

Securities lawyers see hope in national regulator

Federal proposal 'will make Canada a more attractive place to raise capital'

BY DARYL-LYNN CARLSON
For Law Times

Canada's plans to consolidate securities governance into one national regulator have generally been hailed as good news by those who work within the industry.

In particular, the hope is it will provide consistency by replacing provincial securities regulators with federal oversight while increasing the effectiveness of enforcement.

In his federal budget this spring, Finance Minister Jim Flaherty announced the government intends to establish a national regulator within three years. He expects to have a draft of the legislation prepared for release very soon followed by a planned referral to the Supreme Court of Canada for an opinion on the constitutionality of a national securities regulator.

Alberta and Quebec have also launched their own court actions essentially challenging the federal government's constitutional right to usurp their provincial regulators.

Subsequently, the government plans to have its recently established Canadian securities regulator transition office finalize work on an administrative transition plan this summer before

putting the finishing touches on the rules and regulations.

"Canada is the only developed country without a single securities regulator, and it is perceived that we don't have very strong enforcement," says Vanessa Grant, a partner at McCarthy Tétrault LLP who practises corporate finance and advises issuers, investors, and underwriters.

Although the 13 provincial regulators have established comprehensive guidelines and often undertake investigations or prosecutions of violators and fraudsters under their respective regimes, there can be difficulties co-ordinating communications and getting co-operation between the various authorities in cases where the offence occurred in more than one province, she says.

A single regulatory regime will help Canada present its market as one that's progressive in dealing with violations, she adds.

"The advantage is that Canada would be perceived as having a robust capital market with transparency, uniformity, and consistency, which will lead to more people wanting to invest in Canada because we have a strong, well-regulated market."

In fact, the European Union has recently faced calls to establish a regulator that will consolidate all of the markets in Europe

for the same reason that Canada has come under criticism for its piecemeal approach.

In preparation of the transition, the federal government established an expert panel on securities regulation in 2008. Former MP Thomas Hockin, who served as minister of state for finance and is also a former president of the Investment Funds Institute of Canada, chaired the panel.

The panel's final report was released in January 2009. It included a draft of a proposed Securities Act, which the panel said in a news release would "provide clearer national accountability, reduce overlap and duplication, strengthen enforcement, and better serve the needs of investors."

Hockin noted at the time he released the panel's report that Australia was one of the last developed countries to establish a national regulator and has since signed a mutual recognition agreement with the United States.

Linda Fuerst, a partner at Lenczner Slaght Royce Smith Giffin LLP and a former senior investigation counsel with the Ontario Securities Commission's enforcement branch, was surprised to learn first-hand of Canada's poor reputation internationally for its securities regulation.

Prior to joining Lenczner

Slaght in 1994, she spent five months on secondment working with the Securities and Exchange Commission in Washington.

"The perception was that Canada was a difficult jurisdiction to deal with, not because there wasn't a willingness to co-operate but because of regulatory barriers created by the fact that there are individual securities commissions in each province," she says.

Fuerst notes the piecemeal approach in Canada served to curtail effective cross-border co-operation, particularly in cases involving investigations and enforcement. In the event the

SEC sought information from Canada, for example, it had to make individual requests with each provincial body.

There are also slight procedural differences between the provincial regulators that can affect prosecutions and investigations, especially those involving multiple jurisdictions.

The OSC, for example, is unable to share the testimony from someone who was the subject of a formal enforcement investigation with other regulators without an order by the commission or the consent of the person who provided it. But in Alberta, a staff member can release the testimony without permission or an order.

Such nuanced differences can prove to be problematic in complex investigations and prosecutions despite the fact that "recently there's been an effort by jurisdictions to co-ordinate their procedures," Fuerst says.

As a result, she hopes the federal proposal won't meet significant opposition or face delay by the court challenges launched by Alberta and Quebec.

"Investor confidence, regulatory efficiency, and reducing the cost for issuers are the main reasons we need a single regulator in Canada, and it will make Canada a more attractive place to raise capital." **LT**