

The General Trade and Commerce Power after the *Securities Reference*

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A. Introduction

In this comment, I argue that the Supreme Court of Canada's decision¹ that the proposed *Canadian Securities Act*² exceeded Parliament's powers does not entail the more general conclusion that Parliament lacks the power to enact national securities legislation. The Court's rejection of the proposed Act was driven by two characteristics of that legislation that are not essential to a federal securities regime: namely, that it was intended to be "comprehensive" and that its stated objectives mirrored, for the most part, the microeconomic objectives of existing provincial legislation. A federal securities law not possessing these two characteristics remains constitutionally available to Parliament, under the same head of legislative power that could not, in the Court's opinion, sustain the proposed Act.

I acknowledge that such a law may not be politically feasible, and I also make no claim that a parallel (i.e., non-comprehensive) federal securities regime would be desirable as a matter of policy. At least in the short term, such a regime would not achieve the federal government's avowed aim of reducing the fragmentation which, in its view, characterizes the Canadian securities regulatory system.

However, the stakes of the *Securities Reference* were not limited to the shape of the Canadian securities regulatory system. The Reference was also a test of the limits of the federal trade and commerce power and therefore, more generally, of federal power to regulate the

¹ *Reference Re Securities Act*, 2011 SCC 66 [*Securities Reference*].

² Order in Council PC 2010-667 (26 May 2010).

economy. For this reason, it is important to distinguish between what the Supreme Court held that Parliament may not do, and what federal politicians and officials may subsequently decide is not worth doing.

In Section B below, I begin by summarizing the doctrinal requirements for the exercise of the “general trade and commerce” power. This is the power on which the federal government relied as the basis for its proposed Act. In Section C, I explain the characteristics of the legislation that were central to the Supreme Court’s decision to reject it, before describing a hypothetical federal securities law that avoids these weaknesses and therefore, on the best interpretation of the general trade and commerce power, should be considered valid. In Section D, I consider alternative sources of federal authority to enact a general securities regulatory law. Section E concludes.

B. The General Trade and Commerce Power

The *Constitution Act, 1867*³ confers authority on Parliament to enact laws in relation to “the regulation of trade and commerce” (section 91(2)) while conferring authority upon the provinces to legislate with respect to “property and civil rights in the province” (section 92(13)). During its tenure as the court of final appeal for Canada, the Judicial Committee of the Privy Council upheld scarcely any federal laws under the trade and commerce power⁴ and rejected many.⁵ The main ground on which federal laws were held to exceed the power conferred by section 91(2) was that they purported to regulate “particular trades.” According to the Judicial Committee, the regulation of particular trades, or industries, within a province did not come within the concept of the regulation of trade and commerce, but instead came within the exclusive purview of the provinces by virtue of section 92(13).⁶

Since 1949, when it replaced the Judicial Committee as the court of last resort, the Supreme Court of Canada has upheld several federal laws under section 91(2). Some of these

³ (UK), 30 & 31 Vict, c 3.

⁴ The conventionally cited exceptions are *John Deere Plow Co v Wharton*, [1915] AC 330; *AG Canada v AG Ontario*, [1937] AC 405 (“Canada Standard Trademark Case”). Also, in *Reference Re Validity of Section 5(a) Dairy Industry Act*, [1949] SCR 1, aff’d [1950] AC 31, an import restriction was upheld under s 91(2) even though the remainder of the Act was ruled invalid.

⁵ See e.g. *Local Prohibition Reference*, [1896] AC 348; *Insurance Reference*, [1916] 1 AC 588; *Board of Commerce*, [1922] 1 AC 191; *Toronto Electric Commissioners v Snider*, [1925] AC 396; *Attorney-General for British Columbia v Attorney-General for Canada*, [1937] AC 377.

⁶ See e.g. *Citizens Insurance Co v Parsons* (1880), 7 AC 96; *Board of Commerce*, *supra* note 5.

laws dealt primarily with the regulation of cross-border transactions.⁷ Thus, Parliament has a well-established power, under section 91(2), to regulate international and interprovincial trade. In its 1989 decision in *General Motors of Canada Ltd v City National Leasing*, the Court held that, in addition, Parliament can regulate transactions (even those taking place within a province) if the legislation can be described as regulating “general trade and commerce.”⁸ The Court articulated five indicia of legislation qualifying under this second branch of the trade and commerce power,⁹ which may be summarized in terms of two requirements: the legislation must not amount to the regulation of a single industry, and the legislation must be a regulatory scheme directed at a national economic concern rather than a collection of local concerns.

