Question 1

The purpose of the amended statute, given the legislative history, is likely to be unchanged from what the SCC concluded in *Reference Re Securities Act*. The act attempts to create a comprehensive national system of securities regulation. The proposed changes to do not appear to change that underlying goal of the program. However, taken individually, each amendment serves a different function and attempts to delegate authority to a national Regulator. It is therefore necessary to consider each amendment individually to determine whether they are constitutionally valid.

The first amendment gives the national securities regulator power to register securities traders if empowered by provincial authority. This is likely a constitutionally valid provision. The purpose appears to be regulation of the trade of securities. Trade of securities appears to fall squarely within s. 92(13) of the CA 1867 (the province's power over property and civil rights). If this is indeed the case, the federal government cannot legislate over this area itself, nor can it delegate authority to an arm's length body because a government may not delegate authority that it does not directly possess (*Furtney*). This provision, however, requires that the provinces delegate authority to register securities traders. If trade of securities does indeed fall within 92(13), the provinces may delegate the authority (*Grisnich*; *Furtney*). The fact that the national regulator has powers delegated to it by both federal and provincial legislatures does not limit the ability of either level of government to delegate authority that they already possess to the regulator (*Grisnich*).

The second amendment may not be constitutionally valid. This amendment uses federal legislative authority to delegate authority to the regulator to allow the regulator to grant civil remedies for breaches of the program. As mentioned above, parliament may not delegate

authority to a body that it does not otherwise possess (*Furtney*). It is therefore necessary to determine whether the granting of power over civil remedies is within federal legislative competence.

Power over civil remedies appears to fall within the provincial jurisdiction of property and civil rights (*Bedard*), which would suggest that the federal government does not have the ability to delegate that power to the national regulator. However, the federal government may suggest that this provision is dealing with trade affecting the dominion as a whole (*Parsons*) and that the provision is an enforcement mechanism for a national regulatory scheme. The provision does indeed appear to be part of a national scheme for regulating securities (*West Bank First Nation*). This said, it certainly seems that federal power over this area could erode provincial autonomy (*CN Transport*) since the provinces are capable of regulating civil remedies themselves. Moreover, since the entire regulatory scheme is an opt-in program for the provinces, it cannot be said that failure to include some provinces in the scheme would jeopardize the Canadian constitutional balance. It is therefore unlikely that a court would conclude that the creation of civil remedies for breaches of the program falls within the federal trade and commerce power under the banner of trade affecting the dominion as a whole.

The federal government might then claim that they can assume jurisdiction over civil remedies using the federal residuary based found in the Peace Order and Good Government (POGG) clause in the preamble to s. 91. Such a claim would likely be unsuccessful. The *Securities Act* (nor any of the provisions within it) does not fall within the ambit of federal authority created by the emergency powers doctrine. The legislation is not temporary and does not make any pretense at being a response to an emergency. Parliament's basis for jurisdiction through POGG would therefore be by way of the national concern doctrine. The consequences

of the trade of security may well be of national concern, but that is not sufficient for parliament to take jurisdiction under the national concern doctrine. Matters of national concern must be indivisible and cannot be an aggregate of smaller matters (*Re Anti-Inflation Act*). The inability of the provinces to effectively legislate an aspect of the matter may also suggest national concern (*Crown Zellerbach*). The creation of civil remedies for the breaches of securities regulation is not beyond provincial competence, and indeed the Securities Act, as an opt-in program, does appear to be suggesting that it might be. Additionally, it is hard to see trade of securities as being indivisible and distinct from provincial matters. Provinces have regulated securities since confederation and there is no particular reason to believe that the issue has grown beyond them, and the act itself does not comprehend that possibility. Rather, the act is a tool for legislative convenience, intended to simply make regulation easier and uniform.

If the federal government were able to establish that they had jurisdiction, interjurisdictional immunity might still suggest that the authority of the regulator cannot be applied to security traders. The federal authority, even if found to be valid, would still intrude onto the provincial property and civil rights power. If that intrusion impairs a core competency within property and civil rights, interjurisdicitonal immunity could apply (*Canadian Western Bank*). To determine what the core competency is, we must look to the purpose of the property and civil rights power. The purpose appears to be to allow provinces to regulate economic activity at a local level. Trade in securities is a vital aspect of economic activity, and likely a core competency of property and civil rights. The delegation of authority to the regulator by the federal government impairs this competency by failing to permit the provinces to determine, based on provincial interests, what the civil consequences of a breach are.

