2730

SECURITIES ACT, OHIO—CONSENT TO SERVICE—FEDERAL SECURITIES ACT—CANADIAN CORPORATION STOCK—SECTIONS 8624-13, 8624-18 GC.

SYLLABUS:

Sections 8624-13 and 8624-18, General Code, relative to consent to service under Ohio Securities Act, discussed.

Columbus, Ohio, June 17, 1953

Hon. Margaret A. Mahoney, Chief of the Division of Securities
Columbus, Ohio

Dear Miss Mahoney:

I have before me your communication requesting my opinion. In view of the length of your request, due to the inclusion of explanatory material in the nature of a memorandum, I shall summarize the request so as to avoid repetition later.

Canadian counsel has sought information regarding registration and licensing requirements relative to the offering of a Canadian corporation's stock for sale in Ohio. The requirements are found in Sections 8624-1 to 8624-49, inclusive, General Code of Ohio. The corporation intends to make offerings of its securities in the United States, not exceeding $300,000 in any one year. The offering therefore is exempt from registration under the Federal Securities Act of 1933, by virtue of the promulgation of Regulation D by the Securities and Exchange Commission, released March 6, 1953. The securities so exempted are still subject to certain of the anti-fraud provisions of the Federal Securities Act of 1933, and the issuing Canadian corporation must execute a consent to service of process upon the Securities and Exchange Commission. It is the Ohio Division of Securities' understanding that the "feasibility" of Regulation D is based upon the Supplementary Extradition Treaty entered into between Canada and the United States which was designed to cover securities frauds.

The Ohio Securities Act, notably Section 8624-13, General Code, in substance, provides in the case of a securities issuer not domiciled in Ohio, that an irrevocable written consent must be executed thereby ap-

pointing the Secretary of State of Ohio as an agent for service of process with respect to suits and actions growing out of fraud in connection with the sale of securities. Section 8624-18, General Code, contains substantially the same requirement as to an applicant for a securities dealer's license. The question advanced for my opinion is whether a consent to service, executed by a Canadian issuer of or dealer in securities, pursuant to Sections 8624-13 and 8624-18, General Code, in connection with an application filed with the Division of Securities pursuant to Sections 8624-10, 8624-13, or 8624-18, General Code, is valid and binding and of lawful effect upon it in either or both Federal and State courts, or Canadian courts, Provincial or Dominion, in equal degree as a consent to service executed by an applicant of United States domicile, in United States courts, State or Federal?

Section 8624-13, General Code, reads as follows:

> "If the applicant for qualification under section 10 of this act, be an incorporated issuer not domiciled in this state or an unincorporated issuer having the situs of its principal place of business outside this state, there shall be filed with such application the irrevocable written consent of such issuer executed and acknowledged by an individual duly authorized so to consent for such issuer, that suits and actions growing out of a fraud in connection with the sale of such securities in this state may be commenced against it in the proper court of any county in this state in which a cause of action may arise or in which the plaintiff may reside, by serving on the secretary of state of Ohio any process or pleading authorized by the laws of this state, said consent stipulating and agreeing that such service of such process on the secretary of state shall be taken and held in all courts to be as valid and binding as if service had been made upon the issuer itself. If such issuer be a corporation or an unincorporated association, the consent shall, in such case, be accompanied by a certified copy of the resolution of the board of directors, trustees or managers of the corporation or association, authorizing such individual to execute the same.
>
> "Service of any process or pleadings may be made on the secretary of state by duplicate copies, one of which shall be filed in the office of the secretary of state and the other immediately forwarded by the secretary of state by registered mail to the principal place of business of such issuer, or if it has a principal office in this state, then to such principal office; provided, however, that failure to mail such copy shall not invalidate such service.
>
> "Any issuer having filed the consent to service above required, may apply for cancellation of the same when it appears

> that the qualified securiities are entitled to exemption or to registration. Such application shall set forth the facts entitling such securities to exemption or registration, and, if proved to the satisfaction of the division, the division shall cancel such consent to service. Such cancellation shall only apply to causes of action thereafter arising in respect to the sale of such securities."

This section requires an incorporated *issuer* of securities not domiciled in Ohio or an unincorporated *issuer* having the situs of its principal place of business outside Ohio, to file with its application for qualification to sell securities in Ohio, an irrevocable written consent to service upon it by serving the Secretary of State of Ohio with process and pleadings in suits growing out of a fraud in connection with the sale of such securities in this state. It will be observed that the act provides that such service upon the Secretary of State shall be taken and held in all courts to be as valid and binding as if service had been made upon the issuer itself.

