and care of statesmen and, it may be, was peculiarly within the domain of provincial regulation; the method adopted was that of prevention, instead of or in addition to such cure as criminal prosecution and punishment can afford.

The same approach was taken in the subsequent decision of the Privy Council in *Lymburn v. Mayland*, [1932] A.C. 318, in upholding the *Alberta Security Frauds Prevention Act*:

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.

These words were relied on by the Supreme Court of Canada in *Smith v. The Queen*, [1960] S.C.R. 776. In his concurring judgment, Cartwright J. saw the legislative provisions as being “an integral part of a law providing for the regulation of the sale of securities in the province with a view to protecting the public from being defrauded”.

The explicit adoption of the “public protection” basis coupled with a rejection of the “marketing” approach came in the judgment of Fauteux J. in *Gregory & Co. v. Quebec (Securities Commission)*, [1961] S.C.R. 584:

Nor is this conclusion affected by the decisions rendered in a group of cases referred to by counsel for appellant, where the incidence of export trade of farm products on the validity of certain provincial marketing acts was considered. ... These decisions are also irrelevant. The *Act Respecting Securities*, 3-4 Elizabeth II, c. 11, is not marketing legislation within the meaning attending the legislation considered in these cases. In order to protect the public against fraud, it provides for the establishment and operation of a control and supervision over the conduct, in the Province of Quebec, of persons engaged, therein, in carrying on the business of trading in securities or acting as investment counsel.

The characterization of provincial securities legislation was put more broadly in *Duplain v. Cameron*, [1961] S.C.R. 693, where Chief Justice Kerwin and Ritchie J. both characterized the legislation as having as its main object “the regulation of trading in securities within that province”.

I will only mention one further case. In *Asbestos Minority Shareholders v. Ontario (Securities Commission)*, [2001] 2 S.C.R. 132, 2001 SCC 37 the court referred approvingly to two of the objects of the Ontario legislation which may be paraphrased as protection of the public and protection of the integrity of capital markets.

Because the courts have consistently characterized provincial securities legislation in this way, they have always upheld the provincial power to regulate the offering or sale of securities within the province. The result is that there is a basis for jurisdiction which does not depend on whether the sale will be interprovincial or not.

(ii) Regulation of Sellers

Securities legislation generally has two aspects: regulation of trading and securities, and regulation of the persons who sell or offer for sale securities in the province. The provincial jurisdiction over such dealers in securities follows from the general approach taken by the courts to the characterization of provincial securities laws, which I have described above. A number of the constitutional cases involve jurisdiction over such dealers. I do not need to list them all. What is notable is that the courts have in the past given, and continue today to give, this jurisdiction over such persons a considerable extraprovincial effect.

One example is *Gregory & Co.* In that case, a Quebec broker only sold securities to persons outside Quebec. Nonetheless, the court held that the broker was subject to the jurisdiction and control of the Quebec Securities Commission. It did not matter that the broker’s customers were outside the Province. It carried on the business of trading in securities within Quebec. Its offices were in Quebec; it contacted its customers from

Quebec; payments were made to it at its offices in Quebec; and the companies whose shares the broker actively promoted were all Quebec companies and their shares were transferable only in Quebec. The Court rejected the argument that the broker’s activities were entirely interprovincial or international. (It is true that the Court did not have a formal challenge to the constitutionality of the Quebec legislation before it, but the decision is cast in constitutional terms.)

The Manitoba Court of Appeal upheld the reverse situation in *R. v. W. McKenzie Securities Ltd.* (1966) 56 D.L.R. (2d) 56. In that case, the broker was located in Ontario and solicited customers within Manitoba. The court did not consider that the provincial statute was intended to catch “interprovincial trading”. However, it referred to the “public protection” characterization of provincial securities laws and found that the Ontario broker was in fact engaged in trading in securities in Manitoba, as the solicitations took place in Manitoba.

The result in *McKenzie Securities* has sometimes been questioned. However, for present purposes I see this case as another example where provincial legislation which in fact has the result of regulating interprovincial trading was upheld because it was not characterized as marketing legislation, but instead characterized as regulating the trading of securities in the province for the protection of the public.

