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E-BRIEF

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Finding Common Cause: The Renewed Quest for a National Securities Regulator

by
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- Proponents of a national securities regulator suffered a setback when the Supreme Court of Canada ruled Ottawa's proposed *Securities Act* to create such a body was unconstitutional. But the door was not slammed shut. In its ruling, the Supreme Court nevertheless endorsed the possibility of a national regulator based on a model of cooperative federalism.
- In the wake of the decision, the federal government is forging ahead, employing a consultative approach with provinces and territories to establish a common securities regulator.
- The goal is still both feasible and desirable in view of the shortcomings of Canada's current system of 13 provincial and territorial regulators. It remains to be seen, however, which provinces will cooperate with the federal government and, if so, on what terms.

The Supreme Court of Canada's ruling[1] that Ottawa's proposed federal *Securities Act* is unconstitutional left proponents of a national securities regulator wondering what the federal government would do next. Would it continue to pursue this elusive goal, or would it abandon its efforts?

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1 *Reference re: Securities Act (Can.)*, 2011 SCC 66.

We now have the answer. In its recent budget, the federal government said that it is consulting with provinces and territories, a number of which have reaffirmed their interest in working on a cooperative basis towards a common securities regulator (Economic Action Plan 2012 p. 127). The federal government has also extended the term of the Canadian Securities Transition Office, which is charged with leading the effort, by an additional year through to July 12, 2013.[2] In addition, Minister of Finance Jim Flaherty has set a one-year deadline for reaching a deal with the provinces.[3]

The federal government's decision to forge ahead is welcome news, as the goal of establishing a national securities regulator remains both feasible and desirable. Canada is the only developed country in the world without a national securities regulator. The current system of 13 provincial and territorial regulators suffers from a number of infirmities: policy development that is bogged down by the need to gain consensus among multiple jurisdictions; inconsistent enforcement and investor protection; duplicative and inefficient compliance costs; the lack of a single point of accountability, which impairs the regulation of systemic risk; and the inability of Canada to speak with one voice internationally.

The Way Forward

The Supreme Court found the proposed Act unconstitutional under the general branch of the trade and commerce power. It accepted that the "preservation of capital markets to fuel Canada's economy and maintain Canada's financial stability is a matter that goes beyond a particular 'industry' and engages 'trade as a whole.'"[4] However, the Supreme Court found that the proposed Act is chiefly concerned with the day-to-day regulation of "*all* aspects of contracts for securities within the provinces, including *all* aspects of public protection and professional competence within the provinces."[5] Viewing the proposed Act as a whole, the Supreme Court concluded that "it overreaches the proper scope of the general branch of the trade and commerce power descending well into industry-specific regulation. The wholesale displacement of provincial regulation it would effect is not justified by the national concerns that [the federal government] raises."[6]

The Supreme Court nevertheless endorsed the possibility of a national regulator based on a model of co-operative federalism.[7] The court noted the long history of recommendations for a national securities regulator based on federal-provincial cooperation[8] and the experience of other federations in developing successful power-sharing arrangements in the area of securities regulation.[9] It therefore remains constitutionally open to

2 Privy Council 2012-341 March 27, 2012, accessed online: http://www.gazette.gc.ca/rp-pr/p1/2012/2012-04-07/html/order-decret-eng.html.

3 Kiladze, Tim. "Flaherty sets one-year goal for national regulator plan," *Globe and Mail*, April 27, 2012, accessed online: http://www.theglobeandmail.com/globe-investor/flaherty-sets-one-year-goal-for-national-regulator-plan/article2416477/.

4 *Supra*, footnote 1, at para.114.

5 *Ibid.*, at para. 122.

6 *Ibid.*, at para. 117.

7 *Ibid.*, at paras. 9 and 130.

8 *Ibid.*, at paras. 11-28.

9 *Ibid.*, at paras. 48-52, referring to the experiences of Germany, Australia and the United States.

the federal government and the provinces to create a national regulator through joint federal-provincial action. It remains to be seen, however, which provinces will cooperate with the federal government and, if so, on what terms.

Ironically, even though the federal government now has less leverage to impose a deal following the Supreme Court ruling, the provinces may be more willing to participate in a joint federal-provincial scheme. The provinces will be bargaining from a position of greater strength, since they will not be perceived as capitulating to federal demands if they agree to cooperate with the federal government.

The four largest and most important securities regulators are in Ontario, British Columbia, Alberta and Quebec. Ontario has long supported the creation of a national regulator. Although it would like to have the head office based in Ontario, this concern could potentially be addressed by having a national regulator with regional offices and no head office.[10] British Columbia has recently indicated its support as well, provided that provincial jurisdiction is respected.[11] Alberta and Quebec are currently publicly opposed.