Section 8624-18, General Code, which deals with application for a dealer's license, provides, *inter alia*:

> "Every applicant, not a resident of this state, shall name a person within this state upon whom process against such applicant may be served, and give the complete residence and business address of the person designated.
>
> "Every applicant shall file an irrevocable consent to service of process on the secretary of state of this state in the event that such applicant, if a resident of this state, or the person so designated by the non-resident applicant, cannot be found at the address given. Such consent shall be given and service thereunder shall be made as provided in section 8624-13 of this act."

Thus, the Ohio Securities Act is designed to insure that *Ohio courts* have jurisdiction over foreign or alien issuers of or dealers in securities in suits arising out of fraud in connection with an offering of securities for sale in this state. In the case of the issuer, a statutory agent is appointed to receive service of process. In the case of the dealer, his named resident agent shall be served with process, or in the event such agent cannot be found, the secretary of state, statutory agent, is substituted as the agent for service of process. The Ohio Securities Act was enacted in order that Ohio investors might be protected from fraudulent sales of securities.

The Federal Securities Act of 1933, 73rd Congress, 1st Session, Ch. 38, is, as its title discloses: "An act to provide full and fair disclosure of the character of securities sold in interstate and foreign commerce and through the mails, and to prevent frauds in the sale thereof, and for other purposes." The federal legislation was enacted pursuant to Congress' power over interstate and foreign commerce and its power over the mails. See Art. I, Sec. 8, Constitution of the United States.

The Federal Securities Act of 1933 imposes civil liabilities on account of false registration statement; civil liabilities arising in connection with prospectuses and communications.

Section 17(a) of the Federal Securities Act of 1933, deals with fraudulent interstate transactions, and provides in material part as follows:

> "It shall be unlawful for any person in the sale of any securities by the use of any means or instruments of interstate commerce or by the use of the mails, directly or indirectly * * * (1) to employ any device, scheme or artifice to defraud, or * * * (2) to obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statement made, in the light of the circumstances under which they were made, not misleading, or (3) to engage in any transaction which operates or would operate as a fraud or deceit upon the purchaser * * *."

For *willful* violation of the provisions of the act, i.e., Section 17(a) as well as the false registration statement section, Section 24 of the Act provides a maximum penalty of $5,000 or five years in prison, or both, upon conviction.

Section 18, Federal Securities Act of 1933, provides:

> "Nothing in this title shall affect the jurisdiction of the securities commission (or any agency or office performing like functions) of any State or Territory of the United States, or the District of Columbia, over any security or any person."

This section indicates clearly that the federal act is not an exclusive enactment in the field of control over securities.

Section 22a of the Federal Securities Act covers jurisdiction of offenses and suits, both civil and criminal. This section gives the district courts of the United States jurisdiction of offenses and violations under

the title and under the rules and regulations promulgated by the commission in respect thereto, and concurrent with state and territorial courts, in suits at law and in equity brought to enforce any liability created by the title. Any such suit or action may be brought in the district wherein the defendant is found or is an inhabitant or transacts business, or in the district where the sale took place.

At this point it would be well to analyze the purpose of Regulation D promulgated by the Securities and Exchange Commission March 6, 1953. I would summarize Regulation D, which I have before me, by enumerating its four most important and relevant features.

1. The Regulation exempts from the registration requirements of the Securities Act of 1933, offerings of securities, not exceeding $300,000 in any one year, made by Canadian issuers.

2. The Regulation requires the filing with the Securities and Exchange Commission of copies of notification and offering circulars, at least fifteen days before any offering is made under the Regulation.

3. The new Regulation requires the filing of semi-annual reports showing the progress of the offering. No further reports are required after completion or termination of the offering and the filing of a final report.

4. The sixth paragraph of the Regulation reads as follows:

> "In order to give full effect to the civil liability provisions of the Act, the new regulation requires that each non-resident connected with an offering made thereunder, file a written irrevocable consent and power of attorney which would authorize the commencement of any civil actions or suits arising out of any offering made or purported to be made under the regulation or any purchase or sale of any security in connection therewith, by the service of process upon the Securities Exchange Commission, which would be authorized to receive service of all papers in such litigation and which, in turn, would forward copies thereof to the appropriate persons by registered mail."

