Less Talk, More Action:

Ending the Futile Debate on a Canadian Securities Regulator to Focus on Resolving the Real Issues

by

Samantha Piane

A thesis submitted in conformity with the requirements for the degree of Master of Laws

Faculty of Law
University of Toronto

© Copyright by Samantha Piane 2013
Less Talk, More Action:

Ending the Futile Debate on a Canadian Securities Regulator to Focus on Resolving the Real Issues

Samantha Piane
Master of Laws
Faculty of Law
University of Toronto
2013

Abstract

It has been endlessly demonstrated that the provinces will stand in the way of successful negotiations towards a common or national securities regulator in Canada. While there are many flaws in the current regulatory system, there are aspects of a decentralized model that can be valuable, particularly in a country with such regional diversity. Moving forward, policy development should focus on strengthening the current system while realizing the political realities that persist. By retaining various aspects of a decentralized model, yet also cooperating with the federal government to overcome issues that a national regulator might have resolved, there is potential for Canada’s system to prevail.
Acknowledgments

Thanks to Anita Anand for her advice and support throughout the year.
Table of Contents

Abstract ................................................................................................................................. ii
Acknowledgments ................................................................................................................ iii
Table of Contents ................................................................................................................ iv
Chapter One: Introduction....................................................................................................1
Chapter Two: The Futility of a National Regulator .............................................................7
I. A History of Provincial Domination ...................................................................................7
II. Failed Attempts of Harmonization ..................................................................................8
III. The Securities Reference and the Constitution ..............................................................10
1. Constitutional Arguments ..............................................................................................13
2. The Securities Reference ...............................................................................................14
3. Responses to the Securities Reference ..........................................................................16
IV. Provincial Resistance Will Persist ................................................................................19
Chapter Three: Redefining the Goals ..................................................................................22
I. Decentralization ...............................................................................................................22
1. The Theory of Decentralization ....................................................................................22
2. Decentralized Regulation in Canada .............................................................................28
II. Harmonization ...............................................................................................................33
1. The Theory of Harmonized Regulation .......................................................................33
2. The Push for Harmonized Regulation in Canada ..........................................................35
Chapter Four: Policy Discussion ..........................................................................................39
I. Resolving the Issues Cooperatively ................................................................................39
II. A Model Regulator .........................................................................................................41
1. Improving the Passport System ....................................................................................41
2. Lowering Costs for Issuers ...........................................................................................43
III. Regulating Systemic Risk ..............................................................................................47
IV. Strengthening Enforcement ..........................................................................................55
V. An International Voice for Canada ...............................................................................59
Chapter Five: Conclusion ..................................................................................................61
Bibliography ......................................................................................................................62
“[T]he idea that the [Proposed Securities Act] would have resulted in a single regulator – and a single voice in international negotiations – was never more than a chimera.”

Chapter One: Introduction

Since the early 1900’s, securities regulation in Canada has been recognized as a matter of provincial jurisdiction. Each province and territory has independently maintained the responsibility of ensuring that capital markets are well regulated. This scheme of regulation is referred to as decentralized regulation. In the 1960’s, as markets became more global, the idea that securities regulation should be harmonized emerged. Harmonization would require uniform legislation, which was viewed as more efficient than a decentralized system.

After years of proposals and reports conceiving of a single, harmonized system for Canada, the federal government brought a Reference (the “Securities Reference”) to the Supreme Court of Canada asking whether a Proposed Canadian Securities Act (the “Proposed Act”) was within their constitutional authority to enact. The Proposed Act was a single scheme of securities regulation, which would be controlled by one national regulator. Going into the Securities Reference, the federal government faced resistance from Alberta, Quebec, Manitoba and to some extent, British Columbia and Saskatchewan.

as well.\textsuperscript{5} These provinces opposed the Proposed Act, even though it permitted the provinces to opt into the unified system of securities regulation. The federal government was hopeful that eventually most provinces would have done so.\textsuperscript{6}

In December 2011, the Court issued its decision, holding that the Proposed Act, as drafted, was unconstitutional. The decision was founded on the fact that the Proposed Act was directed at matters that fell under the provinces’ property and civil rights authority under Section 92(13) of the Constitution. The Court specified that the way forward should involve cooperation between both levels of government. Nevertheless, the Court did recognize that there might be a potential role for the federal government in securities regulation. For instance, the federal government might be able to regulate the areas of systemic risk and national data collection if the provinces were incapable of such.\textsuperscript{7}

There are two contending approaches at play in the determination of what Canada’s regulatory scheme should look like. On the one hand, there are proponents of a harmonized system who have, for years, pushed for a national regulator in Canada. It is believed that a uniform system of regulation would reduce duplicative costs, allow for enforcement mechanisms to be applicable across the country, and create a single voice

\textsuperscript{5} Anita Anand & Andrew Green “Side Payments, Opt-Ins and Power: Creating a National Securities Regulator in Canada” (2011) 51 CBLJ 1 at 2.

\textsuperscript{6} Reference Re Securities Act, supra note 4 at para 31.

\textsuperscript{7} See ibid.
for Canada. Overall, these proponents believe that a unified system would be stronger and more efficient. On the other hand, there are proponents of a decentralized system who argue for a multi-jurisdictional regulator. Decentralization, they believe, encourages the provinces to be innovative with securities laws, while ensuring that local interests are not marginalized by a single, monopolistic regulator.

I support the latter theory of decentralization, for the pragmatic reason that it is the most realistic system to follow from the results of the Securities Reference. Most recently, the federal government has indicated that it is negotiating an agreement with the provinces on a common regulator. If the federal government is working with the provinces on a cooperative, yet unified, model, it will unlikely persuade all provinces to join. In light of this fact, the federal government has also stated that it will take unilateral action in the form of federal legislation, should an agreement not be reached. It will be argued that cooperative negotiations will face the same provincial resistance to the Proposed Act, and any unilateral action undertaken by the federal government will likely be challenged in the Supreme Court as outside federal jurisdiction. The Supreme Court significantly limited federal jurisdiction in this arena, thus any action the federal government takes will be limited as well. Consequently, Canada will never have a truly

---


11 Ibid.
national regulator – one that is unified in all regards. Thus, the system will always be some form of multi-jurisdictional.

Therefore, at this point, instead of futile negotiations with the provinces on a uniform model, the focus of regulation should be redefined. There are several practical issues that must be overcome to strengthen the regulatory system regardless of whether or not one believes that this would be done best by a decentralized or harmonized regulator. It is argued that these practical issues should be addressed cooperatively, however, in order to garner provincial acceptance, the negotiations must offer the provinces some incentive. Threats of unilateral action will unlikely pave a successful path to cooperation. The history of securities regulation, and other predominant provincial areas, demonstrates that cooperation is possible. Yet, the cooperation should not (and cannot) amount to federal domination. Rather, the federal government should provide some forms of assistance to the provinces, where necessary, to reform securities regulation.

The paper will proceed as follows. Chapter two will establish that a decentralized regulatory system in Canada is, and will remain, the reality. This is a result of the strong political battle between those provinces that want a national regulator, and those provinces that refuse to relinquish power fearing a monopoly, particularly Quebec. This political battle has led to an impasse over and over again; therefore, the debate about establishing a national or common regulator should cease. There are various reasons for this belief. Canada has a history of provincial domination in the securities industry and there have been several failed attempts at harmonizing the regulatory system. Both points have been reinforced by the Supreme Court in the Securities Reference and supported by Constitutional reasoning. This chapter will also highlight some of the responses to the Securities Reference, particularly by proponents of a national regulator.
who believe that the history and scope of securities has changed to warrant federal regulation. Many of these proponents still believe that there is hope for a national regulator, and efforts at achieving one are still underway. In response to this, it will be argued that any current efforts of establishing a national regulator will be faced with resistance from the same provinces that have opposed the scheme all along. Even if some provinces cooperate in these efforts, many will not. As a result of this persistent opposition, the system will likely remain decentralized for some indefinite period of time.

Chapter three then argues, in light of the circumstances, that the focus of regulation should be redefined. There are two contending theories, decentralization and harmonization, each possessing propitious arguments for their respective regulatory models. Because Canada’s system will likely remain decentralized, the focus of regulation should shift from a discussion of who is in the best position to regulate, to a policy discussion of moving forward via cooperative efforts to improve the current system, which is plagued by various practical issues. The policy discussion should seek to resolve the problems that a national regulator might have accomplished. Yet, some of the benefits put forward by proponents of a decentralized system can be retained. If reform efforts are more efficiently concentrated on the actual issues facing securities regulation, rather than a futile debate about establishing a national regulator, there is no reason why decentralized regulation cannot be successful.

Chapter four consists of a policy discussion, which proposes what the regulator should look like, and various ways of resolving some of the identified issues. For each issue, cooperative solutions are suggested. In a decentralized system of regulation, cooperative solutions might work by the federal government assisting the provincial governments to ensure capital markets are well regulated. With federal assistance, the
goals of regulation can be more easily achieved, without limiting provincial autonomy, and while retaining the benefits of a decentralized system. Any limits on provincial autonomy must be justified, and, as will be demonstrated, will be challenging as a result of the Securities Reference. Specifically, it will be suggested that Canada strengthen its passport system, which involves requesting federal assistance in the form of compensation to reduce costs for issuers. It will also suggest that enforcement mechanisms should be strengthened, particularly by the creation of an independent adjudicative tribunal - the creation of which might also require federal assistance. Next, regulating systemic risk will be examined. It will be argued that the federal government cannot unilaterally establish a systemic risk regulator. Rather, the provinces should continue to work with the Canadian Securities Administrators (the “CSA”) on managing systemic risk. Any policy-making efforts should obviously involve the federal government as well, but again, these efforts should be more cooperative. Lastly, it will also be suggested how the CSA might be used to represent Canada on an international platform. Overall, each of the foregoing resolutions proposes that cooperative efforts be used in achieving each of them, yet also offer the provinces incentive for doing so.

