Legislative Power in Relation to Transfers of Securities: The Case for Provincial Jurisdiction in Canada

Benjamin Geva
Osgoode Hall Law School of York University, bgeva@osgoode.yorku.ca

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The article explores constitutional issues underlying legislative jurisdiction in Canada in relation to the passage of a law governing the transfer and holding of securities and interests in securities. It argues for the existence of provincial jurisdiction to legislate a comprehensive statute. Recognizing the imperative of uniform provincial legislation in the area, the article urges the federal government to concede jurisdiction on those points in which it has parallel legislative power.

1. INTRODUCTION

On August 1, 2003, the Canadian Securities Administrators' Uniform Securities Transfer Act Task Force issued a Consultation Paper entitled “Proposals for a Modernized Uniform Law in Canada Governing the Holding, Transfer and Pledging of Securities”, proposing a uniform provincial Securities Transfer Act (USTA). The Consultation Paper described USTA as “commercial property-transfer law governing the transfer and holding of securities and interest in securities.”

This article explores the constitutional issues underlying the legislative jurisdiction in Canada in relation to the passage of such a law, which is designed to cover both the direct and indirect systems of securities holding. Such legislation is concerned with the contractual and property rights of investors in each system, and not with investors' rights and issuers' obligations under regulatory law.


2 Ibid., at 5.

3 “Holding and “holder” are loosely used here to respectively denote “owning and “owner” in a broad sense, rather than necessarily physically taking possession, which is anyway impossible in connection with the direct holding of uncertificated securities and indirect holding.
Briefly stated, in the direct holding system investors are the holders of securities, each of which may be in either certificated or uncertificated form. With regard to each such specific security, the investor has a property right and is in a direct legal relationship with the security issuer. Conversely, in the indirect holding system, an investor does not hold a security, does not have a property right in a specific security, and is not in a direct legal relationship with the security issuer. Rather, an investor in the indirect holding system is the holder of a security entitlement, credited to a securities account kept with a securities intermediary. A security entitlement consists of a bundle of rights against the securities intermediary backed by financial assets held by the intermediary. Financial assets held by the intermediary may be either actual securities, or security entitlements ultimately backed by actual securities held by an upper-tier intermediary. Generally speaking, the entitlement holder has a proprietary right in a pool of financial assets, but not in any one particular asset among those of which the pool consists. Each holding system has thus a distinct subject matter to be addressed by USTA. Accordingly, in connection with the direct holding system, USTA will be dealing with securities. At the same time, in connection with the indirect holding system, USTA will be concerned with security entitlements.

Existing legislation in Canada that governs securities transfers suffers from two serious drawbacks:

Critique along such lines may be traced back to Alberta Law Reform Institute, Transfers of Investment Securities, Report No. 67, June 1993 (Edmonton, Alta.), particularly chapters 6 and 8, respectively dealing with current Canadian law of securities transfers and constitutional jurisdiction.

1. Particularly in relation to the indirect holding system, current law is fundamentally flawed and outdated. It does not accommodate modern market practices and is inconsistent with emerging new international standards. Specifically, it is not in harmony with the advanced legislation applicable in the United States, with which Canada has integrated financial markets.

2. Current law stems from various sources and is quite segmented. The statutes that constitute it were passed under different heads of legislative powers, with each statute covering only specific types of securities. Legislation is partly federal and partly provincial. For example, the transfer of securities issued by a corporation is generally provided for by the corporate statute that governs that corporation. For a provincially incorporated corporation, this is usually the provincial business corporation Act governing the corporation. For a federally incorporated corporation, other than a regulated financial institution, the governing statute is the Canada Business Corporations Act (CBCA). For a federally regulated financial institution, applicable provisions are found in the relevant regulating federal statute; depending on the institution type, this is the statute governing banks, insurance companies, loan and trust companies, or cooperative credit associations. Also, confusion exists within federal legislation itself. For example, the transfer of securities in the form of bills of exchange or promissory notes issued by banks is governed by federal legislation governing banks, while the transfer of securities in the form of bills of exchange or promissory notes issued by provincially incorporated corporations is governed by federal legislation dealing with bills and notes. Existing legislation is thus neither harmonious nor internally consistent, and its application is not always certain.

An exception to this statement is the Business Corporations Act (Ontario), R.S.O. 1990, c. B.16 (OBCA). Unlike other modern business corporation Acts in Canada, the OBCA's rules governing direct transfers of securities apply to any “body corporate, and not merely corporations incorporated under the OBCA. See the definition of “issuer in s. 53(1) of the OBCA. See also the expanded definition of “issuer in s. 85(8) of the OBCA for the limited purposes of the rules in s. 85 of the OBCA governing the indirect holding and transfer of securities through the facilities of The CDS Limited (CDS Limited).
USTA is designed to address both drawbacks and thus to eliminate legal uncertainty as well as the lack of competitiveness of Canadian financial markets that results from the present legal regime. An important aspect of the proposed reform is the elimination of the confusing duplication and segmentation of the existing legislation, which can be achieved as long as USTA is uniformly implemented by all provinces and territories in Canada. Moreover, this reform is to be carried out by the replacement of existing legislation by one comprehensive, internally consistent statute covering all types of securities and securities entitlements, so as to provide for a modern legal regime that will be harmonious with the one in the United States. Stated otherwise, in modernizing the law by providing a proper framework to deal with security entitlements (namely, the indirect holding system), USTA is designed to fill a void. *397 At the same time, in its all-inclusive comprehensiveness, USTA will also rectify a problem stemming from perceptions regarding the division of legislative powers in Canada. By addressing both drawbacks, USTA will substantially enhance both the efficiency and integrity of Canadian financial markets.

This article suggests that the provinces can confidently legislate a comprehensive, all-inclusive USTA. The analysis is premised on the observation that the current state of patchwork uncoordinated legislation is accidental and not the product of any thoughtful or thought-through design. Stated otherwise, the present statutory scheme has never been properly rationalized. Rather, it reflects a series of unrelated ad hoc decisions, each designed to provide for an immediate solution to a single problem. Any thought given to possible side effects of any specific solution has been partial and incomplete. No one has endeavoured to properly examine the resulting overall impact of the present confused statutory scheme to the Canadian capital markets and market participants, and the possible inherent contradictions and uncertainties in the totality of the treatment of the subject matter.