In the *Securities Reference*, the Attorney General of Canada did not suggest that the proposed Act dealt primarily with the regulation of cross-border transactions. Instead, the federal government argued that the proposed Act met the criteria for the exercise of the “general trade and commerce power.”

C. Analysis of the Opinion

1) Vulnerabilities of the Proposed Act

In order to ascertain the scope that remains available for enacting federal securities regulatory legislation, we must first understand the Supreme Court’s objections to the proposed Act.¹⁰ From the Supreme Court’s perspective, the legislation contained three main vulnerabilities.

⁷ *Murphy v CPR*, [1958] SCR 626; *Caloil Inc v Attorney General of Canada*, [1971] SCR 543.

⁸ *General Motors of Canada Ltd v City National Leasing*, [1989] 1 SCR 641 [*General Motors*]. The expression originates with the Judicial Committee’s opinion in *Citizens Insurance Company of Canada v Parsons* (1881), 7 AC 96 [*Citizens Insurance*], observing, in *obiter dicta*, that power conferred by s 91(2) “may . . . include general regulation of trade affecting the whole dominion.”

⁹ *General Motors*, *ibid* (The criteria are as follows: “First, the impugned legislation must be part of a general regulatory scheme. Second, the scheme must be monitored by the continuing oversight of a regulatory agency. Third, the legislation must be concerned with trade as a whole rather than with a particular industry . . . [fourth,] the legislation should be of a nature that the provinces jointly or severally would be constitutionally incapable of enacting; and [fifth,] the failure to include one or more provinces or localities in a legislative scheme would jeopardize the successful operation of the scheme in other parts of the country” at 661–62). The Court noted in *General Motors*, *ibid* at 663 that the criteria are not “determinative”; rather, they aid in determining whether “what is being addressed in a federal enactment is genuinely a national economic concern and not just a collection of local ones.”

¹⁰ In a previous article, while the Reference opinion was pending, I argued that the proposed Act should be upheld under the general trade and commerce power. See Ian Lee, “Balancing and its Alternatives: Jurisprudential Choice, Federal Securities Regulation and the Trade and Commerce Power” (2011) 50 Can Bus LJ 72. Although the Court reached the opposite conclusion, the purpose of this comment is not to criticize the Court’s opinion but,

a) Pith and Substance

The first vulnerability concerned the “pith and substance” of the proposed Act. In Canadian constitutional analysis, the first step in determining whether a law comes within federal or provincial jurisdiction is to describe what the law does and what its purpose is — that is, to describe its “pith and substance.” The next step is to determine whether any of the powers conferred upon Parliament and the legislatures encompasses the power to enact a law having such a pith and substance.

According to the Attorney General of Canada, the pith and substance of the proposed Act was “comprehensive national securities regulation.”¹¹ The government’s argument at the next stage would be that the provinces could not enact a comprehensive securities regime;¹² their incapacity to do so was an indication that the legislation was directed at a national rather than a local economic concern, and that its enactment therefore came within the “general trade and commerce power.”¹³

Unfortunately for the federal government, the Supreme Court read “comprehensive” as a code word for “exclusively federal.” The federal lawyers protested, with good reason, that the legislation had a provincial opt-in mechanism: the regulatory provisions would not enter into force in any province without the provincial government’s consent.¹⁴ Nor, of course, did the federal lawyers contend that the provinces lacked the legislative jurisdiction to regulate securities transactions: in this sense, the federal government was not claiming “exclusive” jurisdiction. But the fact remained that the objective of the legislation, according to the federal government itself, was to establish a “single regulator, and not a fourteenth.”¹⁵ The Supreme Court concluded that

instead, to offer a sympathetic interpretation of that opinion, with a view to ascertaining its implications for the scope of federal authority.

¹¹ *Securities Reference*, above note 1 (Factum of the AG of Canada) (“[t]he Pith and Substance of the Law is Comprehensive National Securities Regulation; The Government’s Goal is to Create a Single National Securities Regulator” at para 47).

