



**SUPREME COURT OF CANADA**

**CITATION:** REFERENCE RE *SECURITIES ACT*, 2011 SCC 66

**DATE:** 20111222

**DOCKET:** 33718

**IN THE MATTER OF a Reference by the Governor in Council  
concerning the proposed Canadian *Securities Act*, as set out in  
Order in Council P.C. 2010-667, dated May 26, 2010**

**CORAM:** McLachlin C.J. and Binnie, LeBel, Deschamps, Fish, Abella, Charron,  
Rothstein and Cromwell JJ.

**REASONS:** The Court  
(paras. 1 to 134)

**NOTE:** This document is subject to editorial revision before its reproduction in final  
form in the *Canada Supreme Court Reports*.

---

REFERENCE RE *SECURITIES ACT*

**IN THE MATTER OF a Reference by the Governor in Council pursuant to section 53 of the *Supreme Court Act*, R.S.C. 1985, c. S-26, as set out in Order in Council P.C. 2010-667, dated May 26, 2010, concerning the *Proposed Canadian Securities Act***

**Indexed as: Reference re *Securities Act***

**2011 SCC 66**

File No.: 33718.

2011: April 13, 14; 2011: December 22.

Present: McLachlin C.J. and Binnie, LeBel, Deschamps, Fish, Abella, Charron, Rothstein and Cromwell JJ.

REFERENCE BY GOVERNOR IN COUNCIL

*Constitutional law — Division of powers — Trade and commerce — Securities — Whether proposed legislation valid under general branch of federal power to regulate trade and commerce — Constitution Act, 1867, s. 91(2).*

Pursuant to s. 53 of the *Supreme Court Act*, the Governor in Council has sought an advisory opinion from the Court as to whether the proposed *Securities Act*

set out in Order in Council P.C. 2010-667 falls within the legislative authority of the Parliament of Canada.

The preamble of the proposed Act states that its purpose is to create a single Canadian securities regulator. More broadly, s. 9 states that the purposes of the Act are to provide investor protection, to foster fair, efficient and competitive capital markets and to contribute to the integrity and stability of Canada's financial system. The Act includes registration requirements for securities dealers, prospectus filing requirements, disclosure requirements, specific duties for market participants, a framework for the regulation of derivatives, civil remedies and regulatory and criminal offences pertaining to securities. The Act does not unilaterally impose a unified system, but permits provinces and territories to opt in, with the hope of creating an effective unified national securities regulation system.

Canada, joined by Ontario and several interveners, argues that the Act, viewed in its entirety, falls within the general branch of Parliament's power to regulate trade and commerce under s. 91(2) of the *Constitution Act, 1867*. Alberta, Quebec, Manitoba, New Brunswick and other interveners argue that the scheme falls under the provincial power over property and civil rights under s. 92(13) of the *Constitution Act, 1867* and trenches on provincial legislative jurisdiction over matters of a merely local or private nature (s. 92(16)), namely the regulation of contracts, property and professions.

*Held:* The *Securities Act* as presently drafted is not valid under the general branch of the federal power to regulate trade and commerce under s. 91(2) of the *Constitution Act, 1867*.

To determine the constitutional validity of legislation from a division of powers perspective, the pith and substance analysis requires the courts to look at the purpose and effects of the law. The inquiry then turns to whether the legislation falls under the head of power said to support it. If the pith and substance of the legislation is classified as falling under a head of power assigned to the adopting level of government, the legislation is valid. When a matter possesses both federal and provincial aspects, the double aspect doctrine may allow for the concurrent application of both federal and provincial legislation.

Parliament's power over the regulation of trade and commerce under s. 91(2) of the *Constitution Act, 1867* has two branches — the power over interprovincial commerce and the general trade and commerce power. Only the general trade and commerce power is invoked by Canada in this reference. This power, while on its face broad, is necessarily circumscribed. It cannot be used in a way that denies the provincial legislatures the power to regulate local matters and industries within their boundaries. Nor can the power of the provinces to regulate property and civil rights within the provinces deprive the federal Parliament of its powers under s. 91(2) to legislate on matters of genuine national importance and scope — matters that transcend the local and concern Canada as a whole.

As held in *General Motors*, to fall under the general branch of s. 91(2), legislation must engage the national interest in a manner that is qualitatively different from provincial concerns. Whether a law is validly adopted under the general trade and commerce power may be ascertained asking (1) whether the law is part of a general regulatory scheme; (2) whether the scheme is under the oversight of a regulatory agency; (3) whether the legislation is concerned with trade as a whole rather than with a particular industry; (4) whether it is of such a nature that provinces, acting alone or in concert, would be constitutionally incapable of enacting it; and (5) whether the legislative scheme is such that the failure to include one or more provinces or localities in the scheme would jeopardize its successful operation in other parts of the country. These indicia of validity are not exhaustive, nor is it necessary that they be present in every case.

Here, the main thrust of the Act is to regulate, on an exclusive basis, all aspects of securities trading in Canada, including the trades and occupations related to securities in each of the provinces. The purpose of the Act is to implement a comprehensive Canadian regime to regulate securities with a view to protect investors, to promote fair, efficient and competitive capital markets and to ensure the integrity and stability of the financial system. Its effects would be to duplicate and displace the existing provincial and territorial securities regimes.

Applying the settled case law, the Act, viewed in its entirety, cannot be classified as falling within the general trade and commerce power. Its main thrust

does not address a matter of genuine national importance and scope going to trade as a whole in a way that is distinct and different from provincial concerns. Canada has not established that the area of securities has been so transformed that it now falls to be regulated under the federal head of power. The preservation of capital markets to fuel Canada's economy and maintain Canada's financial stability is a matter that goes beyond a specific industry and engages trade as a whole. However, the Act is chiefly concerned with the day-to-day regulation of all aspects of contracts for securities within the provinces, including all aspects of public protection and professional competences. These matters remain essentially provincial concerns falling within property and civil rights in the provinces and are not related to trade as a whole. Specific aspects of the Act aimed at addressing matters of genuine national importance and scope going to trade as a whole in a way that is distinct from provincial concerns, including management of systemic risk and national data collection, appear to be related to the general trade and commerce power. With respect to these aspects of the Act, the provinces, acting alone or in concert, lack the constitutional capacity to sustain a viable national scheme. Viewed as a whole, however, the Act is not chiefly aimed at genuine federal concerns. It is principally directed at the day-to-day regulation of all aspects of securities and, in this respect, it would not founder if a particular province failed to participate in the federal scheme.

In sum, the proposed Act overreaches genuine national concerns. While the economic importance and pervasive character of the securities market may, in principle, support federal intervention that is qualitatively different from what the

provinces can do, they do not justify a wholesale takeover of the regulation of the securities industry which is the ultimate consequence of the proposed federal legislation. A cooperative approach that permits a scheme recognizing the essentially provincial nature of securities regulation while allowing Parliament to deal with genuinely national concerns remains available and is supported by Canadian constitutional principles and by the practice adopted by the federal and provincial governments in other fields of activities.

### **Cases Cited**

**Applied:** *General Motors of Canada v. City National Leasing*, [1989] 1 S.C.R. 641; **referred to:** *Reference re Securities Act (Canada)*, 2011 ABCA 77, 41 Alta. L.R. (5th) 145; *Québec (Procureure générale) v. Canada (Procureure générale)*, 2011 QCCA 591 (CanLII); *Lymburn v. Mayland*, [1932] A.C. 318; *Multiple Access Ltd. v. McCutcheon*, [1982] 2 S.C.R. 161; *Global Securities Corp. v. British Columbia (Securities Commission)*, 2000 SCC 21, [2000] 1 S.C.R. 494; *R. v. W. McKenzie Securities Ltd.* (1966), 56 D.L.R. (2d) 56, leave to appeal refused, [1966] S.C.R. ix (*sub nom. West & Dubros v. The Queen*); *Gregory & Co. v. Quebec Securities Commission*, [1961] S.C.R. 584; *Québec (Sa Majesté du Chef) v. Ontario Securities Commission* (1992), 10 O.R. (3d) 577, leave to appeal refused, [1993] 2 S.C.R. x (*sub nom. R. du chef du Québec v. Ontario Securities Commission*); *Bennett v. British Columbia (Securities Commission)* (1992), 94 D.L.R. (4th) 339; *Bell Canada v. Quebec (Commission de la santé et de la sécurité du travail)*, [1988] 1

S.C.R. 749; *Smith v. The Queen*, [1960] S.C.R. 776; *Citizens Insurance Co. of Canada v. Parsons* (1881), 7 App. Cas. 96; *Re Wakim; Ex parte McNally*, [1999] HCA 27, 198 C.L.R. 511; *R. v. Hughes*, [2000] HCA 22, 202 C.L.R. 535; *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217; *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 S.C.R. 3; *Northern Telecom Canada Ltd. v. Communication Workers of Canada*, [1983] 1 S.C.R. 733; *Attorney-General for Canada v. Attorney-General for Ontario*, [1937] A.C. 326; *Hodge v. The Queen* (1883), 9 App. Cas. 117; *Edwards v. Attorney-General for Canada*, [1930] A.C. 124; *Reference re Employment Insurance Act (Can.)*, ss. 22 and 23, 2005 SCC 56, [2005] 2 S.C.R. 669; *OPSEU v. Ontario (Attorney General)*, [1987] 2 S.C.R. 2; *P.E.I. Potato Marketing Board v. H. B. Willis Inc.*, [1952] 2 S.C.R. 392; *Lord's Day Alliance of Canada v. Attorney General of British Columbia*, [1959] S.C.R. 497; *Coughlin v. Ontario Highway Transport Board*, [1968] S.C.R. 569; *Fédération des producteurs de volailles du Québec v. Pelland*, 2005 SCC 20, [2005] 1 S.C.R. 292; *Canadian Western Bank v. Alberta*, 2007 SCC 22, [2007] 2 S.C.R. 3; *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199; *Quebec (Attorney General) v. Lacombe*, 2010 SCC 38, [2010] 2 S.C.R. 453; *Kitkatla Band v. British Columbia (Minister of Small Business, Tourism and Culture)*, 2002 SCC 31, [2002] 2 S.C.R. 146; *Reference re Firearms Act (Can.)*, 2000 SCC 31, [2000] 1 S.C.R. 783; *Re the Initiative and Referendum Act*, [1919] A.C. 935; *Lawson v. Interior Tree Fruit and Vegetable Committee of Direction*, [1931] S.C.R. 357; *Attorney General of Canada v. Canadian National Transportation, Ltd.*, [1983] 2 S.C.R. 206; *MacDonald v. Vapor Canada Ltd.*, [1977] 2 S.C.R. 134; *John Deer Plow*

*Co. v. Wharton*, [1915] A.C. 330; *Kirkbi AG v. Ritvik Holdings Inc.*, 2005 SCC 65, [2005] 3 S.C.R. 302; *Ontario Hydro v. Ontario (Labour Relations Board)*, [1993] 3 S.C.R. 327; *Duplain v. Cameron*, [1961] S.C.R. 693.

## **Statutes and Regulations Cited**

*Bank Act*, S.C. 1991, c. 46.

*Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, Part XII.

Basic Law (Federal Republic of Germany), art. 72(2).

*Budget Implementation Act, 2009*, S.C. 2009, c. 2.

*Canada Business Corporations Act*, R.S.C. 1985, c. C-44.