The position taken here is that provincial legislative power covers the entire area. On the points where it may be superseded by a paramount federal legislative power, the federal government is urged to concede jurisdiction, so as to allow for a uniform comprehensive provincial statute to provide far-reaching benefits. Such benefits will be undercut by any overlapping or duplicating federal statute that inevitably will introduce harmful uncertainty. True, as will be outlined below, federal jurisdiction covers some aspects of USTA, however, by no means can federal jurisdiction be extended to cover the entire area; rather, it is limited to a few aspects or segments only. Accordingly, this article strongly urges the federal government to withhold legislative powers with respect to such points so as to allow uniform provincial jurisdiction over the entire area, thereby eliminating any variation in treatment or uncertainty as to which law applies.

Indeed, in the securities regulation area, the federal government has demonstrated its willingness to eliminate unnecessary overlaps by withdrawing from areas well covered by provincial laws, and thereby enhance market efficiency. *398 A similar approach is called for also in relation to legislation governing the transfer and holding of securities and security entitlements. In the final analysis, the proposed approach is premised on the provision for the entire area of a uniform
comprehensive provincial statute, closely modelled on Article 8 of the American Uniform Commercial Code (UCC).

This approach will facilitate further harmonization with the legal position in the United States.

10 See An Act to Amend the Canada Business Corporations Act and the Canada Cooperatives Act and to Amend other Acts in Consequence, S.C. 2001, c. 14. One stated purpose for the Bill was to do away with duplication, or “eliminate redundant regulation or compliance costs in an area already regulated by provincial securities laws. This was implemented by the Bill in the area of insider trading. See for e.g., s. 52(5) and s. 53 of the Bill, repealing s. 126(3) and (4) and ss. 127 129 of the Canada Business Corporations Act, R.S.C. 1985, c. C 44, respectively.

11 For convenience, the phrase “transfer and holding is used generally in this article in the context of securities and security entitlements even though, strictly speaking, security entitlements are not transferred. Although it is possible to transfer an interest in a security entitlement (e.g., a security interest), most transactions in the indirect holding system involve the extinguishment and creation of separate entitlements, not the transfer of the same security entitlement.

Two obvious limitations of the analysis are to be clarified: First, as indicated, USTA is designed to be a “commercial property-transfer law governing the transfer and holding of securities and interest in securities.” 2 As will be explored further below, 3 this is to be distinguished from a regulatory law dealing with the distribution or trading of securities and the operation of securities markets, namely, securities regulation. Hence, this article takes no position on the debate as to jurisdiction over the latter subject. Second, the article does not discuss the substantive provisions proposed for USTA; 4 that is, it is limited to a discussion on the power to legislate in the area, so that the particular legislative scheme of USTA is outside the scope of the article.

12 See supra, n. 2.

13 See discussion in Section 4, Incorporation of Companies and Banking, infra.


2. CONSTITUTIONAL LAW: BACKGROUND

The following premises on which the discussion rests should be stated at the outset:

1. In Canada, the totality of legislative power is distributed between the federal Parliament and provincial legislatures. 5 Legislative competence in any given area, either provincial or federal, must be based on a specific heading indicated by the Constitution Act, 1867. 6 The latter identifies classes and subjects exclusively assigned to federal jurisdiction in s. 91 and to provincial jurisdiction in s. 92.

15 Peter W. Hogg, Constitutional Law in Canada (student ed.) (Toronto: Carswell, 2000) at 283 84, 392.


2. The various headings of legislative powers enumerated in the Constitution Act are not mutually exclusive; some overlap was even contemplated, and anyway is not precluded. In relation to two legislative powers, one of which is federal and the other provincial, the possibility for such an overlap has been known as the “double aspect” doctrine. Thereunder, subjects which in one aspect and for one purpose fall within s. 92, may for another purpose fall within s. 91. 7

17 Hodge v. The Queen (1883), 9 App. Cas. 117 at 130, and in general, Hogg, supra, n. 15 at 361.
The conclusion of the analysis that follows in this article is that transfer of both securities and security entitlements is a matter of provincial jurisdiction under the legislative power relating to property and civil rights. The federal government is urged to amend federal legislation so as to exclude securities that are bills of exchange or promissory notes. In such a case, comprehensive uniform legislation could be introduced in Canada to govern securities holding and transfers, in both the direct and indirect holding systems, exclusively on the provincial level. Of course, the successful implementation of this proposal presupposes that the provinces and territories agree to uniformly enact such legislation to a degree that has never before been achieved in the history of commercial law in Canada.

3. **“PROPERTY AND CIVIL RIGHTS IN THE PROVINCE”**

Both securities and security entitlements are forms of property. The holding and transfer of securities located in a province is thus fundamentally a matter coming within “Property and Civil Rights in the Province.” As such it falls within the exclusive jurisdiction of the province, within which the securities are located under s. 92(13) of the Constitution...
Act, 1867. This applies to both the direct and indirect holding systems, and irrespective of who is the issuer of those securities. As pointed out by Hogg, “[t]he creation of property rights, their transfer and their general characteristics are within property and civil rights in the province.”

Hogg refers to this head of legislative power as relating to “the entire body of private law which governs the relationships between subject and subject, as opposed to the law which governs the relationships between the subject and the institutions of government,” other than in areas that have been explicitly carved out. It covers rules relating to both “property” and obligations or liability, giving rise to “civil rights.” However, “[t]he enumerated list of federal heads of legislative powers in s. 91 included a number of matters which would otherwise have come within property and civil rights in the province, for example, trade and commerce ..., banking ..., bills of exchange and promissory notes ..., interest ..., [and] bankruptcy and insolvency ....” Such “federal classes of subjects were withdrawn from property and civil rights by their exclusive vesting in the federal Parliament.” In addition, according to Hogg, “the peace, order and good government phrase of the opening language of s. 91 presumably contemplated that certain matters which *402 would otherwise have come within property and civil rights could attain such a national dimension as to come within federal competence.”