¹² *Ibid* (“[t]he legislation is of a nature that the provinces . . . would be incapable of enacting, because the limitations on their powers preclude them from establishing a comprehensive regime of securities regulation” at para 137).

¹³ See above note 8 for more.

¹⁴ Proposed *Canadian Securities Act*, above note 2, s 250.

¹⁵ *Securities Reference*, above note 1 (Factum of the AG of Canada at para 71).

the “main thrust [or pith and substance] of the Act [was] to regulate, on an exclusive basis, all aspects of securities trading in Canada.”¹⁶

The result was that the decisive question in the *Securities Reference* would not be whether the provinces could enact a comprehensive regime but, rather, whether Parliament was entitled to enact a law the point of which was to regulate, on an exclusive basis, all aspects of securities trading in Canada. Or, to put it another way, could Parliament effect a “complete takeover of provincial regulation”?¹⁷ The federal government was much less likely to receive an affirmative answer to this question than to the question that it had hoped the Court would ask, namely whether the provinces lacked the capacity to enact comprehensive legislation.

Some commentators have pointed out that the Supreme Court’s judgment is reminiscent of the early-twentieth-century judgments of the Privy Council.¹⁸ This is a valid observation, and there is a good reason for the resemblance. The Privy Council was preoccupied by the mutually exclusive nature of the federal and provincial powers conferred by the *Constitution Act, 1867*, and often felt obliged to interpret a given federal power narrowly because, in a system of mutually exclusive powers, every inch of federal power is an inch subtracted from provincial power.¹⁹ The modern view is that there is considerable overlap, in practice, between the legislative spheres,²⁰ and that the recognition of federal power to enact a given law does not, in itself, reduce provincial legislative authority. With this awareness, the Supreme Court has been less reluctant than the Judicial Committee to uphold federal legislation. In the *Securities Reference*, however, the Court perceived that what was being asserted was a federal power to regulate — on an exclusive basis — all aspects of a hitherto provincially regulated activity. The Court viewed the case, therefore, as presenting a zero-sum game to which, it is true, the Court reacted in much the same way as the Judicial Committee in analogous circumstances: It said no

¹⁶ *Securities Reference*, above note 1 at para 106.

¹⁷ *Ibid* at para 117. See also *ibid* (“wholesale takeover” at para 128); (“attempt to take over regulation of the entirety of the securities trade” at para 126); (“wholesale displacement of provincial regulation” at para 117).

¹⁸ E.g., Barry Cooper, “A Return to Classical Federalism? The Significance of the *Securities Reference* Decision” Frontier Centre for Public Policy, Policy Series No. 129 (February 2012) (“Classical federalism initially affirmed by the JCPC in *Parsons* [was] reaffirmed in the *Securities Act Reference*”).

¹⁹ An example is the so-called doctrine of mutual modification developed in *Citizens Insurance*, above note 7.

²⁰ *Canadian Western Bank v Alberta*, [2007] 2 SCR 3 (the “dominant tide” in Canadian jurisprudence favours the simultaneous operation of federal and provincial statutes at paras 36–37).

to Parliament in order to prevent provincial legislative autonomy from being “swe[pt]... out to sea.”²¹

b) Regulatory Aims

The second difficulty encountered by the legislation concerned the substantive aims of the scheme as set forth in section 9 of the proposed Act:

The purposes of this Act are:

- (a) to provide protection to investors from unfair, improper or fraudulent practices;
- (b) to foster fair, efficient and competitive capital markets in which the public has confidence;
and
- (c) to contribute, as part of the Canadian financial regulatory framework, to the integrity and stability of the financial system.

The first two aims listed — in particular, investor protection and transactional fairness — appeared to the Court to be paradigmatic provincial concerns,²² and, indeed, the provinces confirmed that these were the aims of their own legislation, the validity of which was unchallenged. The third stated aim of the legislation, the management of systemic risk, was more distinctively national in character, but this did not appear to be what the legislation was mainly about.²³

c) Regulation of the Securities Professions

The opponents of the proposed Act had also argued that, insofar as the regulation of brokers and other intermediaries was a substantial element of the scheme, the legislation was regulating a particular industry, something which Parliament is not entitled to do under the general trade and commerce power.²⁴ The Supreme Court appears to have been receptive to this objection,²⁵

²¹ *Securities Reference*, above note 1 at para 62.