Lastly, chapter five will conclude by reinforcing that as a result of the current circumstances, resources should now be redirected at improving the system that is currently in place. This will, ideally, be a more efficient use of resources.
Chapter Two: The Futility of a National Regulator

Following the federal government’s defeat in the Securities Reference, as identified above, the federal government has since indicated that it is working cooperatively with the provinces towards a common regulator.\textsuperscript{12} In the most recent Budget, the federal government specified that elements of a common regulator would include: a single set of rules to administer; an independent and self-funded body requiring only one set of fees; a board of directors with capital markets expertise; and preservation of local regulatory offices.\textsuperscript{13} Nevertheless, the federal government has also indicated that should cooperative negotiations fail, it will take unilateral action by enacting legislation.\textsuperscript{14} Without further knowledge of the content of the negotiations, and solely on the basis of the above elements, it is unlikely that a common regulator will ensue.\textsuperscript{15} The elements are no different than what was put forward in the Proposed Act, and appear to offer little incentive for the provinces’ cooperation. With respect to any unilateral action


\textsuperscript{13} Campbell, Palmer, and McLeod, supra note 10.

\textsuperscript{14} Ibid.

\textsuperscript{15} See Jeffrey G MacIntosh, “A National Securities Commission? The Headless Horseman Rides Again” in Anand, What’s Next for Canada, supra note 3 223 at 263 [MacIntosh, “Headless Horseman”] (“[t]he closest that we can get to the goals envisioned by the federalists is (via cooperative federalism) a provincially constituted [multi-jurisdictional regulator], perhaps with a federal sidecar having information-gathering responsibilities and some role in addressing systemic risk.” See also Ramandeep K Grewal & Edward J Waitzer, “National Securities Regulation – Centralization and Its Discontents” (2012) 27 BFLR 529 at 539 (stating, “the question, of course, is not whether securities regulation should be federal or provincial – on this point the Court was clear.”).
that might be taken, Canada’s history of provincial domination in the securities industry, various failed attempts at harmonizing the system, and the Supreme Court’s reinforcement that many aspects of the securities industry fall within provincial jurisdiction, demonstrate that the federal government has a very limited role in this arena. This is so, despite the hard feelings expressed by the proponents of a national regulator resulting from the Securities Reference. More significantly, the same resistance faced by the federal government going into the Securities Reference is assumed to recur in the current negotiations towards a common regulator, especially without incentive, and unilateral action will likely be challenged in court. As a result, both the federal government and the provinces must come to terms with the fact that some form of a multi-jurisdictional regulator is the reality, for now.

I. A History of Provincial Domination (With Cooperative Elements)

Despite the evolving nature of securities law as national and international described above, a look at Canada’s history of securities regulation illustrates the provinces’ significant involvement in securities regulation since the beginning of the 20th century. For instance, Manitoba enacted the first blue sky law in 1912. Subsequently, in the 1960’s, Ontario published the Kimber report, which set a benchmark for the other provinces and modernized securities regulation following what had already been done in the United States “US”. Then, in the 1970’s, the provinces acted with the CSA towards harmonization, which eventually led to the current passport system.16 Aside from criminal law provisions, securities regulation has been shaped by the industry itself,

16 Jean Leclair, “Please, Draw Me a Field of Jurisdiction: Regulating Securities, Securing Federalism” (2010), 51 SCLR (2d) 555 at 563-564.
especially with respect to licensing and registration, and ongoing market conduct. The regulatory elements of licensing and registration are most closely connected to the provincial authority over property and civil rights.\(^\text{17}\)

Nevertheless, various cases also demonstrate that some elements of securities regulation have coexisted for some time between both levels of government. For example, in 1929, in *Manitoba Attorney General v. Canada (Attorney General)*, federal corporations were prevented from issuing securities without approval from the provincial authorities. The Privy Council held that provincial legislation interfered with the federal corporation’s ability to raise capital. The case complicated securities regulation and the boundaries of provincial legislation.\(^\text{18}\) Subsequently, in *Mayland and Mercury Oils Limited v. Lymburn and Frawley*, the Privy Council held that a provincial securities law did not encroach on the federal government’s criminal law power. This case shifted the division of powers by the court concluding that a federal company could be subjected to competent provincial legislation, and there was no reason why a federal company could not issue capital through the provinces.\(^\text{19}\)

Moreover, 30 years later in *R v. Smith*, a federal criminal law overlapped the provinces’ legislation prohibiting the publication of false information in a prospectus. The Court held that the provincial legislation was not related to criminal law and therefore did not infringe on the federal government’s criminal law power. This case

\(^{17}\) Ibid.

\(^{18}\) [1929] 1 DLR 369 (JCPC). *See also Condon, Anand & Sarra, supra* note 2 at 85.

\(^{19}\) [1932] 1 WWR 578 (Alta JCPC). *See also Condon, Anand & Sarra, ibid* at 90.
clarified the province’s jurisdiction as established in *Mayland*.\(^{20}\) Lastly, in *Multiple Access Ltd. v. McCutcheon*, there was again legislative overlap between the federal and provincial governments with respect to insider trading laws. The court held the federal and provincial laws could operate concurrently since it was possible for citizens to comply with both of them. One did not render the other inoperative. In this case, the court was also careful not to conclude that a federal structure was not possible.\(^{21}\)

The history and cases are illustrative of the strength of provincial jurisdiction over securities. Even though some federal regulation has been acceptable, it has been in the areas that are clearly federal territory – like criminal law. There is an overall indication by the courts that the provinces are capable of competent regulation.

**II. Failed Attempts of Harmonization**

The debate about establishing a national securities regulator began in the 1960’s. In 1964, the Porter Report recommended that Canada strengthen securities regulation by establishing a federal regulatory agency to work cooperatively with the provinces.\(^{22}\) In 1967, the CANSEC Proposal recommended a more sophisticated regulatory staff, whereby a minister represented each province. This recommendation did not involve usurping authority from the provinces, but it did recognize that securities regulation transcends geographic and constitutional boundaries. Therefore, the Proposal suggested a federal regulator over matters that were international or inter-provincial in nature.


\(^{22}\) *Condon, Anand & Sarra, ibid* at 119.
Nevertheless, the Proposal was criticized for weighing too strongly in favour of Ontario.\(^\text{23}\) Then, in 1979, the Proposals for a Securities Market Law for Canada resulted from a market study. This Proposal recommended that Canada create a federal securities commission that would cooperate with provincial and foreign commissions. This recommendation was never implemented as it was criticized for overlapping and duplicating provincial authority.\(^\text{24}\) Subsequently, in 1994, the federal government and various provinces again proposed a federal securities regulator, which would include an opt-in structure for the provinces, and would apply to extra-provincial securities matters. This proposal was critiqued for being too expensive.\(^\text{25}\)

Most recently, various committees have recommended structures for a national regulator. Many of these initiatives were created as a response to the 2007-2008 economic crisis.\(^\text{26}\) Before that however, in 2003, the Wise Person’s Committee Report called on Canada for the reform of the regulatory scheme. It set forth that the nature of the securities industry had changed and was no longer provincially concentrated. Instead, a national regulator would better represent Canada globally and allow the country to be efficient and sustainable economically.\(^\text{27}\)

\(^{23}\)\textit{Ibid} at 120. See also \textit{Grewal & Waitzer supra} note 15 at 531-532.

\(^{24}\)\textit{Ibid} at 121. See also \textit{Grewal & Waitzer, supra} note 15 at 532 (in 1982 the federal government indicated it did not intend to implement the proposal).

\(^{25}\)\textit{Ibid} at 123-125. See also \textit{Grewal & Waitzer, supra} note 15 at 532.

\(^{26}\)\textit{Anand & Green, supra} note 5 at 4.

Then, following the economic crisis, the Expert Panel on Securities Regulation established the Proposed Canadian Securities Act. The Expert Panel issued a final report and a draft of the Proposed Act that would establish a common securities regulator. The report argued that systemic risk should be explicitly addressed in securities legislation, including the power to take measures dealing with events that affect Canadian capital markets.\(^ {28}\) The report also recommended that within the federal model, the provinces would have regional representation and would be responsible for the local market.\(^ {29}\) Moreover, the model included an opt-in provision for the provinces, which allowed them to voluntarily join the national regulator over time.\(^ {30}\) In response to the report, the federal government created the Transition Office.\(^ {31}\) The Transition Office issued a Transition Plan, which detailed that it would work with those provinces that wanted to cooperate towards transitioning the old system to the new single regulatory system.\(^ {32}\) Shortly thereafter, the federal government brought the Proposed Act by a Reference to the Supreme Court of Canada, which is discussed in more detail below.

Going into the Securities Reference, and currently, Canada has taken steps to harmonize a number of its securities laws. These efforts were taken cooperatively between the provinces and the CSA. This is referred to as the passport system, whereby

\(^{28}\) Condon, Anand, Sarra, supra note 2 at 192.

\(^{29}\) Anand & Green, supra note 5 at 5.

\(^{30}\) Ibid at 6.

\(^{31}\) Ibid at 1.

all provincial regulators (with the exception of Ontario) have agreed that one securities regulatory authority acts as a principal regulator for an issuer. This system gives issuers access to capital markets in multiple jurisdictions while only having to comply with the laws of one principal regulator. Therefore, an issuer only has to meet the requirements of one set of harmonized laws.\(^{33}\)

III. The Securities Reference and the Constitution

1. Constitutional Arguments

There are a number of constitutional arguments against the establishment of a national regulator - the Supreme Court relied on many of these arguments in the Securities Reference. Most of these arguments involve preserving Canada’s federal structure. All of them affirm the difficulty that the federal government faces in creating a common regulator.

For one, Canada, as a federation, is cautioned not to place all economic control within one level of government. It is said that operative governments are a fundamental objective of federalism because they promote the common good.\(^{34}\) Furthermore, if “[c]onstituitional doctrines [are] designed to reconcile the legitimate diversity of regional experimentation with the need for national unity’, then commerce . . . is the ideal sphere where such experimentation should be encouraged.”\(^{35}\)

In *Canadian Egg Marketing Agency v. Richardson*, it was stated that:

---

\(^{33}\) *Condon, Anand & Sarra*, supra note 2 at 181.

\(^{34}\) *Leclair*, supra note 16 at 583, citing *Canadian Western Bank v Alberta*, [2007] 2 SCR 3 at para 22.