Indeed, as set out in Sections 4 and 7 below, in relation to the direct holding of securities, legislative power with respect to property and civil rights may be superseded by other legislative powers. Particularly, this applies to powers with regard to companies, and bills of exchange and promissory notes. Accordingly, liability of a corporate share issuer, namely, its relationship with the security holder (as opposed to the property right of the security holder), as well as liability on a security which is a bill or note, are not matters of “property and civil rights.” The federal legislative power in relation to bills and notes also supersedes provincial jurisdiction over property and civil rights in relation to the transfer, namely, property aspects, of directly held securities in the form of bills of exchange or promissory notes. With regard to the indirect holding system, the picture is, however, more monolithic. On its part, the security entitlement is not only a sui generis form of property, or right in rem. It further creates bundles of obligatory rights, embodied in a unique in personam relationship between the entitlement holder and the securities intermediary. As will be seen below, in contrast to the position regarding the direct holding of securities, both the proprietary and obligatory elements of the security entitlement are, in effect, beyond the reach of other sources of legislative powers and thus entirely remain a matter of “property and civil rights.”

More generally, the law that governs commercial transactions falls into provincial jurisdiction relating to property and civil rights, unless a specific federal power (such as in relation to interest or bills of exchange and promissory notes) derogates from this broad provincial jurisdiction. It seems, though, that “the peace, order and good government” general power is inappropriate for a basic commercial law matter. Accordingly, *403 in relation to the holding and transfer of securities and security entitlements, namely, in both the direct and indirect holding systems, the focus of the discussion shifts to the examination of specific heads of legislative powers, particularly federal, *25 that might supersede the general provincial competence over property and civil rights.

Indeed, the example provided by Hogg for a provincial “property and civil rights subject matter transformed into a federal one by virtue of “the peace, order, and good government” phrase is that of the zoning of the national capital region. See also...
discussion on the “national concern” branch of the phrase, Hogg, supra, n. 15 at 423 34. Obviously, the “emergency” branch, discussed ibid., at 434 44, is irrelevant.

25 Competing provincial heads of legislative powers will be addressed only insofar as the discussion may shed light on a related federal head of legislative power, as for example, immediately below, in relation to companies. Otherwise, the existence of a provincial legislative power parallel to that relating to property and civil rights is of no practical significance.

4. INCORPORATION OF COMPANIES AND BANKING

The subject of holding and transfer of securities is not a matter in relation to the incorporation of companies with provincial objects under s. 92(11) of the Constitution Act, 1867. This provision is thus not the source of provincial jurisdiction relating to the holding and transfer of securities.

With regard to corporate securities, three distinct areas of laws exist. First, company (or corporation) law governs the issuing of corporate securities and the relationship between a security holder and the issuing company. For any given security, this law is broad enough to define and cover the nature of the security, namely, the entire scope of rights in the security, including any transfer restrictions attached to it. Second, securities regulatory law provides for the rules that govern the distribution and trading of securities, or more generally, the operation of securities markets. Third, securities holding and transfer law deals with the proprietary and obligatory matters relating to the holding and transfer of securities and security entitlements. It defines the proprietary rights with respect to securities and security entitlements and provides for mechanisms of transfer for such rights. In effect, with respect to corporate securities, the law governing the third area provides for the property in, and transfer of, rights in what has been defined as part of the regulation under the first area, namely, under corporate law.

26 The distinction between the first and second areas is highlighted along such lines by J.A. VanDuzer, The Law of Partnerships and Corporations (Concord, Ont.: Irwin Law, 1997) at 85 87. It is noteworthy that not only does the author not highlight the distinct nature of the third area, that of securities holding and transfer, he does not discuss it either, thereby lending support to the proposition that it does not belong to companies law, the subject matter of his book.


The power to incorporate companies was understood to coincide with “what is generally classified as company law.” With regard to corporate securities, this power covers the first area, but does not go beyond it. Even provincial legislation governing securities regulation is regarded as “a matter within property and civil rights in the province,” and not as a matter of company law, under the incorporation of companies heading. Accordingly, the third field, that of securities transfer law, remains a matter of “property and civil rights.” The assertion by the Dickerson Report of 1971 that security transfer rules are “an integral, even an essential part, of any corporation law” is thus unfortunate. To a large extent, this observation has been the source of the current confusion. It is inaccurate and ought to be rejected.


29 Hogg, supra, n. 15 at 521.


31 At present, the matter is dealt neither in the United Kingdom nor in the United States as part of legislation governing companies. Arguably, the Dickerson Report was concerned more with introducing the subject matter into Canadian legislation.
than in laying out a well thought out, carefully planned, constitutional design for its introduction. See in particular Spink, supra, n. 27 at 458 (footnote 66). In any event, the fundamental issue here is not in which statute the matter is included, but rather, under what legislative power it is legislated.

By parity of reasoning, the holding and transfer of securities is not a matter in relation to the incorporation of companies “for objects other than provincial objects,” which falls within exclusive federal jurisdiction. 32 Even if this power “authorizes some degree of regulation of trading in ... securities” issued by federally incorporated companies, 33 there is no basis for extending it beyond the area of securities regulation. But even within the securities regulation area, this federal power is stated to exist only to “some degree”. 34 Whether support for such federal power has been diminished, 35 or rekindled, 36 is irrelevant to the discussion on a commercial law dealing with transfer and holding rules applicable to securities and interests in securities. True, “the manner in which shares [of federally incorporated companies] can be transferred and acquired” was stated to fall within the federal power of incorporation, as “necessarily incidental” to it. 37 Nevertheless, this statement was acknowledged to apply in the context of the conditions under which a person may become, or lose his or her position as, a shareholder in a company. 38 This matter is concerned with the position of the shareholder towards the company, and is anyway covered by traditional company law, namely, the first distinct area of the law governing corporate securities, set out above; it is not a matter of securities holding and transfer law. Accordingly, the holding and transfer of securities does not fall under federal jurisdiction even in relation to securities issued by issuers incorporated under federal law.

32 See Citizens Insurance Co. v. Parson (1881), 7 A.C. 96, construing the federal residuary power to fill in gaps as a matter of “Peace, Order, and Good Government” of Canada under the opening words of s. 91 of the Constitution Act, 1867.


