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CONSTITUTIONAL ASPECTS OF APPROVAL OF SHARE TRANSACTIONS

By H.M. KAY*

In many provinces in Canada, statutory provisions requiring that a transfer of shares in companies engaged in a vital industry be approved by a provincial tribunal are part of the regulatory schemes governing those industries. Here one is not concerned with provincial securities legislation generally, but rather with legislation that for the most part deals with the business in which the companies are engaged.¹ In the energy field, for example, provisions prohibiting the transfer of a majority of the outstanding shares in oil and gas companies without the approval of the provincial public utilities board or similar body are common. In some cases, the legislation applies only to companies incorporated in that province,² in others it purports to apply to all companies wherever incorporated.³

Two problems are created by such provisions. The first and more obvious is that the provincial tribunal may refuse approval of the particular sale or transfer of shares. The second problem, just as serious, is that most such provisions necessitate obtaining approval prior to the sale or transfer of the shares, and any publicity given to the proposal could well permit the purchaser to be "scooped" by some other party who might be prepared to risk a challenge to its purchase and this would certainly affect the price of the shares. For example, in 1974 the White Pass and Yukon Corporation applied to the Canadian Transport Commission under section 27 of the *National Transportation Act*⁴ for approval to make a takeover bid for Pacific Western Airlines Ltd. The province of Alberta sought no such prior approvals and made a successful stock market bid for a majority interest before the application could even be heard.⁵

A purchaser can, of course, make a public offering conditional upon approval by regulatory authorities. However, the offer will not be as attractive as one that contains no such condition. This is especially so since the approval must be obtained within a set period of time, which may be difficult to predict

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¹ Such legislation makes a distinction between Dominion and provincial companies, adopting that made by Laskin J. in *Kootenay and Elk Ry. Co. v. Canadian Pacific Ry. Co.*, [1974] S.C.R. 955 at 1012, 28 D.L.R. 385 at 427-28.

² E.g., *The Gas Utilities Act*, R.S.A. 1970, c. 158, s. 25; *The Public Utilities Board Act*, R.S.A. 1970, c. 302, s. 88.

³ E.g., *Energy Act*, S.B.C. 1973 (1st Sess.), c. 29, s. 44.

⁴ R.S.C. 1970, c. N-17.

⁵ *The Queen v. Cdn. Transp. Comm'n*, [1978] 1 S.C.R. 61, 2 A.R. 539, 75 D.L.R. (3d) 257 [hereinafter *Re Pacific Western Airlines*]. The Supreme Court of Canada upheld the position that the Province of Alberta was able to avoid the necessity for approval since the legislation as it then read did not expressly bind the Crown.

and could well be outside any extension of the period for taking up the shares that securities legislation allows.⁶

As illustrated, the significant question is whether such legislation, purporting to prohibit a sale of shares unless the sale is approved by the specified regulatory tribunal, applies to every company. The question most frequently arises with respect to provincial regulatory approval of dealings in federally-incorporated companies. Does a province have the power to rule on share transactions in any company engaged in activities under provincial control? Or is provincial legislation that confines itself solely to share dealings in provincial companies unnecessarily restrictive?

I. SALE OF SHARES IN DOMINION COMPANIES

A. *Dominion Incorporation Powers*

*The British North America Act, 1867*⁷ specifically grants powers with respect to the incorporation of companies to the provinces under section 92, head 11, "The Incorporation of Companies with Provincial Objects." The powers of the Dominion Parliament with respect to the incorporation of companies is not specified, but the subject matter "incorporation of companies with objects not provincial" has been held to be a subject falling within the residuary powers under section 91 as well as under head 2 of section 91, "The Regulation of Trade and Commerce."⁸ Simply put, the principle is that incorporation of companies with other than provincial objects must fall within the residuary power since it is excluded from provincial powers by the very words employed in section 92, especially head 11.

The principal decision on the classification of the Dominion's power to incorporate companies is *John Deere Plow Co. v. Wharton*.⁹ The company was incorporated by letters patent issued under the federal *Companies Act*.¹⁰ In that case, provincial legislation required every company not incorporated within the province to obtain a licence, otherwise the company could not carry on business or bring an action. The Court held that the legislation did not apply to federally-incorporated companies such as the one in question.

Viscount Haldane L.C. examined first the initial incorporation of the company (incorporation here in its narrowest sense) and concluded that the authority of the provinces was confined to head 11 of section 92 and that the incorporation of companies with other than provincial objects, being otherwise not expressly assigned, fell to the Dominion under its residuary

⁶ This problem is twofold. The regulatory process, depending upon the particular tribunal, may take several months to get to a hearing, let alone a decision. Second, the securities legislation will not permit the offer to remain outstanding for much more than a few months, see, e.g., *The Securities Act, 1978*, S.O. 1978, c. 47, s. 89(1), paras. 8, 13 and 14.

⁷ 30 & 31 Vict., c. 3 (U.K.).

⁸ *John Deere Plow Co. v. Wharton*, [1915] A.C. 330, 7 W.W.R. 706, 18 D.L.R. 353 (P.C.); *Great West Saddlery Co. v. The King*, [1921] 2 A.C. 91, [1921] 1 W.W.R. 1034, 58 D.L.R. 1 (P.C.).

⁹ *Id.*

¹⁰ R.S.C. 1906, c. 79.

powers. He then considered those provisions in the Dominion legislation concerning the company after incorporation—the power to sue and be sued, to make contracts and hold property—and found these to be valid federal legislation as well, but under the trade and commerce power in head 2 of section 91. While the special office so accorded to the trade and commerce power may be irreconcilable with other decisions on that power¹¹ this decision is the basis of the statements made that Dominion companies legislation falls under the residuary powers and to some extent under the trade and commerce power.