*Constitution Act, 1867*, ss. 91, 91(2), (15), (17), (18), (21), (27), 92, 92(1)(a), (13), (16), 95.

*Criminal Code*, R.S.C. 1985, c. C-46, ss. 380(2), 382, 382.1, 383, 384, 400.

*Investment Canada Act*, R.S.C. 1985, c. 28 (1st Supp.).

*National Securities Markets Improvement Act of 1996*, Pub. L. 104-290, 110 Stat. 3416 (1996).

*Payment Clearing and Settlement Act*, S.C. 1996, c. 6, Sch.

*Proposed Canadian Securities Act*, Order in Council P.C. 2010-667, preamble, ss. 9, Part 3, 64, 66, Part 4, 73, 74, Part 5, 76, 89, 90, Part 10, 109 to 113, 114, 116, 117(1), (2), 126(1), Part 11, 224, 228(4)(c).

*Securities Act of 1933*, 15 U.S.C. §77a, s. 18.

*Supreme Court Act*, R.S.C. 1985, c. S-26, s. 53.

*Telecommunications Act*, S.C. 1993, c. 38.

*United States Constitution*, art. I, § 8, cl. 3, VI, cl. 2.

## Authors Cited

- Canada. Consumer and Corporate Affairs. *Proposals for a Securities Market Law for Canada*, vol. 2 — Commentary. Ottawa: Minister of Supply and Services Canada, 1979.
- Canada. Expert Panel on Securities Regulation. *Creating an Advantage in Global Capital Markets — Final Report and Recommendations*, January 2009. Online: [www.expertpanel.ca/eng/reports/index.html](http://www.expertpanel.ca/eng/reports/index.html).
- Canada. *Memorandum of Understanding Regarding the Regulation of Securities in Canada* (draft), reproduced at (1994), 17 OSCB 4401.
- Canada. Royal Commission on Banking and Finance. *Report of the Royal Commission on Banking and Finance*. Ottawa: Queen's Printer, 1964.
- Canada. Royal Commission on Price Spreads. *Report of the Royal Commission on Price Spreads*. Ottawa: King's Printer, 1935.
- Canada. Royal Commission on the Economic Union and Development Prospects for Canada — *Report*, vol. 3. Ottawa: Minister of Supply of Services Canada, 1985.
- Crawford Panel on a Single Canadian Securities Regulator. *Blueprint for a Canadian Securities Commission — Final Paper*, June 7, 2006. Online: [http://www.cba.ca/contents/files/misc/msc\\_crawfordreport\\_en.pdf](http://www.cba.ca/contents/files/misc/msc_crawfordreport_en.pdf).
- Gillen, Mark R. *Securities Regulation in Canada*, 3rd ed. Toronto: Thomson Carswell, 2007.
- Hogg, Peter W. *Constitutional Law of Canada*, 5th ed. Supp., vol. 1. Scarborough, Ont.: Thomson/Carswell, 2007 (updated 2010, release 1).
- Howard, John L. "Securities Regulation: Structure and Process", in *Proposals for a Securities Market in Canada*, vol. 3. Ottawa: Minister of Supply and Services Canada, 1979.
- Macey, Jonathan. *An Analysis of the Canadian Federal Government's Initiative to Create a National Securities Regulator*, June 23, 2010.
- Milne, Frank. *The Impact of Innovation and Evolution on the Regulation of Capital Markets*, May 19, 2010.
- Ontario Securities Commission. "CANSEC: Legal and Administrative Concepts" (November 1967), OSCB 61.

Suret, Jean-Marc, and Cécile Carpentier. *Securities Regulation in Canada*. Working paper undertaken for the Commission des valeurs mobilières du Québec, July 2003.

Trebilcock, Michael J. *National Securities Regulator Report*, May 20, 2010.

Wise Persons' Committee — Committee to Review the Structure of Securities Regulation in Canada. *It's Time*. Ottawa: The Committee, 2003.

REFERENCE by the Governor in Council, pursuant to s. 53 of the *Supreme Court Act*, concerning the constitutional validity of the proposed *Securities Act*. The question referred to was answered as follows: The *Securities Act* as presently drafted is not valid under the general branch of the federal power to regulate trade and commerce under s. 91(2) of the *Constitution Act, 1867*.

*Robert J. Frater, Peter W. Hogg, Q.C., Claude Joyal and Alexander Pless*, for the Attorney General of Canada.

*Janet E. Minor, Jennifer A. August and S. Zachary Green*, for the intervener the Attorney General of Ontario.

*Jean-Yves Bernard, France Bonsaint and Hugo Jean*, for the intervener the Attorney General of Quebec.

*Gaétan Migneault*, for the intervener the Attorney General of New Brunswick.

*Eugene B. Szach and Nathaniel Carnegie*, for the intervener the Attorney General of Manitoba.

*George H. Copley, Q.C., Nancy E. Brown and Donald Sutherland*, for the intervener the Attorney General of British Columbia.

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

*E. David D. Tavender, Q.C., D. Brian Foster, Q.C., L. Christine Enns and Jordan C. Milne*, for the intervener the Attorney General of Alberta.

*Andrew K. Lokan, Massimo C. Starnino and Michael Fenrick*, for the intervener the Canadian Foundation for Advancement of Investor Rights.

*Luis Sarabia, Matthew Milne-Smith and David Stelow*, for the intervener the Canadian Coalition for Good Governance.

*John B. Laskin and Darryl C. Patterson*, for the intervener the Investment Industry Association of Canada.

*Mahmud Jamal, Éric Préfontaine and Raphael T. Eghan*, for the intervener the Canadian Bankers Association.

*Kelley M. McKinnon* and *Brent J. Arnold*, for the intervener the Ontario Teachers' Pension Plan Board.

*Guy Paquette* and *Vanessa O'Connell-Chrétien*, for the intervener Mouvement d'éducation et de défense des actionnaires.

*Raymond Doray* and *Mathieu Quenneville*, for the intervener Barreau du Québec.

*Sébastien Grammond* and *Luc Giroux*, for the intervener the Institute for Governance of Private and Public Organizations.

The following is the opinion delivered by

THE COURT —

#### I. Overview of the Court's Opinion

[1] This reference under s. 53 of the *Supreme Court Act*, R.S.C. 1985, c. S-26, requires the Court to determine whether the proposed *Securities Act* set out in Order in Council P.C. 2010-667 falls within the legislative authority of the Parliament of Canada.

[2] The proposed *Securities Act* represents a comprehensive foray by Parliament into the realm of securities regulation. If validly adopted, it will create a single scheme governing the trade of securities throughout Canada subject to the oversight of a single national securities regulator.

[3] The government of Canada (“Canada”), supported by the Attorney General of Ontario (“Ontario”) and other interveners, argues that the entirety of the Act can be sustained as a proper exercise of the general branch of Parliament’s legislative power to regulate trade and commerce, grounded in s. 91(2) of the *Constitution Act, 1867*. The Attorney General of Alberta (“Alberta”), the Attorney General of Quebec (“Quebec”) and other provincial Attorneys General and interveners oppose the Act, arguing that securities regulation is a matter falling within s. 92(13) of the *Constitution Act, 1867*, which gives the provinces legislative jurisdiction over property and civil rights within their borders. Certain opponents of the Act also submit that securities regulation relates to provincial jurisdiction over matters of a merely local or private nature, under s. 92(16) of the *Constitution Act, 1867*.

[4] Canada does not challenge the proposition that certain aspects of securities regulation fall within provincial authority in relation to property and civil rights in the provinces. Nor does Canada argue that any provisions of the Act fall within federal legislative authority because they are necessarily incidental to the exercise of federal powers. Canada’s contention is simply that the securities market

has evolved from a provincial matter to a national matter affecting the country as a whole and that, as a consequence, the federal general trade and commerce power gives Parliament legislative authority over all aspects of securities regulation. This authority, Canada argues, is concurrent with that of the provincial legislatures over all aspects of securities presently regulated by the provinces.

[5] The propriety of such a constitutional realignment cannot simply be assumed. The shift in regulatory authority that the proposed Act seeks to achieve requires justification. Canada asserts that this justification is found under the “general” branch of the trade and commerce power. However, it has failed to show that this power, interpreted as required by the case law, supports the proposed Act.

[6] Canada has shown that aspects of the securities market are national in scope and affect the country as a whole. However, considered in its entirety, the proposed Act is chiefly directed at protecting investors and ensuring the fairness of capital markets through the day-to-day regulation of issuers and other participants in the securities market. These matters have long been considered local concerns subject to provincial legislative competence over property and civil rights within the province. Canada has not shown that the securities market has so changed that the regulation of all aspects of securities now falls within the general branch of Parliament’s power over trade and commerce under s. 91(2). Applying the settled test, we conclude that the proposed Act does not fall within the general trade and commerce power.

[7] It is a fundamental principle of federalism that both federal and provincial powers must be respected, and one power may not be used in a manner that effectively eviscerates another. Rather, federalism demands that a balance be struck, a balance that allows both the federal Parliament and the provincial legislatures to act effectively in their respective spheres. Accepting Canada's interpretation of the general trade and commerce power would disrupt rather than maintain that balance. Parliament cannot regulate the whole of the securities system simply because aspects of it have a national dimension.

[8] We therefore answer the reference question in the negative.

[9] It is open to the federal government and the provinces to exercise their respective powers over securities harmoniously, in the spirit of cooperative federalism. The experience of other federations in the field of securities regulation, while a function of their own constitutional requirements, suggests that a cooperative approach might usefully be explored, should our legislators so choose, to ensure that each level of government properly discharges its responsibility to the public in a coordinated fashion.

[10] At this juncture, it is important to stress that this advisory opinion does not address the question of what constitutes the optimal model for regulating the securities market. While the parties presented evidence and arguments on the relative merits of federal and provincial regulation of securities, the policy question of whether a single national securities scheme is preferable to multiple provincial

regimes is not one for the courts to decide. Accordingly, our answer to the reference question is dictated solely by the text of the Constitution, fundamental constitutional principles and the relevant case law.

## II. The Proposed Act and the Parties' Positions

### A. *National Securities Proposals in Canada*

[11] Recommendations for national securities regulation in Canada are not new. Over the years, many proposals have been put forward, but none implemented. The various proposals, in different ways, attempted to come to grips with the problem underlying this reference — how to achieve national securities regulation within the constitutional division of powers between Parliament and the provincial legislatures. Not surprisingly, the proposals generally envisaged cooperation between the provinces and the federal government as the route to achieving national standards and regulation.

[12] The first proposal dates to 1935, when the Royal Commission on Price Spreads recommended the formation of an investment securities board to oversee the issuance of securities by companies incorporated under federal legislation (*Report of the Royal Commission on Price Spreads*, at pp. 41-42).

[13] In the 1960s, various recommendations and proposals were mooted. The 1964 Royal Commission on Banking and Finance (the “Porter Commission”)

accepted the desirability of uniform legislation and administration of the Canadian securities industry and recommended the creation of an additional regulatory body, based on cooperation between the federal and provincial governments (*Report of the Royal Commission on Banking and Finance*). The body, to be headed by a federal regulator, would have set uniform standards for securities distributed interprovincially and internationally, while permitting existing provincial regulators to continue to govern “local matters such as the licensing of security dealers and their salesmen and the registration of issues to be offered only within their own province” (p. 348).