The federal structure of our Constitution authorizes the growth of distinct systems of commercial regulation whose application is inevitably defined ‘in terms of provincial boundaries’. Provincial legislation validly enacted under s. 92 of the Constitution is applicable only within a single province and may have an effect on the conditions according to which a livelihood may be pursued. Federal legislation, or cooperative federal-provincial legislative schemes, may also apply only in some provinces and, thus, create variable conditions for the pursuit of a livelihood in different provinces . . . This type of economic legislation, and the growth of divergent regulatory regimes in the provinces, is undoubtedly authorized by the Constitution.36

Lastly, it is argued that “[d]iscarding 100 years of provincial efforts at regulating securities would fly in the face of the obvious intention of the Constitution to create a federal country.”37

2. The Securities Reference

As briefly detailed above, after years of failed proposals for a single securities regulator, in 2010, the federal government, Ontario, and other interveners brought a Reference to the Supreme Court of Canada asking whether a Proposed Act was a proper exercise of Parliament’s power to regulate trade and commerce under section 91(2) of the Constitution.38 The Proposed Act was a single scheme of securities regulation, which would be controlled by one national regulator.39 Going into the decision, the federal

37 Leclair, supra note 16 at 586.
38 Reference Re Securities Act, supra note 4 at para 3.
39 Ibid at para 2.
government faced resistance from Alberta, Quebec, Manitoba and to some extent, British Columbia and Saskatchewan as well. These provinces opposed the Proposed Act, even though it permitted the provinces to opt into the unified system of securities regulation. Despite the opposition, the federal government was hopeful that eventually most provinces would have done so. Obviously relying upon a favourable Supreme Court ruling.

Unanimously, the Court held that the Proposed Act was not a proper exercise of Parliament’s power under section 91(2) of the Constitution. The Court reasoned that the Proposed Act mainly concerned issues that fell within the provinces’ power over property and civil rights under section 92(13) of the Constitution. The Proposed Act was not directed at matters that were truly national in importance and scope that distinguished it from provincial concerns. Therefore, it failed to meet the General Motors test required for a matter to come within Parliament’s general trade and commerce power.

In its decision, the Court did recognize that federal intervention in securities law might be justified where the concern is qualitatively different from what the provinces are capable of carrying out. The Court was careful not to make an absolute declaration and specified, “[t]he need to prevent and respond to systemic risk may support federal intervention.”

---

40 Anand & Green, supra note 5 at 2.
41 Reference Re Securities Act, supra note 4 at para 31.
42 Ibid at para 125-126, 134. See also, ibid at para 80 citing General Motors of Canada Ltd. v. City National Leasing, [1989] 1 S.C.R. 641, 661-662 (the requirements for a matter to fall within the federal government’s general trade and commerce jurisdiction are: “(1) whether the impugned law is part of a general regulatory scheme; (2) whether the scheme is under the oversight of a regulatory agency; (3) whether the legislation is concerned with trade as a whole rather than with a particular industry; (4) whether it is of such a nature that provinces, acting alone or in concert, would be constitutionally incapable of enacting it; and (5) whether the legislative scheme is such that the failure to include one or more provinces or localities in the scheme would jeopardize its successful operation in other parts of the country.”
The Court then concluded by advising that a cooperative approach is still available, one that respects the provinces’ role in securities regulation, and allowing federal intervention if warranted. It was reasoned that this approach is in line with Canadian constitutional principles, particularly, federalism.44

3. Responses to the Securities Reference

Following the Securities Reference, proponents of a national regulator had, plausibly, very strong reactions to the decision. They argued that the Supreme Court failed to take into account the evolution of capital markets and instead, determined the case solely based on constitutional law.45 Using abortion and same sex marriage as an example, they contended that the Supreme Court has, in the past, taken the stance that the Constitution is a living tree, which can adapt to new social realities. Despite this, the Court failed to consider the evolving nature of securities law from provincial to national.46

Prior to the Securities Reference, the issue had been heard before two lower courts. Of the three court decisions that considered the constitutionality of the Proposed Act, the dissenting judge, Dalphond JA of the Quebec Court of Appeal, was the only one who reviewed the international character of securities. Dalphond looked at data on

43 Ibid at para 128.
44 Ibid at para 130-133.
45 Anand, What’s Next For Canada, supra note 3 at 4.
46 Michael J. Trebilcock, “More Questions Than Answers: The Supreme Court of Canada’s Decision in the National Securities Reference” in Anand, What’s Next for Canada, supra note 3 37 at 38-39. See also Poonam Puri “The Supreme Court’s Securities Act Reference Fails to Demonstrate and Understanding of the Canadian Capital Markets” (2012) 52 CBLJ 190 at 192-193 (in many Reference cases the Court has undertaken policy analysis. For example, Same Sex Marriage and Quebec Secession).
foreign investments in Canada, national trading, and the national regulation of investment and mutual fund dealers.47 Proponents of a national regulator argued that unfortunately, the Supreme Court failed to conduct the same type of analysis when evidence demonstrated that two thirds of reporting issuers in Canada report in more than one jurisdiction, and also raise capital in more than one jurisdiction. Furthermore, the Court failed to appreciate the nature of a market and instead focused on federalism, and rather than conducting a policy analysis, the Court made its decision based on what has been done in the past.48

The Supreme Court, in the Securities Reference, stated that evidence had to be put forth that the nature of securities regulation had transformed so significantly as to justify a change in its head of power.49 As set out above, since the beginning of the 20th century, the provinces have regulated the securities industry in Canada. This is the case even though provincial jurisdiction extends beyond their respective provinces.50 The Court looked to a study conducted by Suret and Carpentier, which demonstrated how local or regional, and diverse, the Canadian securities industry is. For instance, mining listings dominate the British Columbia market; half of Ontario’s listings are from financial services companies; oil and gas make up the listings in Alberta, while a quarter of the Canadian technology listings come from Quebec.

47 Trebilcock, ibid at 42.
48 Puri, supra note 46 at 192-193.
49 Trebilcock, supra note 46 at 39. See also Reference re Securities Act, supra note 4 at para 116.
Skeptics of Suret and Carpentier’s study argue that it failed to take into account the fact that investors are often from out of province and that public offerings are typically issued in more than one province. Additionally, the study focuses on a narrow segment of capital markets, which represents only a small portion of regulated activity. For instance, it analyzes exempt offerings. Moreover, securities transactions are not local; buyers and sellers are located all over the world. Overall, a regime structured by sub-national levels of government can be an impediment to the productive movement of capital within Canada.

Whether or not the Supreme Court failed to consider the evolving nature of the securities industry, a ruling by the Supreme Court in favour of a national regulator would have upset the balance of power between the federal and provincial governments. If the Court expanded the federal government’s trade and commerce authority into the very general authority of the provinces over civil and property rights, this could have led to federal government intrusion in other provincial arenas. As history and the Court’s discussion indicates, respecting federalism is an important part of regulatory regimes, and the courts in all of the cases were careful in limiting federal jurisdiction to those issues that the provinces are incapable of regulating.

---

51 See Trebilcock, supra note 46 at 39 (Trebilcock’s criticism of Suret and Carpentier study).

52 Ibid at 38.

53 MacIntosh, “Politics, Not Law”, supra note 1 at 181.
IV. Provincial Resistance Will Persist

Even if the Supreme Court ruled in favour of the federal government and went against a history of provincial dominance and federalism, it has been said that there was never any hope of creating a truly national regulator. In the Securities Reference, six provinces argued against one, meaning that several provinces would never have joined the scheme willingly. Moreover, if the provinces did not join, the opt in provision made it clear that they would be able to continue with their existing regulatory schemes.\textsuperscript{54} The federal government would not have been able to rid the provinces of jurisdiction and therefore, a favourable ruling would have only created a multi-jurisdictional regulator.\textsuperscript{55} The system would not have resolved any problems of defragmentation since some provinces would have opted into the scheme, while others would have continued within their own schemes. Having both federal and various provincial schemes regulating would likely have created a host of other problems to resolve, instead of focusing on strengthening the current reality.

Given the provincial opposition to the Proposed Act, even if some provinces are now attempting to cooperate with the federal government, this will not generate the advantages of a single regulator that the federal government has hoped for. 60\% of exchange-listed transactions involve three or fewer provinces. Ontario, Quebec, Alberta and BC are the dominant provinces for listings. Quebec was, and still is, the strongest opposition and is therefore unlikely to ever cooperate with the federal government.

\textsuperscript{54} Ibid at 179, citing principle from \textit{Multiple Access Ltd. v McCutcheon}, [1982] 2 SCR 1161.

\textsuperscript{55} Ibid at 180.
Additionally, Alberta (particularly) and BC were strong opponents to the Proposed Act. In *A National Securities Commission? The Headless Horseman Rides Again*, Jeffrey MacIntosh makes the assumption that Quebec, BC, Alberta, Manitoba, Saskatchewan, and New Brunswick would not have opted into the federal scheme. The same assumptions can be made subsequent to the decision with respect to the outcome of the current negotiations.\(^56\) Thus, if three of the four dominant provinces (and potentially others) exhibit the same resistance to cooperation with the federal government in negotiations towards a common regulator, issuers will nevertheless be subject to multiple regulators. This would result in a handful of issuers being regulated by a federally created common regulator and the rest regulated by provincial schemes, again causing even more fragmentation than the status quo.\(^57\) Consequently, any current negotiations towards a common regulator are unlikely to rectify the problem of issuers facing several compliances costs, as well as other issues that that a single regulator might have resolved.

The Supreme Court specified that cooperative solutions are necessary in resolving the issues surrounding securities regulation. The Court made clear that federalism requires cooperation. At this point, whether or not one believes a national regulator is the solution, the likelihood of it ever happening was weak, and has been severely diminished as a result of the Securities Reference. The country’s federal structure and diversity amongst the provinces creates a regional tension that is very difficult to overcome.\(^58\) The same opposing provinces may attempt negotiations towards cooperation with the federal government, but true harmonization is doubtful. Additionally, any action by the federal

\(^{56}\) See *MacIntosh, “Headless Horseman”*, *supra* note 15 at 223.

\(^{57}\) *Ibid* at 223.

\(^{58}\) See *MacIntosh, “Politics, Not Law”*, *supra* note 1.
government that is taken unilaterally will likely be challenged in court. Moreover, as will be demonstrated in the discussion below on regulating systemic risk, federal action would have to relate to areas that the provinces are incapable of regulating. This is limited and will present a challenge for the federal government.

Therefore, instead of focusing on the idealistic belief that a single regulator may still be possible, in some form, the federal government should concentrate its efforts on improving the status quo within the current system. It needs to be realized that the system is, and will remain for some time, decentralized. A decentralized system is not detrimental to securities regulation in Canada. There are many beneficial aspects of decentralization that can be used to Canada’s advantage. On the other hand, it must also be examined what issues a national regulator might have resolved. These resolutions should be incorporated into any cooperative solutions. Overall, this is a more pragmatic approach to the current status of securities regulation.
Chapter Three: Redefining the Goals

Once it is realized that Canada’s regulatory structure will likely remain unchanged for the foreseeable future, the focus of regulation can then shift to resolving various issues with the status quo. There are two competing theories of regulation – decentralization and harmonization. Concepts found in both theories are instructive for regulatory problem solving. Each theory will be discussed in turn.