²² *Ibid* (“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” at para 6).

²³ *Ibid* at paras 121–22.

²⁴ *Citizens Insurance*, above note 7.

²⁵ *Securities Reference*, above note 1 (“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

although I suspect that it would not, on its own, have been fatal to the validity of the legislation. If the other features of the Act had been valid, a more than reasonable argument could have been made that the industry-specific features were valid under the “ancillary powers doctrine.”²⁶

2) Hypothetical Federal Securities Regulatory Legislation

It appears to me that it is possible to draft a federal securities law that avoids the above-mentioned difficulties. I am referring here not to a law directed primarily or only at systemic risk but to what most people would recognize as a garden-variety securities regulatory law.²⁷

Obviously, such a law would need to be designed so as to operate in parallel to provincial securities legislation, rather than to be comprehensive. It may be that, over time, one or more provinces might choose to align their regulatory framework on the federal regime, for reasons of efficiency, as has happened, to some extent, in the case of business corporations legislation.²⁸ However, it must not be the aim of the federal legislation to supplant the existing provincial schemes.

In addition, the primary objective of the law should *not* be investor protection or the fairness of transactions. The provinces have argued that these are the intrinsic objectives of securities regulation,²⁹ but that is not true. From a federal perspective, and more generally from an economic perspective, these goals are not ends in themselves. The ultimate end of securities regulation, from a federal perspective, is macroeconomic, not microeconomic: it is the efficient allocation of financial resources to productive ventures across the economy, regardless of

whole” at para 112); (“[i]ndividuals engaged in the securities business are still, for the most part, exercising a trade or occupation within the province” at para 117).

²⁶ Under the ancillary powers doctrine, if minor provisions of an otherwise valid legislative scheme encroach on the jurisdiction of the other level of government, the encroaching provisions are valid provided that they are sufficiently functionally related to the achievement of the objectives of the scheme. *General Motors*, above note 7.

²⁷ As David Schneiderman and Mahmud Jamal observe in their respective contributions to this volume, the Court extolls the virtues of a cooperative, intergovernmental approach to securities regulation (e.g. *Securities Reference*, above note 1 at para 9). The Court alludes, in particular, to “the management of systemic risk or Canada-wide data collection” as the federal component of a possible cooperative scheme (para 121). In this section, I suggest that a valid federal securities regulatory law need not be limited to these specific concerns, provided that it avoids the pitfalls of the proposed Act.

²⁸ Ronald J Daniels, “Should Provinces Compete? The Case for a Competitive Corporate Law Market” (1990–1991) 36 McGill LJ 130.

²⁹ *Securities Reference*, above note 1 (Factum of the AG of Alberta) (“[t]he primary purpose of regulating trading in securities is to protect investors . . .” at para 59)); *Securities Reference*, *ibid* (Record of the AG of Alberta, Expert Report, Eric Spink [Spink Expert Report]) (“investor protection has always been the fundamental objective of securities regulation and the other objectives [such as market efficiency] merely extend investor protection concepts into the operational details of markets” at 5).

industry sector.³⁰ Allocative efficiency is a valid national concern; in light of the Supreme Court's opinion, investor protection can be, at most, a means to this end.

A federal securities law can validly impose standard securities regulatory requirements relating to prospectus and continuous disclosure, the purpose of which is to promote allocative efficiency by facilitating the incorporation of information into stock prices.³¹ A federal law could similarly regulate takeover bids and insider trading.³² All of these requirements apply to market participants regardless of what industry they are in.

Imposing requirements specifically on broker-dealers and other securities professionals would be a more delicate matter because this would be regarded as the regulation of a particular trade, something the trade and commerce power does not allow Parliament to do except as an ancillary part of an otherwise valid scheme. In essence, broker-dealer regulation would have to be a minor part of what the legislation does.

In short, my claim is that it is possible to draft a federal securities regulatory act that does not have the weaknesses of the Act rejected by the Court. Whether such an act is desirable as policy or politically feasible are, of course, separate questions.