The extent of federal jurisdiction over share transactions in federally-incorporated companies has been touched on in a line of cases dealing generally with takeover, compulsory acquisition and similar provisions in Dominion companies legislation. This line of cases can be most usefully examined in light of the observation of Mr. Justice Laskin in *Kootenay and Elk Ry. Co. v. Canadian Pacific Ry. Co.*¹² There he stated that the constitutional decisions on incorporation powers exhibit a distinction between the power to “regulate a company *qua* company and the authority to regulate the business activity in which a company may be engaged.”¹³

In *Esso Standard (Inter-America) Inc. v. J.W. Enterprises Inc.*,¹⁴ the question was raised as to the validity of the then section 128 of the Dominion *Companies Act*¹⁵ dealing with takeover bids. Mr. Justice Judson, in giving the decision of the Court, quoted with approval the following observation in the Courts below:

It is my opinion that the Parliament of Canada having legislative power to create companies whose objects extend to more than one Province possesses also the legislative power to prescribe the manner in which shares of the capital of such companies can be transferred and acquired. That matter is one of general interest throughout the Dominion.¹⁶

He went on to comment:

It is truly legislation in relation to the incorporation of companies with other than provincial objects and it is not legislation in relation to property and civil rights in the province or in relation to any matter coming within the classes of subject assigned exclusively to the legislature of the province.¹⁷

The Supreme Court of Canada in this decision also approved the reasoning of the British Columbia courts in *Rathie v. Montreal Trust Co.*¹⁸ In that

¹¹ See Smith, *The Commerce Power in Canada and the United States* (Toronto: Butterworths, 1963) in particular at 94-96. Also consider if the term “incorporation” embraces the continued existence of the company as well as its creation, since this and later cases suggest the assignment of some part of companies legislation to a specific head under s. 91 may be inconsistent.

¹² *Supra* note 1.

¹³ *Id.*

¹⁴ [1963] S.C.R. 144, 37 D.L.R. (2d) 598.

¹⁵ R.S.C. 1952, c. 53.

¹⁶ *Supra* note 14, at 152 (S.C.R.), 605 (D.L.R.), quoting Laidlaw J.A.

¹⁷ *Id.* at 153 (S.C.R.), 605 (D.L.R.).

¹⁸ (1952), 5 W.W.R. (N.S.) 675, [1952] 3 D.L.R. 61 (B.C.S.C.), *rev'd on other grounds*, [1953] 2 S.C.R. 204, *aff'g* (1952), 6 W.W.R. (N.S.) 652 (B.C.C.A.).

case, the Courts considered the constitutionality of section 124 of the *Companies Act, 1934*¹⁹ similarly dealing with takeover bids. In considering the submission that the section might be *ultra vires* the Dominion government, Mr. Justice Coady commented:

This section, it seems to me, is but necessary incidental legislation and advantageous for the proper functioning of a company incorporated under the Dominion Statute. Similar legislation is found in the provincial *Companies Act, RSBC, 1948, ch. 48*, applicable to provincial companies only. It is there generally recognized as necessary incidental and advantageous legislation which in effect provides a convenient way of transferring company undertaking and assets by transfer of shares. If it is considered necessary incidental legislation there, then it is likewise necessary incidental legislation in a Dominion company, and if this be so the fact that this legislation may affect property and civil rights in the province is no objection.²⁰

Some general comments concerning the federal power with respect to the incorporation of companies are also found in the judgment of Chief Justice Duff in *Reference re Section 110 of The Dominion Companies Act*.²¹ It was observed that the phrase "Incorporation of Companies" could not "be read in a manner so strict as to limit it to the subject of bringing such companies into being."²² The Chief Justice went on to "glance" at the state of the law with respect to the incorporation and management of companies existing in England at the time of the passing of *The British North America Act, 1867*.²³ His review of the legislation and comments thereon give a broad interpretation to the phrase "Incorporation of Companies" in the context of the division of powers between the federal and provincial governments.

These cases on Dominion incorporation powers appear to place the sale and transfer of shares in a federally-incorporated company generally within the jurisdiction of the legislative body which created that company. While the decisions in *Montreal Trust Co. v. Rathie*²⁴ state that the sale and transfer of shares is necessarily incidental to the power to incorporate, the Supreme Court of Canada in both *Esso Standard (Inter-America) Inc. v. J.W. Enterprises Inc.*²⁵ and in *Reference re Section 110 of The Dominion Companies Act*²⁶ appears to say that these matters are in pith and substance a part of the power to incorporate. The latter, it is submitted, is the correct view.

'Incorporation' means more than merely the act of incorporating the company, although it is used in this narrow sense even in some of the constitutional cases discussed. The term embraces the continuation of the company, its maintenance as a company and, it is submitted, its regulation in those matters which are peculiar to a company.

¹⁹ S.C. 1934, c. 33.

²⁰ *Supra* note 18, at 683 (W.W.R.), 69 (D.L.R.).

²¹ [1934] S.C.R. 653, [1934] 4 D.L.R. 6.

²² *Id.* at 655 (S.C.R.), 8 (D.L.R.).

²³ 30 & 31 Vict., c. 3 (U.K.).

²⁴ *Supra* note 18.

²⁵ *Supra* note 14.

²⁶ *Supra* note 21.

B. *Provincial Regulatory Powers*

Having considered the scope of the Dominion power to incorporate generally, one turns to those decisions which have considered the provincial power to regulate the transfer and sale of shares in federally-incorporated companies.

