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# TWO DOWN, ELEVEN TO GO: CREATING A CANADIAN SEC OR SOMETHING LIKE IT

*John J. Kappel\**

ON September 19, 2013, Canada's Minister of Finance, Jim Flaherty, Ontario's Minister of Finance, Charles Sousa, and British Columbia's Minister of Finance, Mike de Jong, announced the creation of the Cooperative Capital Markets Regulator (CCMR).<sup>1</sup> The CCMR is being created to serve as a new Canadian securities regulator,<sup>2</sup> partially unifying Canada's current securities regulation system, which is almost entirely administered at the provincial and territorial level.<sup>3</sup> The first section of this article will outline the current method of Canadian securities regulation, the second section will discuss the 2011 attempt by the Canadian Parliament to create a single federal securities regulator and the Canadian Supreme Court's advisory opinion against the creation of such a regulator, and the third section will explore the recently proposed CCMR and the effects that the creation of the CCMR might have on Canadian securities regulation.

## I. THE CURRENT METHOD OF CANADIAN SECURITIES REGULATION: A COMMITMENT TO DECENTRALIZATION

Currently, Canadian securities regulation is done entirely at the regional level; there is no national Canadian Securities regulator.<sup>4</sup> Securities are regulated by thirteen independent agencies, one for each of Canada's ten provinces and three territories.<sup>5</sup> In this respect, Canada possesses the unique, although perhaps not positive, distinction of being the only major industrialized country in the world to not have a single

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1. Gordon Isfeld & Barbara Shecter, *Jim Flaherty: Ottawa, B.C. and Ontario Agree to Establish Co-operative Securities Regulator*, FINANCIAL POST (Sept. 19, 2013, 10:22 AM), <http://business.financialpost.com/2013/09/19/flaherty-announces-historic-cooperative-market-watchdog-with-ontario-b-c/>.

2. *Id.*

3. *Who We Are*, CANADIAN SECURITIES ASSOCIATION, <http://www.securities-administrators.ca/aboutcsa.aspx?id=77> (last visited Mar. 24, 2014).

4. *See id.*

5. *Id.*

national securities regulator.<sup>6</sup> However, the thirteen regulators have achieved a certain degree of unity through their membership in the Canadian Securities Association (CSA).<sup>7</sup>

#### A. THE CANADIAN SECURITIES ASSOCIATION

The CSA refers to itself as an “umbrella organization” comprising all of the provincial and territorial regulators and created to “improve, coordinate and harmonize regulation of the Canadian capital markets.”<sup>8</sup> While the CSA “umbrella” does effectively facilitate cooperation and a certain degree of uniformity between the provincial and territorial regulators, the CSA itself is not a true regulatory body.<sup>9</sup>

Ultimately, the provincial and territorial securities regulators function independently of the CSA and each other to investigate complaints and manage enforcement issues and proceedings within each regulator’s respective jurisdiction.<sup>10</sup> The direct consequence of this fragmented group of regulators is an increased degree of red tape and paperwork encountered by anyone who works in the securities industry and who wishes to operate in more than one province or territory.<sup>11</sup>

In an effort to interconnect the regulatory schemes of the thirteen provincial and territorial regulators and alleviate the burden that can come with having to comply with multiple regulators, the CSA created the Passport System.<sup>12</sup> The goal of the Passport System is to give market participants “automatic access to the capital markets in other jurisdictions by obtaining a decision only from [the market participant’s] principal regulator and meeting the requirements of one set of harmonized laws.”<sup>13</sup> To this end, each market participant falls within the jurisdiction of one of the thirteen regulators, dubbed the market participant’s “principal regu-

6. Barbie McKenna, Steven Chase, Janet McFarland & Sophie Cousineau, *Ottawa Renews Push for National Securities Regulator*, THE GLOBE AND MAIL, <http://www.theglobeandmail.com/report-on-business/flaherty-new-securities-regulator/article14407154/> (last updated Sept. 20, 2013).

7. The thirteen regulators that are members of the CSA are: the Alberta Securities Commission, the British Columbia Securities Commission, The Manitoba Securities Commission, the Financial and Consumer Services Commission (New Brunswick), the Office of the Superintendent of Securities Service Newfoundland and Labrador, the Northwest Territories Securities Office, the Nova Scotia Securities Commission, the Nunavut Securities Office, the Ontario Securities Commission, the Office of the Superintendent of Securities (Prince Edward Island), Autorité des marchés financiers (Quebec), the Financial and Consumer Affairs Authority of Saskatchewan, and the Office of the Superintendent of Securities (Yukon). *CSA Members*, CANADIAN SECURITIES ASSOCIATION, <http://www.securities-administrators.ca/aboutcsa.aspx?id=80> (last visited Mar. 34, 2014).