Alberta's opposition, however, does not appear to be as deeply entrenched as Quebec's. The Alberta government acknowledged before the *Reference* that it could accept a national regulator if the Supreme Court found the draft Act constitutional.[12] If the federal government makes the creation of a national securities regulator a priority and is willing to negotiate on other federal-provincial issues of importance to Alberta, a deal could be within reach.

If Ontario, British Columbia and Alberta come on board, all other provinces would likely participate except for Quebec. A Canadian regulator could be established among the nine participating provinces, and a passport system – which would harmonize and allow for mutual recognition of regulatory requirements with the Quebec market – could be implemented. This example of asymmetrical federalism could be justified by Quebec's distinctive civil law regime and French-language requirements. There is also precedent for asymmetrical deals with Quebec relating to national institutions, such as the arrangements involving the Canada Pension Plan and Quebec Pension Plan. Quebec may also be able to maintain its seat at the International Organization of Securities Commissions.

Both the federal and provincial governments will need to pass legislation that, taken together, creates and delegates powers to the national regulator. Ideally, the federal government would adopt legislation that each of the participating provinces would incorporate by reference. This would ensure that only one legislature is responsible for making any amendments. Given political realities and certain constitutional constraints,[13] it may be necessary for each participating jurisdiction to enact the applicable legislation and any amendments, even

10 Howlett, Karen, and Janet McFarland, "Regulator HQ battle: Toronto or nowhere, Ontario says," *Globe and Mail*, March 10, 2010, accessed online: http://www.theglobeandmail.com/globe-investor/regulator-hq-battle-toronto-or-nowhere-ontario-says/article1210983/.

11 McFarland, Janet, and Tara Perkins, "B.C. open to national securities regulator that respects provincial jurisdiction," *Globe and Mail*, March 30, 2012, accessed online: http://www.theglobeandmail.com/globe-investor/bc-open-to-national-securities-regulator-that-respects-provincial-jurisdiction/article2387733/.

12 Beltrame, Julian. "Alberta softens stand on national securities regulator," *Globe and Mail*, December 12, 2012, accessed online: http://www.theglobeandmail.com/globe-investor/alberta-softens-stand-on-national-securities-regulator/article2268419/.

13 Participating provinces may not be willing to have the federal government be primarily responsible for the legislation. In addition, both the federal and provincial governments must enact valid legislation within their jurisdiction. As a result, it may be necessary for the legislation and any amendments to be adopted by each participating jurisdiction, to the extent of its powers.

though this would be less efficient. In either case, an amending formula could be included in the legislation requiring the consent of a specified percentage of participating jurisdictions prior to any changes.

To ensure that both federal and provincial interests are appropriately protected, a body along the lines of the council of ministers envisioned under the proposed federal scheme would need to be established. This would provide a forum where the federal and provincial governments would work together in crafting legislation, discussing policy issues and in nominating the members of the board of directors of the national regulator. In addition, the board would need to be regionally representative, and the regulator would need to have an office in each participating jurisdiction.

Ottawa's Other Options

Even if no agreement can be reached with the provinces, the federal government will retain the ability to play an important role in improving Canada's system of securities regulation, particularly in the areas of enforcement and systemic risk.

With respect to enforcement, Parliament could enact new criminal law provisions – and potentially a new statute – focused on capital market offences (Puri 2009, 12). Additional funding could be provided to the Integrated Market Enforcement Teams of the R.C.M.P., or a separate body focused on investigating and prosecuting these offences could be established.

The Supreme Court has also recognized Parliament's ability to regulate systemic risk under the general branch of the trade and commerce power.[14] The federal government may therefore choose to adopt legislation regulating certain matters relating to systemic risk on a targeted basis, such as derivatives.[15]

The Supreme Court decision in the *Reference* was a disappointment for proponents of a national regulator. It is not an insurmountable roadblock, however, but rather a bend in the road that provides all parties with a clearer view of a constitutional landscape that must be navigated. If there's a will, there's a way.

14 *Supra*, footnote 1, at paras. 117, 121, 123 and 128.

15 For example, Professor Anita Anand and Grant Bishop have suggested that "the federal government should create a financial markets regulatory agency and mandate such a national regulator specifically with the oversight of systemic risks in securities markets, investing it with powers to intervene where particular products or activities threaten financial stability." They argue that "[t]his would involve the regulation of over-the-counter derivatives, credit rating agencies, record-keeping, short-selling and urgent regulation relating to 'substantial risk of material harm to investors or to the integrity or stability of capital markets.'" See Anita Anand and Grant Bishop, "Securities blanket," National Post, February 10, 2012, online: http://www.nationalpost.com/Securities+blanket/6130882/story.html.

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