Regulating securities: its not just a label

The task, instead, is to describe the features of the law that are most salient in assessing its constitutional validity — typically, the law's purposes and the means it employs.

What's important about securities laws is their pith and substance — that is, what they impose disclosure and other requirements on capital markets transactions for two purposes: (1) protecting investors and (2) ensuring that resources are efficiently allocated to productive ventures across the economy.

Why did the court think that recognizing federal power to enact securities legislation would amount to a 'transfer of jurisdiction'? The answer is that the court had already concluded that securities laws are, in principle, within the exclusive jurisdiction of the provinces.

Securities laws therefore have two aspects. On the one hand, there's an investor protection aspect. By analogy to consumer protection, this is the basis on which provincial securities legislation has repeatedly been upheld. On the other hand, there's an economy-wide allocative efficiency aspect, which brings securities regulation within the concept of 'the regulation of trade and commerce.

This is no different from the nearly identical but nonetheless valid federal and provincial laws that, for instance, penalize impaired driving. These may be viewed from the provincial perspective of regulating highway traffic or from the federal perspective of suppressing behaviour that imperils public safety.

It's clear that Parliament cannot seek to achieve its broader economic objectives by means of a law the main feature of which is the regulation of a single industry. That's what the Court of Appeal thought the federal government was trying to do. However, it's a mistake to characterize federal regulation of securities transactions as the need not be viewed only as regulating the market for a single input. It can also be viewed as regulating the allocation of resources in general to all sectors of the economy.

It's true that the proposed Act regulates certain individual professions, such as that of broker-dealer. However, it does this as an incident to its main activity, which is to regulate capital markets transactions across the economy in the name of allocative efficiency. Constitutional validity is determined by the main features of the law, not its incidental features.

It's also true that the proposed Act limits the right of people to conclude contracts of certain kinds for property situated within a province. But so does virtually every other law enacted by either level of government under any head of power. That's not a basis for concluding it doesn't come within federal power.

In short, enacting the federal proposal involves no "transfer of constitutional jurisdiction." It entails no alteration to the legal scope of federal or provincial powers. It simply requires careful attention to the ends and means of the Act, and the application of the long-recognized principle that legislation can, "in one aspect and for one purpose" fall within provincial power, and "in another aspect and for another purpose" fall within federal power.

Ian Lee is an associate professor in the faculty of law at the University of Toronto.