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CASE LAW UPDATE

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Reference Re Securities Act (Canada)

2011 ABCA 77 (Released 8 March 2011)

Constitutional Law – Division of Powers – Securities Regulation

A unanimous Reference decision of the Alberta Court of Appeal held that Parliament's proposed *Securities Act* ("***Act***") to establish a national securities regulator is unconstitutional; specifically, the five-member panel found that the proposed *Act* is *ultra vires* Parliament's authority pursuant to the *Constitution Act, 1867*.

Both the federal and Alberta governments agreed that the proposed *Act* is, in pith and substance, the regulation of participants in the public market and transactions relating to the raising of capital. At its core, the purpose of the *Act* is the regulation of particular investment contracts and property. Existing case law provides that the provinces have historically regulated the securities industry within provincial jurisdiction over "property and civil rights".

The federal government argued, however, that it holds a concurrent jurisdiction in the area of securities regulation and that it is therefore also able to create valid law on the subject pursuant to the "double aspect doctrine". Any conflicting provincial legislation would then be rendered inoperable to the extent of the conflict with valid federal law on application of the paramountcy principle.

The federal government argued that the *Act* was valid pursuant to its authority over criminal law, and, more significantly, under the general branch of the trade and commerce power, sections 91(27) and 91(2) of the *Constitution Act, 1867* respectively.

The Court of Appeal disagreed: the *Act* is not criminal law as the raising of capital has not traditionally been seen to be criminal and the focus on the statute is not the creation of prohibitions followed by penalties.

Further, under the general "trade and commerce" power, the *Act* failed to meet three of the five indicia used to assess valid law enacted under this power, as recognized by the Supreme Court of Canada in *General Motors v City National Leasing* ([1989] 1 SCR 641).

Of the failed indicia, the court held that, first; the proposed *Act* did not apply to trade as a whole but only a particular segment of the economy. Second, the court held that the provinces have successfully regulated the securities industry for decades; the provinces are not incapable of regulating this industry. Third, as the *Act* contemplates that as some provinces could "opt-out" of the national regulatory scheme; it fails to demonstrate the essential need for a national regulator over trade across the country for the scheme to operate.

After determining that the proposed legislation is unconstitutional, the court highlighted that although the federal government sought to regulate what it considers to be in the national interest, several provinces had objected to the federal legislation on the basis that regional autonomy, diversity and priorities would be sacrificed. The court recognized that one of the fundamental principles of the Canadian federal state is the preservation of local powers and local diversity to enable a promotion of local interests.

Endnote: On April 14, 2011, the Supreme Court of Canada completed hearings and reserved its decision, with written reasons to follow, with respect to the federal government's Reference on the same proposed *Securities Act* (*In the Matter of a Reference by Governor in Council concerning the proposed Canadian Securities Act, as set out in Order in Council P.C. 2010-667, dated May 26, 2010*, 33718 (S.C.C.)).

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