

Securities Bulletin

The Supreme Court of Canada rejects the constitutional validity of the proposed Canadian Securities Act

By: Michael Kutner

Background

On December 22, 2011, the Supreme Court of Canada ("SCC") handed down a unanimous decision rejecting the proposed Canadian Securities Act (the "Act"), which if accepted would have seen the implementation of a single national securities regulator. The SCC ruled that the Act in its current form did not fall within the legislative authority of the Parliament of Canada and consequently was ultra vires the federal government.

Canada, joined by Ontario and several interveners argued that the Act fell within the general branch of Parliament's power to regulate trade and commerce under s.91(2) of the *Constitution Act, 1867*. Whereas, Alberta, Quebec, Manitoba and New Brunswick argued that the scheme fell under the provincial power over property and civil rights under s.92(13) of the *Constitution Act, 1867* and infringes on provincial legislative jurisdiction over matters of a merely local or private nature, namely the regulation of contracts, property and professions.

Those advocating in favour of the national regulator argued that a national securities regulator had now become a necessity in light of changes in capital markets. Whereas markets had once been localized they now reach across borders both nationally and internationally. The evolving nature of the capital markets, was in their opinion, enough to bring securities regulation within the general trade and commerce power. Those arguing against the national regulator disputed this contention and argued that Canadians are still adequately protected by provincial regulators and that by ruling that the Act was constitutional the Federal Government would be appropriating provincial powers over matters of a local or private nature.

Supreme Court Decision

A two step process was applied in determining the constitutionality of the Act. The first step was to determine the "main thrust" of the Act. According to the SCC the "main thrust" was to regulate, on an exclusive basis, all aspects of securities trading in Canada, including the trades and occupations related to securities in each of the provinces.

The second step was to connect the Act to a particular head of power, federal or provincial. In making this determination the SCC looked to *General Motors v. City National Leasing*, which outlines the factors the court looks to in determining whether the legislation viewed as a whole, addresses a matter that is truly national in importance and scope and that transcends provincial competence. The SCC found that parts of the Act transcended national concern to bring it within the s.91(2) general trade and commerce power, including those provisions dealing with short selling, derivatives, data collection and credit ratings. However, the SCC did not believe that regulating those aspects also warranted regulating the day to day operations of securities regulators, which was the "main thrust" of the Act. They held that it could not be classified as falling within the general trade and commerce power as its main thrust does not address a matter of genuine national importance and scope going to trade as a whole in a way that is distinct and different from provincial concerns. The SCC stated that while the economic importance and pervasive character of the securities market may, in principle, support federal intervention that is qualitatively different from what the Provinces can do, they do not justify a wholesale takeover of the regulation of the securities industry which was the ultimate consequence of the proposed federal legislation. As such, the Act as it was presented was not valid under the general branch of the federal power to regulate trade and commerce.

Is this the end for a national securities regulator in Canada?

The implementation of a national securities regulator in Canada was dealt a blow when the SCC handed down their decision. The SCC did however leave open the possibility of narrower legislation focusing on those aspects noted above, which are of a truly national nature, being accepted as falling under a federal head of power.

The SCC also notes that while the Act is ultra vires parliament's general trade and commerce power, a cooperative approach that permits a scheme that recognizes the provincial nature of securities regulation while allowing the federal government to deal with matters of a truly national concern remain available. Perhaps the best route for the federal government to take is to work with the provinces and territories to enact nation wide legislation that encompasses those issues of a national importance rather than focus on the day to day regulation of the securities market.



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