Finally, the jurisdiction of a provincial regulator over a market participant outside the province was affirmed by the Supreme Court of Canada in the *Asbestos Minority Shareholders* case. The Ontario Securities Commission had a public interest jurisdiction over the government of Quebec, even in relation to a transaction which was wholly a Quebec transaction, as Quebec had taken the benefit of an exemption under the Ontario legislation. As I read the decision, the Court did not find that the OSC had direct jurisdiction over the transaction in question, but it did have the jurisdiction to consider making an order against Quebec under its public interest power. The result, however, is that the OSC could properly found its regulatory action on an extraprovincial transaction.

In summary, so long as the court is willing to characterize the legislation as aimed at a matter within provincial jurisdiction, the regulator can in fact regulate interprovincial and international trading. If the provincial legislation is characterized as aimed at such trading, then the logical result would be that the province would not have jurisdiction, but the courts have carefully and consistently avoided any such characterization of provincial securities laws.

(iii) Company Law Jurisdiction

The question of company law jurisdiction has only arisen in the constitutional cases on securities regulation where Dominion companies have sought to say that they are not

subject to provincial securities legislation. So far as my research has gone, the provinces have not had to rely on their company law jurisdiction to uphold their securities legislation. However, I think that in theory this would provide a basis for jurisdiction in respect of provincially incorporated companies, at least in respect of such matters which have been characterized in the federal company cases as matters of company law rather than matters of security law (share structure and issuance, insider trading, takeover bid regulation). On principle, it should also apply to the regulation of corporate governance.

(iv) Incidental Effect

If the pith and substance of a provincial statute is a subject matter within provincial jurisdiction, then there are a number of cases which hold, perhaps illogically, that the provincial legislation can have an incidental effect even on matters which are within exclusive federal jurisdiction: *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1981] 1 S.C.R. 927; see the discussion by Laskin J.A. in *Greater Toronto Airports Authority v. Mississauga* (2000), 50 O.R. (3d) 641 at paras. 40 to 45.

In addition, the “ancillary doctrine” permits provincial legislation to include provisions which are necessarily incidental to the legislative scheme.

The Supreme Court of Canada referred to the ancillary doctrine and the question of incidental effects in the *Global Securities Corporation v. British Columbia (Securities Commission)*, [2000] 1 S.C.R. 494, 2000 SCC 21 decision. For the purpose of the decision, Iacobucci J. found that the extraprovincial effects were incidental to the dominant purpose of the legislation.

In general terms, I see *Global Securities* and *Asbestos Minority Shareholders*, the two recent Supreme Court of Canada decisions on provincial securities laws, as consistent with the line of authority characterizing provincial securities laws. Indeed, in *Global Securities* Iacobucci J. quotes from both *Smith* and *Lymburn*. Both of these recent cases stress the provincial jurisdiction over persons who are part of the securities market within the province. In order to effectively regulate the conduct of such persons, the securities commissions can have regard to extraprovincial events. I would not see these decisions as extending provincial jurisdiction in any significant way. However, it is equally clear that the court was not prepared to revisit the basis for provincial jurisdiction, even though it expressly recognized in *Global Securities* the international character of a securities market and the impact of the Internet (see para. 28). Neither case suggests that the court is interested in applying a marketing analysis to the provincial legislation and so stringently restrict provincial jurisdiction to intraprovincial transactions.

The suggestion has been made that the courts would have been more willing to strike down provincial securities laws if there had been federal securities law in place. This has

to be a matter of speculation and it is difficult to offer any opinion. However, there is no indication in the cases themselves that the characterization of the provincial legislation, which is now firmly established, was adopted for this reason. If Parliament were now to pass securities legislation, I do not expect, at this stage, that this would affect the characterization of the provincial laws.

(b) Jurisdiction of the Territories

The territories simply exercise the jurisdiction delegated to them by Parliament, so there is no constitutional impediment to Parliament dealing with the matter of securities regulation within the territories.

(c) Jurisdiction of Parliament

In respect of Parliament’s jurisdiction to pass securities legislation on the CSC model, in my opinion:

- (a) there is a strong argument that this could be supported under the trade and commerce power;
- (b) I am doubtful that such legislation could be supported as legislation in relation to peace, order and good government; and
- (c) I do not think that comprehensive federal legislation could be based on any other grounds (for example, section 92(10) or the banking power).