[14] The Porter Commission hoped that the establishment of a federal agency would lead to greater agreement and cooperation, eliminating the duplication that the Commission saw as hampering effective securities regulation. In particular, the Commission hoped that the introduction of uniform federal standards would foster the adoption of similar standards in the provinces and free the provinces to focus on purely local matters by automatically clearing federally regulated issues. In its view, a single federal agency would improve cooperation with the United States Securities and Exchange Commission and “would be responsible for and interested in the growth, development and efficiency of the whole Canadian securities industry” (p. 348).

[15] In 1967, just three years after the release of the Porter Commission’s report, the Ontario Securities Commission (“OSC”) circulated a very different

proposal for a single, highly decentralized, national securities regulator. CANSEC — the “Canada Securities Commission” — was to be a three-tiered structure (a council of ministers, CANSEC and administrative staff) designed to achieve uniformity in Canadian securities regulation through cooperation by the federal and provincial governments, rather than by forcing each province to surrender its regulatory activity in the field to a federal body. CANSEC would operate on an opt-in basis: no province would be required to join or remain in CANSEC. Moreover, participation by provinces would not involve a permanent surrender of power: “A government which has passed an amendment in order to bring themselves into the scheme can repeal that amendment” (“CANSEC: Legal and Administrative Concepts” (November 1967), OSCB 61, at p. 66). Provinces would have been able to join CANSEC, then withdraw and regulate independently as before.

[16] The OSC anticipated that CANSEC would be brought into existence through the passage of an organizational statute by the federal government and the subsequent commitment by participating jurisdictions to have the new commission administer their own securities acts. In bringing CANSEC into existence, the OSC did not consider it necessary that the provincial laws themselves be substantively uniform; rather, similar schemes of administration and “some modest degree of uniformity” in securities legislation would suffice (p. 66). The provinces would retain jurisdiction over “nearly all substantive issues”, delegating to the commission authority only to deal with federal corporate, international and criminal matters not clearly within provincial jurisdiction (John L. Howard, “Securities Regulation:

Structure and Process”, in *Proposals for a Securities Market in Canada* (1979), vol. 3, 1607, at p. 1693).

[17] The discussion over securities regulation continued in the 1970s and 1980s. In 1979, the federal Department of Consumer and Corporate Affairs produced a three-volume study entitled *Proposals for a Securities Market Law for Canada*, which contemplated a national securities commission working in cooperation with the provinces. The study recommended the creation of a federal securities commission and the enactment of federal securities legislation and envisioned a “nationally coordinated system of regulation that involves cooperation between a federal commission with federal jurisdiction and provincial and foreign commissions” (vol. 2, at p. 5). It contemplated administration either by a federal commission, by a cooperative body developed through negotiations among the federal and provincial governments, or a body lying on the spectrum between that and a single federal agency.

[18] In 1985, the Royal Commission on the Economic Union and Development Prospects for Canada concluded that there was no reason to tamper with the existing system of provincial regulation of stock markets, but noted that “[t]echnological change, the increasing international integration of capital markets, and the desire of provinces, especially Quebec, to regulate markets in pursuit of provincial development goals are all likely to place greater strains on the existing system in the near future” (*Report*, vol. 3, at p. 167).

[19] In 1994, the Premiers of the Atlantic Provinces asked the federal government to establish a national securities regulator. The proposal ultimately took the form of a draft memorandum of understanding (“MOU”) between the federal government and participating provinces, which was circulated among the provinces ((1994), 17 OSCB 4401). The MOU proposed the creation of a “Canadian Securities Commission” and envisioned a “uniform securities regulatory structure which [would] apply comprehensively within and across all participating provinces” (preamble).

[20] Like the proposal to establish CANSEC, the MOU was premised on opting-in by the provinces and explicitly stated that no government would give up any jurisdiction by joining. Participating provinces were to have the ability to adopt regulations exempting certain securities from provisions of the federal legislation. The jurisdiction of provincial securities regulatory authorities in provinces which elected not to participate in the uniform securities regulatory structure would not be affected. Canada, however, committed to “developing consultation and coordination mechanisms between the Canadian Securities Commission and the securities commission or equivalent office of any province which is not a Party to [the] agreement to maintain the benefits of harmonization of securities regulation in Canada and to promote further such harmonization in the future” (MOU, at s. 29).

[21] In the past decade, calls for a national securities regulator have intensified.

[22] The Wise Persons' Committee ("WPC") of 2003 recommended the adoption of a comprehensive scheme of capital markets regulation for Canada, to be accomplished by the passage of comprehensive federal securities legislation, followed by provincial legislation incorporating the federal law by reference and delegating administrative powers to a newly established "Canadian Securities Commission".

[23] The WPC rejected the "dual structure" of securities market regulation recommended by the OSC proposal to establish CANSEC, the 1979 study by the Department of Consumer and Corporate Affairs and the 1994 MOU. In its view, "a dual structure, in which securities matters limited to a single province would be regulated provincially, while interprovincial and international matters would be regulated by a national body", was not appropriate "[g]iven the nationally integrated nature of Canada's capital markets and the history of provincial regulation of securities matters with incidental effect on matters outside the regulating province" (*It's Time* (2003), at p. 59). In the WPC's view, "efficient capital markets require that the federal legislation extend to all matters related to securities regulation" (p. 60).

[24] The WPC therefore recommended the enactment of a single, comprehensive code for the regulation of Canadian capital markets by the federal government. The single set of rules would cover "all securities regulatory matters in Canada" (p. 59). Provincial participation would be achieved through an obligation

on the federal government to consult with the provinces before amending the legislation.

[25] The 2006 Crawford Panel on a Single Canadian Securities Regulator, established by the government of Ontario, endorsed the adoption of Canadian securities legislation (*Blueprint for a Canadian Securities Commission – Final Paper*). The Panel proposed that uniform regulation would be achieved by all jurisdictions incorporating, by reference, legislation enacted by one province as the *Canadian Securities Act* and establishing a “Canadian Securities Commission”. A common body of securities law would then apply across the country. However, like the WPC, the Crawford Panel viewed the participation of all provinces and territories and the federal government as “ideal” but not necessary for the Commission to be established. The key was “that there be an initial core group of Participating Jurisdictions that agrees to enact, or to enact through incorporation by reference, common legislation that establishes the [Commission] and delegates to it authority over capital markets regulation” (p. 16).

[26] Three years after the Crawford Panel presented its “Blueprint”, the Expert Panel on Securities Regulation (the “Hockin Panel”) released a report that informed the *Securities Act* proposed by Canada in this reference (*Creating an Advantage in Global Capital Markets – Final Report and Recommendations* (2009)). Like the Crawford Panel, the Hockin Panel recommended the establishment of a “Canadian Securities Commission” to oversee a single “*Securities Act*” for Canada.

[27] The Hockin Panel envisioned the establishment of a “comprehensive national regime” of securities regulation (p. 60), to be brought into force in participating jurisdictions through the repeal of local legislation. However, the Panel acknowledged that not all provinces (at least initially) might be willing to participate. It therefore recommended that “[i]n the absence of unanimity on the part of the provinces, the Act should provide for voluntary provincial participation, limiting its application to participating jurisdictions during the transition to a comprehensive national regime” (p. 60). The Panel foresaw that, faced with such circumstances, the federal government might consider a “market participant opt-in feature” (p. 61), and proposed that the Commission consider negotiating memoranda of understanding with non-participating jurisdictions to coordinate securities regulation.

[28] In response to the Hockin Report, the federal government established the Canadian Securities Regulation Regime Transition Office in the *Budget Implementation Act, 2009*, S.C. 2009, c. 2, and prepared a draft Act implementing the Report’s proposals. On May 26, 2010, the Governor General in Council referred this draft legislation to the Court for an advisory opinion as to its constitutional validity.

#### B. *The Proposed Act*

[29] The preamble of the proposed Act states that its immediate purpose is to create a single Canadian securities regulator. More broadly, s. 9 states that the

underlying purposes of the Act are to provide investor protection, to foster fair, efficient and competitive capital markets and to contribute to the integrity and stability of Canada's financial system.

[30] The Act includes registration requirements for securities dealers, prospectus filing requirements, disclosure requirements, specific duties for market participants, a framework for the regulation of derivatives, civil remedies and regulatory and criminal offences pertaining to securities. It provides for the comprehensive regulation of securities in Canada, under the oversight of a single national regulator. It also provides for a single set of laws and rules designed to permit uniform regulation and enforcement on a national basis, thus fostering the integrity and stability of Canada's capital markets at a national level. While various parties emphasize different facets of the scheme, advancing interesting arguments on the implication of words such as "national", "capital markets", "securities industry" and "securities trading", it seems uncontroversial that what the Act seeks is comprehensive national securities regulation, with the aim of fostering fair and efficient capital markets and contributing to the stability of Canada's financial system.

[31] The Act, as proposed, does not seek to unilaterally impose a unified system of securities regulation for the whole of Canada. Rather, it permits provinces to opt in, if and when they choose to do so. The hope is that, eventually, all or most provinces will opt in, creating an effective unified national securities regulation

system for Canada. If this were to occur, it would represent a dramatic realignment in the manner in which securities have been regulated in this country.

### *C. The Parties' Positions*

[32] Canada, joined by Ontario and several interveners, argues that the proposed Act, viewed in its entirety, is a constitutional exercise of Parliament's general power to regulate trade and commerce under s. 91(2) of the *Constitution Act, 1867*. It does not invoke other federal heads of power, such as legislative authority in relation to interprovincial and international trade and commerce (a separate branch of Parliament's s. 91(2) authority), the incorporation of federal companies or the criminal law power (s. 91(27) — except with respect to some offence provisions the constitutionality of which is not contested). Nor does Canada contend that provisions of the Act that might be viewed as falling within provincial legislative powers are valid because they are ancillary to the exercise of federal powers.

[33] Canada and those who support its position acknowledge the oft-affirmed power of the provinces to regulate securities within their borders. However, they argue that securities markets have undergone significant transformation in recent decades, evolving from local markets to markets that are increasingly national, indeed international. This has given rise to systemic risks and other concerns that can only be dealt with on the national level. The evolving national character of securities markets, Canada says, brings those markets within the general trade and commerce power, as defined by existing jurisprudence. In short, Canada contends

that securities have evolved in a way that now brings all aspects of securities regulation under the general branch of the trade and commerce power, including those aspects which would also fall under provincial competence in relation to property and civil rights within the province.

[34] The Attorneys General of Alberta, Quebec, Manitoba and New Brunswick and other interveners oppose the Act. They argue that the scheme the Act sets up falls under the provincial power over property and civil rights under s. 92(13) of the *Constitution Act, 1867* and trenches on provincial legislative jurisdiction over matters of a merely local or private nature (s. 92(16)), namely the regulation of contracts, property and professions. They reject the contention that securities markets have evolved to become a matter of genuine national concern under the general federal trade and commerce power. Rather, they contend, the Act is a thinly disguised attempt to regulate a particular industry — the securities industry.

[35] The Attorney General of British Columbia and the Attorney General of Saskatchewan oppose the Act, but adopt a more nuanced approach to Parliament's ability to regulate securities. Neither province opposes the idea of a national securities regulator, so long as it is achieved in a manner that respects the division of powers. However, these provinces contend that Parliament's participation in securities regulation is best achieved through an exercise in federal-provincial

cooperation, similar to the cooperation existing in the agricultural products marketing context.