3) Double Aspect Doctrine

³⁰ Zohar Goshen & Gideon Parchomovsky, "The Essential Role of Securities Regulation" (2006) 55 Duke LJ 711 (describing as "widespread, yet misguided" the belief that securities regulation is primarily concerned with investor protection. "Securities regulation is not a consumer protection law . . . [T]he ultimate goal of securities regulation is to . . . improve the allocation of resources in the economy." at 713); George J Stigler, "The Public Regulation of the Securities Markets" (1964) 37:2 J Bus 117 ("[s]o far as the efficiency and growth of the American economy are concerned, efficient capital markets are even more important than the protection of investors" at 124).

³¹ Iris H-Y Chiu, *Regulatory Convergence in EU Securities Regulation* (Alphen aan den Rijn: Kluwer Law International, 2008) (the purpose of mandatory disclosure on the secondary market is "to achieve stock price accuracy in order to maintain allocative efficiency and investor confidence" at 16); John C Coffee, "Market Failure and the Economic Case for a Mandatory Disclosure System" (1984) 70 Va L Rev 717 (describing the rationale for mandatory disclosure in terms of "the allocative efficiency of the capital market" at 722).

³² This point seems to have been recognized, albeit obliquely, in the Reference. The Court noted the federal government's argument, in the Reference, that the securities market serves a general allocative function (*Securities Reference*, above note 1 at para 113), then acknowledged that "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" (*ibid* at para 114). The measures I describe in the accompanying text are, of course, "minimum standards" adopted with a view to economy-wide allocative efficiency.

Because provincial securities laws are undoubtedly valid, the validity of any federal securities law will depend on the operation of the so-called “double aspect doctrine,” which allows valid federal and provincial laws to coexist even though their legal consequences overlap.³³

The legislation rejected by the Court did not present an unassailable case for the application of the double aspect doctrine. For one thing, the legislation was not intended to coexist with overlapping provincial legislation but ultimately to supplant it. For another, the first two aims set forth in section 9 of the proposed Act were identical to those set forth in provincial securities legislation. This is not a promising foundation for a double aspect argument: usually, the coexisting provincial and federal laws have *different* primary purposes. This is what generates their distinct constitutional aspects.

By contrast, the parallel federal regime I have outlined above is a more promising candidate. A federal macroeconomic objective — specifically, the optimal allocation of resources throughout the economy — presents the required distinct federal aspect.

4) The Trade and Commerce Power and Subsidiarity

There is a school of thought according to which federal legislative capacity under the “general trade and commerce power” should depend upon demonstrating the provinces’ inability to regulate that activity successfully. This idea, which finds support in one of the indicia developed by the Court in *General Motors*,³⁴ is sometimes said to flow from the principle of subsidiarity,³⁵

³³ This doctrine was confirmed by the Court in its opinion in the Reference: “federal legislation adopted from [a] distinct perspective will be constitutional even if the matter, considered from a different perspective, also falls within a provincial head of power” (*Securities Reference*, above note 1 at para 85).

³⁴ See specifically, the fourth indicium developed by the Supreme Court in *General Motors*, above note 7.

³⁵ See also Jean Leclair, “‘Please, Draw Me a Field of Jurisdiction’: Regulating Securities, Securing Federalism” (2010) 51 Sup Ct L Rev (2d) 555 at 597–99; Noura Karazivan & Jean-François Gaudreault-Desbiens, “On Polyphony and Paradoxes in the Regulation of Securities within the Canadian Federation” (2010) 49 Can Bus LJ 1. Article 5 of the Treaty Establishing the European Community is said to exemplify the principle (“[i]n areas which do not fall within its exclusive competence, the Community shall take action, in accordance with the principle of subsidiarity, only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community. Any action by the Community shall not go beyond what is necessary to achieve the objectives of this Treaty”).

that is, the principle that political decisions should be taken by the level of government that is closest to the citizen.³⁶

From the perspective of subsidiarity, some have sought to explain the outcome in the Reference by the fact that the federal government did not succeed in showing that the provinces are incapable of successfully regulating securities markets.³⁷ In the absence of such a showing, securities regulation must come within the exclusive jurisdiction of the provinces.