(i) Trade and Commerce Power

It is familiar ground to say that *Citizens Insurance Company of Canada v. Parsons* (1881), 7 App. Cas. 96, established that section 91(2), “The Regulation of Trade and Commerce”, did not confer jurisdiction on Parliament in relation to all trade and commerce, as this would constitute too great an invasion of the provincial jurisdiction over property and civil rights. Reading the two heads of power together, the Privy Council concluded that Parliament’s jurisdiction was restricted to two situations: international and interprovincial trade, and general regulation of trade affecting the whole country.

In my view, federal securities regulation could be supported on either of these branches of the trade and commerce power.

There seems little doubt that the first branch, interprovincial and international trade, could be used as a basis for federal securities legislation. The difficulty would be defining the transactions which were excluded from that legislation on the basis that they

were intraprovincial trades. I do not need to attempt to resolve this question for the purpose of this opinion, however. I can safely assume that the situation under such legislation would be that the federal legislation applied to the majority of securities trading, but that there would be a substantial quantity of interprovincial trades which fell outside the scope of the legislation.

The second branch of the trade and commerce power, a general regulation of trade affecting the whole country, was given new life when applied by the Supreme Court of Canada in *General Motors of Canada Ltd. v. City National Leasing*, [1989] 1 S.C.R. 641, as the basis for the expanded federal competition legislation.

Chief Justice Dickson saw the issue as being the proper balancing of the federal trade and commerce power and the provincial jurisdiction over property and civil rights. He said at page 660:

The true balance between property and civil rights and the regulation of trade and commerce must lie somewhere between an all pervasive interpretation of s. 91(2) and an interpretation that renders the general trade and commerce power to all intents vapid and meaningless.

The approach laid out by Dickson C.J.C. was to determine, on a case by case analysis, whether the federal enactment addressed a genuine national economic concern or just a collection of local ones (page 663). To assist in this analysis, he set out 5 indicia, although he emphasized that this only amounted to a “preliminary check-list”, and they did not represent an exhaustive list of traits and the presence or absence of any of the indicia was not necessarily determinative.

The 5 indicia are:

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

The process for determining constitutionality contemplated by Dickson C.J.C. involved, as well, an assessment of the seriousness of the encroachment on provincial powers. Once the court, applying the 5 indicia, has determined that the federal scheme is valid, then it has to consider whether any challenged provision is sufficiently integrated into the legislative scheme that it can be upheld, and in making this determination the court must consider the degree of encroachment on provincial powers.

Although the flexible approach set out by Dickson C.J.C. does not lend itself to certainty, in my opinion federal securities legislation is the kind of scheme which should fit within the second branch of the trade and commerce power.

The first two indicia relate to the regulatory structure of the federal legislation. I assume that any federal legislation would be drafted to satisfy these two points.

The third factor is that the legislation must be concerned with trade in general, rather than a particular industry. Although from one point of view securities trading could be viewed as a particular industry, I regard the operation of the capital markets as having a unique role in our economy which qualifies as a “genuine national economic concern”, to use Dickson C.J.C.’s words. The raising of capital for business ventures is foundational for all economic activity in the country. In this sense, it is part of the infrastructure of the economy, rather than a particular industry. The capital markets have a unique economic character, and the case by case analysis should recognize this.

This approach is consistent with the comment of La Forest J. in *Black v. Law Society of Alberta*, [1989] 1 S.C.R. 591 at p. 609, that a dominant purpose of the *Constitution Act, 1867* was not merely to establish national unity but also to create a national economy.

I think the fourth factor is also satisfied. I think it is clear that there are aspects of the securities market which the provinces cannot address. Their legislation cannot be directed at interprovincial or international trade, and although the provincial legislation can have an incidental effect in this area, this is far from complete coverage.

The fifth factor asks whether the failure to include one or more provinces in the scheme would jeopardize the successful operation of the regulatory scheme in other parts of the country. This is, like the other indicia, intended as a test of whether the legislation is in fact addressing a national concern or a collection of local concerns. In my view, it is quite possible that the actions of one province, if allowed to opt out, could jeopardize the successful operation of the scheme throughout the rest of the country. (It is conceivable that an arrangement could be concluded between the federal government and a dissenting province which had the effect of preserving a properly national scheme. If the end result is a national scheme, then such an arrangement would not disqualify the federal legislation from support on the second branch of the trade and commerce power.)