34 Ibid.

35 See text and n. 10, supra.


38 Esso Standard, ibid., at 153 (per Judson J.).

Similarly, the holding and transfer of securities issued by banks is not a matter of “banking, incorporation of banks, and the issue of paper money,” in relation to which the federal Parliament is assigned the exclusive legislative power under s. 91(15) of the Constitution Act, 1867. Obviously, securities holding and transfer is not a matter relating to the “issue of paper money.” As well, as indicated above, securities holding and transfer is not a matter of “incorporation.” At the same time, “banking” relates to business powers of banks, 39 so that in theory, the federal Parliament may legislate in relation to securities holding and transfers by banks, as this would be legislation in relation to a business power of banks. 40 This, however, will cover activities of banks in holding or disposing of assets owned by banks, including securities, and not the activities of others in holding and disposing of securities issued by banks.
There is further policy support for the conclusion that the area of securities holding and transfers is a matter for federal power, together with the other three distinct headings of federal power, which are lumped together in one section of the article for convenience only.

Securities transfer legislation cannot be made to be in relation to “[s]uch Works as, although wholly situate within the Province, are before or after their Execution declared by the Parliament of Canada to be for the general Advantage of Canada or for the advantage of Two or more of the Provinces,” which fall within federal legislative power under s. 92(10)(c)

5. MISCELLANEOUS: WORKS TO THE ADVANTAGE OF PROVINCES, TRADE AND COMMERCE, AND INTEREST

These are three distinct headings of federal power, which are lumped together in one section of the article for convenience only.

Regardless of the above, singling out and excluding holding and transfers of securities issued by banks and other federally incorporated companies, whether or not they are regulated financial institutions, from the general commercial law of securities holding and transfers, to be provided under the provincial legislative power in relation to property and civil rights, will only add a confusing and unnecessary layer of complexity. It is thus strongly urged that even if the federal incorporation powers invite the proliferation of transfer rules based on any incorporation power, whether provincial or foreign. This is undoubtedly a prescription for disharmonization. Furthermore, linking transfer rules to the jurisdiction of incorporation, rather than to those of the place of the transaction, is contrary to the reasonable expectations of an investor acquiring securities in a given financial market.

40 Obviously, this does not suggest that banks’ power to hold and transfer securities turns securities holding and transfer into “banking. For a similar analysis in connection with the promotion of insurance products by banks, see Canadian Western Bank v. Alberta, 2003 ABQB 254, 2003 CarswellAlta 377, 46 C.C.L.I. (3d) 274 (Alta. Master).

(in conjunction with s. 91(29)) of the Constitution Act, 1867. The simplest reason for the inapplicability of this legislative power even to transfers “wholly situate within the Province” is that “work is a tangible thing.”\(^{42}\) which will not cover the transfer of securities. \(^{*408}\) Transfers not “wholly situate within the Province” fall outside this heading under the plain language of the subsection.

42 See Hogg, supra, n. 15 at 542.

An exclusive federal legislative power exists in relation to “The Regulation of Trade and Commerce” under s. 91(2) of the Constitution Act, 1867. It was held that this encompasses “[1] political arrangements in regard to trade requiring the sanction of Parliament, [2] regulation of trade in matters of inter-provincial concerns, and [3] ... general regulation of trade affecting the whole dominion.”\(^{43}\) Among these headings, the first is irrelevant for securities transfer legislation. The second heading, to the extent that it requires the securities transferred to cross provincial borders, may not be easily applied, as the determination of the location, or situs, of securities is often controversial.\(^{44}\) In the indirect holding context, namely, that of security entitlements, location may be required to be determined not in relation to the underlying financial assets themselves, but rather in relation to the securities intermediary.\(^{45}\) Accordingly, neither the characterization of a given securities transfer as interprovincial, nor the identification of the particular provinces involved, is necessarily an easy process with predictable results. In any event, strictly speaking, security entitlements are not “traded” at all, neither in one province nor between two of them; rather, each transaction generates a corresponding debit and credit, thereby extinguishing one securities entitlement and creating a new and distinct one. Regardless, it is unlikely to be beneficial to regulate interprovincial securities transactions separately from intraprovincial ones.

43 Citizens Insurance Co., supra. n. 32 at 113.


With respect to the third heading permitting the federal regulation of intraprovincial trade, it was held that its application requires certain conditions to be met. They include, among others, the existence under the legislation of a general regulatory scheme as well as the oversight \(^{*409}\) of a regulatory agency. More to the point, “legislation should be of a nature that the provinces jointly and severally would be constitutionally incapable of enacting.”\(^{46}\) Such conditions are not met in connection with securities transfer legislation.


In the final analysis, and more in general, traditionally, the trade and commerce power has not been used to legislate in what jurisprudentially is commercial law governing the transfer of property. Whether the federal trade and commerce power could be understood to cover also intraprovincial securities transactions on the basis that the security industry serves a capital market which is both interprovincial and international, is specifically left open by Hogg.\(^{47}\) Nevertheless, even if the question is to be answered in the affirmative, the application of such power to purely commercial law matters is unfounded, and as demonstrated, contrary to existing jurisprudence. Hogg's discussion is limited to the field of securities regulation, which is quite distinct and separate from the area of securities holding and transfers, and his observations and conclusions ought to remain in their original context.
Finally, in this part of the discussion, s. 91(19) of the Constitution Act, 1867, assigns to the federal Parliament an exclusive legislative power with respect to “Interest.” Yet, “[t]he interest power may be used to control interest rates, but not to control other terms of loans.” Stated otherwise, the power is not broad enough to legislate in relation to the holding and transfer of interest-bearing instruments. Again, this result is defensible, since otherwise, laws passed by different legislative levels would have provided for the holding and transfer of debt and equity instruments.