The third amendment attempts to walk the line between federal and provincial authority by having the federal government delegate regulation of derivative issuers who are international in scope and the provinces delegate regulation if derivative issuers that are national in scope. It is not, however, clear that there is a distinction between national and international derivative issuers. National issuers would certainly appear to fall within provincial jurisdiction as it simply contemplates derivative issuers in Canada issuing derivatives to Canadians; similar to what is contemplated in the first amendment. It is the question of who has the authority over derivative issuers that are international in scope that is unclear. The federal government appears to be suggesting that they hold such authority through the international trade aspect of the trade and commerce power (*Parsons*). However, the ability of the federal government to legislate is largely dependent on whether they are regulating the actual trade of securities across borders (which they may do – *Canadian Industrial Gas*), or the trade of derivatives once they are in province (which they may not do – *Re Agricultural Products Marketing Act*). It is not clear at what point the federal regulation of international derivative issuers is occurring, and it is particularly difficult to make such a determination because they are not a physical product in the same sense as oil or eggs. Given this uncertainty, I cannot conclude that the federal government does not have jurisdiction over international derivative issuers, and therefore they are able to delegate this authority to the regulator.

The fourth amendment ascribes criminal-like penalties for failure to comply with disclosure requirements created by the national regulator using delegated federal authority. The pith and substance of the disclosure requirement appears to be protecting securities buyers. The most likely federal head of power this would fit under is the criminal law making power s. 91(27). While the amendment does not contain a prohibition as such, a positive requirement in a

complex legislative scheme can still constitute a prohibition (a requirement for the valid exercise of the criminal law making power) (*RJR McDonald*). There is a clear penalty attached as well. However, protection of securities buyers does not appear to be a valid criminal purpose. It would be difficult to see this goal as protecting public peace, order, security, health, or morality (*Margarine Reference*). Similar to the second amendment, the federal government would likely also be unable to successfully claim jurisdiction through the national concern doctrine because the provinces are easily able to legislate in this area themselves and regulatory penalties are not indivisible.

Question 2

The decision in *Churchill Falls* is not satisfactory. The SCC essentially decided that provincial limits on territorial jurisdiction are the physical borders of the province. Because the contract between the provinces stipulated that Quebec had rights to receive the electricity in Quebec and distribute it wherever they chose. The court also notes the contract itself states that a right of action exists in Quebec.

The problem with the court's decision is that it fails to consider the connection between Newfoundland and the contract. Newfoundland, in passing the Reversion Act, was not merely legislating over a contract with Quebec. Rather, it was legislating over a contract relating to Churchill Falls – a location physically located within Newfoundland as well as one that was intrinsically linked to Newfoundland's economic viability. Furthermore, despite the clear connection between Newfoundland and Churchill Falls, the court's decision gives Quebec jurisdiction over the contract. Such a decision is unfair and problematic. It makes little sense that Quebec should have jurisdiction over a contract relating to a location in Newfoundland

simply because rights vest in Quebec. Such jurisdiction would give Quebec power to affect the contract and Newfoundland's relationship with Churchill Falls by passing any legislation, while Newfoundland can only sit idly by and hope for the best.

The court has backtracked from the use of physical location as the primary means of determining jurisdiction. In *ICBC*, the court concluded that, while there territorial limits on provincial power, those limits are not merely physical. Rather, the court suggested that territorial limits are to be determined on the basis of the "sufficient connection test". The idea is that, while the cause of action may not have arisen in the province (in ICBC an Ontario statute attempted to allow an Ontario insurance company to recover from a BC insurance company for an accident that took place in BC), the province is still connected to the event and therefore should still retain jurisdiction over it. The sufficient connection test requires simply that there be a sufficient connection between the enacting jurisdiction, the subject matter of the legislation, and the entity sought to be regulated by it. In *ICBC* a sufficient connection could not be established because the Insurance Act was attempting to regulate an insurance company based in BC that did not carry on business in Ontario and that had already paid out a benefit under BC law for an accident that occurred in BC.

