1960

*May 23
Oct. 4

LYLE FRANCIS SMITH .....APPELLANT;

AND

HER MAJESTY THE QUEEN, UPON THE INFORMATION OF A. BRUCE SWAIN ..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Constitutional law—Criminal law—Offences as to prospectus under provincial securities legislation—Whether conflict with Criminal Code false prospectus provision—The Securities Act, R.S.O. 1950, c. 351, ss. 38(1), (9), 47, 47a, 63(1), 68(1)—Criminal Code, 1953-54 (Can.), c. 51, ss. 343, 406.

On an appeal from an order prohibiting the magistrate from further proceeding with an information charging the accused with certain offences under *The Securities Act,* R.S.O. 1950, c. 351, the Court of Appeal reversed the judgment of the trial judge and quashed the order of prohibition. The accused appealed to this Court.

*PRESENT: Kerwin C.J. and Taschereau, Locke, Cartwright, Fauteux, Abbott, Martland, Judson and Ritchie JJ.

Held (Locke, Cartwright and Ritchie JJ. dissenting): The appeal should be dismissed.

Per Kerwin C.J. and Taschereau, Fauteux, Abbott and Judson JJ.: Section 63 of *The Securities Act* is not criminal law within head 27 of s. 91 of the *British North America Act*, 1867, as it is not a provision the pith and substance of which is to prohibit an act with penal consequences. It is merely incidental to the main purpose and aim of the enactment, which is to regulate the security business.

There is no repugnancy between s. 63 of the Act and s. 343 of the *Criminal Code*, as the purposes of the two enactments are entirely different. *Lymburn v. Mayland*, [1932] A.C. 318, *Provincial Secretary of Prince Edward Island v. Egan*, [1941] S.C.R. 396, *O'Grady v. Sparling*, [1960] S.C.R. 804, *Regina v. Yolles*, [1959] O.R. 206, and *Regina v. Dodd*, [1957] O.R. 5, referred to.

Per Abbott, Martland and Judson JJ.: There is no conflict between s. 63(1)(d) and (e) of the Act and s. 343 of the Code. The latter provision makes it an offence to make, circulate or publish a prospectus known to be false in a material particular with intent to induce persons to become shareholders in a company. Section 63(1)(d) and (e), on the other hand, is designed to penalize a person who, required as he is, by the provisions of the Act, to furnish full, detailed information about the company whose securities are sought to be sold, is knowingly responsible for incorporation in that material of information which is false.

The matter of the provincial legislation is not so related in substance to s. 343 of the Code as to be brought within the scope of criminal law in the sense of s. 91 of the *British North America Act*. *The Provincial Secretary of Prince Edward Island v. Egan, supra*, and *Lymburn v. Mayland, supra*, referred to.

Per Locke J., *dissenting*: By s. 343 of the Code Parliament has declared to be criminal and has provided the penalty for the publishing of false statements, whether written or oral, which are known to be false in a material part with the intent to induce others to purchase securities, and by s. 406 has also rendered criminal an attempt to do so.

As the whole purpose of *The Securities Act* is the protection of the public from relying upon false information when purchasing securities, and that of s. 63 to declare criminal the act of making fraudulent misstatements in a prospectus designed for the purpose of inducing such purchases, there is in essence no difference between the offences created and those prohibited by the Code.

Therefore the offences dealt with in s. 63 of the Act trespass upon the exclusive jurisdiction of Parliament in this field and are accordingly *ultra vires*. *Lymburn v. Mayland, supra*, and *Tennant v. Union Bank of Canada*, [1894] A.C. 31, referred to.

Per Cartwright J., *dissenting*: The difference between s. 38(1) and (9) of the Act and s. 343 of the Code, in that under the latter it would be necessary to establish not only that the accused had been knowingly responsible for the making of a material false statement in the prospectus, but also, that this was done with intent to induce persons, whether ascertained or not, to become shareholders in the company, is apparent rather than real. Having regard to the presumption that a person intends the natural consequences of his acts, proof of the allegations in any of the counts in the information would constitute a *prima facie* case under s. 343(1)(a) of the Code.

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Moreover, there is no realistic distinction between making a statement with intent that it shall be relied upon by persons before they become shareholders, as provided for in s. 68(1), and making a statement "with intent to induce" those persons to become shareholders.

By the combined effect of ss. 38, 47, 47a and 63(1) of the Act the Province has attempted to punish by fine, imprisonment, or both, a course of conduct which is so similar to that condemned by s. 343 of the Code as to create an inconsistency or conflict, with the result that the Dominion legislation must prevail. *Rex. v. Nat. Bell Liquors,* [1922] 2 A.C. 218, and *Lymburn v. Mayland, supra,* referred to.

Per Ritchie J., *dissenting*: The impugned provisions of the Act have the combined effect, when read in the context of the statute as a whole, of creating an offence which is substantially the same as that for which provision is made in s. 343 of the Code.

Although the specific "intent to induce persons . . . to become shareholders of the Company" which is required under s. 343 of the Code is not expressly stated to be one of the ingredients of the offences created by the combined effect of s. 63(1)(d) and (e), and s. 38(1) and (9) of the Act, it is nevertheless implicit in the latter provisions that such an intent must form a part of the offences thereby created. *Provincial Secretary of Prince Edward Island v. Egan, supra,* referred to.

APPEAL from a judgment of the Court of Appeal for Ontario[1], reversing the judgment of Hughes J. Appeal dismissed, Locke, Cartwright and Ritchie JJ. dissenting.

C. Thomson, for the appellant;

H. S. Bray and *W. A. Macdonald,* for the respondent;

W. R. Jackett, Q.C. and *S. Samuels,* for the Attorney General of Canada;

R. Cleary, for the Attorney General of Alberta;

J. Holgate, for the Attorney General of Saskatchewan;

L. Tremblay, Q.C., for the Attorney General of Quebec.

The judgment of Kerwin C. J. and of Taschereau, Fauteux, Abbott and Judson JJ. was delivered by

THE CHIEF JUSTICE:—By leave of this Court Lyle Francis Smith appeals from the judgment of the Court of Appeal for Ontario[1] reversing the judgment of Hughes J. and quashing the order of prohibition granted by the latter. That order prohibited His Worship Magistrate J. P. Prentice or such other justices as might be in Magistrate's Court in the City of Toronto from further proceeding to hear the charges against the appellant wherein he is charged with

[1] [1959] O.R. 365, 31 C.R. 79, 125 C.C.C. 43.

offences under subss. (1) and (9) of s. 38 of *The Securities Act*, R.S.O. 1950, c. 351, contrary to s. 63 thereof. The learned judge of first instance pointed out that it was not contended that the Act as a whole was invalid and, in fact, any such contention could not hope to succeed in view of the decision of the Judicial Committee in *Lymburn v. Mayland*[1]. If subss. (1) and (9) of s. 38 of the Act are valid, there can be no question that the Provincial Legislature had power by s. 63 to make it an offence to fail to comply with those provisions.