6. THE PUBLIC DEBT

There is little doubt that the federal legislative power over “[t]he Public Debt and Property” under s. 91(1A) of the Constitution Act, 1867, is broad enough to cover the creation of debt instruments embodying the public debt. However, it does not necessarily follow that the legislative power to provide for the nature of the liability on the instrument reflecting the public debt is a matter of s. 91(1A). Rather, it is more likely that liability on the debt instrument, created under s. 91(1A), is a matter of “property and civil rights” discussed above, unless the instruments are in the form of bills of exchange or promissory notes, in which case, they are legislated under the federal legislative power relating to “bills of exchange and promissory notes” discussed below. By parity of reasoning, it is doubtful whether a statute governing the holding and transfer of public debt instruments is in relation to the public debt. Rather, unless it is in the form of a bill of exchange or promissory note, the pith and substance of such a statute is property and civil rights, a matter which falls within provincial jurisdiction.

Federal provisions dealing with both the liability on, and the holding and transfer of, Government of Canada debt securities are actually unnecessary for the federal legislative scheme governing the public debt. As well, as a matter of policy, it is recommended that the federal government will refrain from covering the holding and transfer of government debt securities, even if it has the power to do so under s. 91(1A) of the Constitution Act, 1867. This recommendation follows from the absence of any convincing policy to single out federal government debt instruments for special treatment, in derogation from the general treatment given to all other securities under general comprehensive uniform provincial legislation, passed under the property and civil rights power.

Query whether such federal rules may be invalid. See General Motors. supra, n. 46 at 668 69.

In this context, some comparison with the position in the United States may be helpful. So far as U.S. law is concerned, in the view of the drafters of UCC Article 8, “U.S. government securities fall within the definition of security in Article 8 and therefore are governed by Article 8 in the same fashion as any other publicly held debt security.” In this sense, the approach proposed here for Canada follows similar lines. Yet, the drafters of the UCC Article 8 went on to acknowledge that the application of Article 8 to U.S. government securities may be “preempted by applicable federal law or regulation.” To that end, federal Treasury Regulations exist in the United States to govern, with respect to treasury securities, both the direct holding system and the upper tier of the indirect holding system for security entitlements.
Obviously, both the constitutional and historical backgrounds are unique for each country. But even without taking into account these factors, so far as the holding and transfer of Government of Canada securities are concerned, the U.S. situation differs from the Canadian situation in one major respect. In the United States, it is a Federal Reserve Bank, namely the central bank, which acts as the central securities depository (CSD) for U.S. government securities. Conversely, the central bank in Canada, the Bank of Canada, plays no CSD role in the indirect holding system for Government of Canada securities. It provides no separate CSD for Government of Canada debt securities. Rather, they are handled as part of the same system of indirect holding used for all securities. That is, the CSD role in Canada is performed by CDS Limited for government as well as corporate and other equity and debt securities. There may be an operational difference between the handling of non-government and government securities, but not in the fundamental legal relationship of the CSD in Canada with each type of issuer. To that end, the treatment in the United States of the relationship between the government as issuer and the central bank as a CSD is quite unique and thus may be inappropriate as a model to be followed in Canada.

However, under the PCSA the Bank of Canada does play an important role as a regulator of “clearing and settlement systems that have the potential to pose a systemic risk to Canada’s financial system.”

Regardless, it ought to be noted that U.S. Treasury Regulations govern only the position of the U.S. government towards its immediate party, the security holder in the direct holding system, and the Federal Reserve Bank, as the CSD, in the indirect holding system. These Treasury Regulations aim at being harmonious with Article 8. For the indirect holding system, they presuppose that all lower tiers, namely each relationship other than that with either the government or the Federal Reserve Bank, are governed by UCC Article 8. The latter is incorporated by reference into the Treasury Regulations as state law, even where it was not adopted by the state in question, so as to become, for the purpose of the Treasury Regulations, part of federal law.

By parity of reasoning, it is not contested here that the position of the Government of Canada as issuer towards an immediate party, such as the security holder in the direct holding system and the CSD in the indirect holding system, may be provided by regulations. Such regulations are to be made consistent with USTA, and following the U.S. Treasury Regulations, may possibly incorporate USTA by reference, for a province that has not adopted it. In a sense, such regulations are analogous to rules issued by a corporate issuer regarding the holding of its own securities on its books, by either a direct securities holder or a CSD. Naturally, unlike the situation in connection with corporate rules, the possibility of preemption by any federal regulations could be considered, but only in connection with specific rules that are individually determined to be inappropriate. In the final analysis, this type of determination is outside the present investigation. For our purposes, one should not lose sight of the fact that no separate federal statute governs the indirect holding system in the United States for security entitlements to U.S. government securities.

Such Regulations could be issued under the Financial Administration Act (Canada), R.S.C. 1985, c. F 11, s. 1, as an enhancement of the Domestic Bonds of Canada Regulations, C.R.C., c. 698.

For the indirect holding system, the Trade Commentary (Appendix B to Part 357, Section 357.10) identifies two types of Article 8 rules as inappropriate for the U.S. Government and Federal Reserve Banks. The first type is with respect to the issuer's obligations. The second type is with respect to the position of the U.S. Government and Federal Reserve Banks towards lower tier holders of securities entitlements.
7. JURISDICTION IN RELATION TO BILLS OF EXCHANGE AND PROMISSORY NOTES — DIRECT HOLDING

Under s. 91(18) of the Constitution Act, 1867, the exclusive legislative power of the Parliament of Canada extends to matters coming within “Bills of Exchange and Promissory Notes.” With respect to these types of instruments, provincial legislative authority in relation to “property” and civil rights is thus superseded. Accordingly, an exception to the exclusive provincial jurisdiction over securities holding and transfers exists with regard to securities which are either bills of exchange or promissory notes.

Exercising the legislative power conferred by s. 91(18), the federal Parliament passed the Bills of Exchange Act (BEA). Thereunder, a bill of exchange (“bill”) is “an unconditional order in writing, addressed by one person to another, signed by the person giving it, requiring the person to whom it is addressed to pay, on demand or at a fixed or determinable future time, a sum certain in money or to the order of a specified person or to bearer” (s. 16(1)). A promissory note (“note”) is “an unconditional promise in writing made by one person to another, signed by the maker, engaging to pay, on demand or at a fixed or determinable future time, a sum certain in money, to, or to the order of, a specified person or to bearer” (s. 176(1)). A certificated debt security may comply with the formal requirements of a bill or note governed by the BEA. It follows that the direct holding and transfer system of certificated securities that are either “bills” or “notes” is governed by the BEA.