### III. The Provincial References

[36] In provincial references, both the Alberta Court of Appeal (2011 ABCA 77, 41 Alta. L.R. (5th) 145) and the Quebec Court of Appeal (2011 QCCA 591(CanLII)) concluded that the proposed Act is unconstitutional.

[37] The Alberta Court of Appeal (*per* Slatter J.A., Côté, Conrad, Ritter and O'Brien J.J.A., concurring) emphasized at para. 6 that the proposed Act “mirrors” provincial securities regimes by licensing and regulating the conduct of participants in the same fashion as the existing provincial legislation. While recognizing that securities products have changed over time, it held that securities regulation remains a matter of property and civil rights under s. 92(13) of the *Constitution Act, 1867*. As a result, the Act did not fall within Parliament’s general trade and commerce power, as defined by the jurisprudence.

[38] A majority of the Quebec Court of Appeal, in two sets of reasons (*per* Robert C.J. and *per* Forget, Bich and Bouchard J.J.A.), also concluded that the proposed Act is unconstitutional. The majority held that the federal proposal would create a comprehensive regulatory scheme that pursued the same objectives through the same means as existing provincial securities laws and fell under provincial jurisdiction over property and civil rights. Like the Alberta Court of Appeal, they

held that the jurisprudence on the general trade and commerce power did not support the conclusion that the Act was a valid exercise of federal power.

[39] Dalphond J.A., dissenting, argued that the Canadian securities market, as a single, integrated, pan-Canadian market, fell within the general branch of Parliament's trade and commerce power.

#### IV. The Regulation of Securities

##### A. *Overview*

[40] The term "securities" designates a class of assets that conventionally includes shares in corporations, interests in partnerships, debt instruments such as bonds and financial derivatives (F. Milne, *The Impact of Innovation and Evolution on the Regulation of Capital Markets* (2010), at para. 2.1; M. R. Gillen, *Securities Regulation in Canada* (3rd ed. 2007), at p. 1). The securities market channels savings in two basic ways: it allows demanders of investment capital ("issuers") to receive investment capital from suppliers of capital ("investors") in exchange for a security; and it allows investors to trade securities with one another. The first type of transaction occurs through the "primary" market, where issuers trade directly or indirectly with investors, while the second type of transaction is referred to as "secondary" market trading (Gillen, at pp. 32-33; Milne, at paras. 2.2-2.4).

[41] Every province and territory has its own securities laws and regulatory agency. These agencies exercise a variety of responsibilities, including: prospectus

review and clearance; oversight of disclosure requirements; takeover bids and insider trading; registration and regulation of market intermediaries; enforcement of compliance with the regime; recognition and supervision of exchanges and other self-regulated organizations; and public education.

[42] Since the beginning of the 21<sup>st</sup> century, efforts to increase interprovincial cooperation and to harmonize provincial and territorial securities laws have intensified. For example, the supervision and regulation of securities firms are presently carried out by the Investment Industry Regulatory Organization of Canada (“IIROC”) working under the authority of the Canadian Securities Administrators, a creature of the various provincial and territorial securities commissions. The provincially organized Canadian Investor Protection Fund insures investors’ funds in the event of the bankruptcy of an investment firm (in an analogous fashion to the federal Canada Deposit Insurance Corporation for bank depositors). IIROC standards are national and directed at ensuring that investment firms are both liquid and solvent. Since 2008, all provincial and territorial jurisdictions except Ontario participate in a “passport regime” based on harmonized rules that allow issuers and market intermediaries to engage in activities in multiple jurisdictions while dealing with a single principal regulator. Nevertheless, distinctions remain between provincial securities regimes.

#### *B. Legislative Competence over Securities: A Shared Field*

[43] Provinces have jurisdiction to regulate securities within their boundaries (intra-provincial jurisdiction) as a matter of property and civil rights, pursuant to s. 92(13) of the *Constitution Act, 1867*. As Lord Atkin stated in *Lymburn v. Mayland*, [1932] A.C. 318 (P.C.), “If [a company] is formed to trade in securities there appears no reason why it should not be subject to the competent laws of the Province as to the business of all persons who trade in securities” (p. 324).

[44] More recently, this Court, in *Multiple Access v. McCutcheon*, [1982] 2 S.C.R. 161, *per* Dickson J. (as he then was), confirmed:

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. ... Since the decision of the Privy Council in *Lymburn v. Mayland*, [1932] A.C. 318 the provisions of provincial securities acts have been given a wide constitutional recognition. [p. 183]

(See also *Global Securities Corp. v. British Columbia (Securities Commission)*, 2000 SCC 21, [2000] 1 S.C.R. 494, at par. 40.)

[45] The provincial power over securities extends to impacts on market intermediaries or investors outside a particular province (*Global Securities*, at para. 41; *R. v. W. McKenzie Securities Ltd.* (1966), 56 D.L.R. (2d) 56 (Man. C.A.), leave to appeal refused [1966] S.C.R. ix (*sub nom. West & Dubros v. The Queen*); *Gregory & Co. v. Quebec Securities Commission*, [1961] S.C.R. 584). The case law also recognizes provincial jurisdiction where the province’s capital markets are

engaged (*Québec (Sa Majesté du Chef) v. Ontario Securities Commission* (1992), 10 O.R. (3d) 577 (C.A.), leave to appeal refused [1993] 2 S.C.R. x (*sub nom. R. du chef du Québec v. Ontario Securities Commission*); *Bennett v. British Columbia (Securities Commission)* (1992), 94 D.L.R. (4th) 339 (B.C.C.A.)).

[46] The Constitution gives Parliament powers that enable it to pass laws that affect aspects of securities regulation and, more broadly, to promote the integrity and stability of the Canadian financial system. These include Parliament's power to enact laws relating to criminal law (s. 91(27)), banks (s. 91(15)), bankruptcy (s. 91(21)), telecommunications (ss. 91 and 92(1)(a)), and peace, order and good government (s. 91) (*Multiple Access; Bell Canada v. Quebec (Commission de la santé et de la sécurité du travail)*, [1988] 1 S.C.R. 749, at pp. 765-66; *Smith v. The Queen*, [1960] S.C.R. 776, at p. 781). Parliament has exercised its powers by enacting, for example, the following statutes and provisions: the *Canada Business Corporations Act*, R.S.C. 1985, c. C-44; the *Criminal Code*, R.S.C. 1985, c. C-46, ss. 380(2), 382, 382.1, 383, 384 and 400; the *Bank Act*, S.C. 1991, c. 46; the *Investment Canada Act*, R.S.C. 1985, c. 28 (1st Supp.); the *Payment Clearing and Settlement Act*, S.C. 1996, c. 6, Sch.; the *Telecommunications Act*, S.C. 1993, c. 38; the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, Part XII. Finally, s. 91(2) of the *Constitution Act, 1867* gives Parliament power over the regulation of trade and commerce. This power has two branches: the power over interprovincial and international commerce (*Citizens' Insurance of Canada v. Parsons* (1881), 7 App. Cas. 96 (P.C.) ("*Parsons*")) and the general trade and commerce power that

authorizes laws where the national interest is engaged in a manner that is qualitatively different from provincial concerns, as discussed more fully later in these reasons.

[47] Canada bases its argument that the proposed Act is constitutional entirely on the s. 91(2) general trade and commerce power. It does not rely on the s. 91(2) power over interprovincial trade which gives Parliament the power to legislate on interprovincial and international aspects of securities. Nor does it invoke other heads of powers under the Constitution. The only question before us therefore is whether the Act can be supported under the general trade and commerce power.

### *C. Securities Regulation in other Federal States*

[48] Canada is not the only federation where the issue of the balance between local and national regulation of securities has arisen. While the solution arrived at in each country is a product of its own constitutional arrangements and imperatives, experience in other federal states suggests that power-sharing between the central and local levels of government in this area can succeed.

[49] The German constitution provides that the *Länder* may enact securities laws, but that the Federation may exercise its legislative power, “if and only to the extent that ... the maintenance of legal or economic unity renders federal regulation necessary in the national interest” (Basic Law, art. 72(1)-(2)). This division of responsibility has led to a three-tiered supervisory system. The federally empowered

regulatory agency dominates the first tier of regulation. The *Länder* have a consultative role in the selection of the agency president, maintain control offices for securities trading and establish stock exchange regulatory agencies which exercise control over the registration or dissolution of a stock exchange located within their territory. Each stock exchange has a Trading Surveillance Office, whose task is to independently monitor the trading and settlement of trades at the exchange.

[50] In Australia, a period of discussion between the Commonwealth and the states culminated, in the early 1990s, in a cooperative scheme for corporate and securities law characterized by cross-vesting of jurisdiction. This national scheme faced constitutional setbacks following judgments of the High Court (*Re Wakim; Ex parte McNally*, [1999] HCA 27, 198 C.L.R. 511; *R. v. Hughes*, [2000] HCA 22, 202 C.L.R. 535). In the wake of the constitutional uncertainty that followed, all states agreed to refer sufficient powers to the Commonwealth to enact corporate and securities law, a process authorized by the Australian Constitution. Since 2001, the national scheme of securities regulation that presently exists in Australia is premised on powers referred by the states to the Commonwealth.

[51] The Commerce Clause in the United States Constitution gives the federal government the power to “regulate commerce ... among the several states” (art. I, §8, cl. 3). Owing to this language, while states may regulate all aspects of securities trading within their jurisdiction, the federal government may choose to regulate virtually all aspects of interstate securities trading. In the event of conflict, U.S.

constitutional law has long recognized that state laws are of no effect and are “pre-empted” by federal law, owing to the Supremacy Clause in art. VI, cl. 2 of the Constitution.

[52] In 1996, the U.S. Congress passed the *National Securities Markets Improvement Act of 1996*, Pub. L. 104-290, 110 Stat. 3416 (1996), which amended s. 18 of the *Securities Act of 1933*, 15 U.S.C. §77a, and effectively pre-empted state securities law as it applied to the great majority of United States issuers. However, this pre-emption did not exclude state participation in securities regulation. Securities are typically subject to “local regulation in the state where the issuer is headquartered, the state from which any offering materials are dispatched or where any oral offers are made, the state where the offerees have their domicile, and the state to which the offering materials are sent” (J. Macey, *An Analysis of the Canadian Federal Government’s Initiative to Create a National Securities Regulator* (2010), at pp. 48-49). Local regulation manifests itself most prominently in the areas of local enforcement and policy.

## V. Constitutional Principles

[53] Before answering the question at hand — whether the Act falls within the federal general trade and commerce power under s. 91(2) — it is necessary to canvas the main constitutional principles engaged in this case.

### A. *The Federalism Principle: An Historic View*

[54] Sections 91 and 92 of the *Constitution Act, 1867* divide legislative powers between Parliament and the provincial legislatures. This division remains the “primary textual expression of the principle of federalism in our Constitution, agreed upon at Confederation” (*Reference re Secession of Quebec*, [1998] 2 S.C.R. 217 (“*Secession Reference*”), at para. 47).