The general aim of the Act is to regulate the security business (there being a wide definition of "security") and this is accomplished by the setting-up of The Ontario Securities Commission, with power to it to supervise the trading in securities by regulation and also power to supervise the trading in securities during a primary distribution by requiring the filing of a prospectus. It is sufficient for the disposition of this appeal to indicate that subs. (1) of s. 38 prohibits a person or company from trading in any security issued by a mining company, where such trade would be in the course of a primary distribution to the public of such security, until there has been filed with the Commission a prospectus containing a full, true and plain disclosure relating to the security. Subsection (9) compels the filing of an amended prospectus where a change occurs during the period of primary distribution to the public in any material fact contained in any prospectus. Section 63 reads:

> 63. (1) Every person, including any officer, director, official or employee of a company, who is knowingly responsible for,
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> (*a*) any fictitious or pretended trade in any security;
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> (*b*) any course of conduct or business which is calculated or put forward with intent to deceive the public or the purchaser or the vendor of any security as to the nature of any transaction or as to the value of such security;
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> (*c*) the making of any material false statement in any application, information, statement, material or evidence submitted or given to the Commission, its representative, the registrar or any person appointed to make an investigation or audit under this Act, under this Act or the regulations;
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> (*d*) the furnishing of false information in any report, statement, return, balance sheet or other document required to be filed or furnished under this Act or the regulations;

[1] [1932] A.C. 318, 101 L.J.P.C. 89.

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(e) the commission of any act or failure to perform any act where such commission or failure constitutes a violation of any provision of this Act or the regulations; or

(f) failure to observe or comply with any order, direction or other requirement made under this Act or the regulations,

shall be guilty of an offence and on summary conviction shall be liable to a penalty of not more than $2,000 or to imprisonment for a term of not more than one year or both.

(2) Subsection 1 shall be deemed to apply, *mutatis mutandis*, to any company save that the money penalties may be increased in the discretion of the magistrate to a sum of not more than $25,000.

(3) Every person or company is a party to and guilty of an offence under this Act,

(a) that actually commits the offence;

(b) that does or omits an act for the purpose of aiding another person or company in the commission of the offence;

(c) that abets another person or company in the commission of the offence; or

(d) that counsels or procures another person or company to commit the offence.

(4) Every person or company that counsels or procures another person or company to be a party to an offence under this Act of which that other person or company is afterwards guilty is a party to that offence, although it may be committed in a way different from that which was counselled or procured.

(5) Every person or company that counsels or procures another person or company to be a party to an offence under this Act is a party to every other offence under this Act which that other person or company commits in consequence of such counselling or procuring and which the person or company counselling or procuring knew, or ought to have known, to be likely to be committed in consequence of such counselling or procuring.

This section is not criminal law within Head 27 of s. 91 of the *British North America Act*, 1867, as it is not a provision the pith and substance of which is to prohibit an act with penal consequences. It is merely incidental to the main purpose and aim of the enactment. The words of Lord Atkin, speaking for the Judicial Committee in *Lymburn v. Mayland*[1], at p. 324, are particularly apt:

There was no reason to doubt that the main object sought to be secured in this part of the Act is to secure that persons who carry on the business of dealing in securities shall be honest and of good repute, and in this way to protect the public from being defrauded.

There is no repugnancy between s. 63 of *The Securities Act* and s. 343 of the Criminal Code. The latter reads:

343. (1) Every one who makes, circulates or publishes a prospectus, statement or account, whether written or oral, that he knows is false in a material particular, with intent

[1] [1932] A.C. 318, 101 L.J.P.C. 89

(a) to induce persons, whether ascertained or not, to become shareholders or partners in a company,

(b) to deceive or defraud the members, shareholders or creditors, whether ascertained or not, of a company,

(c) to induce any person to entrust or advance anything to a company, or

(d) to enter into any security for the benefit of a company, is guilty of an indictable offence and is liable to imprisonment for ten years.

(2) In this section, "company" means a syndicate, body corporate or company, whether existing or proposed to be created.

The purposes of the two enactments are entirely different. Counsel for the appellant argued that the word "knowingly" in subs. (1) of s. 63 of the Ontario Act indicated that the Legislature was encroaching upon the field of criminal law in its widest sense. However, it is not the same conduct being dealt with by the two legislative bodies. The word "knowingly" is really in ease of the provisions of *The Securities Act*. I agree with the submission of counsel for the respondent that the main purpose of the provincial enactment is to ensure the registration of persons and companies before they are permitted to trade in securities, coupled with what is essentially the registration of the securities themselves before the latter may be traded in the course of a primary distribution to the public. Parliament undoubtedly had power to enact s. 343 of the Criminal Code, but a prospectus may in one aspect and for one purpose be the subject of valid provincial legislation, while, in another aspect and for another purpose, it may be the subject of valid federal legislation: *Provincial Secretary of Prince Edward Island v. Egan*[1]. Since the Provincial Legislature has power to prescribe certain information to be supplied to the Commission and since the Legislature has power to provide for punishment of infractions, the enactments of the Legislature and of Parliament may coexist. The remarks of Lord Atkin at pp. 326-327 of the report in *Lymburn v. Mayland*[2], mentioned by Hughes J., cannot apply to the problem before us:

> The penal provisions of s. 14 have been subsequently incorporated into the Criminal Code of the Dominion by 20 & 21 Geo. 5, c. 11 (Canada), s. 5, which now presumably occupies the field so far as the criminal law is concerned.

[1] [1941] S.C.R. 396, 3 D.L.R. 305. [2] [1932] A.C. 318, 101 L.J.P.C. 89.

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As appears from the reasons for judgment of Judson J. in *O'Grady v. Sparling*[1], with which I agree, the decision of the Court of Appeal for Ontario in *Regina v. Yolles*[2] was approved, while the previous decision of that Court in *Regina v. Dodd*[3] was not.

The appeal should be dismissed with costs, but there should be no costs to or against the Attorney General of Canada or to or against the Attorney General of any of the Provinces.

LOCKE J. (*dissenting*):—The question to be determined in this appeal is as to whether subss. (b), (d) and (e) of s. 63 of *The Securities Act*, R.S.O. 1950, c. 351, trespasses upon a field which is occupied by legislation duly enacted by Parliament under head 27 of s. 91 of the *British North America Act*.

It was not contended before Hughes J., nor was it contended before this Court, that the *Securities Act*, other than in respect of the penal provisions of s. 63, was *ultra vires*. The decision of the Judicial Committee in *Lymburn v. Mayland*[4] need not be considered, therefore, except that portion of the judgment delivered by Lord Atkin dealing with the criminal provisions of the Alberta legislation which are referred to at p. 327 of the report. To the extent that this is relevant to the present matter, it appears to be contrary to the view advanced by the respondents in the present appeal.