In summary, in my view Parliament could pass legislation under the trade and commerce power enacting the CSC model.

(ii) Peace, Order and Good Government

The residual power in the opening words of section 91 to make laws for the peace, order and good government of Canada are the basis on which dominion companies legislation is founded. It has been suggested (see Leckey and Ward, “Taking Stock: Securities Markets and Division of Powers”, (1999) 22 Dalhousie L.J. 250) that this power could also be used to support federal securities legislation. This is not an unreasonable argument. However, I do not view it is as strong an argument as that for reliance on the trade and commerce power.

The relevant aspect of peace, order and good government is not its application to emergencies but what has been called the “national concern” branch.

In *Attorney General for Ontario v. Canada Temperance Federation*, [1986] A.C. 193, Viscount Simon said:

In their Lordships’ opinion, the true test must be found in the real subject matter of the legislation: if it is such that it goes beyond local or provincial concern or interests and must from its inherent nature be the concern of the Dominion as a whole (as, for example, in the *Aeronautics* case and the *Radio* case), then it will fall within the competence of the Dominion Parliament as a matter affecting the peace, order and good government of Canada, although it may in another aspect touch on matters specially reserved to the provincial legislatures. War and pestilence, no doubt, are instances; so, too, may be the drink or drug traffic, or the carrying of arms.

The national concern branch has been used to uphold federal jurisdiction over aeronautics, the national capital region, marine pollution and (in part) nuclear energy.

In *R. v. Crown Zellerbach Canada Ltd.*, [1988] 1 S.C.R. 401, Le Dain J. discussed and applied the national concern branch. He summarized the applicable principles as follows, at pp. 431 to 432:

1. The national concern doctrine is separate and distinct from the national emergency doctrine of the peace, order and good government power, which is chiefly distinguishable by the fact that it provides a constitutional basis for what is necessarily legislation of a temporary nature;

2. The national concern doctrine applies to both new matters which did not exist at Confederation and to matters which, although originally matters of a local or private nature in a province, have since, in the absence of national emergency, become matters of national concern;

3. For a matter to qualify as a matter of national concern in either sense it must have a singleness, distinctiveness and indivisibility that clearly distinguishes it from matters of provincial concern and a scale of impact on provincial jurisdiction that is reconcilable with the fundamental distribution of legislative power under the Constitution;

4. In determining whether a matter has attained the required degree of singleness, distinctiveness and indivisibility that clearly distinguishes it from matters of provincial concern it is relevant to consider what would be the effect on extra-provincial interests of a provincial failure to deal effectively with the control or regulation of the intra-provincial aspects of the matter.

The last item, which Le Dain J. called the “provincial inability” test, is essentially the same as the fourth of Dickson C.J.C.’s indicia in *General Motors*. I have already indicated that I think this test could be satisfied.

In respect of the second item, it may be difficult to argue that securities regulation or capital markets are new matters. However, there is a plausible argument that they have become matters of national concern.

The test which I see as problematic is the requirement that the matter have a “singleness, distinctiveness and indivisibility that clearly distinguishes it from matters of provincial concern”. The operation of capital markets is complex and multi-faceted. There is no clear separation between public trading and private distributions of securities, or between public trading and the company law issue of share structure and issuance, insider trading and takeover bids. I am inclined to think that any federal legislation could properly be characterized as a somewhat artificial segregation of what is a larger matter.

My view on this is supported by the express finding by the Supreme Court of Canada in two decisions (*Smith*, supra, and *Multiple Access*, infra) that securities regulation is a “double aspect” area. If there are aspects of security regulation which are properly provincial, then it is difficult to see how this could be characterized as a single, distinctive and indivisible matter.

Further, if the federal legislation can be upheld under the trade and commerce power, then I think on principle the courts would uphold it on this ground and not go on to consider peace, order and good government.

(iii) Other Heads of Power

Some aspects of federal securities legislation could be upheld on the basis of the criminal law (as with the false prospectus offence) or as aspects of the law relating to the incorporation of dominion companies. However, neither of these would provide support for comprehensive federal securities regulation.