I believe it is evident, from a reading of the principal provisions of the Federal Securities Act, as well as a reading of Regulation D, that the federal act and regulation does not supersede or nullify provisions of the Ohio Securities Act. Both acts are aimed at protecting the investor in securities against fraudulent statements and inducements perpetrated by issuers or dealers in securities. The various state "blue sky laws",

including that of Ohio, cover the offering of securities for sale *in the state.* The Federal Act was prompted into law by reason of certain inadequacies existing in many of the state laws. The Federal Act covers offerings of securities made through the instruments or means of interstate commerce, including the mails, and provides for rather heavy criminal penalties in instances of interstate fraud. Many state "blue sky laws" have no criminal sanctions. It is quite conceivable that a given securities transaction might constitute a violation of both the Ohio and the Federal Securities Act.

The fact that Regulation D requires a consent to service to be executed, designating the Securities and Exchange Commission as agent to receive service of process, does not obviate the provisions of the Ohio Securities Act requiring a consent to service to be executed, designating the Secretary of State of Ohio as agent to receive service of process. The Ohio Division of Securities has no administrative discretion with reference to requiring or not requiring an issuer or dealer to execute the consent to service. The Division could not take the position that it would be a vain act to require the Canadian applicant to execute Division Form No. 13 (Consent to Service) merely because a similar consent is required to be executed naming the Securities and Exchange Commission. As was noted above, the federal act specifically recognizes the jurisdiction of securities commissions or divisions of the several states over securities and persons.

Your letter of request refers to the recently ratified amendment to the Extradition Treaty between the United States and Canada. In order to insure against any misunderstanding as to the possible effect this treaty might have on the problem at hand, I should like to point out that this treaty amendment merely enlarges the list of crimes on account of which extradition may be granted under the Convention concluded July 12, 1889 and the Convention concluded December 13, 1900, between the United States and Great Britain. Extradition is now granted for the offense of obtaining property, money or valuable securities by false pretences or by defrauding the public or any person by deceit or falsehood, whether such deceit would or would not amount to a false pretence; the amendment further provides extradition for making use of the mails in connection with schemes devised or intended to deceive or defraud the public.

This amendment makes more effective, therefore, the criminal pro-

visions of the Securities Act of 1933, and as such has no effect upon civil liabilities arising under state blue sky laws. The treaty has nothing to do with consent to service in civil cases.

The Division of Securities of the State of Ohio is concerned chiefly with civil liabilities arising out of the Ohio Securities Act for fraudulent statements in prospectuses and circulars with regard to offerings in Ohio. With respect to the validity of the "consent to service" provision found in Section 8624-13, General Code, I would call your attention to the following statement from the Restatement of the Law of Judgments, Section 14b, at page 80, to wit:

> "It is to be noted that the situations in which a State had such power over a person as to justify the courts of the State in rendering a judgment against him are not immutably definitely fixed. The question is whether the relationship of the person to the State is such that it is reasonable for the courts of the State to exercise such jurisdiction over him.
>
> "In three situations it has long been recognized that the courts can properly exercise such jurisdiction, namely, where the defendant is present and served with process within the State, *and where he has consented to the exercise of jurisdiction over him.* In other situations it is now recognized that the courts can properly exercise jurisdiction, as for example where a person not present or domiciled in the State carries on business in the State or does acts or owns things in the State."
>
> (Emphasis added.)

Perhaps more in point is the following language found in 50 Corpus Juris Secundum, Judgments, Section 893(7), to wit:

> "In order that a judgment against a foreign corporation may be entitled to recognition in other states, it is necessary and sufficient either that the corporation consent to, or waive objections to lack of, jurisdiction, or that it shall be doing business within the state so as to be subject to the jurisdiction of the courts thereof generally, and that jurisdiction shall be acquired in the particular case by proper and sufficient service of process within the state, as by service on a duly authorized resident agent or officer of the company *or on the Secretary of State,* commissioner of Insurance, or other officer, as provided by statute."

It would certainly appear that the provisions of Section 8624-13, General Code, relative to consent to service, are valid and binding upon a Canadian issuer of or dealer in securities. As a condition to the enjoy-

ment of the right to offer securities for sale in Ohio, the issuer or dealer consents to service of process upon the secretary of state. The right to come into Ohio and offer securities for sale is a valid jurisdictional base upon which *Ohio courts* could render a judgment. Section 8624-13, General Code, most certainly covers *alien* issuers of securities. This section commences:

> "If the applicant for qualification under section 10 of this act, be an incorporated issuer *not domiciled in this state* * * * There shall be filed with such application the irrevocable written consent of such issuer * * *." (Emphasis added.)