There is, however, little doubt that in passing the BEA the federal Parliament did not exhaust its legislative power under s. 91(18) of the Constitution Act; federal statutes other than the BEA may govern bills and notes. Moreover, such a federal statute may supersede the BEA. In fact, instruments complying with the definitions of bills or notes under the BEA but nevertheless governed by a federal statute that supersedes the BEA may be securities, whose direct holding and transfer system is thus governed by that other federal statute. This has been a source of overlaps and unnecessary uncertainty as well as inconsistency. Particular overlaps have been noted between the BEA and CBCA. To preclude a result under which negotiable debt securities issued by federally incorporated companies are governed by a different law than the one governing negotiable debt securities issued by provincially incorporated companies, namely, the BEA, Crawford sensibly proposed originally to assign priority to the BEA. Under his view, negotiable debt securities, issued by both federally and provincially incorporated corporations, were to be governed by the BEA. However, subsequent amendments to federal statutes governing financial institutions, including the Bank Act, specifically made transfer provisions of each such statute applicable to negotiable instruments issued by the relevant financial institution, including banks. Such statutes contain express provisions superseding the BEA, so that as a matter of statutory interpretation, their applicability, over the provisions of the BEA, to securities in the form of bills and notes issued by each type of institution cannot be disputed. While relevant provisions in the various statutes that govern financial institutions are fairly uniform, diversity of legislative sources may eventually lead to the loss of uniformity. Uniformity within the federal domain is anyway undermined by such statutes due to existing variance between them and the BEA.

58 Canada Business Corporations Act, supra, n. 7, s. 48(3).


60 Bank Act, supra, n. 8, s. 81, definition of “security.” See also, Insurance Companies Act, supra, n. 8, s. 85; Trust and Loan Companies Act, supra, n. 8, s. 84; and Cooperative Credit Associations Act, supra, n. 8, s. 88.

61 See Bank Act, ibid., s. 83(1); Trust and Loan Companies Act, ibid., s. 86(1); Insurance Companies Act, ibid., s. 87(1) and Cooperative Credit Associations Act, ibid., s. 90(1).
With regard to federally incorporated companies, other than those governed by financial institutions legislation, it is therefore difficult now to invoke lack of uniformity with provincially incorporated companies as a rationalization for regarding the CBCA as necessarily superseded by the BEA. This is so notwithstanding the fact that the CBCA is itself not stated to supersede the BEA. Simply stated, the fact that at least some securities in the form of bills and notes, namely, those issued by federally incorporated financial institutions, are not governed by the BEA, may have far-reaching implications. This fact strongly undermines the position that for uniformity's sake, the application of the BEA to securities in the form of bills and notes issued by provincially incorporated companies justifies the application of the BEA also to securities in the form of bills and notes issued by federally incorporated companies other than regulated financial institutions. From this perspective, it is open to argue now that the CBCA supersedes the BEA with respect to such securities issued by federally incorporated companies other than regulated financial institutions. Arguably, all these duplications, overlaps, and ensuing uncertainties have been more accidental than intentional. They are nevertheless a source of confusion and uncertainty.

Overlaps between the BEA and other federal statutes governing bills and notes that are securities are critically reviewed in writings in Alberta Law Reform Institute, supra, n. 5 at 154 58, which recommend, in the footsteps of Crawford's original position, supra, n. 59, that any such overlaps are to be eliminated so as to bring about clarity. The unnecessary duplication partly reflects the position, specifically disfavoured above in Section 4, Incorporation of Companies and Banking, that securities holding and transfers laws may be passed under federal legislative powers relating to the incorporation of companies and banking.

A security which is neither bill nor note will be governed by valid provincial security transfer legislation. Whether a given security is a bill or note under existing federal law depends on its compliance with the statutory definition under either s. 16(1) (for a bill) or s. 176(1) (for a note) of the BEA. In many cases the determination of this issue is not easy, particularly with regard to the statutory requirement that the order (in the case of a bill) or promise (in the case of a note) must be "unconditional." There is the additional question whether government debt securities are covered by the BEA, even when they comply with the formal requirements. This latter question arises in light of s. 17 of the Interpretation Act, providing that no enactment binds the Crown "except as mentioned or referred to in the enactment." No specific language to that effect appears in the BEA.

Both existing duplication among federal statutes and uncertainty as to whether a security is a bill or note are harmful and detrimental to market certainty. Undoubtedly, the federal Parliament may eliminate duplication by specifically identifying the BEA as governing all securities that are bills or notes. At the same time, the power of the federal Parliament to define bills and notes so as to bring the defined instruments into the field reserved for federal jurisdiction under s. 91(18) of the Constitution Act has not been clarified. There is, however, little doubt that such power exists in relation to instruments circulating in financial markets that bear resemblance to the "historical" bills and notes whose law has been codified in bills of exchange legislation. To that end, there is also little doubt that federal jurisdiction under s. 91(18) of the Constitution Act, 1867, is broad enough to facilitate the amendment of the BEA with a view to expanding and clarifying its scope with regard to borderline cases. This could be done, for example, by refining and better...
defining the requirements for an “unconditional” order or promise, as well as by making the BEA specifically apply to the Crown. Under such circumstances, most borderline bill and note cases can be brought into federal jurisdiction.

However, using the BEA as the one statute to govern direct holding and transfer of securities that are bills or notes may not be the optimal solution. First, not all rules applicable to bills and notes in general are appropriate for bills and notes that are securities. This is recognized in the United States where, under the UCC, and even in the absence of any constitutional consideration, securities in the form of bills or notes are governed by Article 8 (covering securities) and not Article 3 (covering bills and notes in general). See UCC §§ 3-102 and 8-103(d). The rationale for excluding securities in the form of bills and notes from the statute governing bills and notes in general is outlined in Official Comment 2 to UCC §3-102. The Comment sets out a few rules applicable to bills and notes other than securities, such as the liability of an endorser and the discharge of the obligation to the holder rather than the registered owner. A second reason against designating the BEA as the one statute that governs direct holding and transfers of securities that are bills or notes is that any federal statute governing securities in the form of bills and notes may still give rise to duplication between the provincial and federal securities transfer statutes. Like any other duplication, this could be harmful.