I do not subscribe to this interpretation of the *Securities Reference*. I have already explained that, in my view, the Supreme Court's objection to the proposed Act was that its pith and substance was to establish an exclusively federal regulatory scheme having as primary aims such quintessentially provincial concerns as investor protection and transactional fairness.

I have misgivings, moreover, with the normative argument that federal jurisdiction under the general trade and commerce power should depend upon a showing of provincial regulatory ineffectiveness.³⁸ These reservations do not rest upon any disagreement with subsidiarity as a political principle: any government, before acting, should indeed consider whether its aims could be attained just as well by a lower level of government, or even by private ordering.

However, I am not convinced that subsidiarity should be a constitutional constraint upon legislative action. The application of the principle involves assessing legislative efficacy; this is not a task for which the judiciary is unquestionably well suited.³⁹ The idea of entrusting such determinations to judges may be criticized from the perspective of subsidiarity itself, for one cannot say that the Supreme Court is "closer to the citizen" than are the members of the elected branches of government.

I am also concerned that subsidiarity, as a legal constraint, may prove a false friend to provincial autonomy. Sometimes, the judicialization of a political principle diminishes the degree of compliance with that principle. On the one hand, the courts, conscious that they lack a

³⁶ See also the preamble to the Treaty on European Union ("[r]esolved to continue the process of creating an ever closer union among the peoples of Europe, in which decisions are taken as closely as possible to the citizen in accordance with the principle of subsidiarity").

³⁷ See e.g. Sébastien Grammond, "Flaherty's Supreme Court Loss Is Federalism's Gain" *National Post* (22 December 2011).

³⁸ These reservations were also discussed in Lee, above note 9.

³⁹ Indeed, in the Reference, the Supreme Court disavows any inquiry into the relative "efficaciousness" of federal and provincial securities regulation (*Securities Reference*, above note 1 at para 90).

democratic mandate, may apply the principle less than vigorously;⁴⁰ on the other hand, political actors may find that the existence of a judicial review mechanism gives them an excuse to be less careful in policing their own compliance.

D. Other Heads of Power

The Supreme Court's opinion has caused some supporters of comprehensive federal securities legislation to consider whether some other head of federal power might be able to accomplish what the "general regulation of trade" power cannot. The two most obvious candidates are the power to regulate international and interprovincial trade⁴¹ and the federal power to legislate with respect to interprovincial works and undertakings.⁴² A promising third strategy, not often discussed, is that followed in Australia in 1989, whereby the provisions of a federal statute enacted for the federal territory were adopted wholesale by state legislation in each of the states.⁴³

With respect to the international and interprovincial trade power, which the Supreme Court itself mentions as an unexplored source of potential federal authority in relation to securities regulation,⁴⁴ one challenge for the federal government is how to surmount the vigorously argued provincial position that what is colloquially referred to as a transaction between two investors living in two different jurisdictions is in fact two legally disconnected intrajurisdictional transactions, between each investor and her broker.⁴⁵

As for "interprovincial works and undertakings," this expression is the Canadian equivalent of the US concept of "instrumentalities of interstate commerce," the use of which is the basis of US federal securities regulatory jurisdiction. It is lawful to offer securities to the

⁴⁰ The experience with subsidiarity in European Union law is instructive: although the principle has been justiciable since 1992, the European Court of Justice has yet to annul an act of the EU legislature on the basis of subsidiarity.

⁴¹ *Constitution Act, 1867*, above note 3, s 91(2). See text accompanying note 5.

⁴² *Ibid*, s 92(10)(a) ("[I]ines of Steam or other Ships, Railways, Canals, Telegraphs, and other Works and Undertakings connecting the Province with any other or others of the Provinces, or extending beyond the Limits of the Province").

⁴³ The Australian scheme was invalidated by the High Court of Australia on grounds relating to the jurisdiction of Australia's federal courts; these grounds are irrelevant in the Canadian context. See *Re Wakim; ex parte McNally* (1999) 198 CLR 511 (HC Aust).

⁴⁴ *Securities Reference*, above note 1 at paras 47 and 129.

⁴⁵ See e.g. Spink Expert Report, above note 28 ("a typical securities market transaction described colloquially as a single cross-border trade in securities is actually a series of separate contractual and property arrangements, none of which involve any movement of property, cross-border or otherwise" at 2).

public in the US without filing a registration statement with the SEC, but only if the offeror manages to do so without using the telephone, the Internet, or an interstate courier service.⁴⁶ Could a similar theory be a basis for federal securities jurisdiction here?