[55] Inherent in a federal system is the need for an impartial arbiter of jurisdictional disputes over the boundaries of federal and provincial powers (*Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 S.C.R. 3, at para. 124). That impartial arbiter is the judiciary, charged with “control[ing] the limits of the respective sovereignties” (*Northern Telecom Canada Ltd. v. Communication Workers of Canada*, [1983] 1 S.C.R. 733, at p. 741). Courts are guided in this task by foundational constitutional principles, which assist in the delineation of spheres of jurisdiction. Among these, the principle of federalism “has exercised a role of considerable importance in the interpretation of the written provisions of our Constitution” (*Secession Reference*, at para. 57).

[56] The Judicial Committee of the Privy Council, which was the final arbiter of Canada’s constitution until 1949, tended to favour an exclusive powers approach. Thus Lord Atkin in 1937 famously described the respective powers of Parliament and the provincial legislatures as “watertight compartments” (*Attorney-General for Canada v. Attorney-General for Ontario*, [1937] A.C. 326, at p. 354). However, the Judicial Committee recognized that particular matters might have both federal and

provincial aspects and overlap (*Hodge v. The Queen* (1883), 9 App. Cas. 117). Privy Council jurisprudence also recognized that the Constitution must be viewed as a “living tree capable of growth and expansion within its natural limits” (*Edwards v. Attorney-General for Canada*, [1930] A.C. 124, at p. 136, *per* Lord Sankey). This metaphor has endured as the preferred approach in constitutional interpretation, ensuring “that Confederation can be adapted to new social realities” (*Reference re Employment Insurance Act (Can.), ss. 22 and 23*, 2005 SCC 56, [2005] 2 S.C.R. 669, at para. 9, *per* Deschamps J.).

[57] The Supreme Court of Canada, as final arbiter of constitutional disputes since 1949, moved toward a more flexible view of federalism that accommodates overlapping jurisdiction and encourages intergovernmental cooperation — an approach that can be described as the “dominant tide” of modern federalism (*OPSEU v. Ontario (Attorney General)*, [1987] 2 S.C.R. 2, at p. 18). See also: *P.E.I. Potato Marketing Board v. H. B. Willis Inc.*, [1952] 2 S.C.R. 392; *Lord’s Day Alliance of Canada v. Attorney General of British Columbia*, [1959] S.C.R. 497; *Coughlin v. Ontario Highway Transport Board*, [1968] S.C.R. 569.

[58] If there was any doubt that this Court had rejected rigid formalism in favour of accommodating cooperative intergovernmental efforts, it has been dispelled by several decisions of this Court over the past decade. For instance, in *Fédération des producteurs de volailles du Québec v. Pelland*, 2005 SCC 20, [2005] 1 S.C.R. 292, the Court considered a comprehensive and “seamless” scheme for

chicken production and marketing created by agreement between the federal and provincial governments. Abella J., writing for the Court, upheld the provincial legislative component of the federal-provincial scheme, which could operate to limit the production of chicken destined for the interprovincial market, and observed:

In my view, the 1978 Federal-Provincial Agreement, like the scheme in the *Egg Reference*, both reflects and reifies Canadian federalism's constitutional creativity and cooperative flexibility. [para. 15]

[59] Dickson C.J., in concurring reasons in *OPSEU*, summarized the situation aptly:

The history of Canadian constitutional law has been to allow for a fair amount of interplay and indeed overlap between federal and provincial powers. It is true that doctrines like interjurisdictional and Crown immunity and concepts like “watertight compartments” qualify the extent of that interplay. But it must be recognized that these doctrines and concepts have not been the dominant tide of constitutional doctrines; rather they have been an undertow against the strong pull of pith and substance, the aspect doctrine and, in recent years, a very restrained approach to concurrency and paramountcy issues. [p. 18]

[60] As Dickson C.J. pointed out, a restrained approach to doctrines like federal paramountcy is warranted. This point was reiterated by Binnie and LeBel JJ. in *Canadian Western Bank v. Alberta*, 2007 SCC 22, [2007] 2 S.C.R. 3, where the Court said:

The [constitutional] doctrines [developed by the courts] must also be designed to reconcile the legitimate diversity of regional experimentation with the need for national unity [and] they must include a recognition that

the task of maintaining the balance of powers in practice falls primarily to governments, and constitutional doctrine must facilitate, not undermine what this Court has called “co-operative federalism” (*Husky Oil Operations Ltd. v. Minister of National Revenue*, [1995] 3 S.C.R. 453, at para. 162; *Reference re Employment Insurance Act (Can.)*, ss. 22 and 23, [2005] 2 S.C.R. 669, 2005 SCC 56, at para. 10). [para. 24]

[61] While flexibility and cooperation are important to federalism, they cannot override or modify the separation of powers. The *Secession Reference* affirmed federalism as an underlying constitutional principle that demands respect for the constitutional division of powers and the maintenance of a constitutional balance between federal and provincial powers.

[62] In summary, notwithstanding the Court’s promotion of cooperative and flexible federalism, the constitutional boundaries that underlie the division of powers must be respected. The “dominant tide” of flexible federalism, however strong its pull may be, cannot sweep designated powers out to sea, nor erode the constitutional balance inherent in the Canadian federal state.

#### B. *Pith and Substance and Double Aspect*

[63] The “pith and substance” analysis is used by Canadian courts to determine the constitutional validity of legislation from a division of powers perspective. The analysis looks at the *purpose* and *effects* of the law to identify its “main thrust” as a first step in determining whether a law falls within a particular head of power (in this case the s. 91(2) general trade and commerce power) (*RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199, at para. 29;

*Quebec (Attorney General) v. Lacombe*, 2010 SCC 38, [2010] 2 S.C.R. 453, at para. 20; *Kitkatla Band v. British Columbia (Minister of Small Business, Tourism and Culture)*, 2002 SCC 31, [2002] 2 S.C.R. 146, at para. 53). Incidental effects may be discounted; the search is for the main thrust of the law (*Canadian Western Bank*, at para. 28).

[64] Intrinsic evidence, such as purpose clauses and the general structure of the statute, may reveal the *purpose* of a law. Extrinsic evidence, such as Hansard or other accounts of the legislative process, may also assist in determining a law's purpose. The *effects* of a law include the legal effect of the text as well as practical consequences of the application of the statute (*Lacombe*, at para. 20; *Kitkatla*, at para. 54).

[65] After analyzing the legislation's purpose and its effects to determine its main thrust, the inquiry turns to whether the legislation so characterized falls under the head of power said to support it — the classification stage (*Reference re Firearms Act (Can.)*, 2000 SCC 31, [2000] 1 S.C.R. 783, at para. 15). This may require interpretation of the scope of the power. If the main thrust of the legislation is properly classified as falling under a head of power assigned to the adopting level of government, the legislation is *intra vires* and valid.

[66] Canadian constitutional law has long recognized that the same subject or “matter” may possess both federal and provincial aspects. This means that a federal law may govern a matter from one perspective and a provincial law from another.

The federal law pursues an objective that in pith and substance falls within Parliament's jurisdiction, while the provincial law pursues a different objective that falls within provincial jurisdiction (*Canadian Western Bank*, at para. 30). This concept, known as the double aspect doctrine, allows for the *concurrent application* of both federal and provincial legislation, but it does not create *concurrent jurisdiction* over a matter (in the way for example s. 95 of the *Constitution Act, 1867* does for agriculture and immigration).

[67] Canada argues that the main thrust of the proposed Act brings it within the general branch of Parliament's jurisdiction over trade and commerce. It is to this head of power that we now turn.

#### VI. Section 91(2): The Federal Trade and Commerce Power

[68] Canada contends that securities have evolved in a way that brings the entire field of securities regulation under the general branch of the s. 91(2) trade and commerce power, even if some aspects also fall under provincial competence in relation to property and civil rights in the province. To support this contention, Canada seeks to establish that the main thrust of the Act falls under the s. 91(2) general trade and commerce power. As noted earlier, Canada grounds its submission in support of the Act's constitutionality entirely on this power.

[69] As discussed in the preceding section, as a general rule, determining the validity of a statute proceeds in two steps: (1) identifying the main thrust of the

legislation having regard to its purpose and effects; and (2) asking whether the main thrust falls under the head of power said to support it. In this case, the validity of the Act ultimately comes down to the breadth of the general branch of the federal trade and commerce power under s. 91(2) of the *Constitution Act, 1867*. We therefore turn next to the jurisprudence on s. 91(2).

[70] On its face, the general trade and commerce power (as distinguished from the more specific federal power to regulate interprovincial and international trade and commerce) is broad — so broad that it has the potential to permit federal duplication (and, in cases of conflict, evisceration) of the provincial powers over large aspects of property and civil rights and local matters. This would upset the constitutional balance envisaged by ss. 91 and 92 and undermine the federalism principle. To avoid this result, the trade and commerce power has been confined to matters that are genuinely national in scope and qualitatively distinct from those falling under provincial heads of power relating to local matters and property and civil rights. The essence of the general trade and commerce power is its national focus.

[71] In the delineation of the scope of the general trade and commerce power, courts have been guided by fundamental underlying constitutional principles. The Canadian federation rests on the organizing principle that the orders of government are coordinate and not subordinate one to the other. As a consequence, a federal head of power cannot be given a scope that would eviscerate a provincial legislative

competence. This is one of the principles that underlies the Constitution (*Secession Reference*, at para. 58, citing *Re the Initiative and Referendum Act*, [1919] A.C. 935 (P.C.), at p. 942).

[72] The jurisprudence on the general trade and commerce power reflects this fundamental principle. An overly expansive interpretation of the federal trade and commerce power under s. 91(2) not only would subsume many more specific federal heads of power (e.g., federal power over banking (s. 91(15)), weights and measures (s. 91(17)), bills of exchange and promissory notes (s. 91(18)), etc.), but, more importantly, would have the potential to duplicate and perhaps displace, through the paramountcy doctrine, the clear provincial powers over local matters and property and civil rights which embrace trade and commerce in the province. Duff J. (as he then was) expressed this concern in the following manner in *Lawson v. Interior Tree Fruit and Vegetable Committee of Direction*, [1931] S.C.R. 357:

The scope which might be ascribed to head 2, s. 91 (if the natural meaning of the words, divorced from their context, were alone to be considered), has necessarily been limited, in order to preserve from serious curtailment, if not from virtual extinction, the degree of autonomy which ... the provinces were intended to possess. [p. 366]

[73] The circumscribed scope of the general trade and commerce power can also be linked to another facet of federalism — the recognition of the diversity and autonomy of provincial governments in developing their societies within their respective spheres of jurisdiction. As stated in the *Secession Reference*, “[t]he federal structure of our country also facilitates democratic participation by

distributing power to the government thought to be most suited to achieving the particular societal objective having regard to this diversity” (para. 58).

[74] Thus, the starting point is that the general trade and commerce power under s. 91(2) does not encompass all trade and commerce; the power is necessarily circumscribed. At the same time, failure to give meaningful scope to the general trade and commerce power would violate the notion of balance between the federal and provincial orders of government inherent in the division of powers and impermissibly amend the Constitution.

[75] It is unnecessary to trace all the cases that have considered s. 91(2) since 1867. The first and still a leading statement of the scope of the trade and commerce power is found in *Parsons*. In that case, the Judicial Committee of the Privy Council established that a literal interpretation of the words “the Regulation of Trade and Commerce” in s. 91(2) was inappropriate given the balance of powers established in the *Constitution Act, 1867*. *Parsons* also established the twin branches of the s. 91(2) power: (1) interprovincial and international trade and commerce; and (2) general trade and commerce (“general regulation of trade affecting the whole dominion” (p. 113)). The Judicial Committee further held that s. 91(2) does not include the power to regulate the contracts of a particular business or trade (p. 113).