*A.-G. for Man. v. A.-G. for Can.*²⁷ (the *Manitoba Securities* case) concerned the validity of Manitoba legislation which prohibited any company from selling or offering for sale shares or stock without a licence, which in turn required approval of the issue by the provincial Public Utility Board. The provisions were held to be *ultra vires*. The subject provincial legislation was found to interfere "directly and not merely incidentally, in material respects and to a substantial extent, with the capacity of the company to raise capital . . . and so derogates from its status and consequent capacities as a Dominion Company."²⁸ Viscount Sumner commented:

The general effect of these provisions remains. An artificial person, incorporated under the powers of the Dominion with certain objects, invested by these powers with capacities to trade in pursuit of those objects and with the status and capacities of a Dominion incorporation, is under these Acts liable in the most ordinary course of business to be stillborn from the moment of incorporation, sterilized in all its functions and activities, thwarted and interfered with in its first and essential endeavours to enter on the beneficial and active employment of its powers, by the necessity of applying to a Provincial executive for permission to begin to act and to raise its necessary capital, a permission which may be subjected to conditions or refused altogether according to the view, which in their discretion that executive may take. . . .²⁹

It was recognized that the "subject" of the legislation, the protection of inexperienced residents in the province from investing their savings in what might be "ill-designed, ill-equipped and ill-conducted"³⁰ enterprises, might well be within the domain of provincial regulation; however, the method adopted, that of prevention rather than criminal prosecution alone, and its effect was such as to render the legislation *ultra vires*. That effect was "to impair the status and essential capacities of the company in a substantial degree,"³¹ the essential capacity here being to raise capital by the sale of shares. This "status and essential capacities"³² test is referred to in all subsequent cases. Whether it is the only test, or part of a broader test, was not dealt with in this decision.

A similar conclusion had been reached by the Supreme Court of Canada in *Lukey v. Ruthenian Farmers' Elevator Co.*³³ with respect to comparable Saskatchewan legislation. The observations of Mr. Justice Duff regarding the

²⁷ [1929] A.C. 260, [1929] 1 W.W.R. 136, [1929] 1 D.L.R. 369 (P.C.) [hereinafter *Manitoba Securities*].

²⁸ *Id.* at 265 (A.C.), 139 (W.W.R.), 372 (D.L.R.).

²⁹ *Id.* at 266 (A.C.), 140-41 (W.W.R.), 373 (D.L.R.).

³⁰ *Id.* at 265 (A.C.), 139 (W.W.R.), 372 (D.L.R.).

³¹ *Id.* at 267 (A.C.), 141 (W.W.R.), 374 (D.L.R.).

³² *Id.*

³³ [1924] S.C.R. 56, [1924] 1 W.W.R. 577, [1924] 1 D.L.R. 706.

initial incorporating provisions of the Dominion *Companies Act*³⁴ are of interest:

And I think upon principle no distinction can be drawn between the provisions of the Act dealing with these subjects and those which imply power to acquire capital by selling the company's shares; nor do I think any sound distinction can be drawn between such provisions and those which expressly authorize the company to borrow money on its own credit and to give as security for the money so borrowed its bonds and debentures charged upon its property.

It is indisputable I think that if the restrictions established by the statute be validly enacted it is equally within the power of the province to prohibit entirely, in the absence of a certificate, the sale of shares. There cannot I think be any distinction in principle from the constitutional point of view between sale by isolated acts and sale in course of continuous and successive acts. And the learned judges of the court below have rightly considered I think that the true question is whether to create such a prohibition is competent to a provincial legislature.³⁵

Mr. Justice Duff went on to note that not only did the subject legislation prevent a Dominion company from exercising its power to obtain capital in the normal way through the sale of shares, but that this was "the essence of its design."³⁶ He recognized, as all the decisions have done, that Dominion companies are not withdrawn from the operation of provincial laws dealing generally with those matters which are within the stated objects of the company. He framed the test in the following manner:

Dominion companies empowered to deal in intoxicating liquors for example are subject to provincial laws regulating or suppressing the sale of liquor; but such laws are not laws aimed at Dominion companies as such or at joint stock companies as such and do not in effect or in purpose prohibit or impose conditions upon the exercise of powers of Dominion companies which are essential in the sense that they are necessary to enable them in a practical way to function as corporations according to the constitutions imposed upon them by the Dominion.³⁷

It is submitted that two, perhaps overlapping, tests seem to be contemplated here. First, is the provincial legislation, in the broad sense, legislation with respect to the incorporation of companies? Second, will the legislation impair the Dominion company's status or its essential capacities?

Mr. Justice Mignault also held that the provincial legislation was *ultra vires* but used the following, single test:

The selling of its stock or bonds in order to obtain the capital necessary to carry on its business, is an act connected with the very life of a company. Capital is for the company seeking to obtain it what blood is for the human body. Without it the company cannot live and carry on its business and capital can be obtained by the company only by selling its stock or by borrowing money. The Saskatche-

³⁴ R.S.C. 1906, c. 79.

³⁵ *Supra* note 33, at 72 (S.C.R.), 590-91 (W.W.R.), 712 (D.L.R.). Both Ziegel, "Constitutional Aspects of Canadian Companies," in Ziegel, ed., 1 *Studies in Canadian Company Law* (Toronto: Butterworths, 1967) at 159 and Hogg, *Constitutional Law of Canada* (Toronto: Carswell, 1977) at 353 state that Duff J. was being unnecessarily restrictive in confining company law to its meaning in 1867. However, was not his objective to demonstrate that the term "incorporation of companies" embraced much more than the creation of the company alone even in 1867?

³⁶ *Supra* note 33, at 73 (S.C.R.), 591 (W.W.R.), 713 (D.L.R.).

³⁷ *Id.* at 74 (S.C.R.), 592 (W.W.R.), 714 (D.L.R.).

wan statute prevents the Dominion company from selling its stock and bonds or other securities unless and until a certificate of approval is obtained from the local government board. This is an interference with the powers conferred on the company by the Parliament of Canada to carry on its business in the province of Saskatchewan, and so affects its status. And the legislation cannot be sustained as coming within property and civil rights, or as being a matter of a merely local or private nature in the province. It really conflicts with the right of the Dominion Parliament to incorporate companies, and to grant them power to carry on their business throughout the Dominion.³⁸

In concluding that the sale of shares was part of the Dominion's power to incorporate companies, the Supreme Court of Canada did not find it necessary to parade the horrors in the same manner as did the Privy Council. It is submitted that no such parade is required in order to conclude on the basis of the status and essential capacities test that the ability of a company to issue and sell its own shares to the public is vital to its existence.

