

Corporate Securities Law

December 23, 2011

Supreme Court Holds National Securities Act to be Unconstitutional

In a long-awaited decision released yesterday, the Supreme Court of Canada has unanimously held that the proposed Canadian *Securities Act* is unconstitutional as presently drafted, frustrating the hopes of those (including the federal government, the Province of Ontario, the Canadian Coalition for Good Governance and the Ontario Teachers' Pension Plan, among other intervenors) who had sought to replace the current system of 13 different provincial and territorial securities regulators with a single national securities regime.

Background

The notion of a Canadian national securities scheme has been percolating for more than 50 years. Numerous royal commissions, provincial panels and advisory committees have recommended the establishment, in one form or another, of a national securities regulator with jurisdiction over Canada's entire capital markets industry. These efforts gained momentum over the last decade, and in 2008 the federal government appointed an expert panel (known as the Hockin Panel) to seek input on the development of a model common securities act for Canada. The proposed federal *Securities Act* in the form considered by the Court had its origins in the recommendations of the Hockin Panel.

The Province of Ontario, along with a number of other securities industry bodies, was quick to embrace the notion of a single national securities regime, but the proposal ran into vigorous opposition from many of the other provinces, led by Alberta and Quebec, on constitutional grounds. To resolve this matter, the federal government elected to refer the draft *Securities Act* to the Supreme Court of Canada for an advisory opinion as to the Act's constitutional validity.

The Parties' Positions

Canada, joined by Ontario and several intervenors, argued that the proposed Act, viewed in its entirety, was a constitutional exercise of Parliament's general power to regulate trade and commerce. They acknowledged that the regulation of securities has historically been a matter for the provinces, but contended that the evolving character of securities markets, and the increasing importance of (and recent experiences with) systemic risks, could only be effectively dealt with at the national level and prompted the need for all aspects of securities regulation to be brought under federal jurisdiction. Alberta, Quebec, Manitoba and New Brunswick, along with other intervenors, rejected the argument that securities markets have evolved to become a matter of genuine national concern and maintained that jurisdiction over these matters properly belongs in provincial hands.

The Court's Decision

While the Court concluded that elements of the proposed *Securities Act* related to trade and commerce in general terms and therefore fall under federal purview (referring specifically to those sections that deal with the management of systemic risk and data collection on a nationwide basis), it ultimately determined that the Act, viewed as a whole, was principally directed at the day-to-day regulation of all aspects of the securities industry, which is constitutionally within the domain of the provinces. As such, the Court unanimously held that the *Securities Act* as proposed is not constitutional.

Implications

The Supreme Court, in its decision, has closed the door to the unilateral implementation of comprehensive federal securities legislation that would exclusively occupy the field. At the same time, though the Court was naturally carefully to focus on the constitutional analysis and not on broader policy questions of whether a single national securities scheme is preferable to multiple provincial regimes, the Court has left open some windows.

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In particular, the Court made a point of recognizing that the economic importance and pervasive character of the securities markets may, in principle, support federal intervention in certain targeted areas. The Court further noted that a cooperative approach was available to Parliament and the provinces that could allow the federal government to deal with those specific issues that constituted genuinely national concerns. Time will tell whether the federal government (together with the provinces in the context of any cooperative initiative) will seek to pass through these windows left open by the Supreme Court.

Please contact any member of Goodmans' Corporate Securities Group to discuss this decision.