8. *Overview*, CANADIAN SECURITIES ASSOCIATION, <http://www.securities-administrators.ca/aboutcsa.aspx?id=45> (last visited Mar. 24, 2014).

9. *See id.*

10. *Id.*

11. McKenna et al., *supra* note 6.

12. *Pan-Canadian Regulatory Cooperation*, CANADIAN SECURITIES ASSOCIATION, <http://www.securities-administrators.ca/aboutcsa.aspx?id=96> (last visited Mar. 24, 2014).

13. *Id.*

lator.”<sup>14</sup> Once a market participant complies with any requirements set forth by its principal regulator, it is deemed to have complied with the requirements of the other regulators.<sup>15</sup>

One rather distinctive flaw with the Passport System is the fact that the Ontario Securities Commission does not participate in it.<sup>16</sup> Unlike the twelve other securities regulators, the Ontario Securities Commission insists on making its own regulatory decisions.<sup>17</sup> Fortunately, the twelve Passport-participating regulators do accept regulatory decisions of the Ontario Securities Commission, making this only a unilateral disconnect.<sup>18</sup>

## II. THE SECURITIES ACT: PARLIAMENT’S THOUGHT EXPERIMENT IN COMPREHENSIVE CENTRALIZATION

After decades of considering the creation of a national securities regulator and with a certain degree of dissatisfaction with the limited uniformity that the CSA was able to bring to Canadian securities regulation,<sup>19</sup> the Parliament of Canada proposed the *Securities Act* with the intent of creating “a single Canadian securities regulator supported by a comprehensive statutory and regulatory regime that applies across Canada.”<sup>20</sup> The Canadian Parliament elected to unify securities regulation by creating a single national entity to displace the provincial and territorial regulators.<sup>21</sup>

Parliament indicated that the *Securities Act* was designed to provide improved protection for investors,<sup>22</sup> “foster fair, efficient and competitive capital markets” in Canada,<sup>23</sup> and “to contribute . . . to the integrity and stability of [Canada’s existing] financial system.”<sup>24</sup> To meet these goals, Parliament intended to enact: registration requirements for securities dealers,<sup>25</sup> prospectus filing requirements,<sup>26</sup> disclosure requirements,<sup>27</sup> specific duties for market participants,<sup>28</sup> a framework for the regulation of derivatives,<sup>29</sup> private civil remedies,<sup>30</sup> and regulatory and criminal offenses pertaining to securities.<sup>31</sup>

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14. *See id.*

15. *See id.*

16. *Id.*

17. *Id.*

18. *Id.*

19. Reference re Securities Act, [2011] 3 S.C.R. 837, paras. 11–28 (Can.).

20. Proposed Canadian Securities Act, Order in Council P.C. 2010-667, preamble.

21. Reference re Securities Act, [2011] 3 S.C.R. para. 2.

22. Proposed Canadian Securities Act, Order in Council P.C. 2010-667, § 9(a).

23. *Id.* § 9(b).

24. *Id.* § 9(c).

25. *Id.* pt. 5.

26. *Id.* pt. 6.

27. *Id.* pt. 8.

28. *Id.* pt. 10.

29. *Id.* pt. 7.

30. *Id.* pt. 12.

31. *Id.* pt. 11.

Likely realizing that not all of the provincial and territorial regulators would welcome the creation of a single national regulator, Parliament drafted the *Securities Act* so that its provisions would only apply to provinces and territories that opted-in to be under the authority of the national regulator.<sup>32</sup> Nevertheless, on May 26, 2010,<sup>33</sup> the Canadian Governor in Council petitioned the Supreme Court of Canada to issue an advisory opinion ruling on whether the *Securities Act* fell within the scope of Parliament's legislative authority.<sup>34</sup>

#### A. SUPREME COURT OF CANADA'S ADVISORY OPINION ON THE SECURITIES ACT

On December 22, 2011,<sup>35</sup> the Supreme Court of Canada released the requested advisory opinion<sup>36</sup> accessing whether Parliament had the legislative authority to pass the proposed *Securities Act*.<sup>37</sup> The Attorney General of Canada and intervener Attorney General of Ontario argued that the *Securities Act* falls within Parliament's general power to regulate trade and commerce.<sup>38</sup> The Attorneys General of Alberta, Quebec, Manitoba, and New Brunswick intervened and argued that the *Securities Act* intrudes upon provincial legislative authority.<sup>39</sup> The Attorneys General for British Columbia and Saskatchewan also opposed the *Securities Act*, but were not against the concept of a national securities regulator in principal, so long as the national regulator was designed to respect the division of authority between the federal government and the provinces.<sup>40</sup>