In *Lymburn v. Mayland*³⁹ the Privy Council was able to uphold the forerunner of our modern securities legislation. Although it is beyond the scope of this paper to fully examine this area and the extent that modern legislation can be passed by the provinces, Lord Atkin's statement clarifies the difference between the nature of the regulatory control which the province seeks to exercise in securities matters and which it sought to exercise in the *Manitoba Securities* case and the *Lukey* case:

A Dominion company constituted with powers to carry on a particular business is subject to the competent legislation of the Province as to that business and may find its special activities completely paralysed, as by legislation against drink traffic or by the laws as to holding land. If it 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. As to the issue of capital there is no complete prohibition, as in the *Manitoba* case in 1929; and no reason to suppose that any honest company would have any difficulty in finding registered persons in the Province through whom it could lawfully issue its capital. There is no material upon which their Lordships could find that the functions and activities of a company were sterilized or its status and essential capacities impaired in a substantial degree.⁴⁰

An important distinction, it is submitted, is that valid provincial securities legislation is directed at the business of selling or trading in securities and not at the merits of the issue or sale and purchase, apart from requiring disclosure of all pertinent information. Lord Atkin, for that matter, may have envisaged the provincial power as even narrower for he refers to sterilizing the company in both its "functions and activities,"⁴¹ not just functions alone. However, the reference to activities may have been to its activities as a corporate body and not its business activities. That interpretation at least is compatible with later decisions.

³⁸ *Id.* at 79 (S.C.R.), 596-97 (W.W.R.), 718 (D.L.R.).

³⁹ [1932] A.C. 318, [1932] 1 W.W.R. 578, [1932] 2 D.L.R. 6 (P.C.). Professor Hogg, *supra* note 35, at 353, seems to find the distinction unrealistic. Professor Ziegel, *supra* note 35, at 167, seems to have no such difficulty. The "status and essential powers immunity" which troubles Professor Hogg may simply be what Professor Ziegel labels as the double aspect doctrine.

⁴⁰ *Id.* at 324-25 (A.C.), 582 (W.W.R.), 9-10 (D.L.R.).

⁴¹ *Id.* at 325 (A.C.), 582 (W.W.R.), 10 (D.L.R.).

*British Columbia Power Corp. v. A.-G. of B.C.*⁴² (the *B.C. Power* case) summarized the previous decisions as ultimately resting on, "in a practical business sense,"⁴³ the effect on the company.⁴⁴ As a practical matter that is correct; however it is also submitted that the legislation in question must have some other claim to be valid provincial legislation (not companies legislation *per se*) in order to apply the status and essential capacities test.

In the result, it is true, as Professor Hogg observes,⁴⁵ that the legislation considered by *Lymburn v. Mayland*⁴⁶ would prohibit a federal company from raising capital if it did not comply with the securities legislation, just as the provincial legislation in the two earlier decisions would have; however, the approval could be obtained without passing on the merit of the issue, a matter for the internal management of the company. It was not a matter of company law which purported to apply to Dominion as well as provincial companies and the otherwise valid provincial legislation did not impair "its status or essential capacities in a substantial degree."

Recent decisions of the Supreme Court of Canada confirm the distinction between regulation of the business engaged in by a company and regulation of the company as such. They are unclear, however, as to the test or tests to be applied to determine the latter.

Chief Justice Laskin expressed the principle as follows in *Morgan v. A.-G. for P.E.I.*,⁴⁷ which concerned provincial legislation prohibiting non-residents from holding land in the province:

The issue here is not unlike that which has governed the determination of the validity of provincial legislation embracing federally-incorporated companies. The case law, dependent so largely on the judicial appraisal of the thrust of the particular legislation, has established, in my view, that federally-incorporated companies are not constitutionally entitled, by virtue of their federal incorporation, to any advantage, as against provincial regulatory legislation, over provincial corporations or over extra-provincial or foreign corporations, so long as their capacity to establish themselves as viable corporate entities (beyond the mere fact of their incorporation), as by raising capital through issue of shares and debentures, is not precluded by the provincial legislation. Beyond this, they are subject to competent provincial regulations in respect of businesses or activities which fall within provincial legislative power.⁴⁸

The legislation was valid since it merely prohibited a Dominion company, among others, from holding land within the province; it did not vary or take away the corporate power to hold land.⁴⁹ The Chief Justice made the same

⁴² (1963) 44 W.W.R. 65, 47 D.L.R. (2d) 633 (B.C.S.C.).

⁴³ *Id.* at 139 (W.W.R.), 703 (D.L.R.).

⁴⁴ Professor Ziegel, *supra* note 35, at 183, regards the *B.C. Power* case as the most careful examination of the law. The principal error in the case is not the review of the law but the characterization of the expropriating legislation.

⁴⁵ Hogg, *supra* note 35, at 359.

⁴⁶ *Supra* note 39.

⁴⁷ [1976] 2 S.C.R. 349, 5 N.R. 455.

⁴⁸ *Id.* at 364-65 (S.C.R.), 469 (N.R.).