It has also been suggested that federal legislation could be supported on the basis of section 92(10)(a), section 92(10)(c) or section 91(15) (the banking power). In my view, none of these is likely to provide a sound basis for federal jurisdiction.

Section 92(10)(a) gives Parliament exclusive jurisdiction over federal works and undertakings. The wording of the subsection is:

Lines of Steam or other Ships, Railways, Canals, Telegraphs, and other Works and Undertakings connecting the Province with any other or others of the Provinces, or extending beyond the Limits of the Province.

Section 92(10)(a) has only been applied to transportation or communications works or undertakings. It provides the basis for federal jurisdiction over telecommunications companies and broadcasting companies. It is hard to see how the securities industry could be shoehorned into this provision. The fact that the modern securities industry, and the modern markets, use telecommunications links for trading purposes cannot provide the basis. If this were the case, most modern industries would fall within the category. The category is intended to be restricted to those operations which actually serve, as their primary purpose, to connect provinces. The various players in the securities industry do not have the provision of communications facilities as their purpose. Instead, they use the facilities supplied by communications companies in order to carry on their own activity.

Section 92(10)(c) allows for federal jurisdiction over “works” which are “declared by the Parliament of Canada to be for the general advantage of Canada or for the advantage of two or more of the provinces.” I do not see how the securities industry could legitimately be characterized as a “work”, a term which suggests an identifiable physical presence.

Leckey and Ward suggest that federal securities legislation could draw support from section 91(15), the federal banking power. They point to the developing nature of the financial industry (banks, insurance companies, trust companies and brokers) and in

particular to the acquisition by the banks of the major brokerage houses as their subsidiaries. The current *Bank Act* authorizes banks to carry on certain securities-related business (for example, investment counselling services and portfolio management services).

In my view, however, the banking power would not provide support for federal securities legislation.

First, the fact that federal banks may have purchased brokerages does not make those brokerage activities part of “banking” for constitutional purposes.

Second, the banking power is intended to deal with the activities of the institutions created by Parliament as banks (see *Canadian Pioneer Management Ltd. v. Labour Relations Board of Saskatchewan*, [1980] 1 S.C.R. 433). It would not give jurisdiction to regulate the activity of non-banks in the securities markets.

Third, none of the limited number of cases on the scope of the banking power has suggested that it extends so broadly. The cases have involved activities which are part of the general understanding of “banking” or are integrally related to banking activities.

(d) Interdelegation

The courts have been generally approving of various forms of cooperative federalism. In *Re Agricultural Products Marketing Act*, [1978] 2 S.C.R. 1198, Pigeon J. at page 1296 expressed his desire to uphold, if possible, a sincere cooperative effort between the federal and provincial governments.

The one exception is that it is not possible for Parliament or the provincial legislatures to delegate their legislative authority to each other. In *Attorney General of Nova Scotia v. Attorney General of Canada*, [1951] S.C.R. 31, Kerwin J. said:

The *British North America Act* divides legislative jurisdiction between the Parliament of Canada and the Legislatures of the Provinces and there is no way in which these bodies may agree to a different division.

At least four cooperative arrangements are possible: administrative delegation, from one level of government to an administrative body of the other level of government; incorporation by reference of the legislation of another level of government; conditional legislation, whereby the legislation of one level of government does not come into effect without (for example) the approval of another level of government; and mirror legislation, where there is concurrent jurisdiction and the federal and provincial governments pass essentially identical legislation.

Administrative interdelegation was approved by the Supreme Court of Canada in *PEI Potato Marketing Board v. Willis*, [1952] 2 S.C.R. 392. Parliament could validly delegate authority to a provincial marketing board to establish marketing schemes for interprovincial trade in agricultural products. The court approved of an arrangement under which the federal government adopted as its own an agency already authorized under provincial law.

Similarly, a provincial body could exercise authority pursuant to regulations under the federal *Fisheries Act* to license commercial fishermen (*Peralta v. Ontario*, [1988] 1 S.C.R. 1045), and the provincial attorneys general could exercise a discretion conferred by the Criminal Code with respect to the application of alternative measures programs for youth offenders (*R. v. S.(S.)*, [1990] 2 S.C.R. 254).