I. Decentralization

1. The Theory of Decentralized Regulation

Decentralized regulation is often referred to as competitive regulation, since having multiple regulators enables interjurisdictional competition (“IJC”). IJC is defined as, “[a] rivalry among governments in which each government is trying to win some scarce beneficial resources or to avoid a particular cost.”\(^59\) Within this principle is the idea of regulatory competition, which is “a contest among regulatory jurisdictions to attract activity by offering the most efficient regulatory environment in which to operate.”\(^60\) Moreover, an efficient regulatory environment is one that offers participants the type of regulation they are willing to pay for. An ideal regulator would guide, rather than oppose, market forces.\(^61\)

---

\(^59\) Suret & Carpentier, “Securities Regulation in Canada”, supra note 9 at 80.

\(^60\) Ibid. See also Roberta Romano, “The Need for Competition in International Securities Regulation” (June 30 2001), online: Social Science Research Network <http://ssrn.com/abstract=278278> [Romano, “Need for Competition”].

\(^61\) Ibid at 81.
In a country with a federal structure, there are three preconditions for interjurisdictional competition. First, where a country has a fragmented regulatory structure with many authorities, competition will be stimulated best. Second, federalism encourages local autonomy, which strengthens competition because it promotes innovation. Lastly, when local authorities rely on local revenue sources, competition is intensified.}

It has been said that:

[o]ne of the great strengths of federalism is the opportunity it presents for the development of intergovernmental competition…The national government itself should undertake to strengthen competition among the states. It can do so in prosaic yet effective fashion by acting to improve information and mobility.}

Today, capital markets are dominated by sophisticated institutional investors. However, competition in the securities industry can protect both large and small investors, while offering a superior regulatory system. This works by issuers selecting regulators with the best investor protections to lower the cost of capital. Less sophisticated investors are also protected because institutional investors will dictate where issuers choose to be regulated. Overall, this is superior to a national regulator because it allows regulators to determine which rules are effective by being able to ascertain which systems investors prefer.

---


63 Ibid at 15.

64 Romano, “Need for Competition” supra note 60 at 2.

65 Ibid at 3.
The most cited example of regulatory competition is US corporate charter competition, whereby each state has its own corporate law with harmonized choice of law rules to enable competition. This creates a market for corporate law and as a result, incentive for states to offer law that is beneficial to investors.\textsuperscript{66} Furthermore, it is argued that corporate charter competition is instructive for securities regulation because both are concerned with the interest of investors financially, and those corporations that choose regimes that are unfavourable to investors will bear higher capital costs.\textsuperscript{67} It is argued that shareholders have benefitted from corporate charter competition since corporations have not chosen regimes that exploit investors.\textsuperscript{68}

There are many benefits to a competitive regulatory regime. For instance, competition can prevent regulators from transferring wealth to preferred groups because of the threat that issuers will simply switch to a different regime. Whereas, single regulators may favour specific industries or interest groups. This has occurred in the US when the Securities Exchange Commission has been known to fix commission rates, which benefit individual investors at the expense of institutional investors.\textsuperscript{69} Competition forces regulators to put effective investor protections into place, since a failure to do so would result in investors discounting prices and thus, regulators would suffer a loss in


\textsuperscript{67} Romano, “Need for Competition” supra note 60 at 87.

\textsuperscript{68} Ibid at 127.

\textsuperscript{69} Ibid at 5.
Leaving regulators with a monopoly over issuers and investors may allow them to take value for themselves at the expense of investors. A benefit of competition is that it constrains these types of actions. In theory, this maximizes the wealth of both issuers and investors.

Furthermore, having several regulators can allow for faster correction of policy mistakes. Regulators can examine the regimes that are desirable to investors and this provides them with information regarding which rules are preferred. This also gives regulators incentive to improve their regimes. Regulators can be innovative with providing preferred regimes, which can lead to superior regulatory structures. On the other hand, a single regulator would have less of an incentive to be innovative and adopt preferable rules since all issuers would already be under its jurisdiction. In a multi-jurisdictional system, when two jurisdictions are placed side by side, their inefficiencies are easily illustrated, which puts pressure on regulators to be more efficient.

Another limitation of a single regulator is the fact that it prohibits multiple experimentations and any failures would affect the country as a whole rather than just one jurisdiction. Moreover, a national regulator may not be as sensitive to local concerns. This can be true in the areas of investor protection, or in investigations and enforcement, which all have a local dimension. Lastly, similar to the argument above, a national

---

70 Ibid at 3. See also Suret & Carpentier, “Securities Regulation in Canada”, supra note 9 at 8 (agreeing that competition is necessary to counterbalance the central government acting against social well-being).


72 Romano, “Need for Competition”, supra note 60 at 5 - 8.

73 Tung, supra note 66 at 380.
regulator might act in favour of commercial interests, such as financial institutions, rather than in the public interest.\textsuperscript{74}

Opponents of a competitive regulatory system argue that competitive regulation will result in a race to the bottom. The idea of a race to the bottom can take different forms. One example is illustrated by the fact that when jurisdictions compete for capital they might adopt policies that do not impose high costs on actors. Consequently, all jurisdictions will have to adopt policies that attract the same amount of capital.\textsuperscript{75} In the securities context specifically, those concerned with a race to the bottom believe that regulators will reduce regulatory requirements to attract issuers. For instance, issuers will choose regulators with minimal to no disclosure requirements.\textsuperscript{76} Governments typically intervene in the markets when private parties cannot accurately equate a product’s marginal cost and benefit.\textsuperscript{77} Regulation forces issuers to disclose information, favourable or unfavourable, to the public. Therefore, in a competitive system where regulators have low disclosure standards, issuers will not voluntarily disclose more information than necessary.\textsuperscript{78}

In response to those who argue that competition results in a race to the bottom, Roberta Romano, an academic whose research is focused on state charter competition,

\begin{footnotes}
\item[74] Leclair, supra note 16 at 562.
\item[76] Suret & Carpentier, “Securities Regulation in Canada”, supra note 9 at 82. See also Romano, “Need for Competition”, supra note 60 at 24.
\item[77] Romano, ibid at 25.
\item[78] Ibid at 26-27.
\end{footnotes}
asserts that there is no evidence to support the claim. Instead, evidence from institutional equity and debt markets, and cross-country listing practices has demonstrated that issuers actually choose to disclose more information than the regulators require.\textsuperscript{79} In fact, some regulation has prevented the disclosure of information to investors. For example, the SEC has banned earnings forecasts, which is critical information for investors.\textsuperscript{80} Moreover, to prevent a race to the bottom from occurring, there are two solutions. The first solution is harmonization among the jurisdictions for disclosure requirements.\textsuperscript{81} In the same vein, many proponents of competitive markets believe that establishing minimum common standards can overcome any speculation of a race to the bottom occurring. This has been done with US charter competition where the states have established uniform laws in many areas.\textsuperscript{82}

It is also argued that competition and harmonization are not incompatible. As suggested above, competition might actually require some harmonization.\textsuperscript{83} For instance, in a passport system, there is harmonization of substantive rules in order to allow the sale of securities in each jurisdiction.\textsuperscript{84} The harmonization should be on rules that are fundamental to securities regulation. As detailed above, Canada currently operates under this type of system.

\textsuperscript{79} Ibid at 2 & 127.
\textsuperscript{80} Ibid at 86.
\textsuperscript{81} Harrison, supra note 75 at 17.
\textsuperscript{82} Suret & Carpentier, “Securities Regulation in Canada”, supra note 9 at 8. See also ibid at 18 (Harrison suggests that when competition is between provinces, the federal government might have jurisdiction to intervene to prevent a race to the bottom situation).
\textsuperscript{83} Tung, supra note 66 at 370.
\textsuperscript{84} See Harrison, supra note 75 at 17-19.
2. Decentralized Regulation in Canada

In a lengthy study of the Canadian securities market, which was used by the Supreme Court in its determination in the Securities Reference, authors Suret and Carpentier argue against the establishment of a national regulator. They assert that regulatory policy in Canada is guided by pressure groups rather than actual knowledge and research, and after conducting research, no evidence exists that the current Canadian system disadvantages issuers. Additionally, there is no indication that harmonization and uniformity are the most efficient forms of regulation. In fact, the Organization for Economic Co-Operation and Development ranked Canada as having the second best securities regulatory system in the developed world.\(^8^5\)

In the study, Suret and Carpentier rebut the argument that having 13 separate regulators leads to increased costs. Their studies illustrate that issuers typically deal with only one or two regulators in Canada – mostly Ontario and Quebec.\(^8^6\) Between 1991 and 2000, only 3.2% of initial public offerings were by companies without a head office in Alberta, British Columbia, Ontario and Quebec (the four dominant provinces). This means that for many issuers, costs are paid in these jurisdictions only. Additionally, the

---

\(^8^5\) Leclair, supra note 16 at 560-561. See also Eric Spink, QC, “Reacting to the Status Quo in Securities Regulation” (2012) 52 CBLJ 182 at 183 (“The methodological assessments in evidence all ranked the performance of our decentralized system among the best in the world, if not the best, in terms of achieving functional policy objectives of securities regulation.”).