⁴⁹ Contrast this decision with that in *John Deere Plow Co. v. Wharton*, *supra* note 8, or *Great West Saddlery Co. v. The King*, *supra* note 8, for example. The provincial

observation as did Chief Justice Lett in the *B.C. Power*⁵⁰ case, that much depends upon the court's assessment of the effect, the thrust, of the legislation. It can also be contended that he accepted that the status and essential capacities test is not the only test. That test is only applicable if the legislation is not clearly legislation with respect to companies and otherwise appears to come within one of the other heads under section 92. These same principles were reaffirmed in *Canadian Indemnity Co. v. A.-G. of B.C.*⁵¹ in which the Court upheld British Columbia legislation instituting compulsory government automobile insurance. Mr. Justice Martland in that case quoted with approval⁵² the statement of the law found in *R. v. Arcadia Coal Co.*:

The distinction between enactments affecting Dominion companies that are of general application and those that may be termed company law is simply this: In the former case there is no attempt to interfere with powers validly granted to the company by the Dominion nor with the status of the company as such. The circumstance that the company consistently with the general laws of the province may not exercise those powers does not destroy or impair the powers. In the latter case the enactment prohibits or imposes conditions upon the exercise of the powers of Dominion companies as such. In short it is aimed at and affects Dominion company powers as distinguished from being aimed at and affecting a trade or business in the province which Dominion companies may happen to be engaged in in common with provincial companies and natural persons.

In the one case the legislation has to do with a provincial matter, Dominion companies being only incidentally affected; in the other case the legislation is aimed either at Dominion companies or at all companies which includes Dominion companies, and so the province with power to legislate only as to provincial companies must be said to have entered the Dominion field.⁵³

The test formulated in the *Arcadia Coal*⁵⁴ case makes the same distinction that Chief Justice Laskin did in the *Kootenay and Elk Ry. Co.*⁵⁵ case, between regulation of the business in which the company is engaged and regulation of the company *qua* company. It is not confined to impairment of the company's status or essential capacities alone; it is broader. It should also be noted that Mr. Justice Martland described the *John Deere*,⁵⁶ *Great West Saddlery*,⁵⁷ *Manitoba Securities*⁵⁸ and *Lukey*⁵⁹ cases as dealing "with provincial company law or securities legislation and *their* effect in frustrating

legislation cannot be companies legislation and it cannot deprive the company of some essential attribute. It would not be correct though, it is submitted, to say that holding land is not an essential attribute if conferred by the incorporating legislation without more. That corporate power is no less important than the power to sue, but both can be subject to provincial fees, licencing and other business regulation.

⁵⁰ *Supra* note 42.

⁵¹ [1977] 2 S.C.R. 504, 11 N.R. 466.

⁵² *Id.* at 518-19 (S.C.R.), 485-86 (N.R.).

⁵³ [1932] 1 W.W.R. 771 at 784-85, [1932] 2 D.L.R. 475 at 488, 58 C.C.C. 17 at 30 (Alta. C.A.). This is regarded by Professor Ziegel, *supra* note 35, at 176-77, as the best statement of the law.

⁵⁴ *Id.*

⁵⁵ *Supra* note 1.

⁵⁶ *Supra* note 8.

⁵⁷ *Id.*

⁵⁸ *Supra* note 27.

⁵⁹ *Supra* note 33.

the effect of federal incorporation."⁶⁰ While it is unlikely that his Lordship was addressing himself to the precise question, if the legislation was provincial company law then its effect is irrelevant. It cannot apply to Dominion companies, apart from licensing or registration since provincial jurisdiction under head 11 of section 92 is limited to companies with provincial objects.⁶¹

There remains the anomalous decision in the *B.C. Power* case⁶² concerning the expropriation by the province of British Columbia of the shares in a British Columbia-incorporated utility held by and constituting the major asset of a federal company. The expropriatory legislation was held to be invalid as legislation of a company law character or, alternatively, as impairing the essential status and powers of a federal company. It seems to be generally accepted that the decision in holding the legislation *ultra vires* is either wrong or very much confined to the facts.⁶³ It does not in any event stand for the proposition that a provincial law of general character cannot paralyze the business activities of a Dominion company.

C. Provincial Approval of Share Transactions

Having considered then the scope of the Dominion power of incorporation generally and the extent to which the provinces may regulate share transactions in such companies, it is necessary to determine where the two jurisdictions meet and the scope for the provincial legislation.

The provincial legislation is obviously concerned with the control of companies engaged in businesses under provincial jurisdiction, particularly in closely regulated industries such as utilities and the like. It is directed to both the issue of shares by the company and subsequent trades in those shares.

*The Gas Utilities Act*⁶⁴ of Alberta is examined as an example of such legislation. It contains the following prohibition with respect to the issue of securities:

- 24(1) No owner of a gas utility shall . . .
- (e) issue any
 - (i) of its shares or stock, or
 - (ii) bonds or other evidences of indebtedness, payable in more than one year from the date thereof,
 unless it has first satisfied the Board that the proposed issue is to be made in accordance with law and obtained the approval of the Board of the purposes of the issue and an order of the Board authorizing the issue. . . .⁶⁵

⁶⁰ *Supra* note 51, at 516 (S.C.R.), 482 (N.R.) [emphasis added].

⁶¹ The *John Deere* case clearly establishes that paragraph 11 is the extent of provincial jurisdiction as to companies.

⁶² *Supra* note 42.

⁶³ Hogg, *supra* note 35, at 360-62; Ziegel, *supra* note 35, at 183-87. The legislation represented a drastic step, tactically unwise, which was likely the major cause of it being held *ultra vires*.

⁶⁴ R.S.A. 1970, c. 158.

⁶⁵ *Id.*

The definition of owner of a gas utility is not confined to a provincially-incorporated company and therefore includes, among other entities, a federally-incorporated company. The section with respect to change of majority ownership is, however, confined to companies incorporated in Alberta:

- 25(1) Unless authorized to do so by an order of the Board, the owner of a gas utility incorporated under the laws of Alberta, in this section referred to as the "Alberta company", shall not sell or make or permit to be made upon its books any transfer of any share or shares of its capital stock
- (a) to any other owner of a gas utility or public utility, within the meaning of *The Public Utilities Board Act*, or
 - (b) to any other corporation, however incorporated, if the result of the sale or transfer, in itself or in connection with other previous sales or transfers, would be to vest in the other corporation more than one-half of the outstanding capital stock of the Alberta company.
- (2) Every purported
- (a) assignment or transfer, or
 - (b) agreement for assignment or transfer,
- by or through any person or corporation in contravention of subsection (1) is void and of no effect.⁶⁰

This legislation gives rise to questions whether section 25 should be confined to Alberta companies, and to what extent; also whether the restriction therein should be reversed so as to apply only to the issue of shares as opposed to the change of majority ownership.