Incorporation by reference has been approved with respect to gaming regulation. Parliament has jurisdiction over offences connected with gaming, while the provinces have jurisdiction to license and regulate gaming activities. The Criminal Code provisions contemplated lottery licensing schemes being established by a provincial lieutenant governor in council. In *R. v. Furtney*, [1991] 3 S.C.R. 89, it was held that this was not a delegation of federal legislative authority but an incorporation by reference of provincial legislation authorizing the lieutenant governor in council to issue lottery licenses. The court considered that, in the exercise of its powers generally, Parliament was free to define the area in which it chose to act and, in so doing, might leave other areas open to valid provincial legislation.

Furtney also illustrates the use of conditional legislation. The federal exemption from criminal sanction was conditional upon provincial action. This was valid.

Finally, mirror legislation has been used to implement federal-provincial agreements. One example is the parallel federal and provincial legislation implementing the accord between Canada and Nova Scotia over offshore development.

Any of these forms of delegation is, of course, revocable. An irrevocable delegation would be inconsistent with the very concept of delegation, and would amount to a body with authority under the Constitution transferring that constitutional authority to another body, permanently and by its own act.

The requirement that such delegation be revocable has been commented on in a number of the cases. In *Furtney*, the Court said:

The delegate is, of course, always subordinate in that the delegation can be circumscribed and withdrawn.

Similar recognition can be found in *Coughlin v. Ontario (Highway Transport Board)*, [1968] S.C.R. 569; *Peralta*; and *Attorney General of Ontario v. Scott*, [1956] S.C.R. 137.

In summary, the provinces could incorporate the federal legislation by reference, and delegate administrative powers to the CSC. They could also, of course, dissolve regulatory bodies they had previously established. In the case of the territories, Parliament has the original jurisdiction in any event.

2. If one or more provinces or territories decides not to enact the legislation described above, and the federal government concludes that this would jeopardize the successful operation of the scheme in other parts of the country, would the federal government nevertheless have the legislative authority to implement the CSC model on a national basis by including in its legislation an express paramountcy clause that plainly demonstrates an intention to enact a complete code and which states that federal legislation alone would govern, to the exclusion of provincial and territorial regulation, on prescribed matters, including amongst other matters: (a) prospectus review; (b) registration of market intermediaries; (c) take-over bid regulation; (d) continuous disclosure by public companies; (e) prospectus exempt financings; (f) international securities agreements; and (g) securities regulatory enforcement actions?

I will discuss the general application of the doctrines of paramountcy and interjurisdictional immunity, before considering the effect of an express paramountcy clause of the type proposed.

If the federal legislation is upheld under the trade and commerce power, then the provinces have in practice concurrent jurisdiction to pass legislation which will be operative unless there is an operational conflict with the federal legislation, in which case the federal legislation will apply by operation of the doctrine of paramountcy.

If the federal legislation is upheld on the basis of peace, order and good government, then it is more likely that the applicable doctrine for determining the role of any provincial legislation would be the doctrine of interjurisdictional immunity. Under the national concern branch, the exclusive federal jurisdiction is of a plenary nature and extends to intraprovincial aspects.

The principle of paramountcy says that when there is a conflict between valid federal and provincial legislation, the provincial legislation is constitutionally inoperative with respect to the person or conduct dealt with by the federal legislation.

The test for the application of the principle of paramountcy has undergone a subtle change. The classic modern statement of paramountcy has been that given in *Multiple*

Access Ltd. v. McCutcheon, [1982] 2 S.C.R. 161, where Dickson C.J.C. said that both the federal and provincial legislation should be allowed to operate unless there was an operational conflict between them. That remains the test. However, there has been a shift in the way the test is applied. In *Multiple Access*, Dickson C.J.C. said:

In principle, there would seem to be no good reasons to speak of paramountcy and preclusion except where there is an actual conflict in operation as where one enactment says “yes” and the other says “no”; “the same citizens are being told to do inconsistent things”; compliance with one is defiance of the other.