\(^8^6\) Suret & Carpentier, supra note 9 at 3 & 22 (evidence shows that 97% of all issues in Canada are made by four dominant provinces).
study found that the cost of initial public offerings is lower in Canada than in the US, which operates under a harmonized system.\textsuperscript{87}

Suret and Carpentier also assert that a national regulator is contrary to the market approach seen in US charter competition, which strives to meet the needs of participants. They also distinguish the Canadian and American financial systems to affirm that a centralized system is unsuitable for Canada. For instance, the US system has many participants. At the federal level, securities regulation in the US is over larger issuers. However, regulation is known for being costly, slow and lacking resources. In Canada, the system is highly concentrated and smaller issuers predominate the markets. There are few major banks and therefore, the only real competitive element of Canada’s financial system is securities regulation.\textsuperscript{88} It was found that the SEC takes four to seven weeks to complete a review process of a registration statement, while the average time for review in Canada is between eight and 30 days depending on whether it is a long or short form prospectus.\textsuperscript{89}

Moreover, they argue that:

[it seems paradoxical to invoke financial scandals which mainly affected American businesses to support centralization of securities in Canada. These abuses took place mainly in a country where securities regulation

\textsuperscript{87} Ibid at 22.
\textsuperscript{88} Ibid at 10-11 & 136.
\textsuperscript{89} Ibid 45 & 47.
respecting large companies is essentially under the jurisdiction of the federal government and a single commission, the SEC.\textsuperscript{90}

This demonstrates that a single regulator does not in any way guarantee prevention of such market occurrences. A Senate Committee Financial Oversight of Enron report stated that the SEC failed to review Enron’s financial filings even though the business was changing, demonstrating that a single securities regulator does not guarantee efficient regulation of these systemic risks.\textsuperscript{91}

Cooperative efforts between the provinces and other bodies are still possible in a decentralized or competitive system. Cooperative efforts have been made, through the CSA, and therefore there is harmonization in Canada’s current system. The CSA creates national instruments and policies, which can then be adopted by the provinces as law. While not all instruments are adopted, there are very few that are not harmonized. This demonstrates that common viewpoints exist between the provinces, and that there can be cooperation on fundamental issues, thus leading to harmonization.\textsuperscript{92}

Overall, Suret and Carpentier believe that their research demonstrates that criticisms of the current system are inadequately supported. Therefore, the push for a national regulator must stem from somewhere else, for instance, from interest group

\textsuperscript{90} Ibid at 7.
\textsuperscript{91} Ibid at 66.
\textsuperscript{92} Ibid at 29 & 59.
pressure, which cannot be the foundation for establishing an entirely new regulatory regime.\textsuperscript{93}

As demonstrated, there are many benefits to maintaining a decentralized system of regulation in Canada. Despite existing problems with the status quo, Canada’s system has been ranked one of the best in the world, especially in terms of achieving policy objectives. The system is said to be one of the best because of the fact that it is decentralized.\textsuperscript{94} Thus, something can be said for the decentralized model.

True regulatory competition would require a complete restructuring of the current securities regime. For regulatory competition to be most effective, Roberta Romano specifies that one regulator would have jurisdiction over all transactions of an issuer.\textsuperscript{95} The issuer would elect its principal regulator similar to the examples of corporate law illustrated above. Since this is likely a challenging structure to implement, the country is left with a multijurisdictional system.\textsuperscript{96}

Even if true regulatory competition cannot practically be adopted in Canada, the country can still experience some of its benefits through the more general theory of interjurisdictional competition. As discussed above, a multijurisdictional or decentralized

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{93} \textit{Ibid} at 2.
\item \textsuperscript{94} \textit{Spink, supra} note 85 at 1183 (citing a study by Professor Courchene).
\item \textsuperscript{96} Jeffrey MacIntosh, “Let the Provinces Run It” \textit{Financial Post} (26 January 2012), online: Financial Post <http://opinion.financialpost.com/2012/01/26/let-provinces-run-it/> (MacIntosh argues that even without the choice of a regulator, several regulators prevents the perils of a monopolistic regulator. He also advocates for a multijurisdictional structure established by the provinces since it is more likely to achieve the benefits that a single regulator would have offered. More provinces will cooperate if the structure is provincially created, thus leading to fewer regulators) [MacIntosh, “Provinces Run It”].
\end{itemize}
\end{footnotesize}
regulatory system allows for interjurisdictional competition. The various regulators have the ability to be innovative in their regimes. For example, Junior Capital Pool programs and stock savings plans have been started by one province and followed by others. Additionally, negotiated broker fees began in Quebec and were also followed by other provinces.\textsuperscript{97} This can create superior regulation since its effectiveness can be tested by whether or not issuers choose to issue securities in that jurisdiction. In a similar vein, regulators can quickly respond to policy mistakes since any consequence will have only affected the specific jurisdiction rather than the entire country. Lastly, a decentralized or competitive scheme ensures that local concerns are addressed. This is beneficial since a monopolistic regulator might favour particular interest or industry groups over others.

Overall, the benefits of a decentralized system can work to the country’s advantage. In the words of Jeffrey MacIntosh, Canada could be “[t]he class of the world in constructing a securities regulatory apparatus that trades off local and national concerns and encourages innovation without sacrificing investor protection. Just imagine how embarrassed nations with national regulators would be.”\textsuperscript{98} With that said, the status quo is not ideal either. Therefore, to truly reap the benefits of a decentralized system, several problems with the current structure must be resolved.\textsuperscript{99} Some of these problems would have been resolved by the creation of a national regulator. Thus, the theory of harmonized regulation, and the push for such in Canada, warrants a discussion.

\textsuperscript{97} Suret & Carpentier, “Securities Regulation in Canada”, supra note 9 at 96.

\textsuperscript{98} MacIntosh, “Provinces Run It”, supra note 96 at 105.

\textsuperscript{99} See Jeremy Fraiberg “A National Securities Regulator: The Road Ahead” (2012) 52 CBLJ 174 at 177 (specifying that a securities regulatory scheme that is more provincial in nature, with little federal involvement, will have to work around issues of no single point of accountability and policy-making that requires cooperation of all jurisdictions).
II. Harmonization

1. The Theory of Harmonized Regulation

Proponents of harmonized regulation argue that a decentralized system is incompatible with global trends. As illustrated by the responses to the Securities Reference, these proponents support their argument on the fact that capital markets have become so national and international that a national regulator is not only the best, but necessary, to attract business globally.\(^{100}\) It has been argued that, “[m]arkets regulated consistently from a single platform of rules and policies encourage capital to be invested where it can drive economic expansion, entrepreneurial innovation and productivity gains.”\(^{101}\)

Moreover, having a single system ensures certainty in terms of corporate behaviour and investment practices, and also in terms of how rules are applied across the country. For example, a single system allows for enforcement standards that would apply across the entire country.\(^ {102}\) One major concern with the current decentralized regulatory system in Canada is its ability to respond to industry changes, and uniform legislation with consistent standards ensures changes are responded to efficiently and effectively.\(^ {103}\)

Proponents argue that aside from uniform legislation and certainty, there are many benefits to this type of system. For instance, a single regulator allows for a single fee

\(^{100}\) Blueprint, supra note 8 at 3.

\(^{101}\) Ibid at 6.

\(^{102}\) Ibid at 6 -7.

\(^{103}\) See ibid at 12 (regulators must be responsive and flexible).
structure, which results in lower costs for issuers than in a decentralized system where issuers pay costs in several jurisdictions. This is especially beneficial to those smaller and medium sized issuers that cannot afford to issue securities beyond their home province as a result of having to pay multiple compliance costs. Furthermore, moving away from a fragmented decentralized system, which is perceived as unstable and unresponsive, makes a country look more attractive to foreign investors, and brings Canada closer in line with other major securities regulators that have a single regulator.  

As demonstrated above, those who favour regulatory competition do so out of suspicion that a single regulator may be guided by private interests to redistribute wealth in its direction. They argue that the federal government’s intent is, and always has been, to enhance its power and legitimacy to regulate the economy, and they would unlikely support any policy that infringes on their regulatory monopolies. Therefore, proponents of competition argue that competitive systems prevent this monopoly. Similarly, proponents of harmonization argue that the provincial regulators act to maximize their own welfare rather than social welfare by having monopolies over securities regulation. The provinces do not want to lose their power over securities regulation and therefore opposed the national model.

\[^{104}\text{Ibid at 7.}\]
\[^{105}\text{Tung, supra note 66 at 369.}\]
\[^{106}\text{Ibid at 374.}\]
\[^{107}\text{Anand & Green, supra note 5 at 11-12 & 14, citing Frederick Tung, “From Monopolists to Markets? A Political Economy of Issuer Choice in International Securities Regulation” (2002), Wis. L. Rev. 1363.}\]
In a system with multiple regulators, some regulators will be price setters. Price setters set higher regulatory prices by over-regulating, which allows for a larger number of issuers. On the other hand, price takers set lower entry prices to attract issuers and also keep issuers by weakening regulation, thus facilitating more transactions.\(^{108}\) For example, Ontario is a price setter since most issuers want to participate in Ontario’s markets, while provinces such as New Brunswick and Prince Edward Island are price takers. Moving to a national model could potentially increase regulatory costs for smaller issuers. Since Ontario is already a price setter charging higher prices, transition to a national model would be less opposed, than by smaller, price taker provinces whose costs might increase due to the transition.\(^{109}\) As discussed above, supporters of a more competitive regulatory system believe that the type of diversity that exists in the status quo between price setters and price takers allows regulators to better suit investor needs. However, proponents of a national model argue that this decentralized system creates higher regulatory costs and less efficient markets.\(^{110}\)

2. **The Push for Harmonized Regulation In Canada**

Prior to the Securities Reference, proponents of a national securities regulator believed that its establishment could be within the federal government’s constitutional authority. For instance, it was argued that the federal government could, under its general trade and commerce power, enact legislation with an express paramountcy clause

---

\(^{108}\) Anand & Green, *ibid* at 12.

\(^{109}\) *Ibid* at 13 & 16.

\(^{110}\) *Ibid* at 13.
barring provincial legislation.111 Alternatively, it was also argued that the federal and provincial governments could have concurrent jurisdiction, and the federal government could pre-empt provinces that chose not to cooperate.112 As established in the case law above, concurrent jurisdiction between the federal and provincial governments was permissible in many instances.

The push for a national regulator stems, in large part, from several criticisms of the current, decentralized system of securities regulation. First, proponents of a federal regulator argue that capital markets have evolved significantly and that Canada is the only major industrialized country without a uniform scheme of regulation.113 More than 100 countries, including 20 with federal political structures, have a national regulator.114 Furthermore, having 13 separate regulators has created a fragmented system that cannot efficiently react to market events. Particularly, the ability to respond to systemic risk concerns.