It will be noted that the act is not limited to foreign issuers of securities, but instead comprehends all issuers not domiciled in Ohio.

I see no logical reason why a Canadian applicant would be placed in a preferred position by an Ohio court, as regards the validity of its consent to service. The investing public requires as much protection from Canadian issuers and dealers as it does from United States issuers and dealers. In many instances, of course, a judgment obtained in Ohio against a Canadian issuer or dealer, will be of little immediate value. I refer to the strong probability that the applicant has no property within Ohio which could be subjected to levy or attachment.

It seems that the general rule as to the validity of statutes providing for substituted service of process upon foreign corporations is that the form of service provided for by the statute must be such as to be reasonably calculated to bring notice of the suit to the foreign corporation. See 89 A.L.R., 660. It will be observed that Section 8624-13, General Code, provides that the secretary of state shall immediately forward the duplicate copy of the process or pleading by registered mail to the principal place of business of the issuer of the securities. Section 8624-18, General Code, relative to dealers in securities, incorporates the above referred to procedure for notification.

It is true that Section 8624-13, General Code, contains a further provision to the effect that failure to mail such copy shall not invalidate such service. For the purposes of this opinion it is unnecessary to speculate upon the validity of a default judgment rendered by an Ohio court against a Canadian applicant in a case where the secretary of state failed to mail a copy of the service to the defendant.

Assuming a judgment is obtained in an Ohio court against a Canadian issuer of or dealer in securities, following compliance with the consent to service statute and notification by the secretary of state of the pendency of a civil action against the issuer or dealer, such a judgment must be given full faith and credit by the courts of another state in a suit upon the judgment. Article IV, Section 1, Constitution of the United States. Full faith and credit will be accorded the Ohio judgment where the Ohio court had valid jurisdiction over the parties. Again, I know of no reason why a foreign state would discriminate in favor of a Canadian defendant as opposed to a United States defendant. The Ohio court rendering the judgment either has jurisdiction over all applicants, Canadian or domestic, or it has jurisdiction over none.

Federal courts must give full faith and credit to the judgment of state and territorial courts. Huron Holding Corp., v. Lincoln Mine Operating Co., 312 U. S., 183 (1941); Davis v. Davis, 305 U. S., 32 (1938).

Perhaps the most effective means of realizing upon an Ohio judgment against a Canadian issuer or dealer would be for the plaintiff to institute a suit upon the Ohio judgment in a Canadian court in the province wherein the defendant has assets or property. You inquire whether the consent to service executed by the issuer or dealer in Ohio would be validly binding on the issuer or dealer in Canadian courts. In other words, will a Canadian court recognize the validity of the Ohio judgment against a Canadian domiciliary, where the Ohio court rendering the judgment based its jurisdiction over the Canadian upon a written consent to service?

On this point I am impelled to reply that it is not within the province of this office to interpret Canadian law. Were I to render an opinion on foreign or alien law it would be merely speculative. No law has any force of its own outside the limits of the sovereignty from which its authority is derived; a foreign judgment of itself has no force or effect outside the country wherein it is rendered, and each sovereign power determines the force and effect to be given to judgments rendered by the courts of other countries. Hence, this office cannot pass upon the question of what force is given to Ohio judgments by the courts of Canada. The full faith and credit clause of the federal constitution has no application to courts outside the United States and its territories.

If Canadian courts enforce American judgments, it would be upon the principle of comity only.

Accordingly, it would appear that as a condition precedent to issuing or dealing in securities in this state, an applicant of alien domicile is required by Sections 8624-13 and 8624-18, General Code, to file with its application an irrevocable written consent that suits growing out of a fraud in connection with the sale of such securities in this state may be commenced against it in the proper court in this state by service of process upon the Secretary of State of Ohio.

Thus, judgments may be obtained in the Ohio courts, pursuant to service on the Secretary of State, binding upon and of equal force either against alien applicants or those domiciled in another state.

Under the full faith and credit clause of the United States Constitution, judgments of a state court must be given full faith and credit by the courts of another state. Under decisions of the United States Supreme Court a judgment of a state court must be given full faith and credit by the federal and territorial courts.

Whether a judgment of a state court is or is not recognized and given full faith and credit by the courts of a foreign country is a matter of comity to be determined, in the absence of treaty, by the courts of such foreign country.

Respectfully,

C. WILLIAM O'NEILL
Attorney General