The approval of the issue of shares by a Dominion company was held in both the *Manitoba Securities*⁶⁷ and the *Lukey*⁶⁸ cases to be embraced by the Dominion power of incorporation. Therefore, to the extent that the provincial legislation extends to the initial offering, it would seem to be *ultra vires*. The two earlier cases considered legislation almost identical in language and intent to that under consideration here, and there would seem to be no distinction of merit. Whatever the proper test or tests, the effect of prohibition ought to be sufficient to render the legislation invalid. Just as in the *Manitoba Securities*⁶⁹ case, the purpose of controlling the individuals taking over certain vital industries may be laudable enough but the method adopted would be to prevent any shares from being issued. The method is directed at companies as such and is *ultra vires* in so far as it purports to apply to Dominion companies.

Another question is whether there is a difference if the legislation purports to regulate subsequent sales after their issue by the company. The province has a legitimate interest in the control of companies engaged in industries under its jurisdiction and the personalities involved in the regulated industries. But what is the concern directed at? What method for protecting the public has been adopted?

⁶⁰ *Id.*

⁶⁷ *Supra* note 27.

⁶⁸ *Supra* note 33.

⁶⁹ *Supra* note 27.

The power to control, and therefore prohibit, subsequent sales of the shares could have the same effect as control of the original issue, as described in both the *Manitoba Securities*⁷⁰ and *Lukey*⁷¹ cases. The provincial regulatory tribunal could, by refusal to approve a change of control, affect the market for the company's shares in a significant way, and have a very decided impact on the company's ability to raise money.

Takeovers, acquisitions and other subjects of company law may have a double aspect, as seen in the provincial securities legislation, which also touches on those subjects.⁷² The decisions upholding Dominion legislation with respect to the same subjects did not decide that Parliament had exclusive jurisdiction with respect to all aspects to those matters. Provincial legislation, the object of which is to provide affected shareholders with general information concerning an offer, would seem valid based on *Lymburn v. Mayland*.⁷³ It can certainly control business activities of those engaged, for example, in the oil and gas industry within the province. On the other hand, the issuance of shares, compulsory acquisition thereof and other aspects of the continuing existence of the company are embraced within the power to incorporate companies with other than provincial objects.

The status of legislation that rules on the character of the purchaser acquiring control by majority of shares is unclear. Therefore, it is necessary to determine the proper test or tests with greater precision than was necessary in the decisions referred to herein, as well as the character of such provisions.

If one simply characterizes the legislation in question as similar to that under consideration in the cases concerning the Dominion *Companies Act*⁷⁴ referred to above, there are, as stated earlier, two tests for determining the validity of such legislation. First, broadly expressed, is the legislation company law *per se*? If it is, then it comes under section 92 as a valid exercise of provincial power only in its application to provincial companies. Should it purport to extend to Dominion companies as well, then it is *ultra vires* in that application. Second, assuming that the legislation can make some claim to legitimacy under one of the heads under section 92, does the legislation impair the Dominion company's status and essential capacities? In most cases where this test is applied, the provincial legislation is an attempt to regulate a particular business or activity within the province's legislative powers. However, it cannot go so far as to impair the company's status or essential capacities. Its effect then is beyond the power of the province and as such it is *ultra vires*. Whether the test is a particular application of the double aspect doctrine, as Professor Ziegel seems to suggest, it is not necessary to determine. For the most part it seems to be used as a secondary test to determine whether the provincial legislation should properly be classified as

⁷⁰ *Id.*

⁷¹ *Supra* note 33.

⁷² See Ziegel, *supra* note 35, at 167-71.

⁷³ *Supra* note 39.

⁷⁴ R.S.C. 1906, c. 79; R.S.C. 1952, c. 53.

company law or not. While pigeon-holing is not easy, it is submitted that in the *Lukey*⁷⁵ case this is unnecessary as the legislation is company law. In most of the others it is an appropriate test for what might otherwise be valid provincial legislation affecting a particular business or activity.

While one does not normally start with the second test and work backwards, it is submitted that the constitutional questions here can be better analysed by doing so. That second question is whether, if the provincial legislation in question is not companies legislation *per se*, and it is assumed to otherwise be within provincial legislative competence, does it impair the company's status or essential powers? The argument is that the effect can be just the same as in the case of the initial issue of shares by the company; however, it is one step removed and only involves the acquisition of the majority of issued and outstanding shares. Once the company has sold its shares, further sales are subject to provincial legislation of general application, that is, the law of contract and the like. The distinction has already been drawn between provincial legislation which deprives a company of corporate power granted to it by the Dominion and that which prevents it from making any effective use of that power in a particular province. The practical result may well be the same; but as a matter of constitutional law it is the difference between *intra vires* and *ultra vires* legislation. It is submitted that if the status and essential power test was used alone, a court could very well come to the conclusion that there is no such impairment. If the matter were left to this test alone, then, the legislation might appear to be *intra vires* the province. That takes one back to seeing the status or essential capacities test as merely part of a broader test of whether the legislation deals with company law as such.

There appear to be two important distinctions here. First, one alluded to earlier, is the distinction between the control of the business which the company is engaged in and control of the company as such. Second, there is the distinction between provincial laws of general application and company law as such.

With respect to the first distinction, in *Re Pacific Western Airlines*⁷⁶, Mr. Justice Spence made a distinction between control of the business in which the company is engaged and control of the company, based upon the language of the particular regulation. While the decision is directed at a quite different consideration, it does underline the distinction between changes in shareholdings and the company's conduct in its business. There is a significant jump from examining the day-to-day operations of the company to examining the shareholdings in the company and setting aside changes in those shareholdings. While the province has an undisputed right to control the business in which the company is engaged (at least the businesses in question here) the ability to control the sale of its shares cannot be said to be necessarily incidental to the control of the business. What the legislative schemes in question are directed at is approval prior to the sale. There is no reason why

⁷⁵ *Supra* note 33.