The concerns regarding the provinces inability to effectively or efficiently respond to systemic risk is based on the fact that all provincial regulators must agree to industry changes. It is argued that a single regulator is better suited to deal with systemic risk issues because it could make unilateral decisions.115 While many believe that a

111 Condon, Anand, Sarra, supra note 2 at 129.
112 Ibid at 135.
113 Ibid 191.
114 Ibid 186.
115 Suret & Carpentier, “Securities Regulation in Canada”, supra note 9 at 1-2 (highlighting some of the arguments for a national regulator).
decentralized system is advantageous because it encourages cooperation and constant negotiation amongst regulators, proponents of a national regulator believe the system is timely since it requires consensus to regulatory changes and presents a challenge when having to interpret and enforce nationally negotiated standards.116

Proponents of a national regulator also argue that the current system is redundant and costly, leading to unequal investment opportunities because issuers have to pay fees and seek regulatory approval in several different jurisdictions. As a result, issuers bypass smaller jurisdictions, since paying the costs is not worth the capital raising potential in such a small jurisdiction.117 These weaknesses of the current system also lead to uncoordinated enforcement against financial crime.118 Proponents argue that a national model would increase investor protection by providing more rigorous enforcement standards, while encouraging more accessible and innovative capital markets. The national regulator would also allow for a more efficient allocation of resources, have the ability to set consistent standards of regulation, be more uniform for investor protection, and eliminate costs that are duplicated.119

Lastly, another problem with the current system is that Canada lacks a unified international voice. Canada’s lack of international voice can be demonstrated by the fact that the US and Australia have worked together towards a mutual recognition system to

117 Leclair, supra note 16 at 558.
118 Anand, What’s Next for Canada, supra note 3 at 2.
119 Condon, Anand & Sarra, supra note 2 at 186.
enhance cross border law enforcement and to increase investor access to capital markets in each jurisdiction. Unfortunately, Canada was not included in this system.\textsuperscript{120}

As illustrated above, some of the advantages to a national regulator include: the fact that issuers would only face one set of compliance costs; enforcement would be strengthened by the ability to utilize federal criminal law jurisdiction; and Canada would have a single international voice in securities regulation. Additionally, a single regulator would allow for coordination with other financial entities to address issues of systemic risk. These resolutions to the various issues can be achieved successfully in a decentralized system if the issues are given due consideration. This will also require, as recommended by the Supreme Court, federal-provincial cooperation.

\textsuperscript{120} Condon, Anand & Sarra, supra note 2 at 136-138.
Chapter 3: Policy Discussion

I. Resolving the Issues Cooperatively

It has been said that, “[h]ow well Canadians are able to compete with everybody else depends to a large extent on how well we are able to cooperate with each other.” The Supreme Court placed much emphasis on the notion of cooperation between the levels of government for future efforts in achieving an improved securities regime. Cooperative efforts of regulation have proven successful before. In the past, the Supreme Court has consistently refused to confine regulation to one level of government where the subject matter is broad. The following cases are examples of the courts encouraging cooperative federalism.

In Canadian Western Bank v. Alberta, Justice Binnie discussed cooperative governments. He specified that constitutional doctrines must strike a balance between the recognition and management of an overlap in rules between two levels of government. Additionally, the doctrines must reconcile diversity with national unity. Lastly, it must be recognized that maintaining the balance of powers lies with the governments, and cooperative federalism must not be undermined.

Additionally, in Federation des producteurs de volailles du Quebec v. Pelland, the Court upheld Quebec’s laws in a joint federal-provincial scheme that regulated the

122 Leclair, supra note 16 at 585.
production and marketing of chicken. The Court noted that if a scheme is coherent, unified and overall successful, each government has legislated according to their competencies to create the scheme, and therefore, there is no basis to override it.124

Aside from these two cases, there have been various cooperative schemes between the two levels of government that were successful without the use of the courts. In the regulation of trucking and agricultural products, which have both intra and extra-provincial elements, cooperative schemes have been used.125 Likewise, British Columbia and the federal government have cooperated to restrict the export of logs. Lastly, the federal and provincial governments have taken cooperative action in the pension system.126

These examples of cooperative regulation demonstrate that this method of regulation can be successful. However, in the securities context, given the clearly defined jurisdiction of the provinces, the cooperation of the federal government should not amount to regulation. The federal government’s role should be constrained to providing assistance to the provinces in achieving regulatory goals. For instance, the federal government can contribute to policy-making or provide financial assistance to the provinces. By the federal government working cooperatively with the provincial regulators, the provinces can more easily achieve successful resolutions to the status quo. Through cooperating on resolving issues rather than cooperating towards a common


125 Leclair, supra note 16 at 584. See also Pelland, ibid (the Court recognized that each level of government has certain competencies and can created a unified regulatory scheme).

126 Grewal & Waitzer, supra note 15 at 539.
regulator, this achieves some of the goals addressed by the courts in the above cases. For instance, working cooperatively and using positive elements from both decentralized and harmonized theories, can reconcile diversity with national unity.

What follows, is a policy discussion, which suggests resolutions to the issues identified above. The suggestions not only seek to resolve the issues, but to also establish how they may be achieved on a cooperative basis - one that preserves the benefits of the decentralized system. Preserving the benefits of a decentralized system offers incentive to the provinces for cooperating towards a stronger regulatory system. The policy discussion will begin by ascertaining that an ideal regulator can be realized by increasing mutual recognition in the current passport system, and by decreasing costs for issuers. An ideal system would also consist of an independent tribunal to enforce securities laws. Lastly, the system would have the CSA continue to develop policy on systemic risk, and represent Canada, as a diversified whole, at the international level.

II. A Model Regulator

1. Improving the Passport System

While it is argued that the focus of regulation should now turn to resolving various concerns, it must nevertheless be determined how Canada’s decentralized system should continue operate. One idea, put forward by Jeff MacIntosh, is a provincially constituted multi-jurisdictional regulator, where one province would create a regime and the remainder provinces could adopt the whole regime as a provincially created scheme. Furthermore, one commission would then act as enforcement for all provinces that signed on. He argues that this system is likely to attract more support by those provinces
unwilling to join a national regime since it would be created by the provinces.\textsuperscript{127} MacIntosh also believes that this type of system would resolve some of the issues with time and expenses spent since there will be fewer regulators for issuers to deal with. For the same reason, this system would also reduce the number of voices representing Canada at the international level.\textsuperscript{128}

One criticism of this model is that even though it appears more attractive, there is no single point of accountability or policy making.\textsuperscript{129} MacIntosh also highlights several issues with his model. For one, since the system would be operated by one commission, the provinces would have to agree on a head office location, governance structure, policy-making and overall operational structure. Second, compensation for the provinces is an issue. For those provinces that are commonly chosen by issuers, securities regulation has become a profit center. Thus, many of these jurisdictions are averse to joining a common regulator where these profits would not be as sizeable.\textsuperscript{130}

As an alternative, instead of the provinces adopting identical regulatory schemes, the multi-jurisdictional regulator should resemble Canada’s current passport system. Rather than establishing one commission and having to determine issues such as head office location or operational structure, the provinces should retain their regulatory authority, but with increased mutual recognition within Canada’s already established

\textsuperscript{127} See MacIntosh, “Provinces Run It”, supra note 96. See also Fraiberg, supra note 99 at 176 (the negotiations between the federal and provincial government might result in a model that is more provincial in nature as suggested by MacIntosh.).

\textsuperscript{128} MacIntosh, “Provinces Run It”, ibid.

\textsuperscript{129} Fraiberg, supra note 99 at 177.

\textsuperscript{130} MacIntosh, “Provinces Run It”, supra note 96 at 105. See also MacIntosh, “Headless Horseman”, supra note 15 at 265.
passport system. It is also imperative that Ontario be part of this system, should it not join a common regulator with the federal government. The participating provinces could adopt harmonized laws on fundamental issues of compliance similar to the workings of US corporate charter competition discussed above, while other issues can be regulated within each province’s discretion. This ensures that the provinces are unified on fundamental issues of securities law, but also preserves the benefits of policy experimentation and innovation in securities laws. Additionally, this ensures that local concerns will continue to be addressed rather than having one regulator, which causes concerns of a monopoly favouring particular wealth or interest groups.

If the passport system is strengthened, there will be increased mutual recognition of compliance, and the securities industry can still benefit from certain aspects of regulatory competition. It has also been said that if Ontario joins the passport system, the provinces can use their energy on improving policy and having a cooperative relationship with the federal government.\footnote{Spink, supra note 85 at 185.} This will allow the other issues to be resolved with more ease. One incentive for the provinces and ideally, Ontario’s participation, is to lower costs for issuers while not decreasing revenue for the provinces. This incentive is discussed next.

2. Lowering Costs for Issuers

As established above, a common criticism of decentralized regulation is that issuers wanting to issue securities in several provinces or territories are faced with continuing compliance costs in every jurisdiction. Consequently, issuers will choose a
limited number of provinces or territories to issue securities in, and they forgo opportunities in other jurisdictions. Again, many profit center jurisdictions are averse to joining a national or common regulator since profits would not be as sizeable.\footnote{MacIntosh, “Provinces Run It”, supra note 96 at 105.} A national regulator would have reduced costs for issuers since they would have had to pay costs to one regulator only. However, one major flaw with a national regulator is that it would reduce profits received by the individual provinces since the costs would be paid to the federal government instead. Therefore, within the model of a strengthened passport system, there must also be a method for resolving this issue. As it will be demonstrated, resolving this issue under a decentralized system actually benefits both issuers and the provinces, since it reduces multiple costs for issuers so that smaller jurisdictions are not bypassed, thus opening up capital raising for issuers and profit for these smaller provinces.

It is proposed that the federal government reimburse the jurisdictions that cooperate and take part in a multi-jurisdictional or passport system. This might work by issuers selecting one principal regulator, and then paying issuance and all continuing costs in that selected jurisdiction. Since there will be mutual recognition between the provinces in terms of compliance, the issuer would be able to issue in the participating provinces, and should be able to do so without paying duplicative costs. The federal government could use its spending power, which is argued would be insignificant to the federal budget, to achieve what a national regulator would have achieved – one set of
costs for issuers. Under a national regulator, the federal government would have had to provide compensation to the provinces for their loss of revenue. This suggestion has the potential to be an effective way of reducing costs for issuers. It is obvious that those provinces where regulation was a profit center will require an incentive in exchange for reducing or eliminating sources of revenue. Since the federal government is the chief advocate for a single regulator where costs would be reduced, it is not only in the best position to reimburse lost revenue, but should also be the most inclined to do so.