The situation in *Churchill Falls* is not analogous. The Reversion Act attempted to expropriate property located within Newfoundland from the lease agreed to with Quebec. The subject matter of the legislation was the property itself, while the entity that Newfoundland was seeking to regulate with the Act was the contract with Quebec. It seems obvious that a sufficient connection exists. The property was located in Newfoundland and Newfoundland was a party to the contract. This result certainly seems like it would be fairer than the conclusion the court reached in *Churchill Falls*. The benefit of this approach is that it allows for the possibility of a

sufficient connection with more than one province. Both Quebec and Newfoundland could likely to have been found to have jurisdiction over the contract (Quebec's connection to Churchill Falls was that they received the power from it). While there are some complications that arise from this sort of concurrent jurisdiction (uncertainty being chief among them), there are also significant benefits. It would be much harder to take unilateral action harming one province. Such an approach would also encourage cooperation between the provinces, which the court suggested in *Hunt* is desirable.

The court has also rejected the *Churchill Falls* approach when resolving questions of judicial jurisdiction. In *Hunt*, the court dealt with Quebec legislation that prevented documents of Quebec-based companies from being sent out of province. The effect of the legislation was to force any out of province claimant to bring their action in Quebec. The specific facts of the case involved a claimant in BC who was harmed by asbestos in a product manufactured and sold in Quebec. If *Churchill Falls* were to be applied, one could conclude that the Business Record Act was perfectly acceptable on the basis that the company was physically located in Quebec and the product was manufactured there, in spite of the fact that harm occurred in BC (in *Churchill Falls* the fact that the contract was deemed physically present in Quebec carried more weight than the impacts of the contract in Newfoundland). The court, however, rejected this approach. They suggested instead that, when dealing with legislation that has extra-provincial effects, it is appropriate to look at the purpose of confederation and the choice of the provinces to create a federal system. The focus was specifically on judicial independence and the intention to create a fairly uniform judicial system. Justice LaForest suggested that provinces must "respect the minimum standards of order and fairness" in dealing with the judiciaries of other provinces. This logic can be extended to legislative jurisdiction (it seems that order and fairness would

require that provinces do not simply take jurisdiction over others where jurisdiction can be concurrent), and indeed similar language is used in *ICBC* in considering legislative jurisdiction and the sufficient connection test.

In *Van Breda*, the court further elaborated *Hunt*, defining a real and substantial connection test for judicial jurisdiction. The test was based on the principles of order and fairness, and suggested four factors that would indicate the ability of a provincial court to assume judicial jurisdiction: 1) the defendant is domiciled or resident in the province; 2) the defendant carries on business in the province; 3) the tort was committed in the province; 4) the contract connected with the province was made on the province. Similar to the sufficient connection test in *ICBC*, the real and substantial connection test does not preclude multiple provinces from assuming judicial jurisdiction.

The recent trend of the court to look for a connection justifying jurisdiction (be it legislative or judicial) runs counter to the decision of the court in *Churchill Falls*. That decision, viewed in the light of *ICBC*, *Hunt*, and *Van Breda*, appears to ignore a sufficient connection between Newfoundland, the contract, and Churchill Falls and instead conclude that the true issue isn't sufficient connection, but *most* connected. While Newfoundland was clearly connected to the matter (they were, after all, a party to the contract), Quebec was seen as being much more connected because the rights of the contract physically vested in Quebec and rights of action arising from the contract were agreed to arise in Quebec. The court has rejected this idea of *most* connected, instead recognizing that the principles of order and fairness require that a sufficient connection (or a real and substantial connection when dealing with judicial jurisdiction) grant jurisdiction to the province. Implicitly there is a recognition that shared jurisdiction over an issue is both fairer and more desirable.

