

Business

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Alberta fires warning volley over regulator

By Barbara Shecter, Financial Post December 22, 2010



“It appears as though the ranks of those opposing the unilateral imposition of federal securities regulation ... have grown,” says Alberta Finance Minister Ted Morton.

Photograph by: REUTERS/Todd Korol, REUTERS/Todd Korol

TORONTO -- Alberta's finance department is warning of dire consequences, including a clash of competing jurisdictions governing the country's capital markets, if the Supreme Court of Canada gives Ottawa the go-ahead to create a national securities regulator.

Any province joining the national capital markets watchdog will be forced to repeal its provincial regulation to opt in, even if other provinces choose to retain their home regulators and jurisdiction, lawyers for Alberta's finance department state in a legal brief filed in connection with a parallel court challenge in Alberta.

There is "no provision for a participating province, having opted-in, to opt-out," the lawyers say, suggesting that Ontario, which is alone so far in offering a full commitment to the plan, could lose its securities powers, and cede control over regulation to Ottawa.

In such a scenario, Ontario could not change its mind under the terms of proposed national securities legislation, even if other provinces opt to retain local control, agreed Ken Dickerson, program manager at the University of Alberta's Centre for Constitutional Studies.

The proposed legislation, as written, "does not overtly provide for Ontario [or any other single province] to revert back to a provincial regulator" Mr. Dickerson said, adding that a close reading reveals a presumption that most or all provinces "will 'see the light' pretty quickly" and join the national regulator.

The regulatory overhaul, more than 40 years in the making, is supposed to alleviate problems and costs created by the patchwork of 13 provincial and territorial jurisdictions that regulate corporate and market functions in Canada today.

So far, only Ontario has filed documents with the courts supporting the creation of a national watchdog. Some other provinces including British Columbia and New Brunswick have committed only to allow regulatory personnel to be seconded to a transition office creating the framework for the new regulator.

Alberta, Quebec and Manitoba are firmly opposed to the national plan. During a meeting of the country's finance ministers on Monday in Alberta, Ted Morton, the host province's Minister of Finance, warned that "it appears as though the ranks of those opposing the unilateral imposition of federal securities regulation ... have grown."

With the exception of Ontario, he said, "those who are [not] opposed are sitting squarely on the fence when it comes to constitutional arguments... [they are supporting it] in a very qualified way." He added that a leadership race underway in British Columbia could result in a change to that province's stated position of support, depending on who becomes the next premier.

In a recent interview with the Financial Post, following rumblings of discontent with the plan from other provinces, Ontario Finance Minister Dwight Duncan said it was not yet necessary to debate the merits of Ontario ceding power to the federal government.

“All the best advice we’ve had from Bay Street and the capital markets is that we need a common securities regulator. We will continue to support the federal government at the Supreme Court” in April, Mr. Duncan said.

“We supported the legislation which was shown to us; we continue to do that,” he said, adding that it would be “business as usual at the Ontario Securities Commission while all this plays out.”

Even if Ontario stands alone, or among a small group of provinces and territories joining a national regulator under federal jurisdiction, a senior securities lawyer suggested the province may be viewed as “blessed” rather than “stranded.”

A handful of industry players who support the creation of a national regulator concurred, saying Ontario could use its marriage to the federal government to strengthen the perception of its authority on the global stage.

“If other major provinces do not opt in, the OSC will effectively become the national regulator and have control over most of Canada’s capital markets under the national act,” said one person who will be supporting the federal position at the Supreme Court of Canada showdown over national regulation in April.

“Lots of scenarios can play out, but Ontario is the centre of finance in Canada,” this person said, noting that much of the country’s capital markets activity — including the biggest stock exchange — is on its home turf.

A securities lawyer based in Toronto agreed that the province “would continue as a busy market and ‘lead’ regulator in many respects,” and said it could be argued that “Ontario markets would be greeted more favourably internationally if under federal jurisdiction.”

A flurry of legal filings from the provinces is expected in the coming weeks, gearing up to the Supreme Court hearing in April to determine whether the federal government has the jurisdiction to create and operate a single national watchdog for the country’s capital markets.

A quirk in deadlines means a clear picture of how much resistance exists may be known early in the new year, long before provinces must file official legal notices of opposition in February.

Provinces that support the creation of a national regulator for the country’s capital markets are in the final days of preparing their filings which are due Jan. 10.

It “is likely that we will know by Jan. 10 who is opposing,” said one person close to the process.

However, a province that does not file a so-called factum by then may instead be indicating it will not participate in the process at all.

“For example, if New Brunswick doesn’t file anything on the 10th, it might not mean that they are opposing, but rather that they just decided not to bother” participating, this person said.

If the Supreme Court rules the federal government has the power to govern securities regulation, and the proposed legislation is passed, the new national regulator is scheduled to take over the functions of participating provinces in July of 2012.

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