[76] In the late 1970s and early 1980s, this Court revisited the general trade and commerce power. The “modern” trade and commerce cases have affirmed *Parsons* and taken up the task of developing indicia for matters that would properly

fall within the general branch of s. 91(2) — an effort that culminated with the five indicia proposed in *General Motors of Canada v. City National Leasing*, [1989] 1 S.C.R. 641. The test set forth in *General Motors*, to which we will shortly return, finds its origin in *Attorney General of Canada v. Canadian National Transportation Ltd.*, [1983] 2 S.C.R. 206. In that case, Dickson J. (as he then was) emphasized the balance that *Parsons* sought to maintain, and built on indicia relied on by Laskin C.J. in *MacDonald v. Vapor Canada Ltd.*, [1977] 2 S.C.R. 134.

[77] The issue in *Canadian National Transportation* was whether the Attorney General of Canada, as distinguished from provincial attorneys general, could prosecute offences under the criminal law provisions of the *Combines Investigation Act*, R.S.C. 1970, c. C-23. The Court held that the Attorney General of Canada could do so, the majority relying on the federal criminal law power. Dickson J., while agreeing that the criminal law power could in principle validate the legislation, relied on s. 91(2) to support the federal power to prosecute combines offences.

[78] Emphasizing the need to maintain constitutional balance, Dickson J. suggested that s. 91(2) applied to matters of “general interest throughout the Dominion” (p. 261, citing *John Deere Plow Co. v. Wharton*, [1915] A.C. 330 (P.C.)), at p. 340). The general interest test, he said, should be read with a view to the fact that an “overly literal conception of ‘general interest’ will endanger the very idea of the local” (p. 266). At the same time, Dickson J. warned, “there are equal dangers in

swinging the telescope the other way around. The forest is no less a forest for being made up of individual trees” (p. 266).

[79] In the end, Dickson J. opined that to fall under s. 91(2), legislation must be “qualitatively different from anything that could practically or constitutionally be enacted by the individual provinces either separately or in combination” (p. 267, (emphasis added)). The focus of the legislation must be general, although its effects may have local impact. He contrasted laws directed at “general regulation of the national economy” with laws “merely aimed at centralized control over a large number of local economic entities”, indicating that only the former fit within the purview of s. 91(2) (p. 267).

[80] In *General Motors*, the issue was the constitutionality of a civil right of action conferred by a provision of the federal *Combines Investigation Act*. Dickson C.J. delivered the opinion of the Court, upholding the right to a civil action and the statute generally under s. 91(2). Adopting his analysis in *Canadian National Transportation*, he emphasized the need to strike a balance between ss. 91(2) and 92(13). He went on to suggest five indicia of federal competence: (1) whether the impugned law is part of a general regulatory scheme; (2) whether the scheme is under the oversight of a regulatory agency; (3) whether the legislation is concerned with trade as a whole rather than with a particular industry; (4) whether it is of such a nature that provinces, acting alone or in concert, would be constitutionally incapable of enacting it; and (5) whether the legislative scheme is such that the

failure to include one or more provinces or localities in the scheme would jeopardize its successful operation in other parts of the country (pp. 661-62).

[81] Dickson C.J. explained that where the general trade and commerce power is advanced as a ground of constitutional validity, a “careful case by case analysis remains appropriate” (*General Motors*, at p. 663). He further cautioned that the indicia of validity are not exhaustive, nor is it necessary that they be present in every case (pp. 662-63). He noted that the final three share a common theme — namely “that the scheme of regulation [must be] national in scope and that local regulation would be inadequate” (p. 678). He held that the regulation of competition met the test because it was not an issue of purely local concern but “one of crucial importance for the national economy” (p. 678). If the federal government were not able to legislate, there would be a gap, in practical effect, in the distribution of legislative powers.

[82] This Court confirmed this approach in *Kirkbi AG v. Ritvik Holdings Inc.*, 2005 SCC 65, [2005] 3 S.C.R. 302, holding, *per* LeBel J., that the federal *Trade-marks Act*, R.S.C. 1995, c. T-13, was concerned with trade as a whole rather than trade within a particular industry, since trademarks “apply across and between industries in different provinces” (para. 29).

[83] When *Canadian National Transportation*, *General Motors* and *Kirkbi AG* are read together, a common theme emerges. Provided the law is part of a general regulatory scheme aimed at trade and commerce under oversight of a regulatory

agency, it will fall under the general federal trade and commerce power if the matter regulated is genuinely national in importance and scope. To be genuinely national in importance and scope, it is not enough that the matter be replicated in all jurisdictions throughout the country. It must, to use the phrase in *General Motors*, be something that the provinces, acting either individually or in concert, could not effectively achieve. To put it another way, the situation must be such that if the federal government were not able to legislate, there would be a constitutional gap. Such a gap is constitutional anathema in a federation.

[84] The *General Motors* indicia continue to offer an appropriate analytical framework for addressing the question of whether a law is validly adopted under the general trade and commerce power. These indicia are not cast in stone and are interrelated and overlapping. The first two indicia may be viewed as directed at identifying the required formal structure: a federal regulatory scheme under the oversight of a regulator. The final three indicia go to whether federal regulation is constitutionally appropriate. They direct our attention to whether the matter is one of genuine national importance and scope that goes to trade as a whole in a way that is distinct from provincial concerns, thus invoking Parliament's unique ability to effectively deal with economic issues of this category.

[85] The result is a balanced approach that preserves a meaningful role for federal regulation under s. 91(2), without endangering "the very idea of the local" in provincial commercial regulation. The *General Motors* test asks whether the subject

of a federal law presents a distinct federal aspect falling within the general branch of the trade and commerce power. Under the double aspect doctrine, federal legislation adopted from this distinct perspective will be constitutional even if the matter, considered from another perspective, also falls within a provincial head of power. In the end, the *General Motors* test is aimed at preserving the balance that lies at the heart of the principle of federalism, which demands that a federal head of power not be given such scope that it would eviscerate a provincial legislative competence.

[86] Before turning to whether the Act falls within s. 91(2), it may be useful to illustrate what it means to be a matter of genuine national importance and scope within the *General Motors* test, by looking at a matter that has been held to fall within the federal trade and commerce power — competition law.

[87] Competition, as Dickson C.J. observed in *General Motors*, “is not an issue of purely local concern but one of crucial importance for the national economy” (p. 678). It is a “*genre* of legislation that could not practically or constitutionally be enacted by a provincial government” (p. 683, citing *Canadian National Transportation*, at p. 278 (emphasis in original)). Competition law is not confined to a set group of participants in an organized trade, nor is it limited to a specific location in Canada. Rather, it is a diffuse matter that permeates the economy as a whole, as “[t]he deleterious effects of anti-competitive practices transcend provincial boundaries” (p. 678). Anti-competitive behaviour subjected to weak standards in one province could distort the fairness of the entire Canadian market.

This national dimension, as the Court observed, must be regulated federally, or not at all (p. 683, citing *Canadian National Transportation*, at p. 278). Failure by one province to legislate or the absence of a uniform set of rules applicable throughout the country would render the market vulnerable.

[88] The federal power to regulate competition in Canada does not deprive the provinces of the ability to deal with competition in the exercise of their legislative powers in fields such as consumer protection, labour relations and marketing (*General Motors*, at p. 682). Competition law is in pith and substance federal because in purpose and effect its concerns are of national importance and scope. While it deals with contracts and conduct within the province, it touches only their federal aspect and does so in a manner and from a perspective that is distinct from provincial regulation. Thus its main thrust remains federal.

[89] In sum, competition law illustrates how the indicia set out in *General Motors* function to identify a matter that properly falls under s. 91(2). The general trade and commerce power cannot be used in a way that denies the provincial legislatures the power to regulate local matters and industries within their boundaries. Nor, by the same token, can the power of the provinces to regulate property and civil rights within the province deprive the federal Parliament of its powers under s. 91(2) to legislate on matters of genuine national importance and scope — matters that transcend the local and concern Canada as a whole.

[90] We would add that, in applying the *General Motors* test, one should not confuse what is optimum as a matter of policy and what is constitutionally permissible. The fifth *General Motors* criterion, it is true, asks whether failure of one or more provinces to participate in the regulatory scheme would “jeopardize the successful operation of the scheme in other parts of the country”. However, the reference to “successful operation” should not be read as introducing an inquiry into what would be the best resolution in terms of policy. Efficaciousness is not a relevant consideration in a division of powers analysis (see *Reference re Firearms Act (Can.)*, at par. 18). Similarly, references in past cases to promoting fair and effective commerce should be understood as referring to constitutional powers that, because they are essential in the national interest, transcend provincial interests and are truly national in importance and scope. Canada must identify a federal aspect distinct from that on which the provincial legislation is grounded. The courts do not have the power to declare legislation constitutional simply because they conclude that it may be the best option from the point of view of policy. The test is not which jurisdiction — federal or provincial — is thought to be best placed to legislate regarding the matter in question. The inquiry into constitutional powers under ss. 91 and 92 of the *Constitution Act, 1867* focuses on legislative competence, not policy.

#### VII. Application: Does The Proposed Act Fall Within Section 91(2)?

[91] Where particular provisions of a statute are challenged, the proper approach is to focus on the constitutionality of those provisions, read in the context of the statute as a whole: *General Motors*, *Kitkatla* and *Kirkbi AG*. Here the issue, as

framed by the reference question, is the constitutionality of a single, integrated regulatory scheme. It stands or falls as a whole. The question is whether the sum of its particular provisions, read together, falls within the general trade and commerce power, on the test set out above.

[92] To answer this question, we must identify the main thrust of the proposed legislation having regard to its purpose and effects, and then ask whether the scheme, thus characterized, meets the indicia set out in *General Motors*.

#### A. *The Purpose and Effects of the Act*

[93] The first step in the pith and substance analysis is to ascertain the purpose and effects of the Act, viewed as a single, comprehensive scheme.

[94] The task at this stage is not to determine conclusively whether the legislation is provincial or federal in nature — that is the ultimate question of the division of powers analysis — but only to ascertain its main thrust. In some cases, determining the main thrust of a law will be pivotal in terms of its ultimate constitutional validity. In others, validity may depend on close analysis of the constitutional power that is said to support it. As we will see, this case is of the latter sort. While we must ascertain what the Act seeks to do and does, saying at the outset that it is in pith and substance “national” or “federal” simply begs the final question.

[95] Turning first to purpose, the Act's preamble states that Canada intends to create a single Canadian securities regulator. This is consistent with previous proposals for such a body. As discussed earlier, the idea of a single Canadian securities regulator has been percolating for more than 50 years. The Act represents the culmination of sustained efforts towards unification of the provincial securities regulatory regimes. Section 9 of the proposed Act reveals the legislation's broader, underlying purposes: to provide investor protection, to foster fair, efficient and competitive capital markets and to contribute to the integrity and stability of Canada's financial system.

[96] The immediate object of the Act — to create a national securities regulator — does not shed much light on whether the subject matter of the Act is federal or provincial. It is equally consistent with the federal government's contention and with the contention of the opposing provinces that the Act is simply a provincial securities act writ large.