In support of the *Securities Act*, the Canadian government argued that the Canadian securities markets expanded over time from local markets to a national market with nationwide implications.<sup>41</sup> The government further argued that this evolution of the securities market gave the federal government concurrent jurisdiction to regulate the securities market alongside the provinces and territories.<sup>42</sup> The federal government possesses the broad authority to regulate national trade and commerce and it argued that this power grants Parliament the ability to pass the *Securities Act*.<sup>43</sup>

In conducting its analysis the Supreme Court of Canada took note of

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32. *Id.* pmbl.

33. Reference re *Securities Act*, [2011] 3 S.C.R. at 837.

34. *Id.* para. 1.

35. *Id.* at 837.

36. The Supreme Court of Canada has authority to issue advisory opinions. Supreme Court Act, R.S.C 1985, c. S-26, at § 53.

37. Reference re *Securities Act*, [2011] 3 S.C.R. para. 1.

38. *Id.* para. 32.

39. *Id.* para. 34.

40. *Id.* para. 35.

41. *Id.* para. 4.

42. *Id.*

43. *Id.* para. 5.

the decisions of the Quebec Court of Appeal<sup>44</sup> and the Alberta Court of Appeal<sup>45</sup> who both declared the *Securities Act* unconstitutional.<sup>46</sup> The Supreme Court also examined the legal basis for the provincial securities regulation<sup>47</sup> and the nature of national securities regulation in foreign countries including Germany,<sup>48</sup> Australia,<sup>49</sup> and most notably, the United States.<sup>50</sup> The Court paid particular attention to the U.S. Constitution's Commerce Clause and Supremacy Clause which allow U.S. states to regulate securities at the local level, the federal government to regulate securities between the states, and for federal laws regulating securities to trump similar state laws when the two are in direct conflict with each other.<sup>51</sup> The Supreme Court took particular note of the fact that the regulatory system with federal preemption crafted in the United States does not foreclose the ability of the states to have a role in the regulatory process.<sup>52</sup> The Supreme Court also took the time to recount Canada's principles of federalism in general<sup>53</sup> and the particular nature of the Supreme Court's interpretation of the scope of the federal government's trade and commerce power.<sup>54</sup>

After analyzing the proposed *Securities Act*, the Supreme Court came to the conclusion that certain provisions within the act were a valid exercise of Parliament's trade and commerce power because the Canadian securities market is too large and economically important to be fully and properly regulated by the provinces and territories alone.<sup>55</sup> However, the Supreme Court ultimately found that the proposed *Securities Act* went well beyond simply augmenting provincial and territorial securities regulation and amounted to a "wholesale takeover of the regulation of securities."<sup>56</sup>

Finally, the Supreme Court indicated that it believed the primary focus of the proposed act, or the act's "pith and substance," was not regulation of nationwide economic risk, but rather protecting investors and ensuring market fairness.<sup>57</sup> Unfortunately for the Canadian government, the Supreme Court found the latter two objectives to fall squarely within the powers of the provinces and territories, making the *Securities Act*'s primary objectives an unconstitutional intrusion on provincial powers.<sup>58</sup>

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44. *Id.* para. 38.

45. *Id.* para. 37.

46. *Id.* para. 36.

47. *Id.* para. 43.

48. *Id.* para. 49.

49. *Id.* para. 50.

50. *Id.* paras. 51–52.

51. *Id.* para. 51.

52. *Id.* para. 52.

53. *Id.* paras. 54–67.

54. *Id.* paras. 68–90.

55. *Id.* para. 128.

