

## Supreme Court Rules Against Proposed Securities Act

Dec 22, 2011

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In a unanimous judgment, the Supreme Court of Canada has ruled that the proposed federal *Securities Act* is unconstitutional. The federal government had referred the proposed legislation to the Supreme Court for an advisory opinion before proceeding with its plans to create a Canadian securities regulator in conjunction with participating provinces.

The federal government argued that the proposed Act falls under the general branch of Parliament's power to regulate trade and commerce under s. 91(2) of the *Constitution Act, 1867*. By contrast, several provincial governments argued that the proposed Act falls under the provincial power over property and civil rights under s. 92(13). In rejecting the federal government's position, the Supreme Court concluded that the main thrust of the proposed legislation 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 Supreme Court accepted that the preservation of capital markets to fuel Canada's economy and maintain Canada's financial stability is a matter that goes beyond a specific industry and engages trade as a whole. However, the Supreme Court found that the proposed Act is chiefly concerned with the day-to-day regulation of all aspects of contracts for securities within the provinces, including all aspects of public protection and professional competences. Viewing the proposed Act as a whole, the Supreme Court concluded that it overreaches the proper scope of the general branch of the trade and commerce power by descending well into industry-specific regulation. The Court found that the wholesale displacement of provincial regulation that the proposed Act would effect was not justified by the national concerns raised by the federal government in its arguments before the Court.

Although the Supreme Court found the proposed Act to be unconstitutional, it did recognize that Parliament has constitutional jurisdiction over certain aspects of securities regulation under the general branch of the trade and commerce power that transcend intra-provincial regulation of property and civil rights. The Court referred to the prevention of systemic risk and national data collection as two areas that may support federal legislation. In this respect, the Supreme Court's decision marks the first time that it has recognized that Parliament has constitutional

jurisdiction to create a national securities regulator grounded on the trade and commerce power, albeit one that is more circumscribed than the regulator contemplated under the proposed Act.

Importantly, the Supreme Court also stressed that it remains open to the federal government and the provinces to exercise their respective powers over securities harmoniously, in the spirit of cooperative federalism.

## **Implications of the Decision**

The immediate implication of the decision is that the federal government cannot move ahead with its plans for a Canadian securities regulator on the basis set out in the current version of the proposed Act.

It remains to be seen, however, whether the federal government will enact legislation that is focused on those matters that the Supreme Court has suggested may support federal legislation, such as preventing and responding to systemic risk.

The federal government may also choose to continue working with the provinces towards establishing a Canadian securities regulator. There is no reason why this work cannot continue. The Supreme Court ruling specifically endorsed a model of cooperative federalism. In addition, the proposed scheme under the Act contemplated an opt-in model in which a Canadian securities regulator would be created among willing provinces.

Accordingly, if the federal government and certain provinces wish to proceed with the creation of a Canadian regulator, they can do so. New legislation would need to be drafted and certain powers delegated to the new regulatory authority, and arrangements would need to be made with any non-participating provinces, but a scheme that achieves many of the objectives that motivated the proposed Act could still be implemented.

Viewed in this light, the Supreme Court decision is not an insurmountable roadblock to the longstanding quest for a Canadian regulator, but rather a bend in the road that will provide all parties with greater visibility with respect to the constitutional landscape that must be navigated in order to get to this destination.