It is necessary to determine the real object and purpose of s. 63, considered in its context, and it is of some assistance in arriving at a conclusion to examine the history of the legislation. The section reads in part:

> Every person, including any officer, director, official or employee of a company, who is knowingly responsible for,
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> * * *
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> (*b*) any course of conduct or business which is calculated or put forward with intent to deceive the public or the purchaser or the vendor of any security as to the nature of any transaction or as to the value of such security;
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> * * *
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> (*d*) the furnishing of false information in any report, statement, return, balance sheet or other document required to be filed or furnished under this Act or the regulations;

[1] [1960] S.C.R. 804.
[2] [1959] O.R. 206, 19 D.L.R. (2d) 19.
[3] [1957] O.R. 5, 7 D.L.R. (2d) 436.
[4] [1932] A.C. 318, 101 L.J.P.C. 89.

(e) the commission of any act or failure to perform any act where such commission or failure constitutes a violation of any provision of this Act or the regulations;

* * *

shall be guilty of an offence and on summary conviction shall be liable to a penalty of not more than $2,000 or to imprisonment for a term of not more than one year or both.

In 1928, by c. 34, the legislature enacted the *Security Frauds Prevention Act*. The purpose of the legislation is indicated by its title; it was the protection of the public against fraud and fraudulent acts by brokers and other persons offering securities for sale of the nature defined in s. 2. Brokers and salesmen were prohibited by s. 3 from trading in securities unless they were registered in accordance with the requirements of the Act and applicants for registration were required to furnish bonds for the protection of persons dealing with them. Fraud was defined as including, *inter alia*, any intentional misrepresentation by word, conduct, or in any manner, of any material fact, either present or past, and any intentional omission to disclose any such fact, and generally any course of conduct or business calculated or put forward with intent to deceive the public or the purchaser of any security as to the value of such security. Section 16 of this Act provided that every person violating any provision of the Act or the regulations designated as an offence, or who does any fraudulent act not punishable under the provisions of the *Criminal Code* should be liable upon conviction under the *Summary Convictions Act* to a money penalty and to imprisonment.

The provisions of this statute and its name were changed and added to by various amendments between the years 1928 and 1950, when it appeared under the name of *The Securities Act* in the Revised Statutes of Ontario. Various amendments made since that date do not affect the present consideration.

Under the Act as it now is, brokers, investment dealers as defined, and persons issuing securities—an expression defined to include bonds, debentures and shares—are prohibited from trading unless they are registered with the Ontario Securities Commission, a body constituted under the provisions of the Act. Trading is defined as including any attempt to deal in, sell or dispose of a security for valuable consideration. Sections 38, 39 and 40 require

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respectively that before the securities of a mining company, an industrial company or an investment company may be offered for sale to the public, a prospectus signed by the directors or promoters of such companies giving the information detailed in these sections must be accepted for filing by the commission. Part XI of the Act, consisting of sections 49 to 62, both inclusive, under the heading "Provisions relating to Trading in Securities Generally", contains further provisions designed for the protection of the public. These are followed by Part XII of the Act which includes s. 63 and it appears under the general heading "Offences and Penalties".

Section 68(1) of the Act reads in part:

> Where a prospectus has been accepted for filing by the Commission under this Act, every purchaser of the securities to which the prospectus relates shall be deemed to have relied upon the representations made in the prospectus whether the purchaser has received the prospectus or not and, if any material false statement is contained in the prospectus, every person who is a director of the company issuing the securities at the time of the issue of the prospectus, and every person who, having authorized such naming of him, is named in the prospectus as a director of the company . . . shall be liable to pay compensation to all persons who have purchased the securities for any loss or damage such persons may have sustained.

The other provisions contained in Part XIII of the Act deal with general matters which are not relevant to the matters to be considered.

It will be seen from the foregoing that, as the original name of the Act implied, the purpose of this legislation is the protection of the public who purchase securities from fraudulent statements or acts which might induce such purchases. Sections 1 to 62 of the Act, both inclusive, to some of which reference has been made, contain provisions designed to ensure that the statements made by brokers and others engaged in the sale and distribution of shares, bonds, debentures or other securities, whether the same be in writing in the form of a prospectus or oral, relating to the security offered for sale shall be the truth and in accordance with the facts and provide the machinery designed to accomplish this purpose.

I agree with my brother Cartwright that if the subject matter of the punishment of persons who induce others to purchase securities by false or fraudulent statements had

not been dealt with in the *Criminal Code,* s. 63 of *The Securities Act* would be *intra vires* the legislature under head 15 of s. 92.

The punishment of directors or other persons who induce others to become members of a company by false or fraudulent statements has long been treated as an offence to be punished by fine or imprisonment. Section 84 of the *Larceny Act,* 24-25 Vict. (Imp.), c. 96, read:

> Whosoever, being a Director, Manager, or Public Officer of any Body Corporate or Public Company, shall make, circulate, or publish, or concur in making, circulating, or publishing, any written Statement or Account which he shall know to be false in any material Particular, with Intent to deceive or defraud any Member, Shareholder, or Creditor of such Body Corporate or Public Company, or with Intent to induce any Person to become a Shareholder or Partner therein . . . shall be guilty of a Misdemeanor, and being convicted thereof shall be liable, at the Discretion of the Court, to any of the Punishments which the Court may award as herein-before last mentioned.

In substantially this form these provisions were enacted as s. 85 of the Statutes of Canada for 1869 (c. 21). It appears that s. 343 of the *Criminal Code* replaces these provisions of the earlier legislation. That section reads in part:

> Every one who makes, circulates or publishes a prospectus, statement or account, whether written or oral, that he knows is false in a material particular, with intent
>
> (*a*) to induce persons, whether ascertained or not, to become shareholders or partners in a company,
>
> is guilty of an indictable offence and is liable to imprisonment for ten years.

It will be seen that the offence described in s. 63 (1) (*b*) of *The Securities Act* if made with the intent, *inter alia,* to induce persons to become shareholders of a company is an offence under this section and is punishable as such.

Section 406 of the Criminal Code reads in part:

> Except where otherwise expressly provided by law, the following provisions apply in respect of persons who attempt to commit or are accessories after the fact to the commission of offences, namely,
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> * * *
>
> (*b*) every one who attempts to commit or is an accessory after the fact to the commission of an indictable offence for which, upon conviction, an accused is liable to imprisonment for fourteen years or less, is guilty of an indictable offence and is liable to imprisonment for a term that is one-half of the longest term to which a person who is guilty of that offence is liable.

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In my opinion subss. (*b*), (*d*) and (*e*) directly trespass upon the field occupied by s. 343 of the *Criminal Code*. The requirement that the prospectus must be filed with the Commission is not, as has been said, merely to enable that body to determine whether or not the security may be offered for sale to the public—that is of course one of the reasons—but also to place on record a statement of the facts affecting the value of the security upon the faith of which purchasers are by virtue of s. 68 deemed to have purchased, whether or not they have read the prospectus or become aware of its terms. The application to the Commission to file the prospectus is a necessary step on the part of the trader to enable him to offer the security to the public for sale and is made by him for this and for no other purpose.

The section does not purport to deal with innocent misrepresentations; it is only directed against persons who are knowingly responsible for the making of the false statements and this can only refer to fraudulent conduct on the part of the person charged. In the present matter the language of charges 1, 2 and 3 is that Smith was knowingly responsible for the furnishing of false information in a document.