Question 3(A)

In *ICBC* the requirements of order and fairness are viewed as organizing principles of the constitution. These principles govern the relationship between the different governments within the Canadian federation. In *ICBC* they are used to justify a limit on the jurisdiction of the province of Ontario to pass legislation affecting an actor in BC that is, at best, tangentially related to Ontario. The protection of judicial independence discussed in *Provincial Judges* is an unwritten constitutional principle that is deemed to have constitutional force. The court noted that, while not included in the text of the constitution itself, the preamble incorporates principles like judicial independence by reference by stating that the Canada has a constitution similar in principle to that of the UK. The convention of political neutrality discussed in *Osborne* governs the behaviour of public servants.

All three ideas communicated in these cases are unwritten, yet are significant in governing the relationships between actors in Canada's federation. There are, however, significant differences as well. Conventions like political neutrality have no constitutional force. Court will not enforce conventions; conventions are instead enforced through political means. This is in contrast unwritten constitutional principles like judicial independence that do have independent constitutional force. The court will (and did in *Provincial Judges*) apply the principle directly in its decisions and consequences for acting contrary to the principle are judicial. Order and fairness falls somewhere in the middle. Order and fairness is a guiding principle that is used to inform interpretation of the constitution and help the court determine what the text attempts to do (such as how provinces are supposed to interact as in *ICBC*).

Question 3(B)

The Chief Justice defined the ancillary powers doctrine essentially as Chief Justice Dickson did in *General Motors* – a government may trench on the powers of the other level of government if doing so is part of a valid legislative scheme; the more severe the infringement the more necessary to the scheme the infringement must be. She looked to the scope of the power in play in determining that the infringement was minor (and that the rational and functional connection test should be applied). This approach is problematic because it fails to acknowledge the possibility that even broad powers like property and civil rights may have aspects of them that are particularly important that to even touch would be extremely limiting. She also draws a distinction between ancillary provisions that create a substantive right and those that merely assist in enforcing the act. This distinction is as it helps get at the true purpose of the provision in question – if a provision is creating a substantive right it is much harder to see it as a small infringement to advance a legislative scheme.

Justices LeBel and Deschamps suggest that encroachment is the wrong way to view the ancillary powers doctrine, and instead suggest that what is really happening is an overflow – a validly enacted legislative purpose simply overflows onto a provincial head of power. This is a helpful analytical distinction because it clarifies the role of pith and substance in the analysis by explaining that the issue with ancillary powers is not simply a question of whether the pith and substance is constitutionally valid, but whether the overflow is damaging to provincial sovereignty. They also reject the automatic application of the *General Motors* factors in determining the extent of the overflow. They particularly reject the importance of legislative history (which Chief Justice McLachlin applies), suggesting that past overflow likely cannot justify future overflow without simultaneously eroding existing heads of power.

Question 3(C)

The *Medical Services Act* must be validly enacted in order for Ricci and Egg to be charged under it. It must, therefore, not be a colourable exercise of the provincial power over health care in s. 92(9). For this purpose, the prohibition on abortions after the 20th week of pregnancy must be for a valid health care purpose, rather than a moral prohibition. It is likely that the purpose is valid as there is no evidence suggesting that getting a license and abortion is being made unreasonably difficult (as in *Morgentaler*) and the penalties are small and do not appear criminal in nature (*Westendorp*).

Though the *Medical Services Act* is likely valid, it may be inoperative through paramountcy. A provincial statute governing in the same area as a federal statute will be inoperative if it frustrates the purpose of the federal statute (*Mangat*). The criminal code amendment provides an exemption for abortions after the 20th week if they are medically necessary. The purpose of this exemption is likely to prevent criminalization of medically necessary treatment. The *Medical Services Act* creates no such exemption. While it is possible to abide by both acts (simply have abortions before the 20th week), to do so would make medically necessary abortions after the 20th week impossible, which would frustrate the purpose of CC s. 251(2). As a result, s. 3 of the *Medical Services Act* would be inoperative when abortions are medically necessary so long as the criminal code amendment is validly enacted.

The amendment is valid criminal legislation. Though 251(2) provides an exemption, it is a nuance that is intended to further the valid criminal purpose of protection public health (*Margarine Reference*) and therefore s. 251 is likely a valid exercise of the criminal law making power under s. 91(27) of the CA 1867.