56. *Id.*

57. *Id.*

58. *Id.*

As a consolation prize, the Supreme Court indicated that a hypothetical cooperative regulatory scheme where the federal government would address systemic security market risk and national economic concerns while provincial and territorial regulators would regulate investor protection and market fairness.<sup>59</sup> In support of this hypothetical cooperative approach, the Supreme Court noted that other countries with national securities regulators reserve certain aspects of regulation for local regulators instead of condensing all regulatory authority in a single national regulator.<sup>60</sup>

### III. THE COOPERATIVE CAPITAL MARKETS REGULATOR: AN ASPIRATION FOR COOPERATION AND A MIDDLE GROUND

Less than two years after the Supreme Court decided *Reference re Securities Act*, the Canadian Minister of Finance, along with the Ministers of Finance for Ontario and British Columbia, reached an agreement to create a cooperative securities regulator, the CCMR,<sup>61</sup> very similar to the one contemplated by the Supreme Court in the closing remarks of its *Securities Act* opinion.<sup>62</sup> The announcement indicated that the new cooperative securities regulator will provide increased protection for investors, make improvements to Canada's financial services sector, and "support efficient capital markets and manage systemic risk."<sup>63</sup> The cooperative system has been designed with the goals of preserving the current ability to weigh and consider local perspectives and achieving "needed reforms within a national context."<sup>64</sup>

The CCMR will accomplish these goals by creating a "uniform act" for each participating jurisdiction that addresses everything currently addressed by provincial and territorial legislation.<sup>65</sup> A single complementary federal act that addresses national data collection and problems like system risk will also be created. The act will conform to the goals that federal securities legislation may properly pursue according to the Supreme Court's opinion in *Reference re Securities Act*.<sup>66</sup> Both the provincial acts and the federal acts will be administered by the CCMR under authority delegated to the CCMR by the federal government and the par-

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59. *Id.* para. 131.

60. *Id.*

61. *Ministers of Finance of British Columbia, Ontario and Canada Agree to Establish a Cooperative Capital Markets Regulator*, DEP'T OF FIN. CAN. (Sept. 19, 2013), <http://www.fin.gc.ca/n13/13-119-eng.asp> [hereinafter *Ministers of Finance*].

62. *Reference re Securities Act*, [2011] 3 S.C.R. paras. 128, 131; *Ministers of Finance supra* note 61.

63. *Ministers of Finance supra* note 61.

64. *Id.*

65. *Background: Agreed Elements of a Cooperative Capital Markets Regulatory System*, DEP'T OF FIN. CAN. (Sept. 19, 2013), [http://www.fin.gc.ca/n13/data/13-119\\_1-eng.asp](http://www.fin.gc.ca/n13/data/13-119_1-eng.asp).

66. *Id.*

ticipating provinces and territories.<sup>67</sup>

The type of cooperative regulator outlined in the Department of Finance's announcement is very much in line with the type of regulator that the government of British Columbia was advocating for when the *Securities Act* was being challenged.<sup>68</sup> The Ministers of Finance for Canada and Ontario have evidently come to agree with British Columbia in this respect and have invited the other eight provinces and three territories to participate in the new cooperative system.<sup>69</sup> It remains to be seen how many, if any, additional provinces and territories will choose to participate in the CCMR. Alberta and Quebec almost immediately announced their intentions to not participate in the new regulatory system.<sup>70</sup>

With a target implementation date of July 2015,<sup>71</sup> there is ample time for more provinces and territories to elect to participate in the CCMR. The fact that the CCMR's initial draft regulations will not be published until April 30, 2014 creates a great deal of uncertainty with respect to the details of the new regulatory scheme.<sup>72</sup> But this has not stopped a considerable number of people from expressing support; response to the announcement of the CCMR has been largely positive.<sup>73</sup> Evidently, the prospect of having something closer to a national securities regulator is akin to the light at the end of a long tunnel. Canada's Minister of Finance seems particularly proud of the announcement which is not surprising considering he has been trying to reform Canada's system of securities regulation since 2006.<sup>74</sup> The CCMR is in its infancy, only two provinces have agreed to participate in it so far. While it will be not as significant a change to Canada's system of securities regulation that some hoped for, even if every province and territory were to participate, it is a significant step in the right direction that holds significant promise for the future of Canadian securities regulation.

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67. *Id.*

68. Reference re Securities Act, [2011] 3 S.C.R. para. 35; *Ministers of Finance supra* note 61.

69. *Ministers of Finance supra* note 61.

70. McKenna, Chase, McFarland & Cousineau, *supra* note 6.

71. Isfeld & Shecter, *supra* note 1.

72. *Id.* The release date "for the draft provincial capital markets legislation, draft complementary federal legislation, and CCMR memorandum of agreement" was extended to April 30, 2014. *Statement Regarding Establishment of a Cooperative Capital Markets Regulator*, DEP'T OF FIN. CAN. (Jan. 31, 2014), <http://www.fin.gc.ca/n14/14-015-eng.asp>.

73. Isfeld & Shecter, *supra* note 1; McKenna, Chase, McFarland & Cousineau, *supra* note 6.

74. Isfeld & Shecter, *supra* note 1.