In fact, the current treatment of the subject in other federal statutes, as indicated in text at n. 59 61 supra, is an acknowledgement to that effect, except that as indicated, the specific solution that had been adopted brought it further confusion and uncertainties.

*417 Accordingly, the most appropriate approach to the regulation of the direct holding and transfer of securities in the form of bills or notes is the specific exclusion of “securities” from the definitions of “bills of exchange” and “promissory note” under the federal BEA. This ought to be undertaken without the corresponding enactment of a federal statute applicable to securities that are bills or notes. This course of action will amount to the voluntary withdrawal of legislative powers by the federal Parliament in relation to securities that would have been bills or notes. It will have the effect of leaving the provincial “property and civil rights” legislative power unchallenged by the federal “bills of exchange and promissory notes” legislative power, which would have superseded it. Securities that would otherwise be governed by a federal statute would thus be left covered by the uniform provincial statute applying to securities holding and transfer in general. In the absence of any inconsistent federal statute, the general law provisions will not be superseded.

One advantage of this strategy is that it would bring the Canadian legislative approach even closer to that of its American counterpart. As under the UCC, there will be one statute dealing with bills and notes that are not securities, and another statute to govern securities, including those that are in the form of bills and notes. It is noteworthy in this context that, in their quest for a modern, efficient, and rational commercial law framework governing securities holding and transfers, and irrespective of any constitutional considerations, the Americans concluded that all provisions regarding the transfer of securities, including those that are bills of exchange or promissory notes, are to be included in one statute that will supersede the general one dealing with bills and notes. As demonstrated by the preceding analysis, subject to federal cooperation, there are no constitutional barriers to reaching the same result in Canada. The only difference with the United States will be that in Canada, the bills and notes statute not governing securities will remain federal. This is inevitable under the Canadian constitutional division of legislative powers, and immaterial for the purpose of the present discussion. At least in relation to the direct holding system, one uniform statute governing securities holding and transfers, passed by each province and territory, will be all-inclusive in terms of types and form of securities covered.

*418 If this approach is regarded as too bold, the alternative is to pass a federal-specific statute, covering securities in the form of bills and notes, whether government or other debt instruments. As indicated, due to specific features of securities that are bills and notes that distinguish them from bills and notes in general, this is a better approach than the one premised on an amendment of the BEA. As indicated, the passage of the BEA has not exhausted legislative
powers under s. 91(18) of the Constitution Act, 1867. Furthermore, covering all securities that are bills and notes, and specifically excluding them from the BEA, the proposed Act will not be a source of unproductive or harmful duplication on the federal level. The proposed Act will govern securities that are bills or notes. Its definitions will be made to clearly accommodate borderline cases, as previously proposed with respect to amendments to the BEA. The proposed Act will take into account the specific features of such securities as bills and notes but otherwise be harmonized with the provincial USTA. In a sense, on the federal level in Canada, this approach will follow the treatment of the matter in the United States, where securities that are bills and notes are not governed by the general law of bills and notes. Nevertheless, as indicated, this approach will result in an unnecessary duplication between provincial and federal jurisdiction and is therefore recommended only if the proposal to voluntarily decline federal jurisdiction is not accepted. 68

As stated earlier, the federal government's refusal to withdraw from this area would be justified if the provinces and territories were unable to implement the USTA uniformly.

8. JURISDICTION IN RELATION TO BILLS OF EXCHANGE AND PROMISSORY NOTES — INDIRECT HOLDING

While certificated securities that are bills or notes are subject to federal legislative power, rights and obligations in the indirect holding system remain under provincial legislative jurisdiction, even in relation to security entitlements to financial assets consisting of bills and notes. This is so even if the federal Parliament does not follow the suggestion made above in Section 7 and does not exempt the instruments themselves (namely, securities that are bills or notes) from the scope of federal legislation.

*419 The reason is that the indirect holding system is not concerned with the underlying financial asset itself, which may be a certificate in the form of a bill or note falling under federal jurisdiction, but rather with a “security entitlement,” credited to a securities account maintained by a securities intermediary, and defined in both UCC §8-102(a)(17) and Draft USTA s. 1(1) as “the rights and property ... with respect to a financial asset.” The scope of such “property interest” is described in UCC §§-503(b), as well as in Draft USTA s. 108(2), to be “a pro rata property interest in all interests in that financial asset held by the securities intermediary ...” with whom the “entitlement holder” maintains a “securities account.” Consistent with the definition in UCC §8-102(a)(9) as well as in Draft USTA s. 1(1) (as supplemented by s. 5), the “financial asset” may be either a security or security entitlement held by the securities intermediary to back the security entitlement held by the investor. The investor typically does not have a direct property interest in any underlying specific security held by the securities intermediary, but rather a claim to the pool of assets backing the investor’s security entitlement.

Even when the financial asset is a bill or note, so as to fall under federal jurisdiction, neither the “pro rata property” in the instrument, nor the balance of the rights of the entitlement holder towards the securities intermediary, is a matter of the law of bills and notes “in the strict sense” so as to fall within federal legislative power. This is even more apparent in the more usual case when the investor’s claim is to a pro rata share in a pool of underlying instruments and other financial assets, rather than any particular instrument. Moreover, whatever is the analogy between the bill or note and the security entitlement with respect to it as a financial asset, strictly speaking, in the law governing the indirect holding, there is no transfer of a security entitlement, but rather the extinction of one and the creation of another by means of a debit and credit posted to respective securities accounts. There is thus no analogy whatsoever between a transaction involving a bill or note and a transaction concerning a security entitlement.

