

B.C. urges greater securities powers

By Stanley Tromp, Financial Post · Friday, Aug. 20, 2010

British Columbia's securities regulator wants the federal government to toughen its proposed law that creates a national securities authority to give its officials more power to enter residences, get wiretaps and report non-securities wrongdoing.

On May 26, federal Finance Minister Jim Flaherty introduced his proposed Canadian Securities Act under the heading, "Government of Canada moves to protect Canadian investors." The Act would give the Authority the power to investigate and prosecute certain securities offences, by raising them to the level of crimes in the Criminal Code, instead of securities regulators referring criminal matters to the police as they do now.

Before the public unveiling, the B.C. Securities Commission privately advised that the Securities Act and the Criminal Code be toughened further so investigators could apply for a wiretap under the Code for all the criminal offences noted in the Act.

The comments were found in a 30-page commentary by the provincial securities regulator to the federal Finance Department's unpublished draft of the Act and were obtained under the Freedom of Information Act.

The BCSC also lamented that in the proposed Securities Act, some conditions set to obtain a search warrant to search a dwelling house are "unusual and onerous," with a higher test than that in the Criminal Code, and should be dropped from the Act. For one thing, to issue a warrant, a judge would need to be satisfied that entry was or would likely be refused by the occupant, and the BCSC said, "If the occupant refuses entry, the chance of any evidence being in the house upon the Authority's return is unlikely."

A national securities regulator is a politically risky priority for the federal government as it is vehemently opposed by the Quebec and Alberta governments.

When the Act was revealed to much fanfare in May, it was considered weak by some for allowing provinces to decide on participation, but bold for proposing a securities regulator receive similar powers as a law enforcement body. British Columbia -- the key province, along with Ontario, in advocating for the Act -- now appears to be a catalyst in pushing for even tougher rules and powers.

Vancouver securities lawyer Jonathan Reilly strongly supports the idea of a national regulator, to make Canada far more appealing to foreign investors. But in an interview, he said that BCSC's suggestion to change the investigative basis of powers granted by the Act from "verifying compliance with this Act" to "administration of the Act" threatens to shift the burden of proof away from "innocent until proven guilty."

In its recommendations, the BCSC also urged a broader reporting power for the national regulator, noting that often during the course of an investigation the regulator acquires evidence of non-securities Act wrongdoing. Examples would include professional misconduct by lawyers, accountants and engineers. "There should be a catchall section that allows the Authority to forward evidence of non-securities act wrongdoing to the appropriate authorities," it advised.

Mr. Reilly objected that such a new power would be "dangerously undefined," and that if the Authority suspects such misconduct, it should advise the complainant to complain to the professional's disciplinary body, and no change in the Act is required for this.

The commission was also worried about a new provision that could compromise probes. One section requires the Authority to give notice and opportunity to be heard to targets of investigations of fellow regulators. "We are very concerned this will tip off targets that they are being investigated by another agency, and will cause significant delay in our response times for requests for information."

The BCSC raised several other concerns about the federal securities bill:

-One section sets out the Authority's "principles," but the BCSC wrote, "We see little upside to include a principles provision and ... it leaves the Authority open to uncertainty in interpretation and potential challenges."

In this section, one of the means to achieve the Act's purposes included "standards to ensure honest and responsible conduct by market participant." The BCSC replied, "How can you set standards to ensure honesty?"

-The BCSC wanted to broaden the section that sets out the investigatory powers of persons ensuring legal compliance: "Each of these sections uses the phrase 'compliance with the Act.' We believe this phrase is too limiting. Often we need to collect general information that is unrelated to any specific review or inquiry ... to deal with any arising issue."

Most provinces have agreed to yield their securities regulation to the new national Authority. Yet such regulation is a provincial jurisdiction, and Alberta and Quebec have refused to participate. The Finance Minister referred the proposed legislation to the Supreme Court of Canada for a ruling on whether it is constitutional, and the Bill is on hold in the Commons until that issue is decided.

In June 2009, Ottawa appointed former B.C. Securities Commission chairman Doug Hyndman to help usher in a national law. He was named chair of a "transition office" to collaborate with the provincial governments to draft a federal Securities Act.

This collaboration is now continuing with the willing provinces. Observers see Mr. Hyndman as possible candidate to be chosen to run the national authority when it becomes operational.

