

Reference Case to Confirm Constitutionality of Federal Securities Regulation

On October 16, 2009, the federal Minister of Justice announced the Government of Canada's next step in its project to establish a federal regime for regulation of securities. Its plan is to submit a draft bill, the *Federal Securities Act*, to the Supreme Court of Canada in 2010 for an advisory opinion on its constitutionality.[\[1\]](#)

Analysis by the Library of Parliament confirms that "Canada is the only major industrialized nation without a common securities regulator."[\[2\]](#) Proposals to establish a less "fragmented and outdated" system began in 1964. As of 2005: The profusion of regulation [had] led many analysts to argue that the current structure of capital markets is unsustainable without the enactment of uniform securities laws across Canada. The debate is whether harmonization can be achieved through cooperation by provincial regulators or whether a more radical solution is necessary: the imposition of a single national securities regulator by the federal government.[\[3\]](#) The recent financial crisis added impetus to the latest federal push for regulatory coordination and centralization. The November 2008 Speech from the Throne announced the Government of Canada's intention to proceed with a single regulator: "The credit crisis has also underlined the dangers of a fragmented financial regulatory system. To further strengthen financial oversight in Canada, our Government will work with the provinces to put in place a common securities regulator."[\[4\]](#) Existing provincial regulatory regimes are based on their "property and civil rights" jurisdiction (section 92(13) of the *Constitution Act, 1867*). A 2003 report for Finance Canada based its recommendation for a single Canadian securities regulator on three legal opinions, all of them concluding that the federal government has jurisdiction to pass legislation to regulate capital markets.[\[5\]](#) According to these opinions, federal jurisdiction over "regulation of trade and commerce" (section 91(2)), combined with the doctrine of federal paramountcy, would allow for comprehensive federal legislation to regulate securities. The January [2009 report](#) of another "expert panel" appointed by the Minister of Finance recommended the establishment of a Canadian Securities Commission and a new structure under which: The federal Minister of Finance and, ultimately, the federal Parliament would be accountable for securities regulation in Canada. Decisions would be made by a single entity, rather than 13, facilitating quicker, more decisive action.[\[6\]](#) This report included a detailed "[Draft Securities Act](#)" which may be the basis for the draft legislation the government plans to refer to the Supreme Court. The panel advised the federal government to "override" objections from provinces that insist securities regulation is in their own legislative jurisdiction.[\[7\]](#) British Columbia decided to support the federal initiative in January 2009.[\[8\]](#) Seven provinces and the three territories have now agreed to participate in an "Advisory Committee of Participating Provinces and Territories" supporting the federal initiative. Quebec and Alberta were quick to reject the expert panel's recommendations.

Iris Evans, Alberta's Treasurer, said in January 2009, "Alberta remains steadfastly opposed to a single federal regulator.... We will continue to oppose, through all available avenues, including legal action if necessary, any more toward establishing a single national regulator."^[9] Premier Stelmach reinforced the Alberta position, arguing that a national regulator would not be "flexible and responsive."^[10] Alison Redford, Alberta's Justice minister, reiterated the Alberta government position as recently as September 16: "We believe we have jurisdiction over this issue."^[11] Quebec responded in July 2009 by bringing a constitutional reference to its Court of Appeal. Quebec's Justice minister, Kathleen Weil, said, "The federal proposal threatens Quebec's legislative competence and its administrative bodies." Her colleague, Intergovernmental Affairs minister Claude Bechard, insisted: Quebec has always affirmed and exercised its jurisdiction over securities legislation and regulation within its territory. Quebec thus views the federal government's decision to create a Canadian securities commission as an encroachment on Quebec's jurisdiction over property and civil rights.^[12] The Quebec government indicated it was prepared to appeal the issue to the Supreme Court of Canada.^[13] The federal government's announcement of its own reference to the Supreme Court of Canada in 2010 may pre-empt a decision by the Quebec court.

^[1] News release, "Government of Canada Intends to Seek Opinion of Supreme Court of Canada on Constitutionality of Proposed Canadian Securities Legislation" *Department of Justice Canada* (16 October 2009).

^[2] Andrew Kitching, "Securities Regulation: Calls for a Single Regulator" *Library of Parliament* (16 February 2009).

^[3] Tara Grey and Andrew Kitching, "Reforming Canadian Securities Regulation" *Library of Parliament* (19 September 2005).

^[4] Speech from the Throne, "Protecting Canada's Future" *Government of Canada* (19 November 2008).

^[5] Ogilvy Renault, "Constitutional Opinion Concerning the Canadian Securities Commission Model" *Wise Persons' Committee* (10 November 2003); Torys LLP, "Constitutional Authority to Implement the CSC Model" *Wise Persons' Committee* (10 November 2003); Fasken Martineau DuMoulin LLP, "Constitutional Opinion on Securities Regulation" *Wise Persons' Committee* (10 November 2009).

^[6] Expert Panel on Securities Regulation, [*Final Report and Recommendations*](#) (January 2009) at 47.

^[7] David Akin, "Provinces to fight Flaherty's national securities regulator" *Edmonton Journal* (12 January 2009).

^[8] *Supra* note 2.

[9] *Supra* note 7.

[10] Ed Stelmach, "Address to the C.D. Howe Institute" *Government of Alberta* (14 January 2009).

[11] Tamara Gignac, "Alberta opposes national securities regulator despite history of scams" *Calgary Herald* (16 September 2009).

[12] Press release, "[Reference to the Appeal Court of Quebec to Protect Quebec's Jurisdiction Over Securities](#)" *Government of Quebec* (8 July 2009).

[13] Francois Shalom, "Quebec takes feds to court over national securities regulator" *National Post* (8 July 2009).