[97] The broader purposes set forth in s. 9 send a mixed message. One goal is investor protection, which, without more, has historically been a provincial responsibility under s. 92(13). Another goal is to foster fair, efficient and competitive capital markets. Opponents of the Act argue that these are properly provincial responsibilities. The federal government, on the other hand, argues that fostering fair, efficient and competitive capital markets, viewed from a pan-Canadian perspective, also falls under the general trade and commerce power. The third stated goal — to

contribute to the integrity and stability of Canada's financial system — also has a federal aspect.

[98] This brings us to the effects of the proposed federal scheme. We must look not only at the direct effects of the legislation, but also at the follow-through effects the legislation may be expected to produce: *Kitkatla*.

[99] The direct effect of the proposed Act is to establish a federal securities regulation scheme. If implemented as contemplated, all provinces and territories will eventually join the scheme. This will produce follow-through effects. Once a sufficient number of jurisdictions opt in, the current provincial and territorial securities regulation schemes will be effectively displaced. Indeed, in order to be included in the comprehensive regulatory scheme created by the Act, provinces and territories must suspend their own securities laws. The follow-through effects of the proposed Act will therefore be to subsume the existing provincial and territorial legislative schemes governing securities under the federal regulation scheme.

[100] A detailed look at the provisions of the Act confirms that once in place, it will regulate many matters which Canada concedes also fall within the provincial power over property and civil rights under s. 92(13). Parts 1 and 2 establish regulatory oversight mechanisms. These are followed by a number of provisions broadly pertaining to the registration of persons. To this end, Part 3 of the Act gives the Chief Regulator the power to recognize a person as a self-regulatory organization, an exchange, a clearing agency and an auditor oversight organization (s. 64). These

bodies must in turn regulate standards of practice and business conduct of participants in the securities industry (s. 66). Part 4, in similar vein, provides the Chief Regulator with the authority to designate a person as a credit rating organization, an investor compensation fund, a dispute resolution service, an information processor, a trade repository or another entity that provides a market participant with prescribed services (s. 73). Designation engages information sharing duties (s. 74). Part 5 requires registration of dealers, advisers and investment fund managers (s. 76). Parts 6, 7, 8 and 9 deal with the registration of securities, public information on securities and the monitoring of securities and issuers. Other provisions of the Act set standards for trading. For instance, Part 10 prohibits misrepresentations (s. 114), market manipulation (s. 116), insider trading (s. 117(1)), tipping (s. 117(2)) and other unfair practices. It also contains certain standards of conduct and obligations to avoid conflicts of interest that pertain to registered persons (see, e.g., ss. 109 to 113). Finally, Part 11 locks these routine regulatory provisions in place by establishing a scheme for the administration and enforcement of the Act.

[101] The effect of these provisions is in essence to duplicate legislative schemes enacted by provincial legislators exercising their jurisdiction over property and civil rights under s. 92(13) of the *Constitution Act, 1867*.

[102] Against this, Canada argues that what appears, on superficial inspection, to be duplication of provincial legislation is in fact directed at distinct federal concerns — preserving fair, efficient and competitive capital markets throughout

Canada and ensuring the integrity and stability of Canada's financial system. Duplication of provincial provisions, Canada correctly points out, does not mean that there is no federal aspect that can support the Act. Moreover, Canada argues that the Act is not merely duplicative. It includes provisions that go beyond provincial powers. For example, it contains provisions for the control of systemic risk and for data collection on a nationwide basis, something Canada argues cannot be accomplished at the provincial level.

[103] Systemic risks have been defined as “risks that occasion a ‘domino effect’ whereby the risk of default by one market participant will impact the ability of others to fulfill their legal obligations, setting off a chain of negative economic consequences that pervade an entire financial system” (M. J. Trebilcock, *National Securities Regulator Report* (2010), at para. 26). By definition, such risks can be evasive of provincial boundaries and usual methods of control. The proposed legislation is aimed in part at responding to systemic risks threatening the Canadian market viewed as a whole. Without attempting an exhaustive enumeration, the following provisions of the proposed Act would appear to address or authorize the adoption of regulations directed at systemic risk: ss. 89 and 90 relating to derivatives, s. 126(1) on short-selling, s. 73 on credit rating, s. 228(4)(c) relating to urgent regulations and ss. 109 and 224 on data collection and sharing.

[104] The expert evidence adduced by Canada provides support for the view that systemic risk is an emerging reality, ill-suited to local legislation. Prevention of

systemic risk may trigger the need for a national regulator empowered to issue orders that are valid throughout Canada and impose common standards, under which provincial governments can work to ensure that their market will not transmit any disturbance across Canada or elsewhere.

[105] The emphasis in the proposed Act on nationwide data collection may similarly be seen as aimed at anticipating and identifying risks that may transcend the boundaries of a specific province. By analogy with Statistics Canada, it might be argued that broad national data-collecting powers may serve the national interest in a way that finds no counterpart on the provincial plane.

[106] Against this background, we return to the question at hand: what is the main thrust of the proposed *Securities Act*? The purpose of the proposed Act, we have seen, is to implement a comprehensive Canadian regime for the regulation of securities with a view to investor protection, the promotion of fair, efficient and competitive capital markets and ensuring the integrity and stability of the financial system. The effects of the proposed Act would be to duplicate and displace the existing provincial and territorial securities regimes, replacing them with a new federal regulatory scheme. Thus the main thrust of the Act is to regulate, on an exclusive basis, all aspects of securities trading in Canada, including the trades and occupations related to securities in each of the provinces.

[107] These conclusions do not, however, permit us to connect the Act to a particular head of power, federal or provincial. To do that, we must ask whether,

applying the *General Motors* factors, the legislation, viewed as a whole, addresses a matter that is truly national in importance and scope and that transcends provincial competence.

B. *Classification: Does the Act Fall Within the General Trade and Commerce Power?*

[108] To recap, the *General Motors* test frames the inquiry into whether a legislative scheme falls within the general trade and commerce power in terms of the following non-exclusive indicia: (1) Is the law part of a general regulatory scheme?; (2) Is the scheme under the oversight of a regulatory agency?; (3) Is the law concerned with trade as a whole rather than with a particular industry?; (4) Is the scheme of such a nature that the provinces, acting alone or in concert, would be constitutionally incapable of enacting it?; (5) Would failure to include one or more provinces or localities in the scheme jeopardize its successful operation in other parts of the country?

[109] The *General Motors* indicia invite the Court to examine the legislative scheme through the lens of five interrelated inquiries to determine whether, viewed in its entirety, it addresses a matter of genuine national importance and scope that goes to trade as a whole in a way that is distinct from provincial concerns. The inquiry focuses on the nature of the proposed scheme and its purpose and effects, intended and actual. It is contextual, grounded in the record and the legislative facts. With this in mind, we turn to the *General Motors* indicia.

[110] The first two *General Motors* indicia need not detain us. Clearly they are met. The Act would institute a national regulatory regime for securities across Canada. The new national regulatory scheme for securities would feature: a Council of Ministers; the Canadian Securities Regulatory Authority (composed of a regulatory division headed by the Chief Regulator and an independent Canadian Securities Tribunal headed by a Chief Adjudicator); a Regulatory Policy Forum; and an Investor Advisory Panel. Indeed, all parties agree that the Act would create a federal regulatory scheme under the oversight of a regulator.

[111] This leaves the third, fourth and fifth *General Motors* inquiries. These questions take us to the concern that lies at the heart of this case — whether Canada has shown that the proposed Act, viewed as a whole, addresses a matter of national importance and scope, distinct from provincial concerns. Is the proposed Act concerned with trade as a whole rather than with a particular industry? Do the provinces possess the constitutional capacity, acting alone or in concert, to achieve the objectives of the scheme? Finally, would the failure to include one or more provinces frustrate the success of the scheme? If the answers to these questions support the conclusion that the proposed Act falls within the general branch of the trade and commerce power, the double aspect doctrine applies, the balance between the federal and provincial powers required by the federalism principle is satisfied and the proposed law may be validly enacted by Parliament. We now turn to the final three *General Motors* inquiries.

[112] The third question is whether the proposed Act is directed at trade as a whole rather than at a particular industry. This requires us to look at both the purpose and the effects of the Act. Opponents of the Act argue that it is aimed at a particular industry — the securities industry. From their perspective, economic activity consisting of the trading in securities represents a specific industry. They are correct to state that, on their face, the provisions of the proposed Act aimed at government registration and the day-to-day conduct of brokers or investment advisers are not obviously related to trade as a whole.

[113] Canada argues, however, that the proposed Act goes beyond these matters. It sees the Act as fostering a fair, efficient and competitive national capital market and contributing to the integrity and stability of Canada's financial system. Moreover, Canada points out that the securities market is a mechanism for channelling capital from suppliers to consumers and that the capital transferred is applied throughout the Canadian economy in innumerable areas of activity. The securities market thus has a pervasive and significant impact throughout the national economy. It is a pillar of the economy of immense importance to the country as a whole. Regulating this market, Canada argues, relates to trade as a whole and is not an industry-specific matter.

[114] We accept that preservation of capital markets to fuel Canada's economy and maintain Canada's financial stability is a matter that goes beyond a particular

“industry” and engages “trade as a whole” within the general trade and commerce power as contemplated by the *General Motors* test. Legislation aimed at imposing minimum standards applicable throughout the country and preserving the stability and integrity of Canada’s financial markets might well relate to trade as a whole. However, the proposed Act reaches beyond such matters and descends into the detailed regulation of *all* aspects of trading in securities, a matter that has long been viewed as provincial. In justifying the reach of the Act, Canada argues that while securities trading may once have been mainly a local matter, it has evolved to become a matter of transcendent national concern that brings it within the s. 91(2) general trade and commerce power.

[115] No doubt, much of Canada’s capital market is interprovincial and indeed international. Trade in securities is not confined to 13 provincial and territorial enclaves. Equally, however, capital markets also exist within provinces that meet the needs of local businesses and investors. While it is obvious that the securities market is of great importance to modern economic activity, we cannot ignore that the provinces have been deeply engaged in the regulation of this market over the course of many years. To make its case, Canada must present the Court with a factual matrix that supports its assertion of a constitutionally significant transformation such that regulating every aspect of securities trading is no longer an industry-specific matter, but now relates, in its entirety, to trade as a whole.

[116] A long-standing exercise of power does not confer constitutional authority to legislate, nor does the historic presence of the provinces in securities regulation preclude a federal claim to regulatory jurisdiction (see *Ontario Hydro v. Ontario (Labour Relations Board)*, [1993] 3 S.C.R. 327, at p. 357, *per* Lamer C.J.). Nevertheless, the fact remains that Canada must establish that the Act, read as a whole, addresses concerns that transcend local, provincial interests. Canada's argument is that this area of economic activity has been so transformed that it now falls to be regulated under a different head of power. This argument requires not mere conjecture, but evidentiary support. The legislative facts adduced by Canada in this reference do not establish the asserted transformation. On the contrary, the fact that the structure and terms of the proposed Act largely replicate the existing provincial schemes belies the suggestion that the securities market has been wholly transformed over the years. On the basis of the record presented to us, we conclude, as discussed below, that the day-to-day regulation of securities within the provinces, which represents the main thrust of the Act, remains essentially a matter of property and civil rights within the provinces and therefore subject to provincial power.