Some recent cases use the same language: see *114957 Canada Ltée (Spraytech, Société d’arrosage) v. Hudson*, [2001] 2 S.C.R. 241, 2000 SCC 40. However, the growing tendency is for the courts to adopt a more flexible approach which takes into account not just the wording of the two statutes but their purposes. This had its origin in the judgment of La Forest J. in *Bank of Montreal v. Hall*, [1990] 1 S.C.R. 121, in which he said that he would not find the necessary conflict in operation unless the effect of the provincial legislation was to frustrate the legislative purpose of Parliament. This approach was then adopted and applied in *Law Society of British Columbia v. Mangat*, [2001] S.C.R. 113, 2001 SCC 67. In *Mangat*, the federal *Immigration Act* permitted a person to be represented before an inquiry by an adjudicator or in any other proceedings before the Refugee Division by “a barrister or solicitor or other counsel”. The court held that “other counsel” must mean persons other than those licensed to practice law under provincial legislation and there was thus a conflict between the federal and provincial statutes. The provincial legislation frustrated the legislative purpose of Parliament, which was that certain persons should be able to appear before the immigration tribunals. The provincial legislation was therefore constitutionally inoperative.

The principle of interjurisdictional immunity is described in *Ordon Estate v. Grail*, [1998] 3 S.C.R. 437 at para. 81 as follows:

As a general matter within the Canadian federal system, it is constitutionally permissible for a validly enacted provincial statute of general application to affect matters coming within the exclusive jurisdiction of Parliament. The principal question in any case involving exclusive federal jurisdiction is whether the provincial statute trenches, either in its entirety or in its application to specific factual contexts, upon a head of exclusive federal power. Where a provincial statute trenches upon exclusive federal power in its application to specific factual contexts, the statute must be read down so as not to apply to those situations. This principle of statutory interpretation is known perhaps most commonly as the doctrine of “interjurisdictional immunity”.

The principle of interjurisdictional immunity does not serve to protect the entire area of federal jurisdiction in question. As expressed by Beetz J. in *Bell Canada v. Quebec*, [1988] 1 S.C.R. 749 at 762, the immunity applies to the truly federal aspects of a head of power. The point is expressed in *Ordon Estate* at page 497 by referring to “the principle that each head of federal power possesses an essential core which the Provinces are not permitted to regulate indirectly”.

The cases are not entirely consistent as to when it is appropriate to apply paramountcy and when interjurisdictional immunity. For example, the Ontario Court of Appeal in *R. v. Lewis* (1997), 155 D.L.R. (4th) 442, applied the principle of interjurisdictional immunity and found that the provincial legislation dealing with the licensing of accountants did not apply to federal electoral legislation permitting “accountants” to deal with election financial reports. The Supreme Court of Canada in *Mangat* approved this result but suggested it could more appropriately have been achieved by application of the doctrine of paramountcy.

In *Mangat*, the court said that it was appropriate to apply paramountcy as the subject matter (immigration) was one which had a double aspect. The court also showed some preference for the use of paramountcy, describing it as the more supple doctrine.

The area of securities regulation is one which has been found to have a double aspect. In *Smith*, Kerwin C.J., after referring to the provisions in the Criminal Code and in the Ontario securities legislation which both dealt with prospectuses, said:

Parliament undoubtedly had power to enact s. 343 of the Criminal Code, but a prospectus may in one aspect and for one purpose be the subject of valid provincial legislation, while, in another aspect and for another purpose, it may be the subject of valid federal legislation: *Provincial Secretary of Prince Edward Island v. Egan*.

This passage was relied on by Dickson C.J.C. in *Multiple Access*, who also found that the double aspect doctrine was applicable. In that case, the federal and provincial statutes both dealt with insider trading. After referring to the views of Professor Ziegel that securities legislation clearly has a double character and that there is no simple dichotomy between legislation of a company law character and legislation affecting property and civil rights in the province, and having referred to Professor Lederman’s test for double aspect, he said:

The double aspect doctrine is applicable, as Professor Lederman says, when the contrast between the relative importance of the two features is not so sharp. When, as here, the corporate-security federal and provincial characteristics of the insider trading legislation are roughly equal in

importance there would seem little reason, when considering validity, to kill one and let the other live.

Given the recognized double character of the area, and given my earlier conclusion that it is most likely that comprehensive federal securities legislation will be upheld under the trade and commerce power, I conclude that the courts would deal with the overlap between the federal and provincial legislation through the application of the “more supple” doctrine of paramountcy.

In my view, the courts will apply the more modern test for conflict and ask whether the provincial legislation frustrates the legislative purpose of Parliament. I do not think that the courts will find this an easy question to resolve.

