Division of Powers:

Federalism Still Matters: The Securities Reference Case

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1. Introduction

In Canada, the financial industry rests upon "four pillars".[1] These are the securities, insurance, trust, and banking sectors. The first three have been, historically, regulated at the provincial level under the rubric of "property and civil rights", while the fourth has been federally regulated under section 91(15) of the *Constitution Act*, 1867.[2] As early as 1935, however, a Royal Commission recommended the establishment of a federal securities agency tasked with overseeing federally incorporated companies.[3] Nothing came of that. In the 1960s and until last year, numerous other studies came up with proposals regarding the establishment of a federal securities regulator. These proposals dealt with the question of federal provincial coexistence in different manners. Some proposed a federal regular coexisting with provincial counterparts, while others proposed one single federal regulator. How to get the provinces on board also varied depending on the study that was conducted.

Finally, in 2009 another panel released a study recommending the creation of a single federal regulator that would oversee all matters relating to securities in Canada.[4] In order to convince the provinces to give up their role in the regulation of securities, an 'opt-in' approach was suggested. This approach meant that the federal legislation would only apply in those provinces that agreed to give up their regulatory role over securities. Based on this panel's commendations, the federal government prepared a draft act that would enact these recommendations.[5] It also decided to refer the draft act to the Supreme Court to test its constitutional validity. Provincial challenges, also through references, were also brought in Quebec and Alberta. The result was two appellate

[1] Reference Re Securities Act (Canada), 2011 ABCA 77 at para. 2. The term "securities" refers to financial assets such "shares in corporations, interests in partnerships, debt instruments such as bonds and financial derivatives". Securities markets can either be primary, where a company raises money by issuing securities, or secondary where the issued securities are traded among investors. Reference Re Securities Act, 2011 SCC 66 at para. 40.
[2] Reference Re Securities Act (Canada), 2011 ABCA 77 at para. 2.
[3] Reference Re Securities Act, 2011 SCC 66 at para. 12.
[4] *Ibid* at para. 28.
[5] *Proposed Canadian Securities Act*, Order in Council P.C. 2010-667.

decisions and one Supreme Court decision.[6] All three cases found that the draft act was unconstitutional.

This paper will provide a brief overview of the reasons behind the Supreme Court's ruling on the draft act. The paper will proceed as follows. Section 2 will provide an overview of the draft legislation. Section 3 will outline the basic tests the Court used to decide whether the draft act was a valid exercise of federal power. Section 4 will explain the Court's rationale for deciding against the draft act, while section 5 will conclude.

2. The Proposed Federal Securities Legislation

Outlining what the proposed act contained is useful not only to understand what the federal government proposed as its role in regulating the securities sector, but also to understand why the Court ruled against its constitutionality. The proposed act would have created a regulatory agency called the "Canadian Securities Regulatory Authority". In order to motivate and justify the federal government properly deserving a role in the regulation of securities, the preamble to the proposed act laid out several claims. It claimed that "capital markets affect the well-being and prosperity of all Canadians" and that "capital markets are increasingly national and international in scope". Furthermore, because "capital markets are rapidly evolving and include increasingly complex financial products …", "it is important for Canada to have … a strengthened, comprehensive and coordinated enforcement regime for those markets".

The preamble then went on to assert that "it is in the national interest to effectively protect and promote Canadian interests internationally, including through the development of consistent regulatory policies for capital markets". These assertions then allowed the federal government to conclude that "the integrity and stability of Canada's financial system would be enhanced by … a single Canadian securities regulator …".

After a long list of definitions, section 9 of the proposed act then states that the purposes of the act are the protection of "investors from unfair, improper or fraudulent practices", the fostering of "fair, efficient and competitive capital markets", and the "integrity and stability of the financial system." Section 16(2) goes on to explain that the "primary means for achieving" these purposes include "requirements for timely, accurate and efficient disclosure of information", the "prohibition[] of unfair, improper or fraudulent market practices", the creation of "standards for honest and

[6] Reference Re Securities Act (Canada), 2011 ABCA 77; *Québec (Procureure générale) v. Canada (Procureure générale)*, 2011 QCCA 591; Reference Re Securities Act, 2011 SCC 66.