[117] Aspects of the Act, for example those aimed at management of systemic risk and at national data collection, appear to be directly related to the larger national goals which the Act proclaims are its *raison d'être*. However, important as these elements are, they do not, on the record before us, justify a complete takeover of provincial regulation. Individuals engaged in the securities business are still, for the most part, exercising a trade or occupation within the province. On the record before

us, we are unable to accept Canada's assertion that the securities market has been so transformed as to make the day-to-day regulation of all aspects of trading in securities a matter of national concern. For example, the record does not support a necessary link between the national interest in fair, efficient and competitive capital markets and the registration requirements applicable to a securities dealer in Saskatchewan or Quebec. Viewing the Act as a whole, we conclude that it overreaches the proper scope of the general branch of the trade and commerce power descending well into industry-specific regulation. The wholesale displacement of provincial regulation it would effect is not justified by the national concerns that Canada raises.

[118] The fourth *General Motors* consideration addresses the constitutional capacity of the provinces and territories to enact a similar scheme acting in concert. The provinces opposing the Act argue that if there is a national interest in both fair, efficient and competitive capital markets and the need to provide an effective national response to systemic risk, they can meet it by legislating in concert. No doubt the provinces possess constitutional capacity to enact uniform legislation on most of the administrative matters covered by the federal Act, like registration requirements and the regulation of participants' conduct. By way of administrative delegation, they could delegate provincial regulatory powers to a single pan-Canadian regulator.

[119] The difficulty with the provinces' argument, however, is that, as a matter of constitutional principle, neither Parliament nor the legislatures can, by ordinary legislation, fetter themselves against some future legislative action (P. W. Hogg,

*Constitutional Law of Canada* (5th ed. Supp.), vol. 1, at pp. 12-8 ff.). Inherently sovereign, the provinces will always retain the ability to resile from an interprovincial scheme and withdraw an initial delegation to a single regulator. This may not be problematic in many areas. Indeed, it is in the nature of a federation that different provinces adopt their own unique approaches consistent with their unique priorities when addressing social or economic issues.

[120] The provinces' inherent prerogative to resile from an interprovincial scheme aimed for example at managing systemic risk limits their constitutional capacity to achieve the truly national goals of the proposed federal Act. The point is not that the provinces are constitutionally or practically unable to adopt legislation aimed at systemic risk *within* the provinces. Indeed, some provincial securities schemes contain provisions analogous to the ones aimed at systemic risk found in the proposed Act. The point is simply that because provinces could always withdraw from an interprovincial scheme there is no assurance that they could effectively address issues of national systemic risk and competitive national capital markets on a sustained basis.

[121] It follows that the fourth *General Motors* question must be answered, at least partially, in the negative. The provinces, acting in concert, lack the constitutional capacity to sustain a viable national scheme aimed at genuine national goals such as management of systemic risk or Canada-wide data collection. This supports the view that a federal scheme aimed at such matters might well be

qualitatively different from what the provinces, acting alone or in concert, could achieve.

[122] However, this only takes Canada so far. Canada's problem is that the proposed Act reflects an attempt that goes well beyond these matters of undoubted national interest and concern and reaches down into the detailed regulation of all aspects of securities. In this respect, the proposed Act is unlike federal competition legislation, which has been held to fall under s. 91(2) of the *Constitution Act, 1867*. It would regulate *all* aspects of contracts for securities within the provinces, including *all* aspects of public protection and professional competence within the provinces. Competition law, by contrast, regulates *only* anti-competitive contracts and conduct — a particular aspect of economic activity that falls squarely within the federal domain. In short, the proposed federal Act overreaches the legislative interest of the federal government.

[123] The fifth and final *General Motors* inquiry is whether the absence of a province from the scheme would prevent its effective operation. On lesser regulatory matters the answer might well be no. However, when it comes to genuine national goals, related to fair, efficient and competitive markets and the integrity and stability of Canada's financial system, including national data collection and prevention of and response to systemic risks, the answer must be yes — much for the reasons discussed under the fourth question. On these matters a federal regime would be qualitatively different from a voluntary interprovincial scheme. Viewed as a whole, however,

because the main thrust of the proposed Act is concerned with the day-to-day regulation of securities, the proposed Act would not founder if a particular province declined to participate in the federal scheme. Incidentally, we note that the opt-in feature of the scheme, on its face, contemplates the possibility that not all provinces will participate. This weighs against Canada's argument that the success of its proposed legislation requires the participation of all the provinces.

[124] Against the backdrop of these considerations, we come to the ultimate question — whether the Act, viewed in its entirety, addresses a matter of genuine national importance and scope going to trade as a whole in a way that is distinct and different from provincial concerns.

[125] The provisions of the proposed Act, viewed as a whole, compel a negative response. The Act chiefly regulates contracts and property matters within each of the provinces and territories, overlain by some measures directed at the control of the Canadian securities market as a whole that may transcend intra-provincial regulation of property and civil rights. A federal scheme adopted from the latter, distinctly federal, perspective would fall within the circumscribed scope of the general trade and commerce power. But the provisions of the Act that relate to these concerns, although perhaps valid on their own, cannot lend constitutional validity to the full extent of the proposed Act. Based on the record before us, the day-to-day regulation of all aspects of trading in securities and the conduct of those engaged in this field of activity that the Act would sweep into the federal sphere

simply cannot be described as a matter that is truly national in importance and scope making it qualitatively different from provincial concerns.

[126] The conclusion that the Act's attempt to take over regulation of the entirety of the securities trade in Canada exceeds the general branch of the trade and commerce power is also supported by the tenor of the case law. While the jurisprudence acknowledges that securities regulation may possess federal aspects, it has generally viewed basic securities regulation within the provinces as a local matter of property and civil rights (*Lymburn; Multiple Access; Duplain v. Cameron*, [1961] S.C.R. 693; *Smith v. The Queen; Ontario Securities Commission; Global Securities*).

[127] A review of the expert evidence does not lead to a different conclusion. We do not find it necessary or helpful to set out a detailed analysis of the many reports filed on both sides of the issue. For reasons already discussed, arguments in the reports as to whether securities should be regulated federally or provincially as a matter of policy are irrelevant to the constitutional validity of the legislation. A reasonable reading of the reports suggests that routine securities regulation is mainly concerned with the regulation of securities as an industry. It also confirms the local nature of much of Canada's securities industry. J. M. Suret and C. Carpentier, for example, point to different focuses and specializations from province to province (*Securities Regulation in Canada* (2003)). Mining listings compose approximately two thirds of the securities market in British Columbia. About half of Ontario's securities market is attributable to large financial services companies. Alberta is the

dominant national market for oil and gas and roughly a quarter of technology listings emanate from Quebec.

[128] To summarize, we accept that the economic importance and pervasive character of the securities market may, in principle, support federal intervention that is qualitatively different from what the provinces can do. However, as important as the preservation of capital markets and the maintenance of Canada's financial stability are, they do not justify a wholesale takeover of the regulation of the securities industry which is the ultimate consequence of the proposed federal legislation. The need to prevent and respond to systemic risk may support federal legislation pertaining to the national problem raised by this phenomenon, but it does not alter the basic nature of securities regulation which, as shown, remains primarily focused on local concerns of protecting investors and ensuring the fairness of the markets through regulation of participants. Viewing the Act as a whole, as we must, these local concerns remain the main thrust of the legislation — its pith and substance.

[129] This is not a case of a valid federal scheme that incidentally intrudes on provincial powers. It is not the incidental effects of the scheme that are constitutionally suspect; it is rather the main thrust of the legislation that goes beyond the federal power. The federal government properly did not invoke the ancillary powers doctrine. To apply that doctrine, the proposed statute considered as a whole must be valid — which it is not. We further note that we have not been asked for our

opinion on the extent of Parliament's legislative authority over securities regulation under other heads of federal power or indeed the interprovincial or international trade branch of s. 91(2).

[130] While the proposed Act must be found *ultra vires* Parliament's general trade and commerce power, a cooperative approach that permits a scheme that recognizes the essentially provincial nature of securities regulation while allowing Parliament to deal with genuinely national concerns remains available.

[131] The various proposals advanced over the years to develop a new model for regulating securities in Canada suggest that this matter possesses both central and local aspects. The same insight can be gleaned from the experience of other federations, even if each country has its own constitutional history and imperatives. The common ground that emerges is that each level of government has jurisdiction over some aspects of the regulation of securities and each can work in collaboration with the other to carry out its responsibilities.

[132] It is not for the Court to suggest to the governments of Canada and the provinces the way forward by, in effect, conferring in advance an opinion on the constitutionality on this or that alternative scheme. Yet we may appropriately note the growing practice of resolving the complex governance problems that arise in federations, not by the bare logic of either/or, but by seeking cooperative solutions that meet the needs of the country as a whole as well as its constituent parts.

[133] Such an approach is supported by the Canadian constitutional principles and by the practice adopted by the federal and provincial governments in other fields of activities. The backbone of these schemes is the respect that each level of government has for each other's own sphere of jurisdiction. Cooperation is the animating force. The federalism principle upon which Canada's constitutional framework rests demands nothing less.

#### VIII. Conclusion

[134] The *Securities Act* as presently drafted is not valid under the general branch of the federal power to regulate trade and commerce under s. 91(2) of the *Constitution Act, 1867*.

The question referred to was answered as follows: The *Securities Act* as presently drafted is not valid under the general branch of the federal power to regulate trade and commerce under s. 91(2) of the *Constitution Act, 1867*.

*Solicitor for the Attorney General of Canada: Attorney General of Canada, Ottawa.*

*Solicitor for the intervener the Attorney General of Ontario: Attorney General of Ontario, Toronto.*

*Solicitors for the intervener the Attorney General of Quebec: Bernard, Roy & Associés, Montréal.*

*Solicitor for the intervener the Attorney General of New Brunswick: Attorney General of New Brunswick, Fredericton.*

*Solicitor for the intervener the Attorney General of Manitoba: Attorney General of Manitoba, Winnipeg.*

*Solicitor for the intervener the Attorney General of British Columbia: Attorney General of British Columbia, Victoria.*

*Solicitor for the intervener the Attorney General for Saskatchewan: Attorney General for Saskatchewan, Regina.*

*Solicitors for the intervener the Attorney General of Alberta: Fraser Milner Casgrain, Calgary, and Attorney General of Alberta, Edmonton.*

*Solicitors for the intervener the Canadian Foundation for Advancement of Investor Rights: Paliare, Roland, Rosenberg, Rothstein, Toronto.*

*Solicitors for the intervener the Canadian Coalition for Good Governance: Davies Ward Phillips & Vineberg, Toronto.*

*Solicitors for the intervener the Investment Industry Association of Canada: Torys, Toronto.*

*Solicitors for the intervener the Canadian Bankers Association: Osler, Hoskin & Harcourt, Toronto.*

*Solicitors for the intervener Ontario Teachers' Pension Plan Board: Gowling Lafleur Henderson, Toronto.*

*Solicitors for the intervener Mouvement d'éducation et de défense des actionnaires: Paquette Gadler Inc., Montréal.*

*Solicitors for the intervener Barreau du Québec: Lavery, de Billy, Montréal.*

*Solicitors for the intervener the Institute for Governance of Private and Public Organizations: Fraser Milner Casgrain, Montréal.*