

CAN OTTAWA CLAIM AUTHORITY OVER SECURITIES SECTOR?

How much has the world really changed?

When the Supreme Court of Canada meets this spring to consider whether the federal government can create a national securities commission, that simple question will form a key part of the legal debate in the case.

The supporters and opponents of Finance Minister Jim Flaherty's controversial plan to create a new national regulator have now filed their submissions with the top court in preparation for a two-day hearing in April, and they show a stark difference of opinion about whether the federal government can claim authority over the securities sector. ...

York University constitutional law expert Patrick Monahan says a central question emerging from the submissions is whether the federal government can use its constitutional powers over national trade and commerce as grounds for regulating the securities industry. To do that, Ottawa must convince the court that the securities industry has become dramatically more national – even international – in recent decades and, therefore, fits the national nature of the trade and commerce category. ...

Opponents of the proposed national regulator – including the governments of Alberta and Quebec – are dismissing the federal argument, saying the nature of securities trades has not fundamentally changed, and that there are distinct and local elements to the industry in every province. ... In its submission, Alberta has warned the Supreme Court to be careful to not broaden the scope of federal trade and commerce powers so that provinces could lose jurisdiction over lots of other areas, saying the test for shifting powers to the federal government should be rigorous so federalism can still work in Canada. ...

To convince the Supreme Court that securities regulation is or isn't a federal responsibility, both sides will point to a precedent-setting 1989 case involving General Motors of Canada Ltd. and City National Leasing. That ruling, which upheld the validity of a federal anti-competition law known as the Combines Investigation Act (now the Competition Act), said the law intrudes on provincial powers but "because the regulation of competition is so clearly of national interest" it must be upheld. But the court's ruling laid out five tests important in deciding if federal trade and commerce powers should apply to a particular sector, and opponents say Ottawa's proposal doesn't meet all of them. ...

The opposing provinces say they've already created an existing cooperative "passport model" for securities regulation that is up and running – so legislation can be enacted by provinces themselves. The proposed new federal act is almost identical to existing provincial securities acts, they note. "There are no legislative gaps to fill here," the Quebec filing says.

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