

Constitutional Law – Practice Question and Answer

Session: Basic Concepts

Topic: Pith and Substance Doctrine

Recommended time: 1 hour plus 20 minutes reading time

Score: 100 Marks

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QUESTION

Two years ago, Johnson established a stockbroking firm in Brandon, Manitoba whose main business objective was trading and investing in the quoted stocks of public companies. In May last year, Anthony Gaye who at that time was the General Manager of Lambert Accordion Corporation (Lambert Corp) met Johnson at a dinner. Both men got along after Johnson had informed Anthony Gaye that he had many clients who were interested in investing in stocks.

Four months later, Anthony Gaye met Johnson and made a proposal. According to Anthony, Lambert Corp is in dire need of capital to finance a new oil exploration venture. And since Johnson's clients were interested in stocks, Anthony requested him to introduce the stocks of Lambert Corp to the clients and convince them to invest therein. When asked about the prospect of the new oil exploration venture, Anthony admitted that Lambert Corp had not yet concluded the geophysical survey but that he would rely on Johnson not to disclose this to the interested clients. In fact, Anthony showed a prospectus prepared for Lambert Corp which claimed that the geophysical survey had since been completed and drilling had actually started. Anthony prevailed on Johnson to confirm this statement to his clients as this would "push up" the company's share price, promising a five per cent (5%) extra commission on all capital secured through Johnson. This agreement was sealed by both parties.

Last month, one of Johnson's clients who had committed a huge sum into the project discovered the false information in the prospectus after she engaged a private investigator who reported that drilling had not commenced, contrary to the claims in the prospectus.

Anthony Gaye and Johnson were later arrested by the police and charged with 38 counts of issuing false information in a prospectus, in contravention of Manitoba's Security Law. The relevant sections of the Security Law state as follows:

- 1) This law shall regulate the licensing of persons and companies who, after licensing, shall be permitted to trade in the registered securities of companies for the purpose of distribution to interested members of the public.
- 9) No person or company shall make a statement that the person or company knows or reasonably ought to know:
 - a. in any material respect and at the time and in the light of the circumstances in which it is made,
 - i. is misleading or untrue, or
 - ii. does not state a fact that is required to be stated or that is necessary to make the statement not misleading, and
 - b. would reasonably be expected to have a significant effect on the market price or value of a security or an exchange contract.
- 10) Anyone who contravenes this law is guilty of an offence and is liable to a fine of not less than \$2,000,000 or to imprisonment for a term of not more than five years less a day, or to both.

Anthony Gaye has retained you for his criminal defence. In his last discussions with you, he sought to know whether the Security Law as enacted by the Province of Manitoba is valid and wants you to explore this line of defence.

After Anthony left, you checked in with Jeffrey, your partner and sought his opinion as to Anthony's suggestions. Jeffrey presented a vigorous argument to the effect that, though legislations on securities were within provincial property and civil rights power, ss. 9 and 10 of the Security Law were ultra vires the province because they were colourable criminal law, trenching on the exclusive federal criminal law power. He argued that the dominant purpose and effect of the provisions is criminal law and this should be constitutionally challenged on the ground that Manitoba lacked the legislative competence to enact such law. And even if the province had the authority, the provisions conflicted with and frustrated the purpose of the Criminal Code and were thereby inoperative. He referred you to sections 361, 363 and 380(2) of the Criminal Code which contain same and almost similar provisions as to the offence of false pretence particularly in relation to valuable security.

He concluded that the Security Law aims to do the same thing already being done by the Criminal Code and is clearly a replica of the criminal law which the province has no power to enact.

You asked for a couple of hours to enable you put up an argument to counter Jeffrey's.

The answer you seek to provide is that the Manitoba Security Law is valid. Prepare a draft of your answer.