⁷⁶ *Supra* note 5.

the legislature or provincial tribunal cannot review the licence or franchise which the company holds and determine to revoke it if it is dissatisfied with the new owners. Indeed, the argument is often advanced against government ownership of industries generally that the power to regulate is so effective that there is no need to own or similarly control the companies so regulated. It is submitted that there is simply no necessity for a province to extend its control over business activities to the review of any changes in shareholdings in those companies.

The second distinction is between laws of general application and company law as such. There is no doubt that the transfer of shares in any company is subject to the general laws of contract enforced in a particular province, but that is equally true of the issue of shares by the company to the public. While individual contracts for the sale of shares may be void in one province but not in another by reason of a difference in the general law of contract, the legislation in question is directed at the takeover or acquisition, a subject matter which, it is submitted, is quite separate from the individual contract of sale and purchase.

If the provincial legislation in question is upheld, it would likely be on the basis that it is part of the regulation of the business in which the company is engaged. As explained above, it is submitted that there is no necessity for the province to adopt this particular method for protecting provincial interests. Unless the provisions in question are so regarded, the Dominion having given shareholders the freedom to transfer their shares without its approval, the province cannot superimpose upon that framework the necessity to obtain provincial approval. Legislation which would take such freedom of choice out of the hands of the shareholders is of a very different character from legislation which is concerned with disclosure to the public, the form of the contract and the like. It invades the field of federal company law. These two distinctions, it is submitted, come to this: the legislation, while one step removed, is still aimed at companies and cannot masquerade under one of the heads in section 92. If it is aimed at companies, then the province has entered the Dominion field in so far as the legislation purports to apply to Dominion companies. Or, to adopt the language in the *Lukey*⁷⁷ case, the "essence of its design" was to strike at the transfer of shares in a Dominion company which, in the *Esso Standard*⁷⁸ case and other cases,⁷⁹ was held to be part of legislation not coming within any of the classes of subject assigned effectively to the provinces.

Can the provincial legislation be underhanded so long as the Dominion has not passed its own legislation with respect to takeovers and similar acquisitions? It seems to be a curiously Canadian view that, because the Dominion has not sought to implement such a regulatory scheme but has left the shareholders more or less free to sell their shares to whom they choose,

⁷⁷ *Supra* note 33.

⁷⁸ *Supra* note 14.

⁷⁹ For example, *Rathie v. Montreal Trust Co.*, *supra* note 18; *Reference re Section 110 of The Dominion Companies Act*, *supra* note 21.

the field is unoccupied, in that the parties ought to enjoy that freedom unimpaired or that it could have been the intention of Parliament to give them that freedom. The manner in which shares can be transferred in a Dominion company is a matter for the Dominion alone and a frontal assault on that power, which it is submitted this legislation is, cannot be sustained.

It may also be urged, that a takeover or acquisition as such may be ruled upon by either the Dominion or the provinces, depending upon whether it has a federal or provincial character. That is, if the takeover or acquisition of a Dominion company is confined to one province and therefore all of the individual sales transactions would be governed by the laws of one province, then it is a matter of property and civil rights within that province and a proper subject of provincial legislation. On the other hand, if the Dominion company is traded beyond the bounds of one province and as such involves individual share transactions in a number of provinces, then the takeover or acquisition falls either under the interprovincial trade and commerce power or under the residuary powers of the Dominion. If, as has been suggested, the takeover or acquisition as such is something different from the individual contracts for the sale of shares and not divisible, then that creature is beyond the territorial limit of any one province and, as all powers are divided between the two levels of government, must fall to the Dominion. While in most cases the shareholdings will likely go beyond one province, one wonders whether jurisdiction over the takeover of a Dominion company ought to depend upon such facts.

Lastly, it may be of interest to consider whether provincial legislation provisions which purport to void takeovers and acquisitions made without approval conflict with federal combines legislation. While the purpose or intent of the provincial legislation is not specified, it is in large measure directed at reviewing potential monopolies. However, provincial legislation which might conflict with federal criminal law has been treated very generously.

In *Smith v. The Queen*⁸⁰ the Supreme Court of Canada held that provisions in provincial securities legislation making it an offence to make false statements in a prospectus did not conflict with the provisions in the Criminal Code with respect to false statements similarly intended to induce the purchase of securities. There were no penal consequences attached to the purchase under the subject provincial legislation. While a broader base may yet be found for federal combines legislation—the draftsmen of the most recent proposed amendments must surely not be relying upon the criminal law power alone—it is unlikely that any conflict will arise in this field.⁸¹

Having considered the ability of the province to rule on the merits of a takeover or other acquisition in the industries regulated by it, one turns to consider the position of the Dominion and its jurisdiction over provincial companies.

⁸⁰ [1960] S.C.R. 776, 25 D.L.R. (2d) 225, 128 C.C.C. 145.

⁸¹ See Henderson, "Recent Development in Competition Law: The Limits of The Federal Criminal Law Power," [1978] *Law Society of Upper Canada Special Lectures* (Toronto: De Boo, 1978) 109.

II. SALE OF SHARES IN PROVINCIAL COMPANIES

Having considered the application of provincial legislation regarding the issue and sale of shares of federal companies, it should be determined whether the same position exists between provincial companies and federal legislation.

Consider the following provisions in the *Aeronautics Act*.⁸²

15.1(1) From April 4, 1977, an air carrier, operating interprovincially or internationally, shall refuse to allow a transfer of a share of the capital stock of the air carrier to Her Majesty in right of a province, any agent thereof or any corporation controlled directly or indirectly by Her Majesty in right of a province or such an agent to be made in a register of transfers of shares of the capital stock of the air carrier unless the Governor in Council has approved such transfer.