The federal spending power is described as a way for the federal government to influence fields that are within the provinces’ jurisdiction. The power has also been given a Constitutional meaning, which is “[t]he power of Parliament to make payments to people or institutions or governments for purposes on which [Parliament] does not necessarily have the power to legislate.” While the spending power is not explicit in the Constitution, it is inferred from Parliament’s power to levy taxes, to legislate in relation to public property, and to appropriate federal funds. One noted advantage of the federal government’s spending power is it ensures that minimum levels of acceptable public services are available in different regions. Nevertheless, the power is limited so

133 Ibid.
136 Dunsmuir, ibid at 5.
that any conditions imposed on the use of money cannot amount to regulation of a matter falling outside federal jurisdiction.¹³⁷

This proposed solution would resolve the problem for both issuers and the provinces, particularly those provinces or territories that are consistently left out by issuers for being too small to warrant the costs of issuing and compliance. Federal reimbursement would allow issuers to pay one set of costs and it would open up all provinces and territories for issuance. On the other hand, it also benefits the provinces because they will not lose under this system. In fact, the smaller provinces will benefit the most from the compensation since issuers will no longer be held back from issuing in these jurisdictions due to financial restrictions. Additionally, the provinces will not have to fear government interference in their jurisdictions since the spending power cannot amount to regulation. Although this suggestion might be viewed as far-fetched, the federal government should view the opportunity to open up markets for issuers, thereby stimulating the economy, as incentive. Compensating the provinces would be cheaper than establishing an entirely new regulatory regime. Additionally, by issuers selecting one principal regulator, this could resolve the problem of accountability. The principal regulator would be the single source of accountability for issuers that have chosen that jurisdiction.

Overall, this suggestion is a way for the federal government to cooperate with the provinces on regulatory issues, like costs, and provide assistance to achieve what a

¹³⁷ *Ibid* at 7.
national regulator might have. However, unlike the national regulatory model, this resolution benefits both issuers and the provinces.

III. Regulating Systemic Risk

Regulating systemic risk has also been at the forefront of reform discussions. In the Securities Reference, the Court identified systemic risk as a potential area of federal jurisdiction. The Court specified that:

Prevention of systemic risk may trigger the need for a national regulator empowered to issue orders that are valid throughout Canada and impose common standards, under which provincial governments can work to ensure that their market will not transmit any disturbance across Canada or elsewhere.  

In the last few years, systemic risk has been a chief concern for both securities and financial regulatory bodies. While many commentators agree that there is no single definition of systemic risk, they do agree that it refers to, “[t]he interconnectedness of financial institutions such that the failure of one may lead to the failure of others.” It has also been defined as the aggregate of multiple smaller risks and involves, “[t]he risk of breakdown among institutions and other market participants in a chain-like fashion that has the potential to affect the entire financial system negatively.”

140 Ibid at 197-200.
One of the major concerns with regulating systemic risk is efficiency and while the provinces may be capable of regulating risks, it is contended that they might not be as efficient as the federal government in doing so. For instance, requiring approval from several regulators rather than one might prevent a timely response to changes in the market. Although the Court held that the day-to-day operations of securities regulation are within the province’s jurisdiction, it has been argued that systemic risk cannot be managed at a distance from the day-to-day operations. Proponents of a national regulator argue that to effectively manage risk, the federal government must have the ability to assess risk arising from issuers, securities, registrants, exchange trading rules, and retail investment products. This will involve oversight over decisions that issuers and other market participants make. Yet, in many of the proposals for a national regulator, systemic risk was not given much consideration. Additionally, as highlighted above, with the example of the US and the severity of its financial crisis, a national regulator does not guarantee that systemic risk will be efficiently managed. Nevertheless, this does not mean that systemic risk is not a realistic issue that could impact Canadian markets. The Supreme Court in the Securities Reference specified that federal intervention in securities law might be justified where the matter is qualitatively different

142 Edward M. Iacobucci, “Competition Policy, Efficacy, and the National Securities Reference” in Anand, What’s Next for Canada, supra note 3 49 at 53. See also Ford & Gill, supra note 138 at 148-149.
143 See Anand in Anand, What’s Next for Canada, supra note 3 197 at 206.
144 Ford & Gill, supra note 138 at 145.
145 Ibid at 149.
146 Ibid at 152.
from what the provinces can do. Since the Securities Reference, there have been many recommendations on how to best manage systemic risk.

One solution to improving the status quo, following the Securities Reference, is to create a clearinghouse that would be regulated by the federal government. The clearinghouse would act as a regulatory body over systemic risk and data collection. It would also set goals and requirements for data collection, requiring the provinces to collect information in accordance with the set goals. The clearinghouse would then be responsible for analyzing the data provided by the provinces. The federal government would need to have jurisdiction over capital markets in general, but over other layers of risk as well. These other layers of risk include: risk associated with underlying issuer securities in certain conditions; the ways in which issuers are connected through hedging and derivatives; the role played by hedge funds; and risks posed by banks, insurers, payment systems and accounting principles. Most importantly, proponents of this model argue that the federal government must have market related data derived from the provincial level in order to assess these risks. The federal government would be able to dictate what information the provinces are required to provide and how the information is to be gathered.

Some argue this model can create a “race to the bottom” situation, as described above, because the provinces will provide minimal information since compliance will be

147 Reference re Securities Act, supra note 4 at para 128.
148 Ford & Gill, supra note 138 at 146.
149 Ibid at 167-169.
150 Ibid at 168.
costly. However, proponents of this model believe that this is overcome by the fact that the federal government can set a benchmark for which the provinces must perform against, along with incentives for compliance.\(^\text{151}\) Despite this, it has also been argued that this may then create a “race to the middle”, since the provinces will comply with the benchmark, but are likely unwilling to go above and beyond the requested amount.\(^\text{152}\)

The concept of a regulatory clearinghouse has also been criticized over the fact that the public may not be able to hold one particular government responsible and furthermore, it can lead to shifting blame between the governments. Moreover, and more importantly, the model creates an overlap of provincial capacity since the provinces, up until now, have regulated systemic risk. As stated above, many models and proposals did not include approaches to managing systemic risk. The Supreme Court was cautious in its decision and used systemic risk as an example of an area that “may” fall under the fourth factor of the General Motors provincial incapacity test, but evidence must be put forward that the provinces are incapable of regulating this area.\(^\text{153}\)

In light of the above, systemic risk should continue to be managed by the provinces. Nevertheless, the idea of implementing minimum standards to ensure efficient control and management of systemic risk is useful. However, it is more than likely that

\(^{151}\) Ibid at 175. See also Leclair, supra note 16 at 565 (the federal government could also establish minimal standards for the provinces to implement, similar to the benchmark discussed above, to prevent the “race to the bottom” scenario. It is believed that a complementary federal-provincial model allows for competition, which brings advantages to both levels of government).

\(^{152}\) Andrew Green, “Effectiveness, Accountability, and Bias: Some Concerns about a Quasi-National Securities Regulator” in Anand, What’s Next for Canada, supra note 3 185 at 188-189.

\(^{153}\) See Spink, supra note 85 at 185. See also Rousseau, supra note 50 at 188 (arguing that systemic risk cannot be used to create federal legislation since it is a very limited concept and the Office of the Superintendent of Financial Institutions along with Canadian banks are well equipped to monitor and manage systemic risk).
the federal government cannot unilaterally establish a federal systemic risk regulator to oversee systemic risk, unless it is demonstrated that the provinces are incapable, which it has not. Moreover, a federal regulator or clearinghouse would likely receive criticism for being expensive and duplicative, and for the fact that it would essentially create a 14th regulator for the provinces to have to comply with.

Therefore, the federal government should cooperatively work with the provinces, and both levels of government should to make use of existing sources of policy development, such as the CSA, to establish the minimum standards or guidelines for the provinces and territories to follow. The CSA’s mandate is that it attempts to promote harmonization of securities law across the country. It does so by promulgating national or multilateral instruments, which reduce the duplication of matters. The instruments are also responses to issues in the securities market and aim for compatibility across the provinces. National instruments have been agreed to by all provinces and territories, while multilateral instruments have been agreed to by some. Once agreed to, the instruments are binding, however to have legal force, each province or territory must implement them by rule or policy in securities legislation.154

To effectively manage systemic risk, the CSA should work with the federal government and the provinces to develop a national instrument that all provinces would implement. The instrument should specifically address systemic risk. This allows for concerns from both levels of government to be heard and considered. For example, if the federal government is concerned with risks associated with hedging and derivatives, the

CSA should consider and implement the concerns in policy development. Some commentators are critical of having the CSA manage systemic risk because the instruments are non-mandatory. These commentators argue that the provinces can refuse to participate, which may lead to problems when responding to risks.\textsuperscript{155} However, having provincial input on the instrument will ideally act as an incentive for the provinces to agree to the instrument and implement it as law. Additionally, the assumption that the provinces will not agree to the CSA’s policies is unfounded. There has been no indication by the provinces that they are unwilling to cooperate or coordinate systemic risk goals. The provinces have been managing systemic risk, and thus can contribute what has already been done, but are also in the best position to make suggestions for improvement.

Additionally, there is already federal regulation of systemic risk by the Office of the Superintendent of Financial Institutions and the Bank of Canada. These parties work together cooperatively by sharing information and views on various risks. OSFI has regulatory power over securities-related activities of Canadian banks and the Bank of Canada designates securities clearing and settlement systems.\textsuperscript{156} For any newly created regulator to be efficient, there would have to be cooperation with these other regulators. This is assuming that OSFI and the Bank of Canada will cooperate with a federal securities regulator, since such a regulator could be viewed as interfering with already existing regulation. It is therefore argued that any additional regulation of systemic risk

\textsuperscript{155} See Anand, “After the Reference”, supra note 139 at 214.

\textsuperscript{156} Ibid at 287-288.
should instead identify gaps in the regulation that exist between these regulators.\textsuperscript{157} Given Canada’s performance during the financial crisis, it is unlikely that there are significant gaps in regulation.\textsuperscript{158} However, the lack of evidence of existing gaps does not mean there might never be limitations in the current system. Federal regulation by the securities industry might then be justified. Nevertheless, in order to prove there is a gap, there must be clear evidence supporting the fact that the provinces are incapable of regulating.\textsuperscript{159} The CSA can not only use these regulators as a model for policy, but also work with them in coordination on developing management goals that are different from the goals that already exist in financial institutions. Since systemic risk transcends securities regulation, the goals should be coordinated but separate.

In response to the global financial crisis, the CSA is currently working on instruments for regulation of derivatives trading, and has published model rules for comment.\textsuperscript{160} Moreover, the CSA has been used as an example by the International Organization of Securities Commissions (“IOSCO”) of a body that has taken initiative towards reducing systemic risk. In its discussion paper on promoting financial system stability\textsuperscript{161}, a committee of the IOSCO illustrated that the CSA had created its own committee dedicated to establishing a process for identifying, analyzing and monitoring

\textsuperscript{157} Rousseau, supra note 50 at 189.