In evaluating these possibilities, we should bear in mind a major lesson of the *Securities Reference*, which is that the Supreme Court may not be persuaded by a technically clever argument that, in the Court's perception, fails to do justice to the reality of what is at stake. It follows that an argument that Parliament should be able to regulate any activity that the provinces currently regulate, provided that the activity requires the use of the telephone or the Internet, stands a good chance of suffering the same fate as the argument that because of the opt-in clause in the proposed Act, Parliament was not technically effecting a takeover of provincial securities regulatory jurisdiction.

By the same token, however, the provincial argument that intermediation by market-makers transforms what is, in economic terms, a cross-border nexus of contracts into a collection of disconnected local transactions might suffer this fate, too, so I would not entirely discount the argument that a federal securities regulatory law could be drafted in such a manner as to bring it within Parliament's power to regulate international and interprovincial trade.

Finally, given that the federal government appears to be comfortable with an opt-in scheme, under which national rules would apply only in the willing jurisdictions, a third option, little discussed by Canadian academic commentators, is to employ the method used by Australia in 1989. There, the federal Parliament began by enacting a federal corporate and securities law for the Australian Capital Territory.⁴⁷ Each state legislature then enacted a law adopting, by

⁴⁶ See e.g. *Securities Act* of 1933, s 5. One implication of this basis for US federal jurisdiction is that even intrastate transactions are, in principle, subject to federal jurisdiction, so long as an instrumentality of interstate commerce is employed. Intrastate securities offerings are, in fact, statutorily exempted from registration requirements under s 3(a)(11) of the *Securities Act*. This fact does not mean, however, that intrastate transactions (even in securities exempt from registration) are not subject to other US federal securities law provisions, including the requirements of the *Securities Exchange Act* of 1934. See Daniel J McCauley Jr, "Intrastate securities transactions under the federal *Securities Act*" (1958–1959) 107 U Pa L Rev 937; Robert S Kant, "SEC Rule 147 – Further Narrowing of the Intrastate Offering Exemption" (1974–1975) 30 Bus Law 73.

⁴⁷ *Corporations Act 1989 (Cth)*. Sec. 82 of this Act set forth the provisions of a "corporations law"; s. 5 of the Act adopted these provisions as the law of the Australian Capital Territory. A legislative provision enacted by each state parliament adopted s. 82 of the federal Act as the law of that state.

reference, the federal regime as a law of the state.⁴⁸ Given the undisputed power of the Parliament of Canada to enact a securities law for the Canadian federal territories — Yukon, the Northwest Territories, and Nunavut⁴⁹ — a similar strategy would appear to hold promise here as a means of creating a valid federal regime into which willing provinces could opt by legislation.⁵⁰

E. Conclusion

I have advanced the argument that the general trade and commerce power remains available as a basis for the enactment of a federal securities regulatory law. In the *Securities Reference*, the Court decided that this power does not permit the Parliament to effect a “wholesale takeover” of provincial jurisdiction. This proposition should not be confused with the proposition that a garden-variety federal securities law cannot be enacted using this power. Such a law is constitutionally possible, provided that its content and legislative history support its characterization as a parallel federal macroeconomic policy instrument rather than as substitute investor protection legislation.

⁴⁸ For instance, the *Corporations (N.S.W.) Act 1990* provides, at s. 7, that the federal corporations legislation “applies as a law of New South Wales”.

⁴⁹ *Constitution Act 1871*, 34 & 35 Vic., c 28 (U.K.), s 4.

⁵⁰ Although the proposed Act rejected by the Court in the *Reference* also involved an opt-in scheme, the scheme described here is more respectful of provincial legislative autonomy than was the proposed Act. Under the scheme described here, the legal force of the federal provisions in each province would rest upon a provincial legislative act. Moreover, under the usual rules, a province wishing at a later date to exit the federal securities regime would be free to amend or even repeal its reference to the federal rules. By contrast, under the proposal rejected by the Court, the consent of the provincial *executive* would be sufficient to authorize Ottawa to apply its Act in that province, and it was not clear that this consent could be effectively revoked.