In general, the law of bills and notes “in the strict sense” covers matters such as the form, issue, negotiation, and discharge of bills and notes. 69 There is some controversy as to the reach of the federal legislative *420 power to the law of bills and notes “in the broad sense,” namely, to the law governing the proprietary and obligatory features of bills and notes in matters that would otherwise be governed by the general law of the province under its power to legislate over property and civil rights. 70 But regardless, at the most, it may be argued that federal legislation with respect to “broad sense”
matters is valid as ancillary, or necessarily incidental, to “strict sense” legislation on bills and notes. BEA provisions with regard to transfer other than by negotiation (s. 60(1)), capacity (s. 46), and valuable consideration (s. 52) may fall into this category. On the other hand, it is submitted here, legislation governing the indirect holding of financial assets consisting of bills and notes is concerned with the law governing property and other rights of an entitlement holder as against a securities intermediary in the indirect holding system rather than with the law of bills and notes, so as to be a matter of property and civil rights, and not of bills of exchange or promissory notes. As indicated in Section 2 of this article, insofar as it encroaches upon a field of competence belonging to the other level of government, the “double aspect” doctrine is to be relied on by either the federal government or the provinces with extreme caution and restraint. It is only when the federal and provincial characteristics of a law are roughly equal in importance that it can be concluded “that laws of that kind may be enacted by either the [federal] Parliament or a [provincial] Legislature.”


70 For the view, based on a historical approach, that the exclusive jurisdiction given to the federal Parliament in relation to bills and notes was confined to the law of bills and notes in the strict sense, see J. Leclaire, “La Constitution par l'histoire: portée et étendue de la compétence fédérale exclusive en matière de lettres de change et de billets à ordre” (1992), 33 Les Cahiers de Droit 535.

71 Hogg, supra, n. 15 at 361, relying on Lederman, supra, n. 19 at 244, and citing case law adopting this approach.

*421 At present, the indirect holding and transfer of financial assets that are bills and notes within securities accounts maintained by CDS Limited is governed in Canada by the federal Depository Bills and Notes Act (DBNA). Crawford states that the DBNA “was created to deal with the problems of electronic delivery” of bills and notes and that, to that end, it “creates a new class of investment securities designed to be traded and delivered by means of screen-based systems.” Viewed as bills or notes, such instruments fall within the ambit of exclusive federal legislative power under s. 91(18) of the Constitution Act, 1867.

72 Depository Bills and Notes Act, S.C. 1998, c. 13. The DBNA uses the same fictional deemed delivery and possession concepts as s. 85 of the OBCA, such that a transaction related to a “depository bill” or “depository note” effected by way of an entry on the books of CDS Limited has the same effect as a delivery of a bill of exchange in bearer form under the BEA. The USTA Consultation Paper discusses the problems with this concept and the DBNA in general. See USTA Consultation Paper, supra, n. 1 at 41 45.


Nonetheless, in conclusion, Crawford acknowledges that the DBNA “is unlikely to be of significant long-term influence, since it employs a flawed, but expedient, concept of deemed physical delivery that will probably become fully obsolete within a very few years.” This will occur upon the introduction of modern securities transfer and holding legislation, namely, USTA, governing the indirect holding system. As discussed, the focus of the law governing the indirect holding system is on the bundle of rights that an entitlement holder has on the basis of its relationship with its securities intermediary. Such rights include a “pro rata” property in the pool of financial assets held by the securities intermediary. The focus is not on the right to any specific physical instrument, “constructively” delivered from one person to another,
while physically held by the CSD at the highest tier of the chain in the indirect holding system. It is therefore submitted here that Crawford's defence of the constitutionality of the DBNA need not be seen as applicable to legislation governing security entitlements to financial assets that are bills and notes held at all levels of the chain in the indirect holding system.

74 Ibid., at 242.

*422 So far, the discussion in this section has assumed that securities in the form of bills and notes are subject to federal legislative jurisdiction. The discussion has been concerned with the legislative power over the indirect holding system, that is, with the security entitlements to such financial assets. Obviously, no argument in support of federal jurisdiction over the indirect holding system for securities issued in the form of bills and notes could effectively be made if the federal Parliament chooses to follow the suggestion made above in Section 7, and withhold its legislative powers, and not provide for the inclusion of securities which otherwise would be bills and notes within the scope of federal legislation. As discussed, in the absence of a federal statute, securities that would be bills and notes are to be left covered by the general law governing the direct securities holding and transfer of the province. In such a case, the application of general provincial legislation governing the indirect holding system, discussed in this section, to security entitlements to financial assets in the form of bills or notes, could not be questioned.

9. CONCLUSION

The conclusion of this article is that the holding and transfer of securities in both the direct and indirect holding systems is a matter of provincial jurisdiction under the legislative power relating to property and civil rights. It is not a matter relating to the incorporation of companies, and thus does not fall under the federal jurisdiction in relation to federally incorporated companies. Equally, it is not a matter subject to federal jurisdiction over banking, local work to the advantage of more than one province, the regulation of trade and commerce, or interest. On the whole, it is also not a matter falling within the federal legislative power over the public debt. However, certificated debt securities may be subject to federal jurisdiction relating to bills of exchange and promissory notes. With respect to such securities, federal jurisdiction thus extends to the direct holding and transfer system, though not to the indirect holding system.

It is nevertheless recommended that applicable federal legislation should exclude all securities from statutory definitions of “bills of exchange” and “promissory notes” so as to vacate the field in favour of provincial jurisdiction. This would provide for a more rational boundary *423 line between the law governing bills and notes and the law governing securities holding and transfers, and harmonize with the boundary line that currently exists in the United States between these two bodies of law, namely, UCC Articles 3 and 8. However, this recommendation is made on the assumption that the USTA is uniformly adopted, and uniformly maintained, by the provinces and territories to a degree achieved by all 50 U.S. states in relation to the UCC.

In the final analysis, stretched to its limit, federal jurisdiction over securities holding and transfers is patched and segmented. This is not the case for provincial jurisdiction, which can be made to apply to the whole field. The entire area of securities holding and transfers, in both the direct and indirect system, governed by one piece of commercial legislation passed by a single jurisdictional level, will eliminate uncertainty, increase efficiency, and result in harmony with the legislative treatment of the same subject matter in the United States. Provided federal jurisdiction is withdrawn from the direct holding system of certificated securities which are bills of exchange and promissory notes, comprehensive securities holding and transfer legislation can be introduced uniformly in Canada exclusively at the provincial level. Assuming such legislation is uniformly adopted and maintained by all provinces and territories, legal certainty and market efficiencies will be enhanced, and confusion and inefficiencies will be eliminated in Canada.

Footnotes

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