POLITICS, NOT LAW

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In this brief comment, I would like to highlight what I regard as a number of peculiarities, if not pathologies, in the discussion about the creation of a national regulator,1 in light of the Supreme Court of Canada's holding in Reference re: Securities Act (Can.).2 One is that there is not now, nor was there ever, any hope of creating a truly “national” regulator. While British Columbia’s volte-face on the issue is testimony to the power of behind-the-scenes log-rolling, it is nonetheless extraordinarily unlikely that Québec will ever be a willing participant; nor are the odds for Alberta (if not a handful of other demurring provinces) materially different. This matters because the doctrine of paramountcy --- the silent partner in the debate --- seems clear: a comprehensive scheme of federal regulation would not suspend the operation of overlapping provincial regulation.3 Thus, any province that declined to join the federal scheme could continue to operate its own regulatory apparatus free of hindrance from the federal government.

How many provinces would remain outside the fold? While 10 of the 13 provinces and territories nominated representatives to the Canadian Securities Transition Office, that does not by any means suggest that all of those jurisdictions would ultimately have opted in. In fact, six provinces argued against the federal statute in the Supreme Court hearing.4 Moreover, what the 1996 “agreement” to create a national securities regulator has taught us is that the devil is in the details. That agreement came to grief on a number of

1. I do not discuss many of the arguments that I have raised elsewhere. See Jeffrey G. MacIntosh, “The sheriff’s weak case; The Supreme Court will shoot down securities regulator,” National Post, May 31, 2010, FP Comment, p. 11; Jeffrey G. MacIntosh, “The Houdini gambit; The fatal flaws in Ottawa’s legal case for a national securities regulator,” National Post, November 22, 2010, FP Comment; Jeffrey G. MacIntosh, “Systemic fallacy; A national regulator wouldn’t have prevented the credit crisis,” National Post, November 23, 2010, FP Comment, p. 15.

2. 2011 SCC 66.


4. Québec, Alberta, Manitoba, Saskatchewan, British Columbia and New Brunswick.
points, including: (i) the extent to which provinces would be able to regulate wholly intra-provincial transactions;\(^5\) (ii) the extent to which the provinces would participate in policy-making, particularly in relation to particular areas of economic interest (e.g., oil and gas in Alberta, mining in British Columbia); (iii) the degree of centralization or decentralization of the operational apparatus; (iv) the extent to which senior provincial officials would participate in the governance of a federal regulator; (v) the compensation that the federal government would pay each province for giving up what, for many, has been a material source of revenue; (v) the location of the head office; and, (vi) which employees from which commissions would staff the new federal regulator. Any of these factors might have — indeed, almost certainly would have — inspired various provinces and/or territories to remain outside the fold had the project resulted in draft legislation. Thus, the idea that the federal legislation would have resulted in a single regulator — and a single voice in international negotiations — was never more than a chimera.

Much has been made of the court’s emphasis on co-operative federalism as the way to proceed. However, the limited scope of the doctrine of paramountcy coupled with entrenched provincial interests mean that it was never about anything else. Because the federal government never had the power to evict any province from the field,\(^6\) a favourable ruling would simply have altered the constitutional backdrop against which a complex multi-party negotiation would have proceeded (one that may or may not have ultimately resulted in a multi-jurisdictional regulator). Thus, it is not at all clear that the ruling significantly alters the parameters of that debate.

Indeed, the court signalled no objection to the provinces and the federal government delegating their respective powers to a single multi-jurisdictional regulator. While a scheme of this nature would leave any province free to withdraw at any time, that is no different from the scheme proffered by the federal government. In short, the key actor in the constitutional drama, the paramountcy doctrine, spent all of its time backstage.

5. The draft federal legislation required all opting-in provinces to entirely exit the field.
6. By contrast, since the powers of the territories are merely delegated federal power, the federal government may dictate to the territories whatever legislative result it deems best. This would reduce the starting point from 13 to 10 regulators.
Another much-overlooked aspect of the debate about a central regulator (at least until the Supreme Court made it the foundation of their holding) is that a favourable ruling would have fundamentally altered the balance of power between the federal and provincial governments. The power to legislate with respect to property and civil rights in the province is the most general of all of the provincial powers. In particular, it supports regulation in a plethora of domains that might loosely be styled “trade and commerce,” including employment law, contract and commercial law, consumer protection, health and safety, the environment, the professions, marketing boards and more. An expansion of the federal trade and commerce power would thus have inevitably spurred the federal camel much further into the provincial tent.

Even supposing that the creation of a single national regulator would be a good idea, the Supreme Court wisely realized that a favourable ruling would have influenced a myriad of domains completely unrelated to securities law. Not having a library of legislative facts at its fingertips nor the prescience of a seer, the court sagely took the tried-and-true path of judicial incrementalism and applied the law as it stood to the facts at hand. Those who are disappointed at the Supreme Court’s ruling (particularly business interests) might do well to consider the broader implications of a decision favourable to the federal government, both in respect of process issues and the balance of power between the federal government and the provinces.

7. Other powers of a general nature are the power to legislate in relation to local works and undertakings (s. 92(10) and (16)) and the power to legislate in relation to municipal institutions (s. 92(8)).