Since the whole purpose of the Act is the protection of the public from relying upon false information when purchasing securities, and that of s. 63 to declare criminal the act of making fraudulent misstatements in a prospectus designed for the purpose of inducing such purchases, there is in essence no difference between the offences created and those prohibited by s. 343 of the *Criminal Code*. The person applying to file a false prospectus must be taken to be aware of the terms of s. 68 of *The Securities Act* and is either publishing or attempting to publish the document within the meaning of s. 343 for the purpose and with the intent of inducing others to purchase the security offered upon the faith of the false statements.

In the present matter, as appears from the information, the prospectus was that of a mining company and was received for filing by the Commission and a receipt issued.

The statements were, therefore, published and were so published with the intent to induce others to purchase the securities. Whether any of the securities were sold on the faith of the prospectus we are not informed.

Accepting the statements in the information as being correct, while the appellant was not charged that he published the prospectus with the intent to induce any person to become a shareholder in the company as must have been done had the charge been laid under s. 343 of the *Criminal Code,* he was charged with the very conduct which that section is designed to prohibit. If the publishing of the false prospectus to the Commission for the purpose and with the intent above mentioned was not in itself sufficient to constitute the offence referred to in s. 343, it was, in my opinion, an attempt to commit that offence within the meaning of s. 406 of the Code which I have mentioned above.

In *Tennant v. Union Bank of Canada*[1], Lord Watson, in discussing an apparent conflict between the *Mercantile Amendment Act of Ontario* and the *Bank Act,* said:

> Statutory regulations with respect to the form and legal effect, in Ontario, of warehouse receipts and other negotiable documents, which pass the property of goods without delivery, unquestionably relate to property and civil rights in that province; and the objection taken by the appellant to the provisions of the Bank Act would be unanswerable if it could be shewn that, by the Act of 1867, the Parliament of Canada is absolutely debarred from trenching to any extent upon the matters assigned to the provincial legislature by sect. 92. But sect. 91 expressly declares that, "notwithstanding anything in this Act", the exclusive legislative authority of the Parliament of Canada shall extend to all matters coming within the enumerated classes; which plainly indicates that the legislation of that Parliament, so long as it strictly relates to these matters, is to be of paramount authority.

Here Parliament, under the powers vested in it by head 27 of s. 91, has declared to be criminal, and provided the penalty for, the publishing of false statements, whether written or oral, which are known to be false in a material part with the intent to induce others to purchase securities, and by s. 406 has also rendered criminal an attempt to do so. The offences dealt with in s. 63 in *The Securities Act,* for the reasons above stated, trespass upon the exclusive jurisdiction of Parliament in this field and are accordingly, in my opinion, *ultra vires.* No one could, of course, suggest

[1] [1894] A.C. 31 at 45, 63 L.J.P.C. 25.

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that there is any doubt as to the jurisdiction of Parliament in the matter and it is not within the powers of the Legislature to deal with offences of the same nature by penal legislation to supplement or vary the penalties prescribed by the Code.

As the report shows, the main question considered by the Judicial Committee in *Lymburn v. Mayland*[1] was as to whether the *Security Frauds Prevention Act*, apart from its criminal provisions, was *intra vires*, and it is only at the conclusion of the reasons delivered that any mention is made of s. 20 which made it an offence to commit any fraudulent act not punishable under the *Criminal Code*. Considering the Act as a whole, Lord Atkin said that there was no ground for holding that the Act was a colourable attempt to infringe upon the exclusive legislative power of the Dominion as to criminal law. There is, of course, in the present matter no such contention advanced by the appellant. As to s. 20 the judgment reads (p. 327):

> It is said that this encroaches on the exclusive legislative power of the Dominion as to criminal law. Having regard to the wide definition of "fraudulent act" above referred to, it may well be that this argument is well founded. But so far as the section is invalid it appears to be clearly severable.

This appears to indicate, without deciding the point, that the section in question was beyond provincial powers, a conclusion inconsistent with the arguments addressed to us in this matter on behalf of the respondent.

I have had the advantage of reading, and I agree with, the judgment to be delivered by my brother Cartwright in this matter and would allow this appeal, set aside the order of the Court of Appeal and restore the order of Hughes J.

CARTWRIGHT J. (*dissenting*):—This appeal is brought, pursuant to leave granted by this Court, from a unanimous judgment of the Court of Appeal for Ontario[2], quashing an order of prohibition made by Hughes J. directed to His Worship Magistrate Prentice or such other Justices as might be in Magistrate's Court in the City of Toronto prohibiting them from further proceeding with an information charging the appellant with offences under *The Securities Act*, R.S.O. 1950, c. 351, hereinafter referred to as "the Act".

[1] [1932] A.C. 318, 101 L.J.P.C. 89.
[2] [1959] O.R. 365, 31 C.R. 79, 125 C.C.C. 43.

The information in question contained the following four counts:

(1) That Lyle Francis Smith, formerly of the City of Toronto in the County of York, being a director of Canadian All Metals Explorations Limited, between the 13th day of January, 1955, and the 13th day of April, 1955, in the County of York and elsewhere in the Province of Ontario, was knowingly responsible for the furnishing of false information in a document, namely a prospectus for Canadian All Metals Explorations Limited dated the 4th day of March, 1955, submitted to the Ontario Securities Commission by Canadian All Metals Explorations Limited, pursuant to subsection 1 of Section 38 of The Securities Act, and for which a receipt was issued by the Registrar of the Ontario Securities Commission on April 12th, 1955, which prospectus was required to be filed pursuant to subsection 1 of Section 38 of The Securities Act, contrary to the provisions of Section 63 of The Securities Act, R.S.O. 1950, c. 351, and Amendments thereto.

(2) AND FURTHER that the said LYLE FRANCIS SMITH, being a director of Canadian All Metals Explorations Limited, between the 12th day of April, 1955, and the 28th day of September, 1955, in the County of York in the Province of Ontario was knowingly responsible for the furnishing of false information in a document, namely, an Amendment dated the 8th day of September, 1955, to the prospectus of Canadian All Metals Explorations Limited dated the 4th day of March, 1955, submitted to the Ontario Securities Commission pursuant to subsection 9 of Section 38 of The Securities Act, and for which a receipt was issued by the Registrar of the Ontario Securities Commission on the 27th day of September, 1955, which Amendment was required to be filed pursuant to subsection 9 of Section 38 of The Securities Act, contrary to the provisions of Section 63 of The Securities Act, R.S.O. 1950, c. 351, and Amendments thereto.

(3) AND FURTHER that the said LYLE FRANCIS SMITH being a director of Canadian All Metals Explorations Limited, between the 12th day of April, 1955 and the 15th day of October, 1955, in the County of York and elsewhere in the Province of Ontario was knowingly responsible for the furnishing of false information in a document, namely an Amendment dated the 3rd day of October, 1955, to the prospectus of Canadian All Metals Explorations Limited dated the 4th day of March, 1955, submitted to the Ontario Securities Commission, pursuant to subsection 9 of Section 38 of The Securities Act, and for which a receipt was issued by the Registrar of the Ontario Securities Commission on October 14th, 1955, which Amendment was required to be filed pursuant to subsection 9 of Section 38 of The Securities Act, contrary to the provisions of Section 63 of The Securities Act, R.S.O. 1950, c. 351 and Amendments thereto.

(4) AND FURTHER that the said LYLE FRANCIS SMITH, being a director of Canadian All Metals Explorations Limited, between the 13th day of January, 1955, and the 14th day of February, 1956, in the County of York and elsewhere in the Province of Ontario, was knowingly responsible for failure to perform certain acts where such failure constituted a violation of subsection 1 of Section 38 of The Securities Act, R.S.O. 1950, c. 351, and Amendments thereto, in that the said LYLE FRANCIS SMITH, being a director of Canadian All Metals Explorations Limited, between the 13th day of January, 1955, and the 14th day of February, 1956, in the County of York and elsewhere in the Province of Ontario, was knowingly responsible for trading by Canadian All Metals Explorations Limited,

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on its own account, in securities issued by a mining company, namely Canadian All Metals Explorations Limited, where such trading was in the course of a primary distribution to the public of such securities, without filing with the Ontario Securities Commission, and without obtaining a receipt therefor from the Registrar of the Ontario Securities Commission, a prospectus containing full, true and plain disclosure relating to the securities issued by the said Canadian All Metals Explorations Limited and setting forth the information required to be given by clauses (i), (j), (o), (q), and (u) of subsection 1 of Section 38 of The Securities Act contrary to Sub-Section 1 of Section 38 and Section 63 of The Securities Act, R.S.O. 1950, chapter 351 and amendments thereto.

Section 38(1) of the Act, which is referred to in counts (1) and (4) of the information, is as follows:

38(1) No person or company shall trade in any security issued by a mining company either on his or its own account or on behalf of any other person or company where such trade would be in the course of a primary distribution to the public of such security until there has been filed with the Commission a prospectus, and a receipt therefor obtained from the registrar, which prospectus shall be dated and signed by every person who is, at the time of filing, a director or promoter of the mining company issuing the security or an underwriter or optionee of such security, and which prospectus shall contain a full, true and plain disclosure relating to the security issued and shall set forth.

(There follow 23 clauses lettered from (a) to (w), several of which contain sub-clauses, setting out in detail the matters required to be disclosed)

Clauses (*i*), (*j*), (*o*), (*q*) and (*u*), which are referred to in count (4) of the information are as follows:

(*i*) the shares sold for cash to date tabulated under each class of shares as follows:
  (i) the number of shares sold, separately listed as to price,
  (ii) the total cash received for the shares sold, and
  (iii) the commissions paid on the sale of the shares;

(*j*) the particulars of securities, other than shares, sold for cash to date as follows:
  (i) the securities sold,
  (ii) the total cash received for the securities sold, and
  (iii) the commissions paid on the sale of the securities;

(*o*) the details of future development and exploration plans of the management showing how it is proposed to expend the proceeds from current sales of securities;

(*q*) the amount and general description of any indebtedness to be created or assumed, which is not shown in a balance sheet filed with the Commission, and also particulars of the security, if any, given or to be given for such indebtedness;

(*u*) any other material facts not disclosed in the foregoing;

Section 38(9) of the Act, which is referred to in counts (2) and (3) of the information, is as follows:

(9) Where a change occurs during the period of primary distribution to the public in any material fact contained in any prospectus, financial statement or report accepted for filing under this section, which is of such a nature as to render such prospectus, financial statement or report misleading, an amended prospectus, financial statement or report shall be filed within twenty days from the date the change occurs but, subject to any direction of the Commission, the amended prospectus shall be required to be signed only by the signatories to the original prospectus and where any change in directors, promoters, underwriters or optionees has occurred since the filing of the original prospectus the decision of the Commission as to who shall be required to sign the amended prospectus or as to any like matter shall be final.

Section 63 of the Act, which is referred to in all of the counts, is set out in the reasons of the Chief Justice.

It is clear that each count charges an offence created by the Act, that in count (1) by the combined effect of s. 38(1) and s. 63(1)(d), those in counts (2) and (3) by the combined effect of s. 38(9) and s. 63(1)(d), and that in count (4) by the combined effect of s. 38(1) and s. 63(1)(e); and the questions are (i) whether, in the absence of conflicting legislation by Parliament, it is within the power of the Legislature to create these offences, and (ii) whether the provisions creating them are so far in conflict with existing provisions of the *Criminal Code* as to be inoperative. The question whether the provisions of the Act other than those mentioned in this paragraph are *intra vires* of the legislature arises only in connection with Mr. Thomson's argument that certain provisions of s. 63 other than those contained in s. 63(1)(d) and (e) are *ultra vires* and that the section is inseverable.

It was decided in *Rex v. Nat Bell Liquors*[1], that where a provincial Act imposes penalties for enforcing a law of the Province made in relation to any matter coming within any of the classes of subjects enumerated in s. 92 of the *British North America Act,* proceedings to enforce such penalties are proceedings in a criminal cause in the sense in which the word "criminal" is used in what is now s. 40 of the *Supreme Court Act,* although the provincial Act

[1] [1922] 2 A.C. 128, 91 L.J.P.C. 146.

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creating the offence is not legislation in relation to "the criminal law" in the sense in which that term is used in head 27 of s. 91 of the *British North America Act*.

The appellant does not contend that the Act as a whole is invalid. Viewed in the constitutional aspect it does not differ essentially from the *Security Frauds Prevention Act*, 1930, of Alberta, the validity of which was asserted by the Judicial Committee in *Lymburn v. Mayland*[1].

In my opinion, it was rightly conceded that the provisions of s. 38 with which we are concerned are *prima facie* within the powers of the legislature. Their effect is (i) to prohibit persons from trading in any security issued by a mining company where such trade would be in the course of a primary distribution to the public until there has been filed with the Commission a prospectus containing full, true and plain disclosure of certain specified information, and a receipt therefor has been obtained from the Registrar, and (ii) to require the filing of an amended prospectus where a material change occurs during the period of primary distribution. These provisions are an integral part of a law providing for the regulation of the sale of securities in the province with a view to protecting the public from being defrauded; one of their purposes and effects is to ensure that the Commission shall receive true factual information of the sort necessary to enable it to perform this function of regulation; but, as is pointed out by Hughes J., by virtue of ss. 47 and 47a of the Act, the prospectus required by s. 38(1) to be filed with the Commission will find its way in the form in which it is filed into the hands of members of the public who have been invited to buy the shares of the mining company involved, and consequently, another of the purposes and effects of s. 38(1) read with ss. 47 and 47a is to require that prospective purchasers shall be given a copy of a true prospectus.

The main arguments of the appellant are (i) that those provisions of the Act the combined effect of which is to create the four offences with which the appellant is charged are inoperative because they are in conflict with the provisions of s. 343 of the *Criminal Code;* and (ii) that provisions of s. 63 other than clauses (d) and (e) of subs. (1)

[1] [1932] A.C. 318, 101 L.J.P.C. 89.

are invalid and, whether or not they are severable, disclose the intention of the Legislature to invade the field of the criminal law reserved to Parliament by head 27 of s. 91.

As to the first of these arguments, it will be observed that the offences with which the appellant is charged may be briefly described as follows:

(1), being knowingly responsible for the furnishing of false information in a prospectus filed with the Commission the filing of which was required by s. 38(1) of the Act;

(2) and (3), being knowingly responsible for furnishing false information in two documents amending the said prospectus filed with the Commission the filing of which was required by s. 38(9) of the Act;

(4), being knowingly responsible for trading by the mining company on behalf of which the prospectus was filed in securities issued by it when such trading was in the course of a primary distribution to the public of such securities without filing with the Commission a true prospectus as required by s. 38(1).

As to count (4) it is obvious from reading the other counts that what is alleged against the appellant is not that no prospectus had been filed when the trading took place but that the prospectus and amendments which were filed contained false information.

It may well be that on an application for prohibition the Court cannot interpret the meaning of an ambiguous count by reference to the other counts in the same information. If what is intended to be charged in count (4) is that the appellant was knowingly responsible for trading in the manner described when no prospectus had been filed at all other considerations would arise and it is my tentative view that it would be *intra vires* of the Legislature to make it an offence to trade under such circumstances. It is also, I think, questionable whether an application for prohibition was the appropriate remedy as the learned Magistrate would seem to have had jurisdiction to decide the question whether the provisions of the Act on which the four counts are based were *ultra vires* of the Legislature. However, these procedural matters were not raised before us and all counsel sought a decision on the constitutional questions which were so fully dealt with in the courts below. I propose therefore

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to deal with the case on the assumption that the meaning of count (4) is that which I have indicated in the preceding paragraph of these reasons.

In approaching the question whether the alleged conflict exists, it is necesary to consider what are the essential matters which the prosecution would have to establish to prove the commission of the offences charged.

As to count (1) these would be:—(i) that a prospectus was filed with the Commission for Canadian All Metals Explorations Limited, hereinafter referred to as "the Company"; (ii) that the company was a mining company; (iii) that the prospectus contained false information; and (iv) that the appellant was knowingly responsible for furnishing the false information.

As to counts (2) and (3) the matters to be proved would be the same as in the case of count (1) *mutatis mutandis* having regard to the fact that the false information was contained not in an original prospectus but in amendments thereto.

As to count (4) the matters to be proved would be:—(i) that the company was a mining company; (ii) that the company had traded on its own account in securities issued by it in the course of the primary distribution to the public of such securities; (iii) that at the time of such trading there had not been filed a prospectus containing full, true and plain disclosure of the matters required to be disclosed by the clauses of s. 38(1) specified in the count; and (iv) that the appellant was knowingly responsible for the matters stated in (ii) and (iii).

The relevant portions of s. 343 of the *Criminal Code* are as follows:

> 343. (1) Every one who makes, circulates or publishes a prospectus, statement or account, whether written or oral, that he knows is false in a material particular, with intent
>
> (*a*) to induce persons, whether ascertained or not, to become shareholders . . . in a company, . . .
>
> is guilty of an indictable offence and is liable to imprisonment for ten years.

To make a case under this section based on the facts which are alleged against the appellant, it would be necessary for the prosecution to allege in the information and to prove not only that the person charged had been knowingly

responsible for the making of a material false statement in the prospectus, but also, that this was done with intent to induce persons, whether ascertained or not, to become shareholders in the company; in the case of none of the four counts with which the appellant is charged would it be necessary for the prosecution to prove the existence of such an intention; the existence of this difference is one of the primary reasons which brought the Court of Appeal to the conclusion that the legislation creating the offences with which the appellant is charged is not in conflict with s. 343 of the *Criminal Code.*

This difference appears to me to be apparent rather than real. Subsections (1) and (9) of s. 38 of the Act are concerned with one activity only, i.e., the trading in securities issued by a mining company where such trade would be in the course of a primary distribution to the public of such securities; the subsections only come into operation when some person or company proposes to endeavour to make such a distribution; they require the person or company so proposing to file a true prospectus as specified; it is difficult to imagine a situation in which any person or company would proceed to file a prospectus under s. 38 unless it intended to attain the end of having members of the public purchase the shares to which the prospectus relates, that is to say, intended to induce persons, probably as yet unascertained, to become shareholders in a company. Having regard to the presumption that a person intends the natural consequences of his acts it would seem that proof of the allegations contained in any of the counts in the information would constitute a *prima facie* case under s. 343(1) (a) of the *Criminal Code.*

Moreover, s. 68(1) of the Act provides in part as follows:

> Where a prospectus has been accepted for filing by the Commission under this Act, every purchaser of the securities to which the prospectus relates shall be deemed to have relied upon the representations made in the prospectus whether the purchaser has received the prospectus or not . . .

There does not appear to me to be any realistic distinction between making a statement with intent that it shall be relied upon by persons before they become shareholders in the company and making a statement "with intent to induce" those persons to become shareholders.

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The other primary reason on which the judgment of the Court of Appeal appears to me to be based is expressed as follows by Porter C.J.O.:

> The object of this section (i.e. s. 343 of the *Criminal Code*) is different from that of the sections of The Securities Act in issue here. The objective of this section of the *Criminal Code* is to make a criminal offence of fraud upon shareholders and certain other persons in certain dealings with companies. The provincial sections are confined to information to be supplied to the Securities Commission to carry out in part the general purpose of the Securities Act, viz., to regulate the manner in which the business of selling securities should be conducted, and to prevent frauds upon the public. The pith and substance of these sections of The Securities Act is to assure full disclosure prior to dealings with the public.

With respect, I find myself unable to agree with this view, because as is pointed out by Hughes J., when s. 38 is read in the context of the rest of the Act and particularly ss. 47 and 47a, it is plain that the detailed information which s. 38 requires shall be truthfully given is intended and, indeed, required to be placed before those members of the public to whom the shares are offered. I can find no escape from the conclusion expressed by Hughes J. in the following passage:

> I think it is clear, taking into account the meaning of the word prospectus and the effect of Sections 38(1), 47 and 47a taken together with 63(1) that the Province has attempted to punish by fine, imprisonment or both a course of conduct which is so similar to that condemned by Section 343 of the Criminal Code of Canada as to create an inconsistency or conflict. The Dominion legislation must therefore prevail and, as a result, I find that it is not within the competence of the Legislature of Ontario to create the offences contemplated by the application of Section 63(1) (d) and (e) to the provisions of Section 38(1) and (9) of The Securities Act. . . .

If the judgment of the Court of Appeal stands, it will bring about the result that a person who is alleged to have committed the offence described in s. 343(1) (a) of the Code may, at the option of the Crown, be charged on the same facts not under the Code but under the Act and thereby be deprived of the right to be tried by a jury.

The agreement with the view of Hughes J. which I have expressed above renders it unnecessary for me to deal with the second main argument of Mr. Thomson, as to the provisions of s. 63 of the Act other than clauses (d) and (e) of subs. (1). I think it desirable, however, to say that in my opinion any provisions of s. 63 which may be found to be in conflict with provisions of the *Criminal Code* would be severable from the remainder of the section. I wish also

to make it clear that I share the opinion of Hughes J. and of the Court of Appeal that the impugned provisions of the Act standing alone would be valid. It is only because of my agreement with the view of Hughes J. that they conflict with the provisions of s. 343 of the *Criminal Code* that I reach the conclusion that they are inoperative to create the offences with which the appellant is charged.

In the result, I would allow the appeal, set aside the order of the Court of Appeal and restore the order of Hughes J.; the appellant is entitled to recover his costs in the Court of Appeal and in this Court from the informant; I would make no order as to the costs of the Attorneys General.

The judgment of Abbott, Martland and Judson JJ. was delivered by

MARTLAND J.:—The circumstances which gave rise to this appeal are set forth in the reasons of the Chief Justice and of my brother Cartwright. The question in issue is as to whether or not it was within the competency of the Legislature of Ontario to create the offences contemplated by the application of s. 63(1) (d) and (e) to the provisions of s. 38(1) and (9) of *The Securities Act,* R.S.O. 1950, c. 351. There is no need for me to repeat here those provisions.

There would appear to be unanimity of view that the provisions of s. 38 of that Act are *prima facie* within the powers of the Legislature. The sole issue is as to whether the paragraphs of s. 63 above mentioned are in conflict with the provisions of s. 343 of the *Criminal Code* so as to make them inoperative.

The Securities Act exists to regulate the securities business. This is achieved through two main forms of control, the first of which is directed towards the persons or companies selling the securities and the second of which is directed to the securities being sold.

Trading in securities without registration is prohibited by s. 6 of the Act. The duty to grant registration and the power to refuse, suspend or cancel such registration are imposed upon and vested in the Commission by s. 7 and s. 8 of *The Securities Act.*

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Trading in securities in the course of a primary distribution of such securities to the public is prohibited by ss. 38, 39 and 40 of *The Securities Act* unless certain prerequisites, which vary somewhat depending on whether the company whose securities are being offered is a mining, industrial or investment company, are first completed in accordance with the relevant section. Each of the sections requires that a prospectus first be submitted to the Commission making "full, true and plain disclosure" relating to the securities which it is proposed to offer containing the information stipulated in the section. The Commission, under s. 44 of *The Securities Act,* in its discretion, may accept the prospectus submitted to it for filing and direct the Registrar to issue the receipt referred to in ss. 38, 39 and 40, unless it appears that one of the circumstances set out in s. 44 exists. In such a case it is implicit that the Commission is under a duty not to accept the material and forthwith to give the notice provided for by s. 45. The equivalent of s. 8, which provides for suspension or cancellation of existing registrations, is s. 46 which empowers the Commission, where it discovers that any of the circumstances in s. 44 exist following the issuance of a receipt for the prospectus by the Registrar, to order that all trading in the primary distribution to the public of the securities to which the prospectus relates shall cease.

Thus control is exercised through the registration of persons and companies before they are permitted to trade in securities coupled with what is essentially the registration of the securities themselves before the securities may be traded in the course of a primary distribution to the public.

The important feature of ss. 38, 39 and 40 is that, in addition to requiring that a prospectus filed with the Commission shall contain a true, full and plain disclosure relating to the securities proposed to be issued, it is also required that the prospectus shall set forth the specific, detailed information required in each of these sections and shall be accompanied by certain additional material, including financial statements. Unless the material required by these sections is filed with and accepted by the Commission, there can be no lawful trading in the securities in question in the course of a primary distribution.

If the material required to be furnished to the Commission under these sections is accepted by it and a receipt issued, then, and only then, ss. 47 and 47a come into operation and require that a copy of the prospectus and of the financial statements filed with the Commission shall come into the hands of the members of the public who are invited to buy the securities involved. This requirement is not only to compel the furnishing to such persons of a prospectus which is true, but also that it must be one which gives the detailed information regarding the affairs of the company which is required to be furnished to the Commission itself under ss. 38, 39 and 40.

The scheme of these sections of the act is, therefore, to prevent trading in securities in the course of primary distribution until the Commission has received all the information required by the Act and has accepted such material for filing, and then to ensure that persons who are asked to subscribe for such securities shall have all the information which the Commission itself has received.

The purpose of these sections is, of course, defeated if the information is untrue and, in my opinion, the Legislature has the power to require that this information shall be true and to penalize persons who furnish false information, or who fail to comply with the requirements of the Act.

It does not appear to me that there is a conflict between s. 63(1)(d) and (e) and s. 343 of the *Criminal Code*. The latter provision makes it an offence to make, circulate or publish a prospectus known to be false in a material particular with intent to induce persons to become shareholders in a company. This section deals with a false statement in a material particular deliberately made in order to persuade someone to subscribe for shares in a company. The section, of course, has nothing to say as to what the contents of a prospectus must be.

Section 63(1)(d) and (e), on the other hand, is designed to penalize a person who, required as he is, by the provisions of the Act, to furnish full, detailed information about the company whose securities are sought to be sold, is knowingly responsible for the incorporation in that material of information which is false. A good deal of that information might never be incorporated in a prospectus at all unless the Act had required it. Paragraph (d) is not limited

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to falsity of the prospectus "in a material particular", but applies to any information required to be furnished under the Act. It affects any one who is knowingly responsible for the furnishing of the information, whether he personally is interested in the marketing of the securities or not; for example, the engineer, geologist or prospector who furnishes the report on the property of a mining company under subs. (2) of s. 38, or the auditor who furnishes a report pursuant to subs. (8a) of that section.

The test to be applied in cases of this kind is that which was stated by Duff C. J. in *The Provincial Secretary of the Province of Prince Edward Island v. Egan*[1]:

> In every case where a dispute arises, the precise question must be whether or not the matter of the provincial legislation that is challenged is so related to the substance of the Dominion criminal legislation as to be brought within the scope of criminal law in the sense of section 91. If there is repugnancy between the provincial enactment and the Dominion enactment, the provincial enactment is, of course, inoperative.

For the reasons already given, I do not think that the matter of the provincial legislation in question here is so related in substance to s. 343 of the *Criminal Code* as to be brought within the scope of criminal law in the sense of s. 91 of the *British North America Act*. I do not think there is repugnancy between s. 63(1)(d) and (e) of *The Securities Act* and s. 343 of the *Criminal Code*. The fact that both provisions prohibit certain acts with penal consequences does not constitute a conflict. It may happen that some acts might be punishable under both provisions and in this sense that these provisions overlap. However, even in such cases, there is no conflict in the sense that compliance with one law involves breach of the other. It would appear, therefore, that they can operate concurrently.

I do not think that the views expressed by Lord Atkin in *Lymburn v. Mayland*[2], with reference to s. 20 of *The Security Frauds Prevention Act*, 1930 (Alta.), c. 8, are adverse to the conclusion which I have reached.

Section 20(1) of that Act provided, in part, as follows:

> 20. (1) Every person who violates any provision of this Act or the Regulations designated as an offence, or who does any fraudulent act not punishable under the provisions of *The Criminal Code of Canada*, shall be liable upon summary conviction thereof to a penalty . . .

[1] [1941] S.C.R. 396 at 402, 3 D.L.R. 305.
[2] [1932] A.C. 318, 101 L.J.P.C. 89.

Referring to this section, at p. 327 of the report, Lord Atkin said:

> It is said that this encroaches on the exclusive legislative power of the Dominion as to criminal law. Having regard to the wide definition of "fraudulent act" above referred to, it may well be that this argument is well founded. But so far as the section is invalid it appears to be clearly severable.

It will be noted that the portion of s. 20 to which he directed his attention was not that which imposed a penalty for the violation of the Act, or of the Regulations, but the general provision relating to "any fraudulent act not punishable under the provisions of *The Criminal Code of Canada*". This wide provision might, as he indicated, have gone beyond the imposing of a penalty for enforcing a provincial law. The provisions of s. 63(1)(d) and (e) of the Ontario Act do not offend in that way.

In my opinion, therefore, the appeal should be dismissed with costs, but there should be no costs to or against the Attorney General of Canada nor the Attorneys General of any of the provinces.

RITCHIE J. (*dissenting*):—I agree with Hughes J. and with the views expressed in the reasons for judgment of Locke and Cartwright JJ. which I have had the benefit of reading that although the impugned provisions of the Ontario *Securities Act* would be valid if they stood alone, they have the combined effect when read in the context of the statute as a whole of creating an offence which is substantially the same as that for which provision is made by s. 343 of the *Criminal Code* and to that extent they are inoperative. In this respect this case is, in my opinion, basically different from that of *O'Grady v. Sparling*[1].

I am also of opinion that although the specific "intent to induce persons... to become shareholders of a company" which is required under the provisions of s. 343 of the *Criminal Code* is not expressly stated to be one of the ingredients of the offences created by the combined effect of s. 63(1) (d) and (e), s. 38(1) and s. 38(9) of *The Securities Act,* it is nevertheless implicit in the latter provisions that such an intent must form a part of the offences thereby created. This factor, in my view, distinguishes the present case from that of *Stephens v. The Queen*[2].

[1] [1960] S.C.R. 804. [2] [1960] S.C.R. 823.

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The provisions of ss. 63(1), 38(1), 38(9) and 68(1) of *The Securities Act* and ss. 343 and 406 of the *Criminal Code* are set out in the reasons of other members of this Court.

The first three counts of the information here in question which are fully reproduced in the reasons of Cartwright J. all charge the appellant with being

> . . . knowingly responsible for the furnishing of false information in a document . . . submitted to the Ontario Securities Commission . . . pursuant to

s. 38 of *The Securities Act "and for which a receipt was issued by the Registrar of the Ontario Securities Commission."* (The italics are mine.)

It seems to me that under the provisions of *The Securities Act,* whether the document be a prospectus as charged in the first count or an amendment to a prospectus as charged in the second and third counts, the information furnished to the Commission in such a document takes on a very different character and significance after it has been accepted for filing and a receipt therefor has been issued by the Registrar than it bore before it was so accepted.

Before the prospectus or amendment is accepted for filing by the Commission, although it is true that the information therein contained is being furnished for the purpose and with the intention of qualifying the shares or other securities to which it relates for trading by way of primary distribution to the public, it is nevertheless only being furnished to the Commission and not, at this stage, to the public, and if the Commission becomes aware that any of it is false it can refuse to file the prospectus in which case no trading in the securities can take place and the public will not be exposed to the consequences of being misled by the information (see *Securities Act,* ss. 44 and 45).

After the prospectus has been accepted for filing by the Commission the information therein contained ceases to be simply a matter between the person who supplies it and the Commission and it becomes information which is required to be delivered to, and deemed to be relied upon by, all persons before they become shareholders in the company to which it relates (see ss. 47 and 47(a) referred to in the judgment of Hughes J. and s. 68(1) of *The Securities Act*).

It is to be observed that the document which is required by ss. 47 and 47(a) to be delivered to every purchaser of shares before confirmation of sale is "a copy of the prospectus or amended prospectus, *whichever is the last filed with the Commission*" (the italics are mine) and the opening words of s. 68(1) state clearly that it is only in cases "*where a prospectus has been accepted for filing by the Commission*" (the italics are mine) that "every purchaser of the securities to which the prospectus relates shall be deemed to have relied upon the representations made in the prospectus...".

In considering the true meaning and effect to be attached to the language of s. 38(1) of *The Securities Act* which is reproduced in the decision of Cartwright J., it is worthy of note that the words "trade" or "trading" as used in the statute include "any solicitation for or obtaining of a subscription to... a security for valuable consideration..." (see *Securities Act*, s. 1(t)).

It is to be noted that the "false information" referred to in the present charges is information required to be furnished pursuant to ss. 38(1) and 38(9) of *The Securities Act*, and in my view the particulars required by these sections are material particulars, at least in the sense that no trading can take place in the securities to which they relate unless they are so furnished. The second and third counts lodged against the appellant each relate to "an amendment" submitted pursuant to s. 38(9) and it is pointed out that under the terms of that subsection such an amendment only becomes necessary

> Where a change occurs during the period of primary distribution to the public in any material fact contained in any prospectus, financial statement or report accepted for filing . . . .

The present appellant is not merely charged with being "knowingly responsible for the furnishing of false information submitted to the Ontario Securities Commission" and it is not necessary to express an opinion as to the validity of such a charge.

What the appellant is here charged with is being knowingly responsible for the furnishing of false information in a prospectus and amendments submitted pursuant to s. 38(1) or s. 38(9) *for which a receipt was issued by the Registrar* indicating that it had been accepted for filing

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and, in my opinion, this, in effect, means that he is charged with *being responsible for having knowingly made a material false statement which is to be used for soliciting other persons to become shareholders of the company to which it relates and which is to be relied upon by all purchasers of such shares.*

As this offence seems to me to be in substance the same as that of making

> . . . a statement . . . that he knows is false in a material particular, with intent . . . to induce persons . . . to become shareholders in a company

and as this is the language of s. 343 of the *Crimnal Code,* I am of opinion, as I have indicated, that there is a direct conflict between the impugned provisions of the provincial statute and those of the *Criminal Code* and that it is not within the competence of the Legislature of Ontario to create the offences here in question.

In reaching this conclusion, I am mindful of the language used by Sir Lyman Duff in *Provincial Secretary of Prince Edward Island v. Egan*[1], where he said:

> It is, of course, beyond dispute that where an offence is created by competent Dominion legislation in exercise of the authority under section 91(27), the penalty or penalties attached to that offence, as well as the offence itself, become matters within that paragraph of section 91 which are excluded from provincial jurisdiction.

I would allow the appeal and restore the order of Hughes J.

Appeal dismissed with costs, Locke, Cartwright and Ritchie JJ. dissenting.

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