On the one hand, there is the desirability of upholding the benefits of a federal securities regime, which promises more comprehensive coverage, uniformity and greater simplicity.

On the other hand, the courts have for 70 years repeatedly recognized the valid provincial concern over the protection of the public within each province.

I do not think that the past history of cases concerning potential conflicts will be determinative, but it is certainly true that the courts have, historically, tried to accommodate both federal and provincial legislation in the area of securities regulation. In the majority of the cases, there was some federal legislation in question, but the provincial legislation was almost invariably found to be both valid and applicable (or operative). For example:

- (a) *Lymburn v. Mayland*: a dominion company is subject to provincial law as to the business of all persons who trade in securities. The company therefore had to issue its capital using a provincially licensed broker.
- (b) *Smith*: there was no conflict between the Criminal Code false prospectus provision and a provincial securities provision which prevented trading until a prospectus containing full disclosure had been filed and created an offence in relation to the making of a material for false statement in any such prospectus.
- (c) *Duplain v. Cameron*: provincial securities legislation which regulated trading in promissory notes did not offend the federal power in relation to bills of exchange or conflict with the federal legislation.

- (d) *Re Williams and Williams* (1961), 29 D.L.R. (2d) 107 (Ont. C.A.): provincial securities legislation which provides for the appointment of a person to investigate trading in securities does not encroach on the field of criminal law. A similar approach was taken by the B.C. Court of Appeal in *International Claim Brokers Ltd. v. Kinsey* (1966), 57 D.L.R. (2d) 357.
- (e) *Multiple Access Ltd. v. McCutcheon*: provincial securities legislation respecting insider trading was intra vires and did not conflict with the similar provisions of the *Canada Corporations Act*.

I think it would be extremely unlikely that the courts will conclude that Parliament's legislative purpose requires the inoperability for all purposes of provincial securities legislation. This would, in effect, create an exclusive federal head of power.

It is not impossible that the courts will take a very broad view of the purpose of the federal legislation and render the majority of provincial regulation inoperative. However, I do not think this is the most likely result. I think it is more likely that the courts will engage in a balancing exercise. The Supreme Court of Canada has explained that it is necessary to strike a balance when defining the scope of the federal trade and commerce power and the provincial power over property and civil rights (see, for example, the *General Motors* case).

In my view, it is likely that the courts will find that at least a significant part of provincial securities legislation remains operative. Without having two sets of legislation to compare, it is very difficult to offer any precise predictions as to which provincial provisions would remain operative. The likely areas include provincial legislation relating to the following matters: securities which are in substance interests in real estate in the province; the licensing and conduct regulation of dealers in the province; matters related to provincial company law, including share structure, rights attached to shares, insider trading, corporate governance and takeovers; private offerings of shares within the province; and perhaps (though more doubtfully) public trading of shares within the Province.

In summary, federal legislation enacting the CSC model would be effective to exclude provincial securities regulation to the extent that a court was satisfied that Parliament's legislative purpose would be frustrated by the continued operation of provincial securities legislation.

You have asked me to consider the effect of an express paramountcy clause which would show that Parliament intended the legislation to be a complete code and which would expressly state that the federal legislation would govern a number of prescribed matters to the exclusion of provincial and territorial regulation. The prescribed matters would

include prospectus review; registration of market intermediaries; takeover bid regulation; continuous disclosure by public companies; prospectus exempt financing; international securities agreements; and securities regulatory enforcement actions.

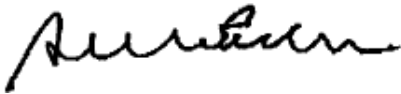
I am not aware of any judicial consideration of an express paramountcy clause of this type.

In my opinion, such a clause would not, by itself, automatically exclude the operation of provincial legislation. A clause which clearly expressed Parliament's intention to enact a comprehensive code and oust provincial and territorial securities legislation would undoubtedly be taken into account by the courts, and would make it more likely that the courts would apply the paramountcy principle.

However, an express paramountcy clause would not exclude the need for the court to consider the substance of the federal legislation and to form its own conclusion on the paramountcy question. The court could not allow Parliament to control its own jurisdictional reach by a bare legislative assertion.

Yours truly,

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