(2) For the purposes of this section, "control" shall be as determined pursuant to the *Canada Business Corporations Act*.⁸³

There are also provisions in the *Air Carrier Regulations*⁸⁴ dealing with change of control, but the Supreme Court of Canada has determined that these do not refer to change of control in the company but rather to the day-to-day conduct of the company's commercial air services.⁸⁵ Whether the draftsmen of the Regulations intended to distinguish between control of the business in which the company is engaged and control of the company itself for constitutional or other reasons is perhaps doubtful. Both these provisions and section 27 of the *National Transportation Act*,⁸⁶ though, appear to embrace a transfer of shares among other transactions which would result in a change of control or acquisition of an interest.⁸⁷ However, these are matters of interpretation of particular statutory provisions. The question whether and to what extent Parliament can affect provincially-incorporated companies has not been the subject of any decisions to date, nor are there any helpful *dicta*.⁸⁸ We must therefore rely upon whatever principles can be distilled from the decisions discussed in the foregoing.

There is a distinction, of course, between a provincially-incorporated company's operations within its own province and those outside its boundaries. Professor Hogg contends that outside its province of incorporation the provincial company is vulnerable to all applicable federal and provincial laws whether or not they impair its status or essential functions. However, it is arguable that a provincially-incorporated company is, when registered extra-provincially, in effect re-incorporated in those other provinces and should therefore enjoy the same immunity from the federal government. For the present purpose, the problem can be dealt with by referring to a provincial company acting within its province of incorporation.

⁸² R.S.C. 1970, c. A-3, s. 15.1, as am. by S.C. 1976-77, c. 26, s. 3.

⁸³ *Id.*

⁸⁴ C.R.C. 1978, Vol. 1, c. 3, ss. 21-22.

⁸⁵ *Re Pacific Western Airlines*, *supra* note 5, *per* Spence J.

⁸⁶ R.S.C. 1970, c. N-17.

⁸⁷ In effect this was the finding of Chief Justice Laskin in *Re Pacific Western Airlines*, *supra* note 5.

⁸⁸ Hogg, *supra* note 35, at 362.

The decisions on the federal incorporation power reason from the grant of power to the provinces under head 11 of section 92 that the power to incorporate companies with other than provincial objects rests with the Dominion under the residuary powers and to some extent under the trade and commerce power. It seems implicit in the reasoning that, subject to the doctrine of paramountcy, the Dominion and provincial powers to create and maintain companies were the same in their respective fields. The provincial position appears to be more certain, since it is based upon an entirely specific grant of power. The reported decisions with respect to federal companies appear to be concerned with a determination of whether or not the subject legislation is in fact company law, and are not either specific applications of the paramountcy doctrine⁸⁹ or (strictly speaking) part of a double aspect test. If the legislation is company law, then neither level of government's legislation can extend to companies incorporated by the other, at least in the case of provincially-incorporated companies operations in the province of their incorporation.

In the case of a primary issue of shares, then, which may well come within the provisions of the *Aeronautics Act*,⁹⁰ the *Air Carrier Regulations*⁹¹ or the *National Transportation Act*⁹² referred to above, federal legislation could not prohibit or make void any such issue by a provincially-incorporated company, just as the converse was true for Dominion companies. In the case of subsequent sales, acquisition of a majority, controlling interest, the same difficulties are encountered.⁹³

The question is whether prohibition of certain share purchases in a company whose business is subject to, in this case, federal regulation is a proper extension of that federal power. The arguments are the same as set forth above concerning federally-incorporated companies carrying on an activity subject to provincial regulation.

There are two observations which ought to be made here. One is with respect to paramountcy. While the status and essential capacities test developed for federal companies does not appear to be based on paramountcy, and as such is equally applicable to provincially-incorporated companies, it does not follow that conflicts will not arise in which the doctrine of paramountcy may apply. However, when examining the sort of legislation under consideration here, the Dominion regulatory scheme and the provincial companies legislation are unlikely ever to be found to be inconsistent. As discussed with respect to the federal trade and commerce power, and combines legislation in particular, the issue will be whether the provisions in the regulatory statute are within the scope of the regulatory power, or are embraced within company law.

⁸⁹ Which, as Professor Hogg notes, would be inapplicable to provincial powers.

⁹⁰ R.S.C. 1970, c. A-3.

⁹¹ C.R.C. 1978, Vol. 1, c. 3, ss. 21-22.

⁹² R.S.C. 1970, c. N-17.

⁹³ This argument was raised before the Supreme Court of Canada in *Re Pacific Western Airlines*, *supra* note 5 and, although not discussed in the decision, was not well received by the Court.

The second matter concerns the trade and commerce power, and whether, as explored above, the power to rule on the merits of a takeover which involves a purchase of shares spread over several provinces may be a matter of interprovincial trade and commerce. Given the emasculated position accorded to the trade and commerce power, it would be surprising if federal prohibition of a takeover could be seen as a matter of interprovincial trade and commerce. There is, however, a territorial limitation on all provincial powers and once the takeover or acquisition assumes a national or international character it may fall outside the jurisdiction of the provinces under section 92. In such case only the Dominion could have any power to legislate, whether under a specific head of power or the residuary power. This enters into the broader question of federal-provincial jurisdiction over security generally, and is beyond the scope of this paper. However, while the takeover or acquisition may involve a great number of individual contracts for the sale of shares, each of which is governed by the general law of a particular province, the takeover or acquisition as such is not divisible. If it involves sales in two or more provinces then any part of it cannot be dealt with by a province. It is not, though, on this analysis, part of the regulation of the company's business activities. In summary then, in the absence of the takeover having such a national character, the position is that the provincial company is in much the same position under federal legislation as the federal company is under provincial legislation.