\textsuperscript{158} Ibid.

\textsuperscript{159} Spink, supra note 85 at 185.

\textsuperscript{160} Ibid at 217. See also “About the CSA”, online: Canadian Securities Administrators <http://www.securities-administrators.ca/aboutcsa.aspx?id=1111&terms=systemic+risk>

systemic risk. The CSA’s committee was also concentrated on assessing systemic risk and subsequent steps at mitigating any identified risks. The committee was made up of members from the provinces and territories with diverse experience in regulation. The committee defined systemic risk according to various market entities and activities, and prioritized categories of risks, such as OTC derivatives, and identified sources. Lastly, the committee established mechanisms for mitigating the risks, which included monitoring data, amending policies, and cooperating with other regulators. Overall, “[t]he Committee concluded that some areas of potential concern were already being considered as part of the existing policy development process within the CSA. For example, CSA committees were already considering steps to address risks associated with OTC derivatives and credit rating agencies.”

In addition to the initiatives already undertaken by the CSA, there should be model rules or an instrument that puts in place minimum requirements for data collection on the types of identified transactions that pose certain risks. The data should be reviewed by the commissions, according to specific guidelines imposed by the CSA, which should establish levels of risk associated with certain types of transactions. The instrument should also establish mechanisms for dealing with each level of risk. For instance, if risk is low then the commissions could continue to monitor it. If risk is high, there could be information sharing between other financial regulators and suggested responses.

The fact that the steps taken by the CSA were an example cited as part of an international discussion for securities regulators on how to mitigate systemic risk is a

---

162 Ibid at 37-38.
clear indication that the CSA is more than capable of effective management. As stated above, there is nothing to suggest that the provinces and territories are unwilling to cooperate with the CSA’s initiatives. On the whole, it appears as though the current decentralized system is capable of managing systemic risk and data collection, or has at least taken the necessary steps to ensure that it is. Therefore, federal involvement that amounts to regulation in this area will likely be unwarranted. However, federal government cooperation on developing policy, and involvement from OSFI and the Bank of Canada, are imperative to the success of risk management. Moreover, managing systemic risk in a decentralized system allows for policy experimentation. The CSA could test certain policies in some provinces before implementing them countrywide. This also ensures that any policy mistakes do not affect the entire country as a whole, and any negative effect might be mitigated if experimented with first in a select number of provinces.

IV. Strengthening Enforcement

One of the top priorities of improving Canadian securities regulation is to strengthen enforcement. Various methods have been recommended as to how best accomplish this priority. For instance, one suggestion involves the federal government assisting to create a truly competitive securities market by delegating to the provinces control over judicial appointments. It is believed that by doing so, the provinces will be able to compete in terms of relative judicial competence. Moreover, the provinces could appoint corporate practitioners with an understanding of securities laws, but also create

163 See Blueprint, supra note 8 (the Panel addresses that Canada has a reputation for being unable to prosecute egregious securities law violations. Consequently, this contributes to foreign investors reluctance to invest in Canadian capital markets).
courts similar to those seen in Delaware, where the judges have specialized expertise in
corporate matters.\textsuperscript{164} Others have suggested that since the federal government now has a
limited role in securities regulation, it could use what power it has, to enact legislation
under its criminal law jurisdiction to create capital market offences.\textsuperscript{165}

One idea that stands out as a viable solution is to create a separate body that
would prosecute regulatory offences. Poonam Puri has advocated for this idea,
suggesting that Canada create a national enforcement agency or securities tribunal.
While Puri believes enforcement can be best accomplished with a common regulator, she
does indicate that it is possible to implement these ideas in a decentralized system.\textsuperscript{166}
Puri proposes the creation of two new bodies. The first body would be the Canadian
Capital Markets Enforcement Agency ("CCMEA"), which would create a police force
from the Integrated Market Enforcement Team and the RCMP to investigate and
prosecute criminal capital market offences. The CCMEA would also combine the
adjudication and prosecution of regulatory offences of all provincial and territorial
commissions into one division. Additionally, the second body would be the Canadian
Securities Adjudicative Tribunal ("CSAT"), which would combine the adjudicative
functions of all provincial and territorial regulators into an independent tribunal.

\textsuperscript{164} MacIntosh, "Headless Horseman", supra note 15 at FN 104.

\textsuperscript{165} Fraiberg, supra note 99 at 177. See also MacIntosh, "Provinces Run It", supra note 96 (MacIntosh
suggests that the federal government delegate its criminal law power to the provinces taking part in a
multijurisdictional regulator).

\textsuperscript{166} Expert Panel on Securities Regulation, A Model for Common Enforcement in Canada: The Canadian
Capital Markets Enforcement Agency and the Canadian Securities Hearing Tribunal by Poonam Puri
(January, 2009), online: <http://www.expertpanel.ca/eng/reports/research-studies/common-enforcement-
agency-puri.html> at 2.
Criminal offences would be heard in specialized criminal courts with expertise in capital market offences, while regulatory offences would be heard by the CSAT.\textsuperscript{167}

There are certain issues with the model that Puri proposes. First, to create the regulatory division of the CCMEA, the provinces would have to relinquish their authority over both investigation and prosecution. Given the resistance to a common regulator, it is unlikely that many provinces would agree to give up this enforcement power. Moreover, the creation of a separate police force and specialized criminal court will likely be costly and arguably, somewhat unnecessary. Puri acknowledges that the creation of a separate police force will be costly.\textsuperscript{168} It appears as though it would be more efficient to improve the tools already in place (the RCMP, the IMET and the criminal courts) rather than create entirely new structures. For example, increasing information sharing between those involved in enforcement and potentially training selected individuals in the RCMP rather than creating a new force. Lastly, it is likely more practical for investigations to continue at a local or regional level. The provincial or territorial commissions are closest to the offence and therefore investigating will be more efficient. This ensures that some of the benefits of decentralization are respected, such as protecting local interests, and it also safeguards the provinces role in the enforcement process.

On the other hand, the creation of an independent tribunal has merit. Puri specifies that one advantage to an independent tribunal is that the most qualified candidates can be selected to adjudicate matters. Furthermore, the members of the

\textsuperscript{167} \textit{Ibid} at 3-5.

\textsuperscript{168} \textit{Ibid} at 6.
tribunal could be nominated by the provinces and territories to ensure diversity. Lastly, the hearings would take place in the province or territory where the misconduct occurred.\textsuperscript{169} An independent tribunal was also proposed by the Crawford Panel, which created a blueprint for a single securities regulator in Canada. The Panel recommended that the tribunal would consist of experienced adjudicators who would work out of separate offices and travel to conduct hearings. The appropriate jurisdiction for hearings would be determined according to a “significant connection” test.\textsuperscript{170}

The establishment of an independent securities tribunal in Canada could resolve several flaws with enforcement. Because of this, the federal government should work cooperatively with the provinces to establish the resources for a tribunal. The tribunal could be provincially constituted, but with federal government assistance and input. Nevertheless, the provinces would need some incentive to cede part of its enforcement powers. Having the provinces remain in control over investigations is a start. However, there should be more regional representation in the makeup of the tribunal than Puri’s suggestions of having the provinces/territories nominate members. Depending on where the panel is adjudicating, there should be regional representation at each hearing. For instance, if the misconduct took place in Alberta, someone adjudicating the case should be from Alberta to ensure familiarity with Alberta securities law. With that said, the law of the province or territory where the hearing is held should apply. This is another reason why there should be representation for the province or territory at each hearing, and further incentive for the provinces to cooperate. As suggested above, the tribunal would

\textsuperscript{169} Ibid at 8.

\textsuperscript{170} Blueprint, supra note 8 at 28.
consist of highly expertized members, familiar with securities laws. Lastly, and most importantly, while the law of the relevant jurisdiction would apply, there must be some recognition across the provinces and territories of the enforcement penalties by the tribunal. The provinces and territories must recognize that it is in the public’s best interests for penalties to apply across the country in order to prevent abuses of securities laws from occurring again.

V. **An International Voice for Canada**

A final concern for critics of Canada’s current regulatory system is that the country lacks an international voice because it is decentralized. It is said that a national regulator would allow Canada to have one single voice, which would strengthen its international position. As a solution, the CSA should represent Canada as a whole on the international level. The CSA has already been a member of various international organizations. For instance, the CSA is a member of the North American Securities Administrators Association (the “NASAA”). The NASAA represents North America and is a voluntary organization devoted to investor protection. The CSA is also a member of the Council of Securities Regulators of the Americas (“COSRA”), which also focuses on investor protection as well as market integrity, regulatory cooperation and information sharing. This organization is unique because it combines developed and developing countries. As already noted, the CSA is a member of the IOSCO, where members cooperate to promote efficient markets, share information on experiences, establish
standards for monitoring transactions, and to establish standards for effective enforcement.\textsuperscript{171}

If the CSA does act as a sole representative for Canadian securities regulation, this does not mean that the provinces diverse positions should not also be represented. While Canada’s political and federalist structure has stood in the way of a national regulator, its diversity allows for innovation, which may be beneficial to Canada’s international position. As illustrated above, the fact that the CSA was used as an example for systemic risk management demonstrates that it can represent Canada in a positive manner, and as a country that sets regulatory examples for others.

Chapter Four: Conclusion

As argued above, the goals of securities regulation moving forward should focus on resolving the various practical issues that exist. Despite cooperative efforts by the federal government to establish a common regulator with the provinces, some provinces might never agree to such a scheme. This means that Canada will always have a multi-jurisdictional regulatory system. Consequently, many of the practical issues will continue to create problems in the securities industry. These issues should now be at the forefront of securities related policy discussions or cooperative efforts. As demonstrated, many of these issues can be resolved by more effectively using the tools that Canada already has in place. By strengthening the current passport system, working with the federal government to reduce costs for issuers, creating an independent tribunal to improve the consistency of enforcement, and making use of existing bodies, such as the CSA, to represent Canada and manage systemic risk issues, securities regulation can be improved, even if the system remains decentralized.
Bibliography

Books:


Peter W. Hogg, Constitutional Law of Canada, 2nd ed, (Toronto: Carswell, 1985)

Articles, Papers & Reports:


Jean Leclair, “Please, Draw Me a Field of Jurisdiction: Regulating Securities, Securing Federalism” (2010), 51 SCLR (2d) 555.


Cases:


Other:

