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National and Coordinated Approaches to Securities Regulation: The Latest Initiatives in Historical Context

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NATIONAL AND COORDINATED APPROACHES TO SECURITIES REGULATION

David Johnston[1], Kathleen Rockwell[2] & Cristie Ford[3]

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1 As Governor General of Canada, His Excellency David Johnston has refrained from expressing opinions on matters that are currently under public policy discussion. Any views or recommendations on policy changes in this chapter or in the text as a whole are those of Kathleen Rockwell and Cristie Ford, and should not be attributed to His Excellency.

2 Senior Special Counsel to the Vice-Chairs, Alberta Securities Commission. The opinions stated here should not be taken to be those of anyone at the Alberta Securities Commission, or any other organization, other than Kathleen Rockwell herself.

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17.01 INTRODUCTION

As proponents of a single Canadian securities regulator often point out, Canada is the only industrialized country in the world without a national securities regulator.[4] Creating a national regulator, however, involves challenging issues concerning federalism and regional diversity. It would be far from a straightforward undertaking.

Serious calls for a national securities system in Canada in the modern era began with the *Porter Report* (1964) and the *Kimber Report* (1965).[5] The topic's popularity ebbs and flows, with proposals in 1979, 1994-97, 2002, 2003, 2005, and 2008 to the present. The most recent round of the debate has been gaining momentum since 2001. The *Harris White Paper*, published in 2002, noted that Canada had until that point lacked a major exogenous event to stimulate reform.[6] Following the onset of the GFC in 2008, Canada may have moved further down the road to establishing a single securities regulator than it has yet, though that outcome has not been reached and, indeed, may be more elusive than ever.

The federal government has pursued the goal of a national securities regulator for many years, with increased recent intensity.[7] In 2008, the federally-constituted Hockin Panel recommended that Canada create a single, comprehensive national securities regulator. This led the federal government to establish the Canadian Securities Transitional Office (CSTO), which drafted legislation — a "*Canadian Securities Act*" — that would establish a Canadian securities regulator.[8] In 2010, the federal

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4 See, *e.g.*, Department of Finance, *Jobs, Growth and Long-term Prosperity: Economic Action Plan 2013* (Ottawa: Public Works and Government Services Canada, 2013) at 143 [*Budget 2013*].

5 *Report of the Royal Commission on Banking and Finance* (Ottawa: Queen's Printer, 1964) [*Porter Report*]; *Report of the Attorney General's Committee on Securities Legislation in Ontario* (Toronto: Queen's Printer, 1965) [*Kimber Report*]. For another early proposal, see J. Alex Langford & David L. Johnston, "The Case for a National Securities Commission" (1968) U. Toronto Com. J. 21 describing the "CANSEC" initiative and "CANSEC", November 1967 O.S.C.B. 61 at 65.

6 A. Douglas Harris, *White Paper: A Symposium on Canadian Securities Regulation: Harmonization or Nationalization?* (Toronto: CMI/CFIE, 2002) [*Harris White Paper*] at 5.

7 The terminology in this chapter distinguishes between a "single" or "common" securities regulator, which could be the product of a cooperative agreement among all provinces, all territories and the federal government participating (a single regulator) or among only some of the provinces and territories with the federal government (a common regulator), and a "national" securities regulator, which would be something created under exclusive federal jurisdiction. As discussed below, the prospect of a *national* securities regulator has largely been eliminated since the SCC's 2011 decision.

8 See Minister of Finance, "Proposed Canadian Securities Act", online: <http://www.fin.gc.ca/drleg-apl/csa-lvm-eng.htm>.

government referred the draft *Proposed Canadian Securities Act* (the Proposed Act) to the SCC for an advisory opinion on its constitutionality. In December 2011, the SCC held in *Reference re Securities Act*[9] that the Proposed Act was unconstitutional.

Following the *Reference*, the debate over a national approach to securities regulation has switched from a jurisprudential debate to a policy debate. Some of the larger jurisprudential questions have been resolved, while others have emerged. The question now is not whether Canada *ought* to have a unified, national securities regulator operating pursuant to exclusive federal jurisdiction — something that now seems unattainable — but what the best arrangement between federal and provincial levels of government might be, given their shared jurisdiction over important aspects of securities market regulation.[10] The federal government is now trying to establish a "Cooperative Capital Markets Regulator", with Ontario, British Columbia, Saskatchewan and New Brunswick agreeing to participate in the initiative.[11] Other provinces, particularly Québec, remain firmly opposed to any such arrangement.[12]

This chapter starts with a review of the history of this debate, which adds important context to the current situation. We then review the most recent attempt to create a national securities regulator and the Supreme Court of Canada (SCC)'s decision that the Proposed Act is unconstitutional. Finally, we consider the path forward following the *Reference* and analyze the various options for change.

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9 *Reference re Securities Act*, [2011] S.C.J. No. 66, 2011 SCC 66 (S.C.C.) [*Reference*].

10 For a comprehensive discussion of the *Reference* and the potential options moving forward, see Anita Anand, ed., *What's Next for Canada? Securities Regulation After the Reference* (Toronto: Irwin Law, 2012). In this chapter, for convenience only, we use the term "provinces" to refer to both provinces and territories.

11 See 17.05 Options after the Reference, A. A Cooperatively Established Common Regulator — CCMR as an Example.

12 Alberta, also historically and typically opposed, recently proposed a national regulator for serious enforcement matters, with an accompanying national systemic risk body. Richard Blackwell, "Ottawa presses ahead despite Alberta's new securities regulation plan", *The Globe and Mail*, April 3, 2014.

17.02 OUTLINE OF VARIOUS NATIONAL SECURITIES SYSTEM OR REFORM INITIATIVES

A. Introduction

The result of the *Reference* — the most recent attempt at creating a federally-empowered national securities regulator — has forced proponents of a national system to consider different options, particularly options based on cooperative federalism. This makes it more important than ever to look to past proposals on the issue — along with the extensive thoughtful commentary that accompanied some of them — with a view to whether aspects of such proposals could be implemented in the current jurisprudential and political environments. This section reviews these proposals for reform, up to and including the most recent proposal.

The past initiatives, and the present ones, must grapple with a similar set of challenges and questions. Securities regulation historically has been held to fall under provincial constitutional jurisdiction.[13] Proposals for a single securities regulator must deal with the jurisprudential and practical legacies of the federal/provincial division of powers in this field, as well as the political and social context that gives rise to federalism concerns in the first place. In securities regulation, the challenges for any initiative cluster around three main questions:

1. Legal Aspects – jurisdiction, delegation and empowerment: What is the scope of a single or common regulator's jurisdiction and, constitutionally, where does it come from? How is a regulator empowered to exercise that jurisdiction? If the power is delegated, what is the mechanism for delegating it? What legal foundations are likely to produce a more permanent, stable, constitutionally valid regulatory structure?
2. Administrative structure: How should a single or common regulator's governance be structured? What is the best structure to ensure a regulator is able to respond efficiently and effectively to new developments in the capital markets? Where would a regulator's head office be, if it has one? How are the costs of a regulator covered? What can be done to ensure a regulator operates cost-effectively? Should the provinces receive payments in exchange for losing any corresponding provincial authority or administration over securities regulation? What should be done about the fees that provinces historically have earned through their securities

[13] See, *e.g.*, *Reference re Securities Act*, [2011] S.C.J. No. 66, 2011 SCC 66 at paras 43-45 (S.C.C.).

regulators? How should the transition to a single or common regulator be orchestrated to minimize disruption? Are there language concerns?

3. Political questions – implementation and legitimacy: How exactly should a single or common regulator be structured — with how much autonomy or empowerment going to local or regional units, and how much centralization? What are the criteria for making that decision (presumably factors such as political viability, optimal effectiveness in discharging regulatory responsibilities, stability and predictability for market participants, and political accountability would be relevant)? How can the system gain the advantages of efficiency and uniform coverage while also paying heed to regional concerns — which include not only protecting local investors, but also protecting unique capital markets, local industry, and employment? What should be done about provinces that refuse to participate (if any)? Should they be permitted to join later, and with what consequences? If they do not join, how should their interface with the otherwise-single or common regulator be structured? Who should be entitled to (or who is likely to be recognized to) speak for Canada in international fora such as IOSCO?

Familiar regulatory purposes — fostering fair and efficient capital markets, protecting investors, and (more recently) managing and preventing systemic risk — are also relevant to any proposal. These operate in the background of any discussion of proposed changes to the securities regulatory structure in Canada.

B. Porter Commission and Earlier

The 1935 *Report of the Royal Commission on Price Spreads* made one of the first calls for a national approach to securities regulation.[14] In 1964, the *Porter Report* also advocated uniform securities regulation. It proposed two alternatives — a national agency with federal legislation or a uniform Act creating a single agency. That agency would use provincial cooperation to oversee the growth, development and efficiency of the Canadian securities industry and markets.[15] However, "constitutional validity" was a concern, as the proposal would likely only add an

14 *Report of the Royal Commission on Price Spreads* (Ottawa: King's Printer, 1935) at 41-42. The Report called for a "Securities Board", with the federal government either taking over or guiding the system towards uniformity.

15 *Report of the Royal Commission on Banking and Finance* (Ottawa: Queen's Printer, 1964) at 348 [*Porter Report*].

additional regulator to the mix, instead of decreasing overlapping regulation.[16]

These reports both concluded the national securities issue warranted attention. The *Porter Report*, in particular, was gravely concerned with decreasing duplication, improving enforcement and providing more information to investors. It cautioned, however, that a national system not become "unduly bureaucratic and costly" or "highly detailed and comprehensive" (like the U.S. SEC).[17]

C. CANSEC

The OSC presented the CANSEC (Canada Securities Commission) proposal in 1967. It proposed that the federal and provincial governments jointly delegate their authority to a single agency created by the federal government. The federal government and each provincial government would delegate securities authority to this agency.[18] CANSEC proposed three tiers of regulation: a council of ministers with representation from each participating jurisdiction; a commission to hear appeals and decide important matters; and an administrative staff.[19]

CANSEC would have authority over all interprovincial securities matters. Each province would retain intraprovincial control. This would

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16 A. Douglas Harris, *White Paper: A Symposium on Canadian Securities Regulation: Harmonization or Nationalization?* (Toronto: CMI/CFIE, 2002) [*Harris White Paper*] at 10-11, citing J. Alex Langford & David L. Johnston, "The Case for a National Securities Commission" (1968) U. Toronto Com. J. 21. The *Harris White Paper* provides an excellent analysis of harmonization and nationalization efforts from the 1964 Porter Report through to the end of the 1990s.

17 *Report of the Royal Commission on Banking and Finance* (Ottawa: Queen's Printer, 1964) at 349 [*Porter Report*]. Some of the pros and cons of a national, common or single Canadian securities regulator are discussed in 17.06 Considerations.

18 This joint agency and delegation approach has been upheld by the SCC as valid in other fields. For example, in *Prince Edward Island (Potato Marketing Board) v. HB Willis Inc.*, [1952] S.C.J. No. 31, [1952] 2 S.C.R. 392 (S.C.C.), the SCC approved a joint federal-provincial agency for marketing agricultural products; in *Coughlin v. Ontario (Highway Transport Board)*, [1968] S.C.J. No. 38, [1968] S.C.R. 569 (S.C.C.), the SCC approved a similar scheme regulating interprovincial trucking. Harris has noted that delegation can lead to accountability problems, as it would be unclear which level of government would be accountable for the agency's performance, and how that accountability would be addressed — A. Douglas Harris, *White Paper: A Symposium on Canadian Securities Regulation: Harmonization or Nationalization?* (Toronto: CMI/CFIE, 2002) [*Harris White Paper*] at 19:

> There must be a direct mechanism for stakeholders in capital markets regulation — issuers and their stakeholders, investors and intermediaries — to express and act democratically upon their views of the quality of securities regulation in their jurisdiction.

19 "CANSEC", November 1967 OSCB 61 at 65 (CANSEC Proposal) and J. Alex Langford & David L. Johnston, "The Case for a National Securities Commission" (1968) U. Toronto Com. J. 21.

avoid constitutional debates and challenges, while preserving regional interests. There would be a head office in Ottawa;[20] national or regional offices in each of Montreal, Toronto and Vancouver; and local offices in other regions.

CANSEC envisaged a single, uniform filing of prospectuses, ITRs, and other materials,[21] then:

> [u]ltimately ... that the participating governments could go beyond the uniform filing stage and develop a model uniform securities act which all participating governments could then enact.[22]

CANSEC had other advantages: the federal government would be involved; all provinces need not participate at once; dissatisfied provinces could leave at any time;[23] and, implementation could be staged.[24] As the first proposal to grapple seriously with the questions of jurisdiction, administration and legitimacy that underlie this area, much of the CANSEC proposal is still valid and valuable today. The CANSEC proposal puts forward a cooperative federalist model that seeks to avoid constitutional issues, and establishes a council of ministers to entrench provincial representation. At the same time, it is based on a gradual adoption model — with a model Uniform Securities Act being the product of prior agreement, not the catalyst for it — that differs from the more recent federal initiatives discussed below.

D. The *1979 Proposals*[25]

The *1979 Proposals* resulted from an extensive federal study of securities regulation in Canada.[26] The report is in three volumes: a

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20 This "head office" would likely be nominal.

21 J. Alex Langford & David L. Johnston, "The Case for a National Securities Commission" (1968) U. Toronto Com. J. 21 at 29. Some of this has materialized in the Passport System, as discussed throughout this text.

22 *Ibid.*

23 This flexibility would, of course, be restricted by practical realities, such as having to re-establish a provincial Commission with adequate staffing and funding. Harris sees the ability to opt out as a disadvantage because it removes stability from the system. Not only would withdrawals weaken the system, but also threats of withdrawal could be used as a bargaining tool: A. Douglas Harris, *White Paper: A Symposium on Canadian Securities Regulation: Harmonization or Nationalization?* (Toronto: CMI/CFIE, 2002) at 17. However, the Crawford Panel, *A Blueprint for A New Model: A Discussion Paper by the Crawford Panel on A Single Canadian Securities Regulator* (Toronto: Government of Ontario, 2005) at 11, note 9, did not see this as a practical concern, since participants will have an incentive to work within the system instead of moving backwards.

24 J. Alex Langford & David L. Johnston, "The Case for a National Securities Commission" (1968) U. Toronto Com. J. 21 at 30. Different stages could be, for example, clearance, filing requirements and registration.

25 Canada, Department of Consumer and Corporate Affairs, *Proposals for a Securities Market Law for Canada*, 3 vols. (Ottawa: Consumer and Corporate Affairs Canada, 1979) [*1979 Proposals*].

detailed draft *Canada Securities Market Act* (*1979 Draft Act*); a commentary (*1979 Commentary*) on each section of the *1979 Draft Act*; and a collection of excellent studies.[27] The *1979 Draft Act* aimed to:

> [F]urther the achievement of the goals enunciated in this section by ensuring the availability of information relating to investment decisions, by protecting investors from fraudulent and deceptive conduct and by ensuring fair competition, all of which can best be accomplished by the creation of an independent public body to regulate the Canadian securities market and securities market actors over which the Parliament of Canada has legislative jurisdiction in cooperation with similar provincial and foreign public authorities.

It was based on the twin ideals of investor protection and market efficiency.[28] It had no specific implementation plan. Douglas Harris in particular thought this was a problematic omission that showed the need for any reform proposal to "not rely on significant further negotiations for the determination of its scope or implementation" (although he acknowledged that details would need to be left for negotiation).[29]

Many of the issues explored in the *1979 Proposals* are still relevant. For example, the *1979 Commentary* noted that the "administration" provisions of the *1979 Draft Act* were designed to encourage cooperation with provincial securities regulators and other government agencies. However, as with CANSEC, nothing came of this enormous effort. The national system topic virtually disappeared for 15 years.

E. 1994 to 1997 Proposals

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26 Johnston anticipated that the lack of input from policy makers and the provinces would limit the "practical success" of the *1979 Proposals*: David L. Johnston, "Book Review of Proposals for a Securities Market Law for Canada" (1981) 26 McGill L.J. 626 at 626. Another point noted in earlier editions of this treatise was the need for consultation and cooperation, which appears to be the direction that current single or common regulator approaches are taking.

27 The studies were comprehensive, covering topics including: "Canadian Capital Markets"; "Constitutional Aspects of Federal Securities Legislation"; "The Definition of Security for Purposes of a Securities Act"; "Disclosure Requirements"; "Continuing Disclosure and Data Collection"; "Securities Regulation: Problems in Relation to Sanctions"; "Insider Trading"; "Canadian Financial Institutions"; "Applications of Automation in the Canadian Securities Industry: Present and Projected"; "International Aspects of Securities Legislation"; "The Licensing of Securities Market Actors"; and "Government Supervision of Self-Regulatory Organizations in the Canadian Securities Industry".

28 See Chapter 1 Context and Philosophy, 1.04 Purpose of Securities Regulation, B. Twin Goals: Investor Protection and Efficient Capital Markets.

29 A. Douglas Harris, *White Paper: A Symposium on Canadian Securities Regulation: Harmonization or Nationalization?* (Toronto: CMI/CFIE, 2002) [*Harris White Paper*] at 25.

The national regulator proposal resurfaced in 1994. One immediate difficulty was that it countered the trend at the time of devolving power away from the federal government.[30] Thus, it encountered resistance, especially in Québec.[31]

1. *The 1994 Proposal*

In 1994, at the request of the premiers of the Atlantic provinces,[32] the federal government developed a draft memorandum of understanding concerning a uniform securities regulator. The OSC, another supporter of the initiative, published the *1994 Proposal* in its Securities Bulletin.[33] The *1994 Proposal* was to be between Canada and any participating provinces. The federal government clearly contemplated that some provinces (for example, Québec) might opt out of a national system. The *1994 Proposal* would not in any way have affected the jurisdiction of those provinces.

The preamble explicitly stated the desire to improve regulatory efficiency by decreasing overlap and duplication by establishing "... a uniform securities regulatory structure which [would] apply comprehensively within and across all participating provinces".[34] It also emphasized the need to recognize and foster regional characteristics. Finally, it stressed that no participant would lose "... any jurisdiction, right, power, privilege, prerogative or immunity by virtue of this agreement or any other agreement resulting therefrom".[35]

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30 However, some say that centralization of securities regulation could be "traded off" for decentralization in other areas. For example, see David L. Johnston, Letter to the Honourable John Manley, January 11, 1996 at 2:

> If the federal government proposes devolution of powers in a certain number of fields such as immigration, manpower training, housing, municipal affairs, forestry, fish, agriculture, environment, energy, pursuant to the Masse Committee deliberation, it may be appropriate to look at two-way street trade-offs in areas such as securities regulation[.]

In the February 27, 1996 Throne Speech, 2nd Sess., 35th Parl., online, <http://www.parl.gc.ca/Parlinfo/Documents/ThroneSpeech/35-2-e.html>, the federal government stated (at 5) that it was prepared to withdraw from "labour market training, forestry, mining, and recreation", although it did not explicitly mention trade-offs with other fields.

31 For example, Bloc Québecois MP Yvan Loubier criticized the logic behind a national commission. He cited Ottawa's contrary commitment in the 1996 Throne Speech, *ibid*., to increase provincial responsibilities in certain areas: Rob Carrick, "Ontario Considers Handing Securities Regulation to Ottawa", *The Globe and Mail* (March 5, 1996).

32 A. Douglas Harris, *White Paper: A Symposium on Canadian Securities Regulation: Harmonization or Nationalization?* (Toronto: CMI/CFIE, 2002) [*Harris White Paper*] at 27.

33 *Memorandum of Understanding Regarding the Regulation of Securities in Canada* (1994) 17 O.S.C.B. 4401 [*1994 Proposal*].

34 *1994 Proposal*, *ibid*., at 4401.

35 *1994 Proposal*, *ibid.*

The *1994 Proposal* contemplated a transition period of one year. During the transition, the federal government was to enact comprehensive securities legislation[36] and establish a Canadian Securities Commission (CSC). The federal legislation would not apply to intraprovincial matters or to any matters relating to non-participating provinces. Canada would represent the CSC in international fora.[37] During the transition period, provinces would repeal their existing legislation, incorporate as their own the new federal legislation (by reference, as it would exist from time to time), and delegate administrative authority over their legislation to the CSC.

The CSC, headquartered in Toronto, would be autonomous and report to the federal Minister of Finance. Regional offices in each of British Columbia, Alberta, and one of the Atlantic provinces (and others, if that would increase efficiency) would preserve regional flexibility and service. Other regions could have had local representation.[38]

The system would be "closed".[39] Participating provinces could exempt offerings from the federal legislative provisions if they met certain closed conditions.[40] As compensation for lost future revenues, Canada would pay an aggregate lump sum of $150 million to all participating provinces. That amount would be recovered from future CSC-generated revenues.[41] Fees paid to the CSC would be for the CSC (that is, not funnelled into general revenue).[42]

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36 This legislation (the Act, regulations and policy statements) was to be similar to "existing uniform provincial legislation" (*1994 Proposal*, *ibid*., ss. 2-3, at 4402). Presumably, this meant the relatively uniform legislation in Alberta, British Columbia, Newfoundland, Nova Scotia, Ontario and Saskatchewan.

37 *1994 Proposal*, *ibid*., s. 30, at 4407.

38 *1994 Proposal*, *ibid*., s. 23, at 4406.

39 See Chapter 9 Distribution Exemptions, 9.02 Preliminary Concepts, B. The Closed System.

40 *Memorandum of Understanding Regarding the Regulation of Securities in Canada* (1994) 17 O.S.C.B. 4401, s. 24 at 4406 O.S.C.B. allowed provinces to exempt offerings if the primary offering were only to residents of that province; secondary trading were only among residents of that province; and any secondary trades not restricted to residents of that province were subject to the federal legislative provisions. This ensured that the federal legislation did not encroach upon matters that were clearly intraprovincial.

41 This was, and should remain, extremely controversial. In addition, the amounts under consideration have escalated in tandem with the growth of securities markets and activities.

42 Under the current provincial system, Commissions are self-funding. Much of the Commissions' revenue remains with the Commissions: see Chapter 4 Machinery, 4.05 Financial Independence of the Commission, B. Self-Funding.

The CSC would communicate and provide services in both English and French.[43] Critics were concerned that both English and French filings would also be required.[44]

2. *Responses to the 1994 Proposal*

Edward Waitzer, then-Chair of the OSC, analyzed the *1994 Proposal* according to five "key" objectives: (1) maximizing operational efficiency; (2) ensuring regulatory integrity; (3) optimizing regulatory autonomy; (4) constructing effective coordination; and (5) designing a functional transition process.[45] His analysis is informed by practical, logistical experience in the field of securities regulation in particular. The key objectives he sets out remain a useful way to assess the promise of any reform to securities regulation.

First, Waitzer believed the existing provincially-based system had fairly successfully achieved increased operational efficiency and decreased regulatory costs. However, there was room to improve further. He worried that focusing exclusively on a national system could derail attempts to improve the current system.[46] Such improvements would be necessary if the CSC proposal were derailed or delayed (as indeed happened).

Second, he stressed that the CSC must emphasize the fundamental tenets of securities regulation (investor protection and capital market efficiency). Otherwise, competing concerns — such as maintaining public confidence by releasing information only when necessary — could weaken the resulting regulatory system.[47] Waitzer also believed the *1994 Proposal*

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43 *Memorandum of Understanding Regarding the Regulation of Securities in Canada* (1994) 17 O.S.C.B. 4401, s. 36 at 4407 O.S.C.B.

44 See also 17.06 Considerations, C. Administrative Structure, 8. Language Concerns.

45 Edward J. Waitzer to the Honourable Bob Rae, May 16, 1994, in (1994) 17 O.S.C.B. 4409 at 4410-4411. At 4411-4417, Waitzer evaluated each of these objectives in the context of the *1994 Proposal*. He also emphasized their relevance to all discussions of increased cooperation and coordination (even proposals not involving federal regulation or administration).

46 *Ibid*., at 4411-4412.

47 *Ibid*., at 4412-4413. Waitzer's main concern appeared to be that the *1994 Proposal* was too much a response to pressure from financial institutions. These are federally regulated on a prudential (*i.e.*, solvency) basis. See Chapter 1 Context and Philosophy, 1.02 Securities Regulation and Financial Regulation. Waitzer explained that the objectives of investor protection and institutional solvency often conflict. Prudential regulators are more concerned with releasing information only when absolutely necessary. They want to prevent a potentially unwarranted or premature decrease in public confidence. Conversely, investor protection regulators generally believe that information should be released as soon as it is available. This provides the public with full knowledge and a level playing field. See Brent

was an opportunity to implement more ambitious changes in Canadian securities regulation. Such changes were necessary partly because provincial legislatures had not adapted to their changing environments.[48]

Third, the CSC would have to be independent (that is, from political pressures) and autonomous (that is, self-funding).[49] Further, if the new proposals merely added another layer of legislation and bureaucracy, accountability could decrease.[50] Waitzer also believed the fundamental principles of the CSC — and specifically, the paramount consideration of the interests of investors and issuers — should be developed before political considerations dictated the structure under which it would operate:

> [It] appears to respond to vaguely formulated regional concerns by prescribing ex ante, in some detail, how (and where) the [CSC] will be managed. At best, this is a superficial response. At worst, it suggests a level of political (or bureaucratic) intervention in internal management issues which would be anathema to the principles of independence and accountability....[51]

Nick Le Pan, in response, argued that regional concerns should not be ignored in developing the proposed structure:

> Regional sensitivity and representation is of serious and paramount concern to some of the other provinces ... A truly national regulatory system must not neglect such regional characteristics as long as they are not incompatible with an efficient and transparent regulatory regime.[52]

Sutton, *The Cost of Regulatory Compliance in the Canadian Financial Sector* (Ottawa: Conference Board of Canada, 1994) at 6.

Nick Le Pan disagreed (Nick Le Pan to Edward J. Waitzer, September 9, 1994, in (1994) 17 O.S.C.B. 4396 at 4397. He argued that the provinces were consulted in the development of the *1994 Proposal*. He also denied that new federal legislation would take an insolvency approach. The *1994 Proposal* preamble did focus on investor protection.

48 Waitzer noted that there was a backlog of "securities law issues which should be addressed by statutory reform" and suggested that the boundaries between corporate and securities laws should be reconsidered. Edward J. Waitzer to the Honourable Bob Rae, May 16, 1994, in (1994) 17 O.S.C.B. 4409 at 4413-4414.

49 *Ibid*., at 4414-4415. Nick Le Pan to Edward J. Waitzer, September 9, 1994, in (1994) 17 O.S.C.B. 4396 at 4398, responded that the *1994 Proposal* already provided for the CSC to be autonomous and independent. This included the power to develop its own amendments. Also, it would be self-funding, and employees would not be covered by the *Public Service Employment Act*.

50 Edward J. Waitzer to the Honourable Bob Rae, May 16, 1994, in (1994) 17 O.S.C.B. 4409 at 4414-4415. Nick Le Pan to Edward J. Waitzer, September 9, 1994, in (1994) 17 O.S.C.B. 4396 at 4398, did not believe political accountability or responsibility would decrease, as the chair of the CSC would report directly to the federal Minister of Finance, who is directly responsible to the Canadian Parliament.

51 Edward J. Waitzer to the Honourable Bob Rae, May 16, 1994, in (1994) 17 O.S.C.B. 4409 at 4416.

52 Nick Le Pan to Edward J. Waitzer, September 9, 1994, in (1994) 17 O.S.C.B. 4396 at 4399. Le Pan was then Assistant Deputy Minister in the federal Department of Finance.

Fourth, regarding coordination, Waitzer found the *1994 Proposal* more ambitious than CANSEC. The latter did not contemplate immediate legislative uniformity among participants. He stressed the need to develop coordinating mechanisms before implementing the *1994 Proposal*, especially if some provinces were likely to opt out.[53] Le Pan countered that such mechanisms could best be developed once it was known which provinces would participate.[54]

Finally, Waitzer was concerned that the *1994 Proposal* inadequately considered transitional costs, time and procedures. This could be disastrous. Proper implementation and transition were vital if a national system proposal were to have any chance of success.[55] Le Pan agreed it was essential "to ensure that any transition [was] handled as smoothly as possible, thus minimizing the costs to governments and uncertainty for market participants".[56] He noted the importance of maintaining as much continuity of staff as possible, and that the *1994 Proposal* would have established a "task force, composed of full-time securities experts" to assist with the transition.[57]

Then-OSC Vice Chair John Geller, on the other hand, favoured federal "effective and *exclusive* [securities] regulation".[58] That is, he recommended avoiding a U.S.-style system where the provinces would have concurrent regulatory authority. Until such a federal solution was practical, he, too, cautioned that the "quest for the best [not] frustrate the ability to obtain the merely good".[59] Canada should continue to focus on increasing effectiveness and decreasing duplication in the current system.

Cally Jordan[60] was concerned that the *1994 Proposal* was too complicated and too political. She questioned the decision to proceed by way of Memorandum of Understanding (*i.e.*, "political, closed-door government-to-government negotiations") when dealing with "a domestic matter for which we have a legislative and constitutional framework". Second, in her view the over-complicated proposal of "interrelated

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53 Edward J. Waitzer to the Honourable Bob Rae, May 16, 1994, in (1994) 17 O.S.C.B. 4409 at 4416-4417.

54 Nick Le Pan to Edward J. Waitzer, September 9, 1994, in (1994) 17 O.S.C.B. 4396 at 4399. We disagree. Coordinating mechanisms should be pursued independently of and concurrently with the development of a national system.

55 Edward J. Waitzer to the Honourable Bob Rae, May 16, 1994, in (1994) 17 O.S.C.B. 4409 at 4417.

56 Nick Le Pan to Edward J. Waitzer, September 9, 1994, in (1994) 17 O.S.C.B. 4396 at 4399.

57 *Ibid*.

58 John A. Geller, "Federal Securities Regulation" (Paper delivered at the Securities Forum '95, February 15, 1995) (1995) 18 O.S.C.B. 658 at 658 [emphasis added].

59 *Ibid*., at 660.

60 Cally Jordan, "Canada Needs a National Securities Regulator", *The Financial Post* (February 24, 1995).

harmonized legislation with a provincial to federal delegation of power" in the *1994 Proposal*, was reminiscent of what she saw as the unsuccessful and backward-looking changes being undertaken in Australia. Third, she thought the federal government might consider asserting jurisdiction over the area and simply drafting legislation. Fourth, she believed federal regulation should be implemented in stages, beginning with international aspects.[61]

3. February 1996 to 1997

After an initial flurry of interest and comments, the *1994 Proposal* appeared to have met the same fate as CANSEC and the *1979 Proposals*. The principal objections to it ultimately coalesced around concerns about the size and allocation of transfer payments to the provinces, and Waitzer's concern that focusing on establishing a national system would squander an opportunity to improve the existing regime.[62] The *1996 Throne Speech* again revived it, when the federal government expressed its willingness to work toward a CSC with any interested provinces.[63]

At the June 1996 first ministers' conference, the federal and provincial governments (excluding British Columbia and Québec)[64] endorsed the idea of giving securities regulation to a federally-run commission.[65] The parties expected a formal agreement within a few months, then several months to draft the legislation.[66] The new CSC and legislation would follow the *1994*

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61 However, she acknowledged this could cause further duplication, over-regulation and a loss of technical regulatory expertise. In Jordan's view, "better the co-ordinated jumble of knowledgeable provincial regulators than one federal regulator of uncertain authority." *Ibid.*

62 A. Douglas Harris, *White Paper: A Symposium on Canadian Securities Regulation: Harmonization or Nationalization?* (Toronto: CMI/CFIE, 2002) [*Harris White Paper*] at 33.

63 February 27, 1996 Throne Speech, 2nd Sess., 35th Parl., online: <http://www.parl.gc.ca/Parlinfo/Documents/ThroneSpeech/35-2-e.html>.

64 Then-Premier Glen Clark of British Columbia stated that British Columbia had its own market and stock exchange and did not plan to cooperate (Barrie McKenna & Alan Freeman, "Eight Premiers Endorse National Securities Commission," *The Globe and Mail* (June 22, 1996)). Then-Premier Lucien Bouchard of Québec emphasized the CSC was proceeding despite opposition by the Québec financial community, political parties and people. He believed this typified the federal government's attitude to Québec's economic and financial needs (Alan Toulin, "Eight Premiers Support Idea of National Securities Agency," *The Financial Post* (June 22, 1996)). He also predicted chaos and destructive competition.

65 Barrie McKenna & Alan Freeman, "Eight Premiers Endorse National Securities Commission," *The Globe and Mail* (June 22, 1996).

66 *Ibid.*

Proposal.[67] However, the 1996 revival faded in 1997, and the reformists' drums did not sound again until 2001.

F. 2001 to 2006

1. Introduction

Proposals for a national approach to securities regulation resurfaced again in the early 2000s. Support for a national commission grew in various quarters throughout 2001 and 2002. These years were characterized by a sense of urgency among proponents of a single securities regulator, and a new recognition of the need to resolve some underlying empirical and jurisprudential questions. Competing models based on greater provincial coordination, without federal intervention, were advanced during the same period.

By the end of this period, many of the most significant inefficiencies associated with provincial securities regulation had been addressed through harmonization and the passport system. At the same time, momentum gathered around proposals for a single securities regulator.[68]

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67 *Memorandum of Understanding Regarding the Regulation of Securities in Canada* (1994) 17 O.S.C.B. 4401.

68 Another important contribution to the goal of improving Canadian securities regulation was the Task Force to Modernize Securities Legislation, commissioned by the Investment Dealers' Association (as IIROC then was) in 2005. It issued its report, *Canada Steps Up* in 2006. The Task Force focused on enhancing the competitiveness of Canada's capital markets, improving the disclosure-based regime, and reducing regulatory barriers to accessing the capital markets. It recommended that "a co-operative national program be established and funded by securities regulators, self-regulatory organizations (SROs) and law enforcement agencies" to establish enforcement priorities and improve enforcement: *ibid*., Volume 1: Final Report at 11. It also engaged in extensive consultation and commissioned five volumes of independent research studies on several topics: modernizing disclosure; how investment decisions are made; new products and emerging risks, including hedge funds and investment "wrappers"; the role of securities regulation in promoting a competitive capital market; characteristics of Canada's capital markets; the international competitiveness of Canadian stock exchanges and capital markets; and enforcement. Some of those research reports have influenced subsequent securities practice, or the single regulator debate: see, *e.g*., Julia Black, "Involving Consumers in Securities Regulation" (proposing that an investors panel be established — something the Hockin Panel subsequently recommended, and Ontario has implemented); Peter Cory & Marilyn Pilkington, "Critical Issues in Enforcement" (criticizing existing securities enforcement practices, including for being fragmented between provinces); and Christopher Nicholls, "The Characteristics of Canada's Capital Markets and the Illustrative Case of Canada's Legislative Regulatory Response to *Sarbanes-Oxley*" (discussing the nature of Canadian capital markets, including its bifurcation between very large and very small issuers across provincial jurisdictions), in Volumes 6, 6 and 4 respectively of the IDA, *Canada Steps Up* (2006).

2. *Reciprocal Delegation Proposals*[69]

Two suggestions have involved reciprocal delegation among the provinces, although in slightly different formats. In November 2001, David Brown, then-OSC Chair, proposed a "Pan-Canadian Commission", given his conclusion that Canada had "too many regulators. Too many regulatory structures. Too much overlap and duplication."[70] He concluded that a model uniform statute and decision-making delegated among the provinces (*i.e.*, a refinement on what is now essentially the Passport System) could be precursors to a single commission.[71] Brown envisioned a Pan-Canadian Commission created by the provinces (as opposed to the federal body contemplated by some other proposals), with each province delegating administrative authority to that Pan-Canadian Commission.

The same month, an alternative reciprocal delegation proposal came from British Columbia's Joyce Maykut, who concluded that federal involvement was constitutionally necessary. However, she stopped short of calling for a single national commission, reflecting British Columbia's concerns with maintaining regional flexibility and autonomy.[72]

Neither scheme would be stable, in that opting-out, or threats to opt-out, could constantly undermine the administrative basis. Moreover, accountability would be an issue, as would regional flexibility (unless delegation were conditional — again harming stability). Harris also noted that Maykut's proposal could actually increase compliance costs, as provincial commissions would likely remain large.

3. *The Harris White Paper*

A March 2002 symposium led to the *Harris White Paper*,[73] in which Douglas Harris set out eight criteria for assessing any reform proposals (while noting the difficulty of reducing the myriad considerations at stake to these

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69 Much of the detail for this section is taken from the A. Douglas Harris, *White Paper: A Symposium on Canadian Securities Regulation: Harmonization or Nationalization?* (Toronto: CMI/CFIE, 2002) at 55-62 [*Harris White Paper*]. For a discussion of the advantages and disadvantages of delegated approaches, see also 17.06 Considerations.

70 David Brown, Keynote Address (Dialogue with the OSC, November 20, 2001). See also Letter from David A. Brown to Michael Phelps (July 8, 2003) at (2003) 26 O.S.C.B. 5466.

71 *Ibid.*

72 Joyce C. Maykut, "An Alternative Regulatory Model for Canada" (8th Queen's Annual Business Law Symposium, November 16, 2001). Harris noted that leaving the scope of delegation to be determined did not meet his determinacy requirement.

73 A. Douglas Harris, *White Paper: A Symposium on Canadian Securities Regulation: Harmonization or Nationalization?* (Toronto: CMI/CFIE, 2002) [*Harris White Paper*].

eight, or determining their relative importance).[74] Like Waitzer's 1994 criteria, many of Harris's criteria remain helpful in assessing the merits of any regulatory reform proposal, including current ones:

1. Constitutional validity: the regulatory structure proposed should be constitutionally valid without the need for a constitutional amendment or concessions or waivers from the affected provinces.
2. Stability: the regulatory structure proposed should have structural permanence, and should not permit strategic behaviour by participating provinces who might credibly threaten to withdraw if their demands on administrative or policy issues are not met.
3. Local and regional flexibility: the regulatory structure proposed should provide some ability for local and regional variation in securities legislation and/or administration, at least to the extent consistent with satisfying the other criteria.
4. Universality: the regulatory structure proposed should be designed to apply as widely as possible across the country.
5. Accountability: the regulatory structure proposed should ensure that elected representatives are accountable to their constituents for the quality of regulation of Canada's capital markets.
6. Determinacy: a reform proposal should propose a scheme for securities regulation that does not rely on significant further negotiations for the determination of its scope or implementation, and that defines clearly areas of exclusive regulatory authority.
7. Responsiveness: the regulatory structure proposed should ensure that the regulator with jurisdiction will have the authority and appropriate incentives to respond efficiently and effectively to changing economic circumstances that affect Canadian capital markets.
8. Cost effectiveness: the regulatory structure proposed should provide a clear opportunity to reduce the costs of regulatory compliance for issuers and intermediaries, relative to the status quo.

It is difficult to reduce the list of evaluative criteria to the eight items listed above — there are many other considerations that can and should be considered, including avoiding regulatory externalities, maximizing Canada's effectiveness and the representation of the interests of Canadian issuers in the international sphere, the transitional costs associated with moving to a centralized structure, enforcement, and regulatory transparency.[75]

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74 *Harris White Paper*, *ibid*., at 49-52.

75 *Harris White Paper*, *ibid*., at 49-50 (the points are renumbered for ease of reading; footnotes omitted). As is common in securities law, a balance must be reached.

A final critical element was the importance of finally quantifying some of the suspected costs of the current system, and anticipated savings of a reformed system.[76]

Harris observed that "[n]o one participating in the debate suggests that the status quo should be maintained." At the same time, none of the reform proposals then being offered satisfied all eight criteria.[77] Important issues concerning the significance of local and regional interests, the costs of regulatory fragmentation, and the benefits of regulatory competition remained unresolved, with progress "hampered by a lack of focused and comprehensive empirical and theoretical research".[78] The *Harris White Paper* recommended that Canada "establish a joint federal and provincial committee to commission, oversee and report on the research and consultation necessary to recommend a securities regulatory structure to the provincial and federal governments". It concluded that "[g]overnments and stakeholders in the Canadian capital markets cannot afford to defer any longer the resolution" of these issues in view of the increasing mobility of capital and the need to compete internationally.[79]

4. Crawford Report

The 2003 *Crawford Report*, commissioned by Ontario, found "an urgent need" for a single regulator in Canada.[80] It cited the typical problems and concerns, such as obstacles to efficient trans-border activity and requirements (both domestically and internationally); inefficiencies associated with having 13 current regulators (which vary in status, authority and function); failed attempts to address the problems; and the CSA's limitations, despite its accomplishments (that is, each jurisdiction remains free to take its own approach; national initiatives are developed and implemented slowly; the CSA lacks enforcement powers; the CSA is not accountable to anyone; and members of the CSA are raising different visions and philosophies).[81]

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76 *Harris White Paper*, *ibid*., at 51-52.

77 *Harris White Paper*, *ibid*., at 52.

78 *Harris White Paper*, *ibid*., at 75, 75-86.

79 *Harris White Paper*, *ibid*., at 90.

80 *Five Year Review Committee Final Report: Reviewing the Securities Act (Ontario)* (Toronto: Queen's Printer, 2003) at 29 [*Crawford Report*]. The draft report was issued in 2002 and was one of the proposals considered in A. Douglas Harris, *White Paper: A Symposium on Canadian Securities Regulation: Harmonization or Nationalization?* (Toronto: CMI/CFIE, 2002) [*Harris White Paper*] at 44-45, 54.

81 *Crawford Report*, *ibid*., at 29-36. Regarding the last point, the *Crawford Report* notes the following, at 34: "With no coordinated focus to all these initiatives, the risk is that rather than pursuing an ideal system, the country's system of securities regulation grows ever more

The *Crawford Report* recommended that a single national regulator be established, but with regional offices to reflect regional concerns. However, it did not endorse a particular model for its constitution, noting that "proposals for a federal regulator could be revived … [a]lternatively, a supra-provincial body to which the provinces and territories delegate their authority could be established" or other models may be proposed.[82] In the interim, the *Crawford Report* endorsed continued and increased harmonization efforts.[83]

In discussing this recommendation in 2004, the Standing Committee on Finance and Economic Affairs found "unanimous" support for a single regulator, but no consensus on the method to achieve this goal.[84] It ultimately recommended continuing work towards a single regulatory system, with "*one new regulator, one common body of securities law and one set of fees*."[85]

fragmented and cumbersome". An example of such different perspectives across Canada is the recent proposals for regulating shareholder rights plans ("poison pills") during takeovers. Québec's proposal (AMF, "Consultation Paper: An Alternative Approach to Securities Regulators' Intervention in Defensive Tactics," March 14, 2013) diverges in important ways from the CSA's proposed NI 62-105 *Security Holder Rights Plans*. See Chapter 11 Take-Over Bids, 11.07 Defensive Tactics, I. Shareholders' Rights Plan ("Poison Pill"), 2. Proposed NI 62-105 Security Holder Rights Plans.

82 *Crawford Report*, *ibid*., at 37.

83 *Crawford Report*, *ibid*., at 41: "Harmonization" consists of regulators agreeing to work toward common ends but allowing different regulators to adopt different means. In Canada, this would mean each province could have different legislation, so long as the broad effects of each were equivalent. That could be achieved, in part, through similar interpretation or application and often with coordinated administration across the different Commissions. Harmonization differs from "unification", which means uniform or identical legislation across the jurisdictions (though its interpretation or application may vary). For more on harmonization see Chapter 20 International Issues, 20.05 Internationalizing Regulation: Methods of Interlinking Jurisdictions.

84 Ontario Standing Committee on Finance and Economic Affairs, *Report on the Five Year Review of the Securities Act* (Ontario, Legislative Assembly, 2004) at 5 (see also 4-7) [*SCFEA Report*].

85 *SCFEA Report*, Recommendation 2, *ibid*., at 7 (original emphasis).

5. *MacKay Recommendations*[86]

In October 2002, then-federal Minister of Finance John Manley, appointed Saskatchewan lawyer Harold MacKay to recommend a process that would determine the optimal securities system for Canada.

MacKay echoed the view of the *Harris White Paper* that the status quo was no longer acceptable. He emphasized the need for significant and prompt improvements. He made seven recommendations: that (1) a "Wise Persons' Committee" be immediately established to conduct a review of the alternatives and make recommendations; (2) there be no more than six committee members, who have relevant experience, and who should be broadly geographically representative; (3) the committee's mandate "be to identify the appropriate model for securities regulation in Canada, including the underlying philosophy of regulation that should be adopted" — a system with investor protection, efficient capital markets, equal protection across Canada, encouragement of local innovation, and a positive image and single voice internationally; (4) the committee consider two particular models — improved coordination or a national system; (5) the commission have competent and federally funded staff; (6) there be a suggested reporting date of September 30, 2003; and (7) participation by market participants, academics and regulators be encouraged.

The committee was constituted, and a report prepared.

6. *Wise Persons' Committee (WPC)*

The *WPC Report*'s philosophy is well-summarized by the following passage:

> The best securities regulatory structure involves a collaborative approach on the part of the federal and provincial governments. Both the federal government and the provincial governments would have significant roles. The federal role reflects the national and international nature of Canada's capital markets. The provinces would play a key role in the selection of the Commissioners and have initial and continuing input into the legislation.

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86 Material for this section is taken from Harold MacKay, "Letter to the Honourable John Manley" November 15, 2002, Department of Finance. See also John Manley, "Letter from Minister Manley to Provincial Ministers," March 4, 2003, Department of Finance; "Head of TSX seeks end to Turf Wars — Stymiest Challenges 'feuding regulators' to Work Together", *The Globe and Mail*, November 28, 2002. In December 2002, Finance Minister John Manley endorsed MacKay's recommendation that a "Wise Persons' Committee" be established. The Wise Person's Committee, *It's Time: Wise Person's Committee to review the structure of securities regulation in Canada* (Ottawa: Department of Finance, 2003) [*WPC Report*] was issued in December 2003.

> This would ensure that Canada retains the accumulated experience of the provinces in securities regulation. It would also ensure that the Canadian securities regulatory system would continue to be administered in a way that is regionally responsive to investors and issuers across Canada. The model provides for continued federal-provincial consultation in the evolution of Canada's securities regulatory system.[87]

Under the *WPC Report*'s proposal,[88] the federal government was to have enacted a comprehensive Canadian Securities Act. The WPC's proposed Act could only be amended with the agreement of a majority of provinces representing a majority of the Canadian population. There would be a Canadian Securities Commission (CSC), with commissioners from all regions (two from each of Ontario and Québec; one from each of British Columbia and Alberta; two from the other jurisdictions; and one from any jurisdiction). The federal Minister of Finance would appoint commissioners from nominees. Each province (but not the territories) would have a representative on the nominating committee. Each provincial minister and the federal Minister of Finance would be on a Securities Policy Ministerial Committee.

The CSC's head office would be in the National Capital Region. The head office would enact rules and policies, set enforcement priorities, handle international matters, regulate exchanges and self-regulatory organizations, and coordinate the regional offices. There would be "strong, functionally empowered regional offices in Vancouver, Calgary, Winnipeg, Toronto, Montreal and Halifax".[89] Those would handle prospectus reviews, exemption applications, registration applications, compliance reviews and investigations. They would also initiate enforcement proceedings, with adjudication by a separate body. The CSC would be accountable to the public through the federal Minister of Finance.

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87 *WPC Report*, *ibid*., at 57.
88 *WPC Report*, *ibid*., at 57-69.
89 *WPC Report*, *ibid*., at 58.

7. *Passport System*[90]

While Ontario and the federal government have been most energetic in advocating for a single regulator, over the last decade the other provinces have also undertaken efforts to change the status quo and improve the efficiency of securities regulation. In September 2004, the governments from 12 provinces and territories (all but Ontario) entered into *A Provincial/Territorial Memorandum of Understanding Regarding Securities Regulation* (the "*Passport MOU*").[91] It contained their agreement to form a Council of Ministers of Securities Regulation "to approve strategies and action plans to enhance the regulatory framework for securities through" a number of means, including "implementing the passport system and monitoring its operation".[92]

The Passport System was implemented in September 2005 through MI 11-101 *Principal Regulator System*, and it continues to operate, now through MI 11-102 *Passport System* and related instruments. It focused initially on areas of securities laws that were already highly harmonized, such as prospectuses, exemptions and continuous disclosure.[93] Each market participant has a "principal regulator" which completes the majority of matters such as reviews and decision-making.[94] Today it is a

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90 See Chapter 4 Machinery, 4.02 Structure of the Commission, H. The Passport System and Chapter 7 The Prospectus, 7.06 Passport System. The Passport System largely superseded the Uniform Securities Legislation (USL) project, spearheaded by the ASC (see CSA Notice 11-303 *The Uniform Securities Legislation Project*). The USL project had created a consultation draft of a complete code of the core requirements of securities regulation (the *Uniform Securities Act*) — details were to be in the rules (it would have been easier to change the rules in all jurisdictions), thus increasing flexibility and maintaining the uniform "platform" legislation. This undertaking was, however, derailed — seemingly by practical, political and application problems. However, work on the USL project was likely helpful during at least the initial stages of developing the Passport System.

91 Provincial-Territorial Securities Initiative, *A Provincial/Territorial Memorandum of Understanding Regarding Securities Regulation*, September 30, 2004.

92 *Ibid*., s. 3.1.

93 *Ibid*., ss. 5.2, 5.3. This is similar to the "staging" approach recommended if federal legislation were passed without uniform legislation.

94 MI 11-102 Passport System, s. 1.1 "principal regulator". The principal regulator model under the Passport System is not to be confused with the "regulatory competition" model. Under the former, the principal regulator is the jurisdiction with which the market participant has the closest connection, but all of the jurisdictions have similar essential requirements (with some — typically minor — regional differences). Under the latter, the market participant would choose its preferred jurisdiction and, therefore, its preferred regime —– each of those regimes would have an incentive to enact "beneficial regulatory requirements" rather than "burdensome regulatory requirements". See E. J. Pan, "Harmonization of U.S.-EU Securities Regulation: The Case for a Single European Securities Regulator" (2003) 34 Law & Pol'y Int'l Bus. 499 at 506. Also see, *e.g.*, Douglas J. Cumming & Jeffrey G. MacIntosh, "The Rationales Underlying Reincorporation and Implications for Canadian Corporations" (2002) 22 Intl. Rev. L. & Econ. 277). We discuss regulatory competition in the context of

comprehensive system that covers most aspects of securities regulation.[95] It has also been a catalyst for substantial harmonization across the provincial regimes — including in Ontario.

The passport system has sought to provide "a single window of access to market participants … through mutual recognition, legal delegation [delegation of power to a primary jurisdiction], or a combination".[96] It operates somewhat like what U.S. lawyers would recognize as a "full faith and credit" regime, in which autonomous jurisdictions (states in the U.S. context, or provincial securities regulators in Canada) agree to recognize and give credit to other autonomous jurisdictions' decisions as if they were their own.

Provinces maintain the ability to enact local rules under the Passport System (allowing for regional differences and the testing of new initiatives). However, they are expected to consider several factors before implementing any legislation that would not be "highly harmonized" with that of other participating jurisdictions. Those considerations are:

- Whether the initiative is necessary to meet a policy objective;
- How the impact on other jurisdictions would be minimized;
- How the impact on the efficiency of the provincial/territorial passport framework would be minimized;
- Making the measure subject to regular reassessment to ensure the integrity of the passport system is maintained.[97]

All jurisdictions also "retain the authority to set and collect fees".[98] In other words, issuers must pay the requisite regulators' fees in all jurisdictions even though only one jurisdiction is responsible for, for example, issuing a receipt for a prospectus.

The Passport System was a response to forceful criticisms about delay and inefficiency. For at least some provincial participants, addressing these problems was a means to defuse increasingly urgent calls for national securities regulation. Indeed, under the *Passport MOU*, the signatories effectively precluded further development towards a national system:

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deleterious regulatory arbitrage between London and New York in Chapter 20 International Issues, 20.02 Internationalization of Markets, C. Consequences, 1. Concerns about Net Regulatory Burden.

95 The regime is described in greater detail in Chapter 4 Machinery, 4.02 Structure of the Commission, H. The Passport System.

96 Provincial-Territorial Securities Initiative, *A Provincial/Territorial Memorandum of Understanding Regarding Securities Regulation*, September 30, 2004, s. 5.1.

97 *Ibid.*, s. 5.10.

98 *Ibid.*, s. 5.11.

> 8.2 Ministers, through the Council, will continue to explore options for further reform of the securities framework that would respect individual provincial and territorial responsibilities for securities regulation.
>
> 8.3 Options for further reform will be consistent with the original goal of the provincial/territorial securities initiative: to develop a provincial/territorial framework that inspires investor confidence and supports competitiveness, innovation and growth through efficient, streamlined and cost-effective securities regulation that is simple to use for investors and other market participants.[99]

This explains Ontario's reluctance to participate. Ontario has been consistent in advocating for a single regulator system. It has stated that it would consider participating in a passport system only "as part of a clear transition to a common securities regulator, common securities laws and single fee structure".[100]

The Passport System has achieved considerable success since the *Passport MOU*, in terms of reducing duplication and delay and helping to harmonize provincial regimes. Although Ontario is not part of the Passport System, there is a sophisticated and effective mechanism in place integrating Ontario's regulatory scheme with the Passport System activities of the other provinces. In contrast to the proposals that advocate creating a single or national securities regulator, the Passport System emphasizes provincial cooperation and autonomy. Any federal jurisdiction over aspects of securities regulation — specifically national data collection and managing systemic risk, as the SCC ruled in 2011[101] — is beyond the Passport System's scope.

8. Crawford Panel

The Government of Ontario commissioned the *Crawford Common Regulator Discussion Paper* in 2005.[102] It proceeded on the assumption

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99 *Ibid*., ss. 8.2, 8.3.

100 Ontario, Ministry of Government Services, *Modernizing Securities Regulation in Canada* (Ontario, Queen's Printer, 2004), online: <http://www.gov.on.ca/MBS/english/mbs/releases/general/june2404-report.html>. Ontario also placed time limits on meeting those goals, such as two to four years for agreement to create a common regulator; and one to two years for agreement on common legislation and a single fee structure.

101 See 17.04 The *Reference re Securities Act*.

102 The final report was released in 2006: Crawford Panel, *Blueprint for A Canadian Securities Commission* (Ontario: Crawford Panel, 2006) [*Crawford Panel*]. An earlier draft of the Report was also released, and formed the basis of consultations: see Crawford Panel, *A Blueprint for A New Model: A Discussion Paper by the Crawford Panel on A Single Canadian Securities Regulator* (Toronto: Government of Ontario, 2005).

that a common regulator was necessary; its mandate was to propose a model for such a regulator. It stated:

> We are sensitive to the concerns of various Canadian jurisdictions that a single regulator may be susceptible to domination by one or more large provinces or by a federal policy agenda. We are also sensitive to concerns that such a regulator may not respond effectively to local issues, adequately service small and medium-sized issuers ("SMEs") or draw upon the regional expertise that has developed at certain provincial and territorial securities regulators. … Our model seeks to address these concerns while at the same time achieving three goals set out in our mandate: a single regulator, a single law and a single fee structure.
>
> …
>
> In order for any model of a common securities regulator to gain broad acceptance in Canada, it is fundamental that the regulator is structured in such a way that it cannot be dominated or controlled by any one participating jurisdiction. In addition, a Canadian securities regulator must provide (i) accountability to all participating jurisdictions, (ii) transparent governance, and (iii) regulatory expertise, efficiency and flexibility in the areas of investor protection and market efficiency.[103]

The model[104] preferred that all 13 jurisdictions plus the federal government would be involved in a common securities regulator (the Canadian Securities Commission or "CSC"). However, the panel recognized that some jurisdictions may initially "opt-out".[105] The ministers from each "participating jurisdiction" would sit on a Council of Ministers, which would elect directors to the Board of Directors; oversee the adjudicative body (the Canadian Securities Tribunal or "CST"); approve rules and changes to structural matters; and arrange reviews of the CSC's internal controls and financial reporting. The Board of Directors would be responsible for other governance matters. It need not be regionally representative, as skills were the primary requirement. There would also be a Nominating Committee (one member from each participating jurisdiction). This would present to the Council of Ministers nominees for the Board and the CST. The number of vice-commissioners would depend on the number and identity of participating jurisdictions.

The CSC would be governed by a single Act, enacted by one participating jurisdiction (*i.e.*, not necessarily Ontario or the federal government) and incorporated by reference in the others. The legislation would contain a framework of core requirements. The scheme would

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103 *Crawford Panel*, *ibid*., at 11, 15.

104 *Crawford Panel*, *ibid*., at 16-29.

105 The panel hoped that such jurisdictions would "opt-in" over time. It also noted that participating jurisdictions could later "opt-out", but thought this would be unlikely once a CSC was established (see *Crawford Panel*, *ibid*., at 16-17).

maximize flexibility by locating details in separate rules made by the CSC. Amendments to the legislation (ideally infrequent) would initially require approval by the legislatures of two-thirds of the participating jurisdictions.[106]

The panel did not recommend a location for the head office, noting that it would depend on which jurisdictions initially participated. The head office would set policy priorities, oversee policy development, allocate CSC resources, and handle international and financial sector coordination. Regional offices would also be established. Those could "build upon existing areas of expertise and become 'centers of excellence' in certain policy areas."[107] Either the head office or the regional offices could receive filings and applications. Those matters would then be assigned to the CSC staff with the appropriate experience.

One senior officer would be responsible for all enforcement matters, with enforcement staff in each regional office. Moreover:

> Federal government involvement in the CSC will overcome the jurisdictional challenges that have plagued some enforcement proceedings under Canada's current system. Enforcement orders will be effective across all Participating Jurisdictions, without the necessity for holding multiple hearings and issuing multiple orders that slows down the current system.[108]

Fees collected by the CSC would fund the CST. Note that the CST and its staff would be separate from the CSC. The CST's adjudicators would sit in panels of three to hear allegations of securities law contraventions. Adjudicators would travel across the country, or would hold hearings by telephone or video-conference. Adjudicators would have adjudication experience and "ideally" some securities or financial services industry experience. Appeals of CST decisions would be to the superior or divisional court in the jurisdiction where the hearing was held. The CST would not handle exemption applications.

While the Crawford Panel did not generate any immediate policy action, several of its recommendations found their way into subsequent reform models. In particular, subsequent proposals have included a Council of Ministers and a Board of Directors along the lines described by the Crawford Panel.

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[106] The panel contemplated that the participating jurisdictions could decide to change this formula, even though such a change could have an impact on the prevention of dominance by one or more participating jurisdiction. *Crawford Panel*, *ibid*., at 23, note 21.

[107] *Crawford Panel*, *ibid*., at 22.

[108] *Crawford Panel*, *ibid*., at 27 (footnotes omitted).

G. Recent Developments

1. The Hockin Report

Current efforts towards a single national securities regulator were influenced heavily by prior initiatives, but garnered sustained attention under then-federal Minister of Finance Jim Flaherty.[109] In 2008, the Minister appointed an Expert Panel on Securities Regulation to provide recommendations on improving securities regulation in Canada (the Hockin Panel).[110] Part of its mandate was to provide advice on how to promote and advance an effective and efficient regulatory approach, "with a view to creating a Canadian advantage in global markets."[111] Its mandate also noted that the Hockin Panel's recommendations would "be respectful of the jurisdictional framework for securities regulation in Canada and [would] allow willing participation of provinces and territories."[112]

The Hockin Panel released its *Final Report* (the *Hockin Report*) in January 2009, a few months after the GFC bank failures and bailouts of Fall 2008. It made several recommendations and released a *Draft Securities Act* (the Hockin Panel Draft Act),[113] designed to implement its recommendations.

The *Hockin Report* referred to the two standard core objectives of securities regulation: protecting investors from unfair, improper or fraudulent practices, and fostering fair and efficient capital markets.[114] The *Hockin Report* also identified several "guiding principles", which included facilitating the reduction of "systemic risk". The *Hockin Report* pointed to "recent developments in the global financial system" as having demonstrated the need to include reducing systemic risk as a guiding principle for securities regulation.[115]

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109 The late Mr. Flaherty resigned and was replaced by Joe Oliver in March 2014: Bill Curry, Shawn McCarthy, Steven Chase and Josh Wingrove, "Oliver To Take Over Finance Portfolio from Flaherty", *The Globe and Mail* (March 18, 2014). Mr. Flaherty passed away in April 2014.

110 Expert Panel on Securities Regulation, *Creating an Advantage in Global Capital Markets: Final Report and Recommendations* (Ottawa: Department of Finance Canada, 2009) [*Hockin Report*].

111 *Hockin Report*, *ibid*., at v.

112 *Hockin Report*, *ibid*.

113 Expert Panel on Securities Regulation, *Draft Securities Act*, s. 11, online: <http://www.expertpanel.ca/eng/documents/CAC_SBS_2009-01-07.pdf>.

114 *Ibid*., at 30. These would be included in the Draft Act's "Purposes" section, as they are in the Ontario *Securities Act*, R.S.O. 1990, c. S.5, s. 1.1.

115 Expert Panel on Securities Regulation, *Creating an Advantage in Global Capital Markets: Final Report and Recommendations* (Ottawa: Department of Finance Canada, 2009) at 11.

The *Hockin Report* recommended that a Canadian Securities Commission (CSC) be established. It would be a federal crown corporation with an independent governance board accountable to the federal government, charged with overseeing a single Securities Act for Canada.[116] The *Hockin Report* highlighted what the Hockin Panel saw as several problems with the current "fragmented" structure: (1) the lack of coordination among provincial regulators made it difficult to react quickly to capital market events;[117] (2) the current system did not reflect the increasingly national and international scope of capital markets, thereby limiting securities regulators' ability to reduce systemic risk; and (3) the current system misallocated resources and was therefore less efficient and effective as compared to a national regulator.[118]

The Hockin Panel's proposed CSC was designed to fulfil the same functions as provincial Commissions (policy making, rule-making, investigation and prosecution of regulatory offence)[119] with the exception of adjudication. Following the *Crawford Panel*, the *Hockin Report* recommended a bifurcated approach to enforcement, in which the CSC would investigate and prosecute alleged violations of securities law, but an Independent Adjudicative Tribunal would fulfil most of the adjudicative functions previously performed by provincial Commissions.[120] The *Hockin Report* also recommended that the exchange-traded derivatives market be regulated through securities legislation and overseen by the CSC.[121]

The *Hockin Report* anticipated that not all provinces would be willing to participate, and therefore recommended that the federal Securities Act limit its effect to jurisdictions that voluntarily participated. In the event that a "sufficient number of provinces" did not participate, the

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The *Hockin Report* did not offer a comprehensive definition of systemic risk, noting only that "systemic risk has been primarily concerned with clearing and settlement issues, setting minimum capital requirements, and limiting the contagion from failing securities dealers". *Hockin Report*, *ibid*., at 10. We discuss systemic risk at 17.03 Systemic Risk of this chapter.

116 *Hockin Report*, *ibid*., at 42.

117 The *Hockin Report* noted the Asset Backed Commercial Paper (ABCP) crisis in Canada as illustrative of this failure. See Appendix B, "The ABCP Crisis in Canada: Implications for the Regulation of Financial Markets".

118 Expert Panel on Securities Regulation, *Creating an Advantage in Global Capital Markets: Final Report and Recommendations* (Ottawa: Department of Finance Canada, 2009) at 40. There are also strong opposing views, as discussed elsewhere in this treatise.

119 *Hockin Report*, *ibid*., at 42.

120 *Hockin Report*, *ibid*., at 45. The CSC would retain some adjudicative functions, including discretionary exemptions and matters relating to contested takeover bids. Courts would retain their jurisdiction.

121 *Hockin Report*, *ibid*., at 55-56. The *Hockin Report* also recommended that the CSC have "sufficient policy depth and resources" to regulate over-the-counter (OTC) derivatives, which it noted had a close connection to the GFC. However, it did not make any specific recommendations about regulating OTC derivatives.

Hockin Report recommended a controversial "market participant opt-in feature", which would allow market participants not based in a participating province to opt-in to the federal scheme, rather than being subject to the provincial securities regime in their home province.[122]

A Council of Ministers comprising the federal Minister of Finance and ministers designated by each participating province would provide policy direction and propose legislative amendments. A Governance Board would oversee the CSC's effectiveness.[123] An "Executive Management Team" consisting of a Chief Executive Officer, Vice-Chairs, an Executive Director, and other members would head the CSC.[124] These members and members of the Independent Adjudicative Tribunal would be nominated by an independent Federal-Provincial Nominating Committee, but appointed by the federal Minister of Finance.[125] The CSC would also be required to consider the views and proposals of two Special Independent Tribunals: an Investor Panel and a Small Reporting Issuer Panel.[126]

The *Hockin Report* avoided the contentious issue of choosing a location for the CSC's head office, recommending only that it be located "in one of the four largest provinces".[127] It left the final decision to be negotiated among the participating provinces. However, the *Hockin Report* did recommend that the CSC have regional offices in all "major financial centres" as well as smaller local offices to reflect regional needs and niches.[128]

The proposed CSC would be self-funding, as the provincial Commissions are now.[129] To compensate provinces for lost revenues flowing from the elimination of their Commissions, the *Hockin Report*

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122 *Hockin Report*, *ibid*., at 60-61. The market opt-in proved to be highly controversial. The WPC had asserted that most market participants in most provinces would have preferred to operate under a national securities regulatory regime. By raising the possibility that market participants could opt into the federal CSC even without the agreement of the provinces in which their head offices were located, the *Hockin Report* led to concerns that provincial jurisdictions could be "hollowed out" or forced by market pressure to acquiesce to the regime. Ironically, this could lead to the "race to the bottom" that some national-system proponents fear would be the result of regulatory competition, *i.e.*, non-participating provinces might try to make their regimes more attractive to market participants to discourage them from opting-in to the federal scheme.

123 *Hockin Report*, *ibid*., at 44-45. The members of the Governance Board would be independent of the CSC, with the exception of the Chief Executive Officer, who would be an *ex officio* member.

124 *Hockin Report*, *ibid*., at 43.

125 *Hockin Report*, *ibid*., at 45.

126 *Hockin Report*, *ibid*., at 44.

127 *Hockin Report*, *ibid*., at 43.

128 *Hockin Report*, *ibid*.

129 *Hockin Report*, *ibid*., at 43.

proposed that the federal government negotiate direct compensation agreements with the provinces.[130]

The *Hockin Report* also outlined a transition plan for implementing the new regime. First, the federal government would create a team to oversee negotiations with the provinces, draft a federal Securities Act, and plan the establishment of the CSC and Independent Adjudicative Tribunal.[131] The *Hockin Report* recommended that this team establish with willing provinces a memorandum of understanding addressing transition matters.[132]

The *Hockin Report* had little to say regarding the constitutional validity of its proposals. It did, however, conclude by saying that:

> In the event that the transition mechanisms and plans described above [do] not lead to the implementation of a single comprehensive national securities regime in Canada, we suggest that the federal government consider unilateral action to implement such a regime. The advice provided by our special advisor on constitutional law… has confirmed that the federal government has the constitutional authority to do so. This opinion is widely held by constitutional lawyers.[133]

As described below, ultimately the SCC's decision did not align with the *Hockin Report*'s expectations with respect to the federal government's constitutional authority.

2. *The CSTO and Proposed Canadian Securities Act*

In response to the Hockin Panel's recommendations, the federal government established the Canadian Securities Transition Office (CSTO) in July 2009.[134] The CSTO's mandate was "to assist in the establishment of a Canadian securities regulatory authority" through the creation of a federal Securities Act.[135] Its mandate also included developing a transition plan for the implementation of the new regime.[136] After British Columbia indicated its willingness to consider, at least in principle, the prospect of a national securities regulator, the BCSCn's long-time Chair, Doug Hyndman, assumed the CSTO Chair.

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130 *Hockin Report*, *ibid*., at 43-44. Here, the *Hockin Report* avoided settling on firm compensation figures in advance, as the *1994 Proposal* had done.
131 *Hockin Report*, *ibid*., at 59.
132 *Hockin Report*, *ibid*.
133 *Hockin Report*, *ibid*., at 62.
134 *Canadian Securities Regulation Regime Transition Office Act*, S.C. 2009, c. 2, s. 297.
135 CSTO, *Annual Report 2009 – 2010*, online: <http://csto-btcvm.ca/CSTO/media/MediaPublic/Content/CSTO_Annual_Report_009-10.pdf> at 7.
136 *Ibid*.

As set out in the *Hockin Report,* the CSTO was to lead interprovincial cooperation throughout the transition. The CSTO established an Advisory Committee of Participating Provinces, which at the time included 10 of the 13 jurisdictions.[137] Québec and Alberta were notably absent. The CSTO also struck a legal advisory committee, made up of members of the Legal Advisory Committee to the Hockin Panel.[138]

The CSTO delivered a draft statute to the federal government in May 2010.[139] The stated purposes of the *Proposed Canadian Securities Act* (the Proposed Act) were to: provide investor protection; foster fair, efficient and competitive capital markets; and "contribute to the integrity and stability of the Canadian financial system."[140] However, as the SCC subsequently noted in the *Reference*, the Proposed Act's preamble also made clear that "its immediate purpose is to create a single Canadian securities regulator."[141]

¶ The Proposed Act followed most of the Hockin Panel's recommendations respecting the creation of a national securities regulator. Many of these recommendations, in turn, bore the imprint of Ontario's earlier Crawford Panel. The Proposed Act would have created a "Canadian Securities Regulatory Authority" (CSRA)[142] comprised of a Regulatory Division,[143] and an independent Canadian Securities Tribunal.[144] A Board of Directors would oversee the CSRA.[145] The CSRA would also include a "Regulatory Policy Forum"[146] charged with developing rules and policy, and an "Investor Advisory Panel"[147] to represent the interests of investors with respect to all of the CSRA's activities. As recommended by the Hockin Panel and as with existing provincial Commissions, the CSRA would be self-funding.[148] The

137 *Ibid.*, at 9-10. Participation on the advisory committee was not necessarily equivalent to supporting the CSTO project.
138 *Ibid.*, at 11.
139 *Ibid.*, at 13.
140 Minister of Finance, *Proposed Canadian Securities Act*, <www.fin.gc.ca/drleg-apl/csa-lvm.pdf>, s. 9.
141 *Reference re Securities Act*, [2011] S.C.J. No. 66, 2011 SCC 66 at para. 29 (S.C.C.).
142 Minister of Finance, *Proposed Canadian Securities Act*, <www.fin.gc.ca/drleg-apl/csa-lvm.pdf>, ss. 14-17.
143 *Ibid.*, ss. 22-25. The Regulatory Division would be headed by a "Chief Regulator" (s. 24).
144 *Ibid.*, s. 28. This tribunal would be headed by a "Chief Adjudicator" (s. 35).
145 *Ibid.*, ss. 18-21. The directors would be appointed by the Governor in Council on the recommendation of the Minister, having regard to their expertise and the need to achieve adequate regional representation.
146 *Ibid.*, s. 50.
147 *Ibid.*, s. 51. The Hockin Panel recommended the creation of such a panel. However, the Act did not implement the Hockin Panel's recommendation that the Act create a panel representing the interests of small issuers.
148 *Ibid.*, s. 52.

Proposed Act did not specify where the CSRA would maintain its head office or its regional offices, nor the official language requirements, if any, to which the CSRA would be subject.

At a substantive level, the Proposed Act was generally consistent with provincial securities legislation.[149] A significant addition was the creation of a framework for regulating exchange-traded derivatives,[150] in keeping with the Hockin Panel's recommendations.

Although the Proposed Act sought to create a single national securities regulator, it applied only within "designated" provinces, meaning those that opted into the regime.[151] However, certain provisions of the Proposed Act were to apply "to the whole of Canada", including certain critical definitions,[152] the provisions relating to criminal offences and punishment[153] and orders for the production of information.[154] Neither the CSTO nor its Proposed Act adopted the Hockin Panel's recommendations for a "market participant opt-in".

17.03 SYSTEMIC RISK

Before turning to the *Reference* and responses to it, it is important to address the concept of "systemic risk". Systemic risk has been an increasingly pervasive topic of discussion — generally, since the GFC and specifically in the Canadian securities context, since the *Reference*.

In the *Reference*, the SCC adopted the following definition of systemic risks:

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149 As noted by the Court in the *Reference re Securities Act*, [2011] S.C.J. No. 66, 2011 SCC 66 at para. 101(S.C.C.), the effect of the substantive provisions was "in essence to duplicate legislative schemes enacted by provincial legislators". This feature of the legislation was crucial to the outcome in the *Reference*.

150 Minister of Finance, *Proposed Canadian Securities Act*, <www.fin.gc.ca/drleg-apl/csa-lvm.pdf>, ss. 89-92. Despite the ultimate failure of the Proposed Act following the *Reference*, Canada has taken recent steps towards regulating the OTC derivatives market through the Office of the Superintendent of Financial Institutions. See Chapter 20 International Issues, 20.01 Introduction. The federal government also intends to amend the *Bank Act* "to create an explicit regulation-making authority for banks regarding over-the-counter derivatives". Department of Finance, *The Road to Balance: Creating Jobs and Opportunities* (Ottawa: Public Works and Government Services Canada, 2014) at 130 [*Budget 2014*].

151 *Ibid*., s. 250.

152 *Ibid*., ss. 251(a)-(b). These included the definitions of "issuer", "material change", "material fact", "misrepresentation", "related financial instrument", "security", "take-over bid" and "trade", as well as the definition of "special relationship" in s. 8.

153 *Ibid*., ss. 158-167.

154 *Ibid*., ss. 148-152, subject to certain qualifications.

> Systemic risks have been defined as 'risks that occasion a "domino effect" whereby the risk of default by one market participant will impact the ability of others to fulfil their legal obligations, setting off a chain of negative economic consequences that pervade an entire financial system' (M. J. Trebilcock, *National Securities Regulator Report* (2010), Reference Record, vol. I, 222, at para. 26). By definition, such risks can be evasive of provincial boundaries and usual methods of control. …[155]

The Court suggested, "[w]ithout attempting an exhaustive enumeration," that some of the Proposed Act's provisions on derivatives, short-selling, credit rating, urgent regulations, and data collection and sharing seemed to be directed at systemic risk.[156]

A different characterization of systemic risk (in the financial system context as a whole) was proposed in April 2009 by the Financial Stability Board (FSB), in concert with the International Monetary Fund and the Bank for International Settlements: "the disruption to the flow of financial services that is (i) caused by an impairment of all or parts of the financial system; and (ii) has the potential to have serious negative consequences for the real economy".[157] Systemic risk assessments will vary, *inter alia,* across countries, industries, scales (regional, national, or international) and time. Therefore, "a high degree of judgment founded in a detailed knowledge of the functioning of the financial system will … be required in any assessment."[158] IOSCO has noted that "[s]ystemic risk, in the context of securities markets is not limited to sudden catastrophic events; it may also take the form of a more gradual erosion of market trust."[159] IOSCO stated a concern that a narrow focus "may interfere with early foresight, especially in securities markets where often new trends, vulnerabilities and risks are not systemic by nature or from the onset, but rather become systemic due to size or a specific confluence of other

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[155] *Reference re Securities Act*, [2011] S.C.J. No. 66, 2011 SCC 66 at para. 103 (S.C.C.). See also Anita Anand, "After the Reference: Regulating Systemic Risk in Canadian Financial Markets" in Anita Anand, ed., *What's Next for Canada? Securities Regulation After the Reference* (Toronto: Irwin Law, 2012) at 200-205 (describing systemic risk).

[156] *Reference re Securities Act*, [2011] S.C.J. No. 66, 2011 SCC 66 at para. 103 (S.C.C.). The provisions of the draft federal Securities Act (Minister of Finance, *Proposed Canadian Securities Act*, online: <http://www.fin.gc.ca/drleg-apl/csa-lvm-eng.htm>) the Supreme Court identified are ss. 73, 89, 90, 126(1), 109, 224 and 228(4)(c).

[157] Staff of the International Monetary Fund and the Bank for International Settlements, and the Secretariat of the Financial Stability Board, "Guidance to Assess the Systemic Importance of Financial Institutions, Markets and Instruments: Initial Considerations," *Report to the G-20 Finance Ministers and Central Bank Governors* (October 2009) at 5-6. The Financial Stability Board was established by the G-20 in April 2009. It includes all G-20 economies as well as the European Union.

[158] *Ibid*., at 7-8.

[159] IOSCO, "Risk Identification and Assessment Methodologies for Securities Regulators" (June 2014 at 8 (original emphasis omitted).

conditions and circumstances."[160] IOSCO's systemic risk definition recognizes that issue: "[s]ystemic risk refers to the potential that an event, action, or series of events or actions will have a widespread adverse effect on the financial system and, in consequence, on the economy."[161]

Systemic risk can be a function of several conditions, but three criteria can help identify the systemic importance of an institution, market or instrument: "***size*** (the volume of financial services provided by the individual component of the financial system), ***substitutability*** (the extent to which other components of the system can provide the same services in the event of a failure), and ***interconnectedness*** (linkages with other components of the system)".[162] Other important "indicators of vulnerability" for institutions in particular (rather than markets or instruments, which can also be systemically important) include the degree of leverage, liquidity risks and large maturity mismatches between assets, and structural complexity.[163]

Some commentators prefer to characterize systemic risk as interconnected and complex, rather than linear, as may be suggested by the "domino" analogy (although dominoes can of course be set up — and fall — in interconnected patterns).[164] The interconnected nature and multiple relationships in modern capital markets are subject to a range of risks that operate in the day-to-day markets. This is true for financial institutions, financial markets, and financial instruments.[165] For example, financial market intermediaries (such as clearing and settlement systems) face a range of risks in their daily operations. Those risks include legal, credit, liquidity, general business, custody and investment, and operational

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160 *Ibid*.

161 *Ibid*. at 7.

162 *Ibid*., at 2 (emphasis in original); 8-11.

163 *Ibid*., at 13.

164 See, *e.g*., Janis Sarra, "Assuring Independence and Expertise in Financial Services Law: Regulatory Oversight in Light of the Supreme Court of Canada *Securities Reference* Judgment" in Anita Anand, ed., *What's Next for Canada? Securities Regulation After the Reference* (Toronto: Irwin Law, 2012) at 111. More generally see Steven L. Schwarcz, "Regulat- "Regulating Complexity in Financial Markets" (2009) 87 Wash. L. Rev. 211 (describing "system effects" between tightly coupled components of capital markets systems); or European Central Bank, *Financial Stability Report* (June 2010) at 155-160. For a network analysis of one component of Canada's banking system, see Lana Embree and Tom Roberts, "Network Analysis and Canada's Large Value Transfer System", Bank of Canada Discussion Paper 2009-13 (December 2009).

165 These categories are adopted by the Staff of the International Monetary Fund and the Bank for International Settlements, and the Secretariat of the Financial Stability Board, "Guidance to Assess the Systemic Importance of Financial Institutions, Markets and Instruments: Initial Considerations," *Report to the G-20 Finance Ministers and Central Bank Governors* (October 2009) at 6-11.

risk.[166] This makes financial market intermediaries systemically important *per se*. The relevant systemic risks can be mitigated more generally when financial market intermediaries are operated safely and efficiently in relation to those risks. At the same time, because of their central position between multiple counterparties, financial market intermediaries can concentrate risks and create interdependencies.[167] Their failure to operate safely and efficiently with regard to the day-to-day risks of their businesses can have systemic implications. In other words, their very nature creates a situation in which systemic risk can be the product or the consequence of those other risks, once individual or aggregate risks achieve a certain level of magnitude.

That is only one example. Other financial institutions, financial markets and financial instruments may also be deemed "systemically important", depending on the criteria set out above — size, substitutability and interconnectedness. Because the nature of the various underlying risk factors and their relationships to each other can be complex,[168] managing systemic risk can be a challenging task beset by significant uncertainty.[169]

17.04 THE *REFERENCE RE SECURITIES ACT*

A. Background

In May 2010, the federal government referred the Proposed Act to the SCC for an advisory opinion as to its constitutional validity.[170] Before that reference was decided, the Alberta and Québec Courts of Appeal (asked by their own governments to consider the Proposed Act) held it was unconstitutional – it did not fall within the federal government's

166 Bank for International Settlements Committee on Payment and Settlement Systems and Technical Committee of IOSCO, "Principles for Financial Market Infrastructures" (April 2012) at 18-20.

167 *Ibid*.

168 Schwarcz describes three levels of complexity that underlay the U.S. subprime mortgage crisis, which provoked the GFC: "complexity of the assets underlying investment securities and of the means of originating those assets"; "complexities of modern investment securities"; and "complexities of modern financial markets", including the complex relationships between financial institutions. He argues that several distinct kinds of market failure can result from these levels of complexity. Steven L. Schwarcz, "Regulating Complexity in Financial Markets" (2009) 87 Wash. L. Rev. 211 at 216-236.

169 These complexities cause difficulties when contemplating the potential effectiveness of any regulator that attempts to "manage" systemic risk.

170 Order in Council, P.C. 2010-667.

general trade and commerce power.[171] The question asked at the SCC was whether the Proposed Act was "within the legislative authority of the Parliament of Canada."[172] The ultimate issue as phrased by the SCC was "whether the [Proposed] Act, viewed in its entirety, addresses a matter of genuine national importance and scope going to trade as a whole in a way that is distinct and different from provincial concerns."[173] Ontario was the only province that intervened on behalf of the Proposed Act. Alberta, Québec, Manitoba and New Brunswick intervened in opposition to it. British Columbia and Saskatchewan opposed the Proposed Act, but adopted a "more nuanced approach to Parliament's ability to regulate securities" — that is, they did not oppose the idea of a national regulator, if achieved through federal-provincial cooperation and with respect for the division of powers.[174]

The SCC released its decision on December 22, 2011. The Court held that the Proposed Act, as drafted, was *ultra vires* Parliament. As elaborated on below, the SCC rejected Canada's argument that the Proposed Act fell within its general trade and commerce powers under s. 91(2) of the *Constitution Act, 1867*.[175] The Court held that the entire Proposed Act was *ultra vires*. However, the Court also noted that certain aspects of the Proposed Act — "management of systemic risk" and "national data collection" — are within Parliament's constitutional jurisdiction, as they are national in scope.[176] The Court also stressed the need for cooperation with the provinces in securities regulation reform.[177]

The *Reference* decision made clear that the provinces have jurisdiction over day-to-day securities matters, and that the national concerns raised "do not justify a wholesale takeover of the regulation of the securities industry which is the ultimate consequence of the proposed federal legislation."[178] At the same time, by clearly allocating jurisdiction over managing systemic risk and national data collection to Parliament,

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171 *Reference re Securities Act (Can.)*, [2011] A.J. No. 228, 2011 ABCA 77 (Alta. C.A.); *Québec (Procureure générale) v. Canada (Procureure générale)*, [2011] Q.J. No. 2940, 2011 QCCA 591 (Que. C.A.) (Dalphond J.A. dissenting). See *Reference re Securities Act*, [2011] S.C.J. No. 66, 2011 SCC 66 at paras. 36-39 (S.C.C.).

172 Order in Council, P.C. 2010-667.

173 *Reference re Securities Act*, [2011] S.C.J. No. 66, 2011 SCC 66 at para. 124 (S.C.C.).

174 *Reference*, *ibid*., at para. 35. There were also non-provincial intervenors.

175 30 & 31 Victoria, c. 3 (U.K.).

176 *Reference re Securities Act*, [2011] S.C.J. No. 66, 2011 SCC 66 at para. 117 (S.C.C.). The *Reference* did not say that the Federal Government had a responsibility to engage in either of these areas, only that they fall within federal jurisdiction.

177 *Reference*, *ibid*., at para. 133.

178 *Reference*, *ibid*., at para. 128.

the decision also made clear that the federal government could have a role in some aspects of securities regulation.[179]

B. The Decision

1. The Relevant Positions

Canada's argument in support of the Proposed Act's validity rested entirely on Parliament's general power to enact laws regulating trade and commerce under s. 91(2) of the *Constitution Act, 1867*.[180] In support of its argument, Canada stressed the fundamental changes to Canada's securities market in recent decades, arguing that securities regulation had transformed from a provincial matter to a national, even international, one.[181] Canada argued that this gave Parliament concurrent jurisdiction with the provinces over the regulation of securities.[182]

The main contrary argument presented to the SCC was that the Proposed Act fell under s. 92(13) property and civil rights powers, so that the Proposed Act was "a thinly disguised attempt to regulate a particular industry — the securities industry."[183]

2. Pith and Substance

The first step in any division of powers analysis is to determine the "pith and substance" of the relevant provisions, in this case the Proposed Act. This step seeks to identify the "main thrust" of the particular law by looking at both its purpose and its effects. As the next step, the reviewer classifies the legislation under one of the enumerated heads of power in the *Constitution Act, 1867* — either provincial or federal.[184] The SCC also considered the "federalism principle" and the SCC's movement in recent

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179 We discuss systemic risk and national data collection below.

180 *Reference re Securities Act*, [2011] S.C.J. No. 66, 2011 SCC 66 at para. 32 (S.C.C.). Canada did not rely on the separate branch of s. 91(2) — "legislative authority in relation to inter-provincial and international trade and commerce" (at paras. 32, 47).

181 *Reference*, *ibid*., at para. 33.

182 *Reference*, *ibid*., at para. 4. Canada, rationally, did not dispute the provinces' jurisdiction over securities regulation within their respective borders. As the SCC noted, securities regulation has consistently been held to be *intra vires* the provinces' property and civil rights powers under s. 92(13) of the *Constitution Act, 1867*. *Reference*, *ibid*., at paras. 43-44.

183 *Reference*, *ibid*., at para. 34.

184 *Reference*, *ibid*. at para. 65. Note that the "double aspect doctrine" allows for concurrent application of federal and provincial jurisdiction on different aspects, but does not create concurrent jurisdiction (at para. 66).

decades "toward a more flexible view of federalism that accommodates overlapping jurisdiction and encourages intergovernmental cooperation" – the "'dominant tide' of modern federalism". The Court noted, however, the required respect demanded for division of powers and a constitutional balance: "...The 'dominant tide' of flexible federalism, however strong its pull may be, cannot sweep designated powers out to sea, nor erode the constitutional balance inherent in the Canadian federal state."[185]

After discussing the general branch of the trade and commerce power,[186] the SCC examined the Proposed Act as a whole, based on the requisite test.[187] In so doing, the SCC examined the purpose of the Proposed Act. Before discussing the explicit purposes identified in the Proposed Act,[188] the SCC characterized as equally consistent with both sides of the issue the legislation's "immediate object", based on the Proposed Act's Preamble, of creating a national securities regulator.[189] The SCC then noted that the first of the "broader purposes" of the Proposed Act — investor protection — historically had been a provincial responsibility.[190] On the other hand, the purpose of contributing "to the integrity and stability of Canada's financial system" has "a federal aspect."[191] The Court did not specifically link jurisdiction over the Proposed Act's other purpose — fostering fair, efficient and competitive capital markets — to either level of government.[192]

The analysis then turned to the effects of the legislation. Here, the SCC noted that the direct effect of the Proposed Act, if implemented in the manner intended by the federal government,[193] would be effectively to displace the provincial and territorial securities regulatory regimes — even with "a sufficient number of jurisdictions" (rather than all jurisdictions) opting-in.[194] The Court concluded that the effect of the Proposed Act's provisions was "in essence to duplicate legislative schemes enacted by provincial legislators exercising their jurisdiction over property and civil rights".[195] The Court accepted that some of the provisions were concerned with genuinely national issues, such as the provisions relating to controlling systemic risk and to national data collection.[196] However, the Proposed Act's effects went well

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[185] *Reference*, *ibid*., at paras. 57, 62. Also see, in general, paras. 54-62.
[186] *Reference*, *ibid*., at paras. 68-90.
[187] *Reference*, *ibid*., at para. 91 *et seq*.
[188] Minister of Finance, *Proposed Canadian Securities Act*, online: <http://www.fin.gc.ca/drleg-apl/csa-lvm.pdf>, s. 9.
[189] *Reference re Securities Act*, [2011] S.C.J. No. 66, 2011 SCC 66 at paras. 95-96 (S.C.C.).
[190] *Reference*, *ibid*., at para. 97.
[191] *Reference*, *ibid*.
[192] *Reference*, *ibid*., at para. 97.
[193] In other words, if all provinces and territories eventually joined the scheme.
[194] *Reference re Securities Act*, [2011] S.C.J. No. 66, 2011 SCC 66 at para. 99 (S.C.C.).
[195] *Reference*, *ibid*., at para. 101.
[196] *Reference*, *ibid*., at paras. 102-105.

beyond those issues. The Court ultimately concluded that the main thrust of the Proposed Act was "to regulate, on an exclusive basis, all aspects of securities trading in Canada, including the trades and occupations related to securities in each of the provinces."[197]

3. *Section 91(2): Trade and Commerce*

The Court then turned to the issue of whether this pith and substance could be characterized as falling under the general trade and commerce power of Parliament.[198]

The Court began by contrasting the apparent breadth of the general trade and commerce power with its practical essence:

> On its face, [it is] so broad that it has the potential to permit federal duplication (and, in cases of conflict, evisceration) of the provincial powers over large aspects of property and civil rights and local matters. This would upset the constitutional balance envisaged by ss. 91 and 92 and undermine the federalism principle. To avoid this result, the trade and commerce power has been confined to matters that are genuinely national in scope and qualitatively distinct from those falling under provincial heads of power relating to local matters and property and civil rights. The essence of the general trade and commerce power is its national focus.[199]

In delineating this scope, the SCC referred to the "fundamental underlying constitutional principles". The Court noted that a federal head of power cannot be interpreted to have a scope that would eviscerate a provincial legislative competence. Therefore, the general trade and commerce power does not have a starting point of "all trade and commerce; the power is necessarily circumscribed." However, it must be given a meaningful scope so as not to violate the balance between federal and provincial powers.[200]

The SCC determined whether the impugned legislation "addresses a matter that is truly national in importance and scope and that transcends provincial competence"[201] by looking at five (non-exclusive) indicia, as

[197] *Reference*, *ibid*., at para. 106.

[198] As noted above, Canada's argument rested only on the general branch of the power to regulate trade and commerce, based on the increasingly national nature of the Canadian securities market. The Court therefore considered only this head of power.

[199] *Reference re Securities Act*, [2011] S.C.J. No. 66, 2011 SCC 66 at para. 70 (S.C.C.).

[200] *Reference*, *ibid*., at paras. 71-74.

[201] *Reference*, *ibid*., at para. 107.

identified by the Court in *General Motors of Canada Ltd. v. City National Leasing*.[202] The Court summarized these in the *Reference*:

> ... (1) Is the law part of a general regulatory scheme?; (2) Is the scheme under the oversight of a regulatory agency?; (3) Is the law concerned with trade as a whole rather than with a particular industry?; (4) Is the scheme of such a nature that the provinces, acting alone or in concert, would be constitutionally incapable of enacting it?; (5) Would failure to include one or more provinces or localities in the scheme jeopardize its successful operation in other parts of the country?[203]

The Court "examin[ed] the legislative scheme through the lens of five interrelated inquires to determine whether, viewed in its entirety, it addresses a matter of genuine national importance and scope that goes to trade as a whole in a way that is distinct from provincial concerns."[204]

The Court answered the first two factors summarily, as all parties agreed that the Proposed Act "would create a federal regulatory scheme under the oversight of a regulator."[205]

With respect to the third factor, the Court agreed that some provisions of the Proposed Act — such as those aimed at day-to-day conduct of brokers and advisers — "are not obviously related to trade as a whole." However, the Court also accepted that the "preservation of capital markets to fuel Canada's economy and maintain Canada's financial stability" goes beyond a particular industry (the securities industry) to engage trade and commerce as a whole within the general trade and commerce power.[206] However, the Court concluded that the Proposed Act went well beyond such matters "into the detailed regulation of *all* aspects of trading in securities, a matter that has long been viewed as provincial."[207] After noting the lack of support for Canada's assertion that the securities industry in Canada had transformed to such an extent that Parliament had acquired the power to regulate its every aspect, the SCC stated:

> ... On the basis of the record presented to us, we conclude, as discussed below, that the day-to-day regulation of securities within the provinces, which represents the main thrust of the [Proposed] Act, remains

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[202] [1989] S.C.J. No. 28, [1989] 1 S.C.R. 641 (S.C.C.). The SCC outlined the history of these criteria at para. 76 of the *Reference*.

[203] *Reference re Securities Act*, [2011] S.C.J. No. 66, 2011 SCC 66 at para. 108 (S.C.C.). Also see paras. 80-85 re *General Motors*; and paras. 86-89 re competition law as an example.

[204] *Reference*,, *ibid*., at para. 109.

[205] *Reference*, *ibid*., at para. 110.

[206] *Reference*, *ibid*., at paras. 112-114.

[207] *Reference*, *ibid*., at para. 114 (original emphasis).

> essentially a matter of property and civil rights within the provinces and therefore subject to provincial power.[208]

Moreover, even though systemic risk management and national data collection "appear to be directly related to the larger national goals …, they do not, on the record before us justify a complete takeover of provincial regulation."[209]

Regarding the fourth factor — whether the provinces were constitutionally capable of enacting a similar scheme — the SCC found that the provinces did indeed have the capacity to enact legislation on most of the matters covered by the Proposed Act and "could delegate provincial regulatory powers to a single pan-Canadian regulator."[210] However, the provinces would "always retain the ability to resile from an interprovincial scheme and withdraw an initial delegation to a single regulator".[211] When that ability is considered in light of the truly national goals of the Proposed Act, "there is no assurance that [the provinces] could effectively address issues of national systemic risk and competitive national capital markets on a sustained basis."[212] Therefore, the provinces do lack the requisite constitutional capacity in that regard. The Court nevertheless found that the Proposed Act as a whole went well beyond the matters of national concern and into the detailed regulation of all securities regulation aspects.[213]

The fifth and final factor is whether a province's absence would prevent the scheme's effective operation. The SCC found that the "genuine national goals" of the Proposed Act — that is, managing systemic risk and engaging in national data collection — would be harmed if not all provinces participated in the scheme. Once again, however, the Proposed Act went too far by having as its main thrust the day-to-day aspects of securities regulation, so that the absence of one or more provinces in that regard would not be a problem. Moreover, the opt-out feature meant that the Proposed Act, on its face, contemplated that not all provinces would need to be involved in the federal government's legislative scheme — thus undermining Canada's argument on this point.[214]

4. Conclusion

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208 *Reference*, *ibid*., at para. 116.
209 *Reference*, *ibid*., at para. 117.
210 *Reference*, *ibid*., at para. 118.
211 *Reference*, *ibid*., at para. 119.
212 *Reference*, *ibid*., at para. 120.
213 *Reference*, *ibid*., at para. 122.
214 *Reference*, *ibid*., at para. 123.

The Court concluded that the Proposed Act did possess some genuinely national features, which were perhaps valid on their own but could not save the Proposed Act as a whole. This conclusion was supported by case law and not altered by a review of the expert evidence adduced.[215] In the end, "as important as the preservation of capital markets and the maintenance of Canada's financial stability are, they do not justify a wholesale takeover of the regulation of the securities industry" as would result from passage of the Proposed Act.[216] Therefore, the Court answered the Reference question in the negative, finding the Proposed Act as a whole to be *ultra vires* Parliament. The SCC noted that "the policy question of whether a single national securities scheme is preferable to multiple provincial regimes is not one for the courts to decide." The Court's answer was "dictated solely by the text of the Constitution, fundamental constitutional principles and the relevant case law."[217]

The Court's decision has engendered considerable scholarly commentary on the judgment's reasoning and possible underlying rationales,[218] its relationship to Canadian federalism more broadly,[219] and the options now available to the federal government.[220]

17.05 OPTIONS AFTER THE *REFERENCE*

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215 *Reference*, *ibid*., at paras. 125-127.

216 *Reference*, *ibid*., at para. 128.

217 *Reference*, *ibid*., at para. 10. The Court's decision not to factor in policy considerations at all has been criticized: see Edward M. Iacobucci, "Competition Policy, Efficacy, and the National *Securities Reference*" in Anita Anand, ed., *What's Next for Canada? Securities Regulation After the Reference* (Toronto: Irwin Law, 2012) at 49.

218 See, *e.g*., Michael J. Trebilcock, "More Questions than Answers: The Supreme Court of Canada's Decision in the National *Securities Reference*"; Edward M. Iacobucci, "Competition Policy, Efficacy, and the National *Securities Reference*"; David Schneiderman, "Making Waves: The Supreme Court of Canada Confronts Stephen Harper's Brand of Federalism" in Anand, *ibid*., at 37, 49 and 75 respectively.

219 See, *e.g*., Vanessa MacDonnell, "Developments in Constitutional Law: The 2011-2012 Term" (2012) 59 S.C.L.R. (2d) 51 at 55-70; also Poonam Puri, "Twenty Years of Supreme Court Reference Decisions: Putting the *Securities Reference* Decision in Context"; Lorne Sossin, "Can Canadian Federalism Be Relevant?" in Anand, ed., *ibid*., at 13 and 101 respectively.

220 See, *e.g*., John B. Laskin and Darryl C. Patterson, "Moving Forward after the *Securities Act Reference*: The Future of Securities Regulation in Canada" (2012) 1:1 Com. Litig. & Arb. Rev. 5; also Janis Sarra, "Assuring Independence and Expertise in Financial Services Law: Regulatory Oversight in Light of the Supreme Court of Canada *Securities Reference* Judgment"; Anita Anand, "After the Reference: Regulating Systemic Risk in Canadian Financial Markets"; Jeffrey G. MacIntosh, "A National Securities Commission? The Headless Horseman Rides Again"; and Stéphane Rousseau, "The Provinces' Competence over Securities Regulation in Canada: Taking Stock of the Supreme Court's Opinion" in Anand, ed., *ibid*., at 111, 197, 223 and 279 respectively.

Following the *Reference*, it seems likely that Canada is moving in the direction of increased cooperation, with an as-yet-unknown role for the federal government. The choice today appears to be primarily along the middle ranges of a spectrum of cooperative options, with varying degrees of centralization, involving both the federal government and the provinces.

It is significant that each province already recognizes the same fundamental regulatory goals of investor protection and fostering fair and efficient capital markets.[221] While regulatory regimes differ, there are no fundamental barriers of regulatory philosophy or emphasis to a common system, increased provincial cooperation, or some combination.[222]

Although the Court found the Proposed Act invalid, three features of the *Reference* suggest that the federal government may still be able to pursue a national or common securities regulator (as opposed to maintaining the status quo). First, following the SCC's statement that "each level of government has jurisdiction over some aspects of the regulation of securities and each can work in collaboration with the other to carry out its responsibilities",[223] the federal government, working in concert with one or more of the provinces, could create a common regulator. As discussed below, Canada, British Columbia, Ontario, New Brunswick and Saskatchewan are currently pursuing this possibility. Second, the Court made clear that while the Proposed Act as a whole was not constitutional, the aspects relating to national concerns were "perhaps valid on their own".[224] Therefore, another option open to the federal government is to create a new scheme that achieves these ends without intruding into the day-to-day aspects of securities regulation — this would most likely occur in conjunction with further interprovincial cooperation and coordination. Third, because Canada relied only on the general branch of the s. 91(2) trade and commerce power, it remains possible (though unlikely) that similar legislation could be *intra vires* Parliament under the interprovincial and international trade branch of s. 91(2), or under other

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221 See Chapter 1 Context and Philosophy, 1.04 Purpose of Securities Regulation, B. Twin Goals: Investor Protection and Efficient Capital Markets.

222 Another important fact is that Canada's market is relatively small. Canadian equity markets constitute only approximately 3.5 per cent of the world total. In January 2014, the total market capitalization of all issuers listed on TSX and TSX-V was approximately $2.3 trillion (TMX Group Ltd., *Equity Financing Statistics*). These statistics are updated monthly and available online: TMX Group Ltd., online: <http://www.tmx.com/en/pdf/MonthlyFinancingSummary.pdf>. The total market capitalization of all world equity markets is roughly USD $64 trillion : World Federation of Exchanges, *2013 Market Highlights* (January 24, 2014), online: <http://www.world-exchanges.org/files/2013_WFE_Market_Highlights.pdf>.

223 *Reference re Securities Act*, [2011] S.C.J. No. 66, 2011 SCC 66 at para. 131 (S.C.C.).

224 *Reference*, *ibid*., at para. 125.

heads of federal power. Apart from these options, it is also possible that the status quo — with continually improved cooperation and coordination — may continue. We discuss all four possibilities below.

A. A Cooperatively Established Common Regulator — CCMR as an Example

The federal government did not abandon the prospect of creating a common (not a national) securities regulator for Canada following the *Reference* decision. In its March 2013 budget the federal government stated that its preference was "a common securities regulator established cooperatively with provinces and territories", with the alternative of federal legislation to carry out the federal government's "regulatory responsibilities consistent with the decision rendered by the Supreme Court of Canada".[225] The government also stated that it would be willing to "delegate the administration of its own securities regulation" only if a "critical mass" of provinces did the same.[226]

In September 2013, Canada, British Columbia and Ontario entered into an *Agreement in Principle to establish a Cooperative Capital Markets Regulator* (CCMR).[227] On July 9, 2014, New Brunswick and Saskatchewan agreed to join as well, and signed an *Amended Agreement in Principle*.[228] The Agreement would lead to a single regulator (if all provinces and territories were to participate), with responsibility for regulatory, enforcement and adjudicative functions. It would also manage systemic risk and represent Canada internationally.[229] The CCMR's principal components would be a regulatory division, an independent

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[225] Department of Finance, *Jobs, Growth and Long-term Prosperity: Economic Action Plan 2013* (Ottawa: Public Works and Government Services Canada, 2013) at 142 *[Budget 2013]*. The federal government also said that it would extend the CSTO's mandate to an indeterminate date beyond July 12, 2013 (*ibid*., at 143), although the content of the CSTO's website is currently archived.

[226] *Ibid.*

[227] Department of Finance, *Agreement in Principle to Move Towards a Cooperative Capital Markets Regulatory System* (September 19, 2013) [*Agreement in Principle*].

[228] Department of Finance, Press Release, "Saskatchewan and New Brunswick Agree to Join the Cooperative Capital Markets Regulatory System" (July 9, 2014); Department of Finance, *Amended Agreement in Principle to Move Towards a Cooperative Capital Markets Regulatory System* (July 9, 2014) [*Amended Agreement in Principle*].

[229] *Amended Agreement in Principle*, *ibid*., at s. 1.1. The Department of Finance and the CSTO use both "CMR" and "CCMR" in referring to the proposed new regulator. In the *Amended Agreement in Principle* it is the CMR. To avoid confusion, we use the acronym CCMR, even when referring directly to the *Amended Agreement in Principle*.

adjudicative division, and a "regulatory policy forum for consultation on policy issues".[230]

The parties have set deadlines of August 29, 2014 to execute a Memorandum of Agreement; December 19, 2014 to publish initial draft regulations for comment; and June 30, 2015 for enacting provincial legislation (for matters of provincial jurisdiction), and complementary federal legislation (for "criminal matters and matters relating to systemic risk in national capital markets and national data collection").[231] There would be a single regulator and a single set of regulations, under authority delegated by each participating government.[232] The goal is to "operationalize the CCMR" by Fall 2015.[233]

According to the *Amended Agreement in Principle*:

> The purpose of the Cooperative System would be to regulate capital markets in a manner that would:
>
> - foster more efficient and globally competitive capital markets in Canada and facilitate the raising of capital from investors across Canada and internationally through more integrated markets governed by innovative, responsive and flexible regulation on the basis of national standards reflected in cooperatively-developed regulations consistently applied;
> - provide increased protection for investors through a combination of more nationally consistent and active compliance activities, more effective enforcement against misconduct and improved coordination with police and prosecution authorities both within and outside Canada;
> - strengthen Canada's capacity to identify and manage systemic risk on a national basis; and
> - enable Canada, through the single voice of a new cooperative capital markets regulator, to play a more empowered and influential role in international capital market regulatory initiatives.[234]

Jurisdictionally, the *Amended Agreement in Principle* states that "each of the Participating Jurisdictions is addressing matters within its constitutional jurisdiction and is neither surrendering nor impairing any of

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230 *Amended Agreement in Principle*, *ibid*., at s. 5.1.
231 *Amended Agreement in Principle*, *ibid*., ss. 6.3, 2. This federal legislation would be "platform" legislation containing broad provisions, with the delegation by the federal government to the CCMR of federal authority to make nationally-applicable regulations and exercise national emergency powers related to systemic risk in national capital markets and national data collection, and to make orders regarding practices giving rise to systemic risk in national capital markets. *Amended Agreement in Principle*, *ibid*., s. 4.
232 *Amended Agreement in Principle, ibid*.,, s. 2.
233 *Amended Agreement in Principle, ibid*.,, s. 6.3
234 *Amended Agreement in Principle, ibid*.,), s. 1.1.

its jurisdiction, with respect to which it remains sovereign".[235] The CCMR would include local perspectives and work towards "needed reforms".[236]

The *Amended Agreement in Principle* establishes a Council of Ministers, consisting of the federal Minister of Finance and the relevant ministers from participating provincial and territorial jurisdictions. The Council of Ministers would, *inter alia*, appoint members of the regulator's board of directors and the independent adjudicative tribunal (both based on recommendations from a nominating committee); and it would provide policy oversight, propose legislative amendments, and approve regulations.[237]

The CCMR's head office would be in Toronto, with regulatory offices in all participating jurisdictions.[238] In addition to assisting the CCMR with funding until it is established (at which point it will be self-funding), and reimbursing provincial participating jurisdictions for employees seconded to the CCMR for transition purposes, the federal government will also "make payments to Participating Jurisdictions that will lose net revenue as a result of the transition to the Cooperative System on a transparent basis."[239] Participating jurisdictions may also request that the CCMR's board of directors consider making regulations to accommodate specific provincial economic development initiatives.[240]

How the CCMR will interact with non-participating provincial or territorial jurisdictions is not settled. Clearly, the *Amended Agreement in Principle* contemplates that its federal criminal, data collection and systemic risk-regulating aspects will apply beyond the participating jurisdictions. The *Amended Agreement in Principle* states that the CCMR "will use its best efforts to negotiate and implement an interface

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235 *Amended Agreement in Principle*, *ibid*., at s. 1.2.
236 *Amended Agreement in Principle*, *ibid*., at s. 1.3.
237 *Amended Agreement in Principle*, *ibid*., at ss. 2, 3.1. Proposals for voting rights on appointments, regulation-making and fundamental changes are also set out (ss. 3.2-3.5, 3.7). These vary depending on the topic, with fundamental changes having the strictest requirement of approval from all "Major Capital Markets Jurisdictions" (meaning "each provincial Participating Jurisdiction that represents at least 10 percent of the national gross domestic product derived from financial services (i.e., British Columbia and Ontario initially")) and the federal government. Saskatchewan and New Brunswick are not Major Capital Markets Jurisdictions.
238 *Amended Agreement in Principle*, *ibid*., at s. 5.3. The Chief Regulator would also be located in Toronto, with Deputy Chief Regulators in each of Toronto, Vancouver, Saskatchewan (this one "representing Saskatchewan, Manitoba, Northwest Territories, Nunavut and Yukon to the extent they are Participating Jurisdictions", and New Brunswick (this one "representing New Brunswick, Newfoundland and Labrador, Nova Scotia and Prince Edward Island to the extent they are Participating Jurisdictions"). The Deputy Chief Regulators located in Saskatchewan and New Brunswick would hold that post for a period of five years after the date on which the CCMR commences operations. *Amended Agreement in Principle, ibid.,* at s. 5.4.
239 *Amended Agreement in Principle*, *ibid*., at ss. 2, 6.4.
240 *Amended Agreement in Principle, ibid.,* at s. 3.4.1.

mechanism" with non-participating jurisdictions, such that the "system contemplated by [the] Agreement is, effectively, of national application".[241]

The 2014 federal budget reiterated the government's desire to have all provinces and territories participate in the CCMR,[242] although only two others have since joined. However, Québec has already signaled its intention to challenge the federal legislation described in the *Agreement in Principle* (and the subsequent *Amended Agreement*).[243] It is also possible that the CCMR initiative will fail entirely, in which case the federal government could still choose to exercise its jurisdiction over systemic risk and data collection independently (as it has said it would do). Given that systemic risk and other kinds of risk that exist in the day-to-day operations of the securities markets are closely related, any federal regulation of systemic risk in the capital markets that extends to non-participating jurisdictions may also be subject to challenge.

As noted, the CCMR contemplates that the governments of all participating jurisdictions would delegate their regulatory authority to a single regulator. Each of CANSEC, the *1994 Proposal* and the *Crawford Common Regulator Discussion Paper* advocated similar approaches, under which a single administrative agency would be created and authority delegated to it.[244] Such approaches have succeeded in other areas of shared jurisdiction, such as with the marketing of agricultural products[245] and the regulation of interprovincial trucking.[246]

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241 *Amended Agreement in Principle*, *ibid*., at s. 6.5.

242 Department of Finance, *The Road to Balance: Creating Jobs and Opportunities* (Ottawa: Public Works and Government Services Canada, 2014) at 129 *[Budget 2014]*. As noted above, the budget also states that the government proposes to amend the *Bank Act* to create an explicit regulation-making authority for banks regarding over-the-counter derivatives. This "will facilitate the integration and consolidation of over-the-counter derivatives regulations with the Cooperative Capital Markets Regulator when it becomes operational." *Budget 2014*, *ibid*., at 130.

243 Rhéal Séguin, "Quebec to challenge proposed federal securities regulator", *The Globe and Mail* (December 13, 2013).

244 It would make no sense for each province to try to pass legislation creating a single administrative agency. The Crawford Panel, *A Blueprint for A New Model: A Discussion Paper by the Crawford Panel on A Single Canadian Securities Regulator* (Toronto: Government of Ontario, 2005) would have one Participating Jurisdiction pass the initiating legislation. The *Hockin Report* would have established a federal crown corporation. The *Amended Agreement in Principle* and associated documents are silent with respect to which level of government would establish the CCMR.

245 See, *e.g.*, *Prince Edward Island (Potato Marketing Board) v. H.B. Willis Inc.*, [1952] S.C.J. No. 31, [1952] 2 S.C.R. 392 (S.C.C.) (approving a joint federal-provincial agency for marketing agricultural products); *Reference re: Agricultural Products Marketing Act, 1970 (Canada)*, [1978] S.C.J. No. 58, [1978] 2 S.C.R. 1198 (S.C.C.) (upholding legislation for production and marketing of eggs cooperatively established between the provinces and the

In *Furtney*, a criminal case, the SCC held that:

> Parliament may delegate legislative authority to bodies other than provincial legislatures, it may incorporate provincial legislation by reference and it may limit the reach of its legislation by a condition, namely the existence of provincial legislation.[247]

The *Furtney* case suggests that the federal government could also delegate authority to a joint federal-provincial agency; incorporate provincial legislation into its own Securities Act; and limit its own securities legislation by provincial legislation. The *Amended Agreement in Principle* contemplates doing the first. It does not explicitly suggest that either the federal government or any participating provinces or territories

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federal government); *Fédération des producteurs de volailles du Québec c. Pelland*, [2005] S.C.J. No 19, 2005 SCC 20 (S.C.C.) (approving a similar scheme regulating the production and marketing of chickens). Other cooperative schemes exist as well: see Ramandeep K. Grewal and Edward J. Waitzer, "National Securities Regulation: Centralization and Its Discontents" (March 2012) 27 B.F.L.R. 529.

246 *Coughlin v. Ontario (Highway Transport Board)*, [1968] S.C.J. No. 38, [1968] S.C.R. 569 (S.C.C.) [*Coughlin*]. One important aspect of *Coughlin* is its finding that Parliament may incorporate by reference provincial legislation as it may exist from time to time.

247 *R. v. Furtney*, [1991] S.C.J. No. 70, [1991] 3 S.C.R. 89 at 104-105 (S.C.C.) [*Furtney*]. *Furtney* was a challenge to the constitutionality and effectiveness of *Criminal Code* lottery provisions. The main focus of the case was the last option described in the quote above — *i.e.*, circumstances in which Parliament limits the reach of its legislation due to the existence of provincial legislation. Our concern is mainly the first option. The *Coughlin* case above also established that Parliament may incorporate by reference provincial legislation as it may exist from time to time. *Coughlin. Ontario Highway Transport Board*, [1968] S.C.J. No. 38, [1968] S.C.R. 569 at 582-83 [*Coughlin*. Inter-delegation is also discussed below: see 17.05 Options After the *Reference*, D. Continued Provincial Cooperation, No Federal Role.

See also *British Columbia (Milk Board) v. Grisnich (c.o.b. Mountainview Acres)*, [1995] S.C.J. No. 35, [1995] 2 S.C.R. 895 (S.C.C.). The Milk Board was constituted by the British Columbia government. It had authority delegated both from that government and the federal government. The SCC upheld the delegation. The appellants challenged a judgment ordering them to pay amounts levied by the Milk Board. They argued the Board's order had not specified on its face whether, in making that order, it relied on its delegated power from the federal government or from the provincial government. The majority of four justices held that if an administrative order were challenged, the body would be required to identify and support its jurisdictional basis. While concurring in the result, a minority of three preferred to address the issue on inter-delegation grounds. Writing for the three, LaForest J. said at 908-909 S.C.R. (emphasis added):

> The very point of an administrative inter-delegation scheme … is to ensure that a provincial marketing board is possessed of the totality of regulatory power over one agricultural product. *The very reason such joint federal-provincial schemes are necessary is because no one level of government is constitutionally empowered to regulate all aspects of intraprovincial and extraprovincial trade* … the administrative inter-delegation scheme is a means of allowing Parliament to delegate administrative powers to a body created by the provincial legislature in a manner that avoids the rule against legislative inter-delegation … To require an administrative agency overseeing and implementing a national marketing scheme to 'choose' between its federal and provincial authority would defeat the very *raison d'être* of the scheme.

would incorporate the other jurisdictions' legislation into their own Acts. The *Reference* leaves open the possibility that federal and provincial or territorial jurisdiction may be somewhat overlapping. Moreover, each jurisdiction must have the ability to carry out activity that is in pith and substance within its jurisdiction, and to carry out other activities necessary and incidental to being able to exercise its own jurisdiction.

At the same time, the power to adopt by reference will only be effective if the adopting legislature also has jurisdiction to legislate in relation to the area in which the legislature that enacted the adopted legislation has legislated. Put another way, the legislation being adopted has to be legislation that the adopting legislature has the independent power to enact. So for Parliament to be able to adopt provincial legislation regulating some aspect of the securities industry, the adopted legislation would have to be legislation that Parliament has the power to enact independently of the provinces. This is consistent with the *Reference*, which emphasizes that the jurisdiction of each level of government is distinct: "one power may not be used in a manner that effectively eviscerates another."[248] Each jurisdiction would contribute something unique to the collective administrative agency established under the *Amended Agreement in Principle*.

B. National Systemic Risk Regulator

As noted, the federal government has announced its intention to proceed to exercise its systemic risk jurisdiction on its own, if a single or common regulator plan fails. In that event, systemic risk responsibilities could be allocated to an existing federal regulator (such as the Canadian banking regulator, the Office of the Superintendent of Financial Institutions (OSFI)) or a freestanding federal systemic risk regulator could be created (for the securities markets or generally).

Because systemic risk in the securities markets is intimately interlinked with many aspects of those markets, creating a free-standing federal systemic risk regulator that does not possess jurisdiction over day-to-day securities regulation could be challenging.[249]

[248] *Reference re Securities Act*, [2011] S.C.J. No. 66, 2011 SCC 66 at paras 7, 43-46, 57-66, 83 (S.C.C.); also *Global Securities Corp. v. British Columbia (Securities Commission)*, [2000] S.C.J. No. 5, [2000] 1 S.C.R. 494 at paras 22-25, 45-46 (S.C.C.).

[249] See also Anita Anand, "After the Reference: Regulating Systemic Risk in Canadian Financial Markets" in Anita Anand, ed., *What's Next for Canada? Securities Regulation After the Reference* (Toronto: Irwin Law, 2012) at 197.

One critic of a federal systemic risk regulator argues that there is no need for the federal government to exercise its jurisdiction to manage systemic risk, given that it arises from the day-to-day operations of the securities markets.[250] While acknowledging the federal government's jurisdiction over systemic risk, Jeffrey MacIntosh proposes that systemic risk simply will not arise if the provincial regulators do their jobs. He says that "to the extent that there is a link between securities regulators and systemic risk, it is adequately addressed when regulators are attentive to their historic mandates."[251]

Even if correct, this approach does not account for that fact that provincial securities regulators, concerned with their day-to-day operations, may not pay close attention to the accretion of multiple smaller risks both in their own jurisdictions and those of the other provinces. Provinces will naturally affect systemic risk through their day-to-day regulation of securities markets. If they go too far, of course, they will be entrenching on federal jurisdiction — a question that potentially could become the subject of another court decision. At the same time, the fact that systemic risk is embedded in the day-to-day operations of the securities markets means that any attempt on the part of the federal government to manage systemic risk will have to be done in some degree of concert with the provinces — although not necessarily a single or common securities regulator.

The crucial question continues to be how to design the link between such a systemic risk regulator and the provincial Commissions, which remain responsible for regulating the day-to-day operations of the securities markets. According to the FSB, implementing quantitative indicators and methodologies for identifying and managing systemic risk "will likely require enhanced data collection".[252] Without, at a minimum,

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[250] Jeffrey G. MacIntosh, "A National Securities Commission? The Headless Horseman Rides Again" in Anand, ed., *ibid*., at 223.

[251] *Ibid.*, at 276.

[252] Staff of the International Monetary Fund and the Bank for International Settlements, and the Secretariat of the Financial Stability Board, "Guidance to Assess the Systemic Importance of Financial Institutions, Markets and Instruments: Initial Considerations", *Report to the G-20 Finance Ministers and Central Bank Governors* (October 2009) at 18. The report discusses quantitative assessments and methodologies, including indicator-based approaches, network analysis, market data-based risk portfolio models, and stress testing and scenario analysis at 15-20. Much effort has been devoted to aspects of data collection within several institutions with which Canada is involved. The primary international institutions involved have been the Financial Stability Board (FSB), IOSCO, and the Bank for International Settlements; in several instances they have coordinated efforts. See, *e.g.*, Bank for International Settlements Committee on Payment and Settlement Systems and Technical Committee of IOSCO, "Principles for Financial Market Infrastructures" (April 2012); FSB and IOSCO, "Consultative Document: Assessment Methodologies for Identifying Non-Bank Non-Insurer Global Systemically Important Financial Institutions: Proposed High-Level

access to substantial information about the day-to-day operations of the securities markets, it is unlikely that a federal systemic risk regulator would function effectively. Even if a federal regulator had the resources and ability to identify risk and coordinate a response, it could be ineffective if it lacked the power to implement that response by intervening (directly or indirectly) in day-to-day securities regulation.

Designing a separate regulatory regime that is effective and nimble in managing systemic risk, while not infringing on provincial jurisdiction, would be challenging. One option would be to create a federal body comprised of provincial representatives, likely from the Commissions.[253] Alternatively, a federal regulator could be designed as a form of "clearinghouse", possessing the ability to collect and analyze data provided by the provincial securities regulators.[254] In a similar vein, John Laskin and Darryl Patterson have suggested that a potential model may be the federal *Payment Clearing and Settlement Act*, under which "the Bank of Canada and its Governor are given designation, directive, information-collecting, audit, enforcement and other powers relating to clearing and settlement of payment obligations, contingent in large part on the existence of systemic risk".[255]

Some observers argue that other federal entities, such as the Office of the Superintendent of Financial Institutions (OSFI) or the Bank of Canada, could regulate systemic risk, thus avoiding the need to create a new, free-standing systemic risk regulator.[256] The OSFI has experience managing systemic risk in the banking sector. It also has substantial credibility at present, because Canada's banking sector survived the GFC relatively well.

However, the specialized mandates of institutions like the OSFI and the Bank of Canada may make them ill-suited to the particular task of controlling systemic risk in the securities context.[257] These pre-existing mandates raise

Framework and Specific Methodologies" (January 8, 2014); Report of the Senior Supervisors Group to the FSB, "Progress Report on Counterparty Data" (January 15, 2014).

253 Anita Anand, "After the Reference: Regulating Systemic Risk in Canadian Financial Markets" in Anita Anand, ed., *What's Next for Canada? Securities Regulation After the Reference* (Toronto: Irwin Law, 2012), at 218.

254 Cristie Ford and Hardeep Gill, "A National Systemic Risk Clearinghouse?" in Anita Anand, ed., *What's Next for Canada? Securities Regulation After the Reference* (Toronto: Irwin Law, 2012) at 167-169; but, see Andrew Green, "Effectiveness, Accountability, and Bias: Some Concerns about a Quasi-National Securities Regulator", in Anand, ed., *ibid*. (raising questions about accountability within a clearinghouse model).

255 John Laskin and Darryl Patterson, "Moving Forward after the *Securities Act Reference:* The Future of Securities Regulation in Canada" (2012) 1 Comm. Litig. and Arb. Rev. 5 at 9.

256 Nick Le Pan, "Look Before You Leap: A Skeptical View of Proposals to Meld Macro- and Microprudential Regulation" (2009) C.D. Howe Institute, Commentary No. 296.

257 Anita Anand, "After the Reference: Regulating Systemic Risk in Canadian Financial Markets" in Anita Anand, ed., *What's Next for Canada? Securities Regulation After the Reference* (Toronto: Irwin Law, 2012) at 217-218.

issues of institutional independence, since the need to control systemic risk could in some instances conflict with the other goals of these institutions.[258] Therefore, it is arguable that these institutions may be more suited to play a lesser role in monitoring and reducing systemic risk.[259]

Moreover, the securities markets operate in fundamentally different ways than the banking sector. The number of participants in the securities sector is far greater, and participants are more varied in nature. Thus far, their regulation has been disclosure-based and investor protection-oriented, rather than prudential. Neither the Bank of Canada nor OSFI currently has access to information about developments in the securities markets, or even much familiarity with how those markets operate and how systemic risk might develop within them. In their present forms they lack both the resource infrastructure and the expertise to discharge this task (which is not to say that such capacity cannot be developed).

Another alternative would be to establish a new, freestanding regulator responsible for managing systemic risk in the securities markets. Given the number of other regulators in the Canadian securities markets, a dedicated systemic risk regulator could also help ensure that that issue does not "get lost".[260] IOSCO in particular has been involved in delineating the responsibilities of securities regulators with regard to systemic risk. IOSCO maintains that, following the GFC, securities regulators in particular have an important role to play in mitigating systemic risk.[261] The standards and methodologies being developed at the international level may help guide the management of systemic risk within Canada, and Canadian securities markets.

Alternatively, a new regulator could be made responsible for systemic risk across the Canadian capital markets — that is, in the

[258] Anand, ed., *ibid*., at 218-219.

[259] Also in the federal government's *Budget 2012* it committed to implementing "a comprehensive risk management framework for Canada's systemically important banks". Department of Finance, *Jobs, Growth and Long-term Prosperity: Economic Action Plan 2012* (Ottawa: Public Works and Government Services Canada, 2012) at 144 [*Budget 2012*].

[260] Anita Anand, "After the Reference: Regulating Systemic Risk in Canadian Financial Markets" in Anita Anand, ed., *What's Next for Canada? Securities Regulation After the Reference* (Toronto: Irwin Law, 2012) at 219.

[261] Technical Committee of IOSCO, "Mitigating Systemic Risk: A Role for Securities Regulators" (February 2011) at 8-14, 26-27. Also see IOSCO, "Objectives and Principles of Securities Regulation" (June 2010) at 3, discussing "systemic risk" as an objective of securities regulation (and, in particular, see Principles 6, 32, 37 and 38 and, implicitly, Principles 7, 22 and 23); Financial Stability Board and IOSCO, "Consultative Document: Assessment Methodologies for Identifying Non-Bank Non-Insurer Global Systemically Important Financial Institutions: Proposed High-Level Framework and Specific Methodologies" (January 8, 2014); IOSCO, Consultation Report, *A Comparison and Analysis of Prudential Standards in the Securities Sector* (March 2014) at iii. Also see The Board of IOSCO, "Risk Identification and Assessment Methodologies for Securities Regulators" (June 2014).

banking and insurance sectors as well.[262] The United States has established a systemic risk body, the Financial Stability Oversight Council, across institutional jurisdictions. In the United Kingdom, as well, the Prudential Regulatory Authority is responsible for the "prudential regulation and supervision of banks, building societies, credit unions, insurers and major investment firms".[263]

C. Federally-Constituted National Regulator

In the event that no single or common regulator is established, and the federal government remains committed to exercising its jurisdiction, it could once again try to establish a truly national securities regulator, through federal legislation alone. The scope of the *Reference* was limited, in that it considered the Proposed Act only as it was drafted, with provisions that essentially duplicated provincial law. Canada relied only on the general branch of the trade and commerce power under s. 91(2) of the *Constitution Act, 1867*. The decision's narrow scope leaves some room for speculation about whether the Proposed Act might have survived

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[262] The *Dodd-Frank Act* created a similar regulator in the Financial Stability Oversight Council, which sets capital requirements, limits leverage and restricts the trading activities of systemically significant firms. See Anita Anand, "After the Reference: Regulating Systemic Risk in Canadian Financial Markets" in Anita Anand, ed., *What's Next for Canada? Securities Regulation After the Reference* (Toronto: Irwin Law, 2012) at 219-220. See also Technical Committee of IOSCO, "Mitigating Systemic Risk: A Role for Securities Regulators" (February 2011) at 12 (describing steps taken in the U.S. and Europe). See online: <http://www.treasury.gov/initiatives/fsoc>. It is chaired by the Secretary of the Treasury, with its voting members the chairs of all of the country's federal financial institutions or regulators: the Chairman of the Board of Governors of the Federal Reserve System; the Comptroller of the Currency; the Director of the Bureau of Consumer Financial Protection; the Chairmen of the SEC, the Federal Deposit Insurance Corporation, the Commodity Futures Trading Commission, the Federal Housing Finance Agency, and the National Credit Union Administration; plus an "independent member with insurance expertise" appointed by the President.

[263] See online: <http://www.bankofengland.co.uk/pra>. The U.K. "twin peaks" model is quite different from the Canadian one. It would not be necessary to adopt a "twin peaks" model, which distinguishes between prudential regulation and consumer protection, in order to establish an overarching systemic risk regulator. Also see comments in John Laskin and Darryl Patterson, "Moving Forward after the *Securities Act Reference*: The Future of Securities Regulation in Canada" (2012) 1 Comm. Litig. And Arb. Rev. 5 at 9. Whether an existing federal regulator's mandate is expanded or a new systemic risk regulator is created, there may be merit in assessing systemic risk not only on an entity basis (that is, banks versus non-bank financial institutions), but also on an activity basis (that is, when they are engaged in activity that generates potential systemic risk). The FSB has identified the benefits of using a modified entity-based model to monitor "shadow banking" activity in the Canadian government-insured mortgage securitization industry. Financial Stability Board, "Global Shadow Banking Monitoring Report 2013" at 26-29.

constitutional scrutiny under other heads of power, or under the interprovincial and international trade branch of s. 91(2).

Ian Lee has made a suggestion in this vein,[264] which others have attempted to refute.[265] Given the SCC's statements regarding the spirit of Canadian cooperative federalism[266] and the jurisdiction over day-to-day securities regulation belonging to the provinces, a unilateral approach to creating a national securities regulator that functionally replaced the existing Commissions, through federal legislation alone, is unlikely.[267]

D. Continued Provincial Cooperation, No Federal Role

In the absence of a federally-involved solution — immediately or at all — the provinces can be expected to continue to work together to build on the successful NI and MI initiatives and tackle issues of coordination, cost, coverage and harmonization.[268] In spite of its limitations, the Passport System has made significant progress. It would be strengthened by Ontario's participation. A clear failure to establish a national, single or common securities regulator might incline Ontario to participate fully in the existing Passport System, since its support of a national securities regulator was one of its main reasons for not doing so.

17.06 CONSIDERATIONS

A. General

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[264] Ian B. Lee, "The General Trade and Commerce Power after the *Securities Reference*" in Anita Anand, ed., *What's Next for Canada? Securities Regulation After the Reference* (Toronto: Irwin Law, 2012). In his view the legislation would still be "what most people would recognize as a garden-variety securities regulatory law" though on a national scale. Anand, ed., *ibid*., at 66.

[265] Jeffrey G. MacIntosh, "A National Securities Commission? The Headless Horseman Rides Again" in Anita Anand, ed., *What's Next for Canada? Securities Regulation After the Reference* (Toronto: Irwin Law, 2012) at 261.

[266] *Reference re Securities Act*, [2011] S.C.J. No. 66, 2011 SCC 66 at para. 133 (S.C.C.).

[267] Also unlikely is the possibility of amending the constitution to change the federal/provincial balance of power in this area. But, see Philip Anisman, "The Regulation of the Securities Markets and the Harmonization of Provincial Laws", in "Harmonization of Business Law in Canada", Vol. 56 of the research studies prepared for the Royal Commission on the Economic Union and Development Prospects for Canada (Toronto: University of Toronto Press, 1986) at 77.

[268] Provinces will likely continue their work towards achieving increased cooperation and harmonization while proposals for a single or common regulator are being pursued.

The prospect of unilateral federal action to create a comprehensive securities regulator is now slim. Gone with this prospect are some of its potential advantages — notably, seamless and straightforward application across the country (particularly important around enforcement), some reduced duplication, and an indisputably unified Canadian voice on the international stage. Proponents of a single, national regulator have argued that such a regulator would be more effective in protecting investors and fostering fair and efficient capital markets. (While this is possible, whether it would in fact have been the case would have depended on how the regulator was structured and the regime implemented.) It would presumably have been self-funding, like the existing Commissions, though there might have been costs, including transfer payments, associated with the transition from the provincial Commissions to a federal one.

On the other hand, likely also gone are the model's associated concerns and disadvantages. Above all, this option would have raised concerns that regional interests were not being considered adequately, given policy directives and compromises and what could have been a less locally responsive bureaucracy. The prospect of a unified national securities regulator also raised concerns about the potential loss of expertise now residing in provincial Commission staff (again, depending on how the transition was implemented and the regime structured). Other concerns were the possibility of fundamental changes to the federal/provincial division of powers in ways deleterious to provincial interests; diminishing the crucial concept of federalism; and not embracing cooperative federalism. Canada would have had to pursue such a regime over the vociferous concerns of some provinces, particularly Québec. Canada and the provinces will also not bear the costs and uncertainty associated with another round of constitutional litigation.[269]

In considering the advantages and disadvantages of the options discussed earlier, we address legal aspects, administrative structure, and political questions. We largely refer to the eight reform criteria that Douglas Harris advanced in 2002.[270] We also consider the potential for each to meet

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[269] This s particularly because further litigation would have been based on heads of federal power that, in the view of many, are less viable bases for creating a national securities regulator than the general branch of the trade and commerce power relied on in the *Reference*.

[270] As noted above, the *Harris White Paper* identified eight criteria for assessing reform proposals: (1) Constitutional validity; (2) Stability (regulatory permanent and no room for strategic behaviour by participating provinces); (3) Local and regional flexibility; (4) Universality (applying as widely as possible across the country); (5) Accountability; (6) Determinacy; (7) Responsiveness; and (8) Cost effectiveness. See 17.02 Outline of Various National Securities System or Reform Initiatives, F. 2001 to 2006, 3. The Harris White Paper.

See also Edward Waitzer's analysis of the *1994 Proposal*, above at 17.02 Outline of Various National Securities System or Reform Initiatives, E. 1994 to 1997 Proposals, 2. Responses to the goals of securities regulation, although that is difficult to assess without knowing how any regulatory model would be structured or implemented.

B. Legal Aspects: Jurisdiction, Delegation and Empowerment

One common, country-wide, cooperative federalist regulator — that possessed all the jurisdiction needed to manage the day-to-day activities in the securities markets, as well as systemic risk and data collection — would likely be the most efficient and least duplicative approach. This, however, seems unlikely.

A CCMR-type model could substantially resolve inter-jurisdictional questions as to the participating jurisdictions that delegated their authority to the new CCMR. Administrative inter-delegation is constitutionally permissible. Since all relevant powers at both levels of government would be delegated to the common regime, the common regulator would have the seamless constitutional jurisdiction to operate across the subject matter area. This would not, however, resolve jurisdictional questions related to non-participating jurisdictions, including complementary federal legislation that would purport to apply in non-participating jurisdictions as well. It also would not absolve the CCMR from having to identify the source of its authority if an administrative action were challenged.[271] Even if pursued by the federal government and some provinces, the national scope of the requisite complementary federal legislation would likely be challenged by at least one non-participating province. In fact, Québec has already stated it will launch a constitutional challenge of the CCMR proposal, to the extent that it purports to apply in that province.

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the 1994 Proposal. Waitzer's analysis identifies important aspects of regulatory design. As noted above, he highlighted five objectives: (1) maximizing operational efficiency; (2) ensuring regulatory integrity; (3) optimizing regulatory autonomy; (4) constructing effective coordination; and (5) designing a functional transition process. These objectives are less helpful in assessing the present options, however, because potentially each of the options could meet these objectives relatively well (or relatively poorly). It is difficult to assess their relative merits in the abstract, since implementation will be determinative. For example, any of the three options could presumably increase or decrease operational efficiency: the CCMR establishes a unified regulator, which could offer efficiency gains (depending on how it is structured), but the Council of Ministers may not be more efficient with respect to agreeing on policy questions than the existing CSA is. The CSA itself could continue to work to improve its operational efficiency, with or without coordination with a national systemic risk regulator.

[271] The CCMR would need to identify whether its power came from federal or provincial/territorial authority, if an administrative action were challenged: *British Columbia (Milk Board) v. Grisnich (c.o.b. Mountainview Acres)*, [1995] S.C.J. No. 35, [1995] 2 S.C.R. 895 (S.C.C.).

If the CCMR were to be agreed to by all provinces except, for example, Québec, a stable form of asymmetrical federalism between the CCMR and that province could perhaps be established (in some ways similar to Ontario's link to the Passport System). Even then, however, the division of powers and the boundary-spanning nature of systemic risk suggest that the precise nature of federal jurisdiction *vis-à-vis* Québec would have to be adjudicated.

If the CCMR (or comparable system) is not pursued, the federal government could choose not to exercise its jurisdiction over national data collection and systemic risk management.[272] A federal decision not to exercise independent jurisdiction would make jurisdictional division of powers questions moot unless, perhaps, the provinces acting together attempted to create a scheme that trenched on federal jurisdiction, and the federal government then chose to object.

If there were to be a federal systemic risk regulator but no common regulator, jurisdictional issues would arise between that systemic risk regulator and the provinces (through the Commissions) would again arise. While systemic risk is intrinsically connected to the day-to-day operation of the securities markets, federal jurisdiction could be triggered at some threshold level relating to the systemic importance of particular financial institutions, markets or instruments. Given that potential — even probable — overlap, disagreements or differing views could lead to challenges of a systemic risk regulator's purported exercise of jurisdiction. This would seem likely to lead to a challenge or reference — either path would logically end at the SCC.

C. Administrative Structure

1. Funding and Regulatory Costs

On some aspects of administrative structure, the CCMR[273] is consistent with several earlier proposals. In particular, it now seems accepted that the CCMR would be self-funding, as the Commissions are, and that the participating provinces would receive some (undetermined) payment to compensate for the revenue streams the Commissions generated.

272 Although the result would effectively be maintenance of the status quo, it would be a change in that there would be knowledge that the federal government has systemic risk jurisdiction but was not choosing to exercise it.

273 As in other sections discussing advantages and disadvantages, we use the proposed CCMR as an example of a common regulatory system.

Since 1994, plans for a national or common regulator have had a "buyout" component — a payout to all participating provinces to compensate them for revenue streams they would lose because of a single fee structure.[274] Such a buyout was seen as necessary because the federal government needed Ontario (as by far the largest securities province) to support the national system concept. Ontario was loath to lose its revenue from securities fees, as were the other jurisdictions. In the *Harris White Paper*, Douglas Harris proposed that any feasible proposal must include a buyout feature.[275] The buyout plan has been heavily criticized, however, largely because the buyout payments were to be a debt of the new regulator.[276] It is uncertain whether the federal government would plan to cover any such buyout cost now or would still plan to recoup it through higher fees charged by a new regulator to market participants.

If a common securities regulator must pay this debt to the provinces off over many years by charging fees above market value, this would dampen market efficiency. One rationale for a common system is to attract and retain domestic and foreign issuers by reducing their costs of dealing with multiple regulators. Much of that improvement could be lost if buyout payments were made a debt of the common securities regulator.

A self-funding single or common regulator would be able to establish a comprehensive fee structure (for all participating jurisdictions), thus addressing the issue of multiple fees paid to different Commissions. However, that single fee structure would need to fund all of the regulatory offices and staff in all participating jurisdictions. For example, the CCRM proposal would see a regulatory office in each participating jurisdiction

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274 This was an aggregate amount of $150 million, but has escalated since. More recent proposals have not even attempted to quantify what a potential buyout amount would be.

275 A. Douglas Harris, *White Paper: A Symposium on Canadian Securities Regulation: Harmonization or Nationalization?* (Toronto: CMI/CFIE, 2002) at 33 [*Harris White Paper*]. Also see the *Hockin Report*, recommending that the federal government negotiate direct compensation agreements with the provinces to compensate them for foregone revenue. Expert Panel on Securities Regulation, *Creating an Advantage in Global Capital Markets: Final Report and Recommendations* (Ottawa: Department of Finance Canada, 2009) at 43-44 [*Hockin Report*]. But see Ed Waitzer, "Coordinated Securities Regulation: Getting to a More Effective Regime" (Paper presented to the Queen's Annual Business Law Symposium, November 4, 1994) (1994) 17 O.S.C.B. 5371 at 5375 at 5381 (expressing surprise that the federal government would use a buyout approach, instead of threatening the provinces that the fees they now collect are essentially indirect taxation and, therefore, possibly not within provincial authority).

276 For commentary on the buyout topic, see "National Unity of National Securities", *The Globe and Mail* (June 25, 1996) (calls for the compensation proposal to be "watered down"); Peter Hadekel, "Prospect of National Securities Agency Raises Legitimate Fear," *The [Montreal] Gazette* (June 15, 1996) (scheme is founded on the "ludicrous premise" that agencies such as the OSC have the right to overcharge); Terence Corcoran, "Unlawful Trading in OSC Shares", *The Globe and Mail* (June 14, 1996) (suggesting that it would be improper for the federal government to treat securities regulation as a profit-making industry to be taken over).

with the “staff, expertise and resources that are commensurate with the capital markets activity, and regulatory and enforcement demands of the Participating Jurisdiction”.[277] A common regulator would also have national administrative and governance costs (such as the CCMR’s proposed Council of Ministers and Administrative Tribunal). Therefore, even a self-funding common regulator would have considerable operational costs and fees would not be insignificant.

If the federal government were to establish a free-standing federal systemic risk regulator (instead of pursuing a common regulator with systemic risk regulation included), such systemic risk regulator would not have access to the same day-to-day revenue streams that the Commissions have. Conversely, it would have substantial expenses, given its potential data collection obligations, its national reach, and the complex nature of systemic risk itself.[278]

2. Market Efficiency and Regulatory Efficiency

Fostering fair and efficient capital markets is a key priority for securities regulators, as is discharging regulatory responsibilities in an efficient and effective manner. Fostering market efficiency and regulatory efficiency are two distinct, if connected, objectives.

With regard to market efficiency, aspects of the 1995 *Efficiencies Report* remain instructive today.[279] One source of inefficiency noted by the Report is violations of securities regulation, both inadvertent and deliberate. Inadvertent violations, with consequent inefficiencies, could be caused by excessive compliance burdens among other things, while deliberate violators may be able to avoid sanctions merely by operating in another province.[280]

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[277] Department of Finance, *Amended Agreement in Principle to Move Towards a Cooperative Capital Markets Regulatory System* (July 9, 2014) *[Amended Agreement in Principle]* at ss. 2, 5.3. The *Agreement* also states that “each regulatory office should continue to provide the range of services that it does today … and the employment of current staff in that office would continue”. *Ibid*., at s. 5.3.

[278] Of course there are different potential costs — to Canadian markets and the Canadian economy — of not having a systemic risk regulator.

[279] *Report of the Task Force on Operational Efficiencies in the Administration of Securities Regulation* (June 19, 1995) 18 O.S.C.B. 2971 at 2972 [*Efficiencies Report*].

[280] This concern has decreased somewhat through the operation of the reciprocal enforcement system — see Chapter 14 Enforcement, 14.06 Reciprocal Orders.

Another source of inefficiency in a decentralized system, both for the market and for the regulatory system as a whole, is procedural variation across jurisdictions.[281]

A common regulator such as the proposed CCMR would not automatically respond to the problem of inadvertent violations caused by an excessive compliance burden. However, there could be some efficiency benefits to be gained, in terms of sanctioning deliberate violators and further harmonizing procedures and technical requirements.

Anita Anand and Peter Klein set out several criteria for evaluating inefficiencies in a decentralized system: (1) lack of harmonization; (2) duplication; (3) opportunity cost risk; and (4) uncertainty.[282] Lack of harmonization is caused by a lack of "structural uniformity" (the processes of implementing securities regulation) and "substantive uniformity" (the substance of securities law). These give rise to other inefficiency problems. Duplication and delay are major contributors to inefficiency, particularly for smaller issuers. Uncertainty over a model for improving the system is problematic, as are the uncertainties caused by proposed innovations in different jurisdictions. "Dynamic efficiency" is also important, as it "seeks to ensure that a market remains efficient as it changes through time. This requires flexibility in a regulatory regime."[283] Flexibility is hampered by factors such as lack of harmonization, duplication and uncertainty.

While the Passport System is a great improvement on what came before, it still contains some inefficiencies and inconsistencies.[284] A common system like the CCMR could bring additional consistency for participating jurisdictions, in areas such as exemptions and enforcement. Having a single regulator could also achieve greater consistency in the use of discretion, which would reduce duplication and increase predictability and efficiency for market participants.[285]

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[281] This concern — well explained in the *Report of the Task Force on Operational Efficiencies in the Administration of Securities Regulation* (June 19, 1995) 18 O.S.C.B. 2971 at 2972 [*Efficiencies Report*] – is no longer as much of an issue, given the tremendous strides of cooperation and harmonization through National Instruments, the Passport System, and other initiatives.

[282] These factors, and the discussion in the remainder of the paragraph is from Anita I. Anand & Peter Charles Klein, "Inefficiency and Path Dependency in Canada's Securities Regulatory System: Towards a Reform Agenda" (2005) 42 Can. Bus. L.J. 41 at 43-51.

[283] *Ibid.*, at 50.

[284] Ontario's participation would be a significant step toward addressing many of the remaining inefficiencies and inconsistencies.

[285] To the extent that discretionary decisions would continue to be made at the local level in the planned multiple regional offices, this type of consistency seems unlikely to materialize.

A common system as envisioned by the CCMR, with identical legislative requirements, would also likely be supported by a single adjudicative body to ensure consistency.[286]

Whether a common regulator would improve the existing approach in efficiency terms would depend on its structure and implementation. One problem is obtaining sufficient and sufficiently comprehensive participation from the provinces. For example, a province could condition its participation in a common system on preserving its autonomy over certain areas. If enough "participating" jurisdictions did this in enough areas, the resulting common system would only be an extra administrative layer with limited effective authority.[287] This would discourage issuers and hurt Canada's markets and investors. Therefore, if a common system proposal allows regional flexibility — as it should — there must be safeguards to ensure that regional autonomy does not outweigh the collective interest in a viable common regime.

The comprehensiveness and effectiveness of links between a common regulator and non-participating jurisdictions — or between a free-standing systemic risk regulator and the Commissions — would also affect regulatory efficiency, and Canadian jurisdictions' ability to foster fair and efficient capital markets.

3. Level of Bureaucracy

The bureaucratic aspects of regulatory efficiency relate to staffing and infrastructure. A common regulator such as the proposed CCMR would need to establish its own bureaucracy. The CCMR proposal anticipates that each participating jurisdiction would have a regulatory office that "should continue to provide the range of services that it does today with local decision making authority within national standards and the employment of current staff in that office would continue".[288] This is

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[286] On balance, we support the *Amended Agreement in Principle*'s recommendation to establish an independent tribunal, separate from the regulatory body itself, provided that there also exists a "regulatory forum" along the lines earlier contemplated by the CSTO (and identified in the *Amended Agreement in Principle*), to ensure the tribunal remains connected to the policy concerns of the regulatory body as a whole. In the absence of a single adjudicative body, a common appellate body could achieve some of the same effect.

[287] For example, in 1996, the IDA (one of IIROC's predecessor bodies) imposed the following conditions on supporting a national system: there should be no residual involvement by participating provinces (except in limited regional matters); and there should be a commitment to ensure regional and investor protection concerns do not outweigh efficiency concerns (IDA, "Position Paper: Canadian Securities Commission," April 1996).

[288] Department of Finance, *Amended Agreement in Principle to Move Towards a Cooperative Capital Markets Regulatory System* (July 9, 2014) *[Amended Agreement in Principle]*, s. 5.3.

important to maintain expertise and ensure a smooth transition to a new model, and also perhaps to help encourage jurisdictions to participate. However, it suggests that much potential role overlap across jurisdictions will not be resolved right away, if at all. If, as seems likely, there would be one or more non-participating jurisdictions, the need to integrate their operations with the CCMR's would create additional bureaucratic costs.[289] It is difficult to determine if the proposed CCMR or a similar model would represent increased or decreased bureaucracy relative to the existing decentralized model.

Following the *Reference* decision, it seems unlikely there would be a fourteenth securities regulator in Canada (a federal regulator), although there may still be a fourteenth regulator if the federal government were to exercise its jurisdiction over systemic risk and national data collection. The degree of additional, unhelpful regulatory burden imposed would depend on the effectiveness of the integration between that regulator and a single regulator or among that regulator, a common regulator and non-participating jurisdictions. Commission reactions to a federal systemic risk regulator could range from consent and cooperation to fundamental opposition, with coordination costs varying as a result.

If the federal systemic risk regulator had to generate its own data without Commission assistance, duplication and additional bureaucracy could be the result. On the other hand, the *Reference* may have generated an opportunity for Canada to create a unique kind of regulator, based on increased federal-provincial negotiation and cooperation.[290] This could have the potential to meld local and national concerns in effective ways without increasing duplication or overlapping bureaucracy.

4. Opportunity to Update and Reform Securities Regulation

Harmonization through National and Multilateral Instruments and Policies has improved Canadian securities regulation over the past several years. Much of the duplication, disarray, and non-standardized definitions of the previous era have been mitigated. While the CSA's admirable harmonization efforts can and should be continued, harmonization efforts do not alter the fact that the system is not perfect. For example, National

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This seems to be a commitment to retain at least a substantial portion of existing Commission staff for at least a significant period.

289 Such costs would be greater with a greater number of non-participating jurisdictions, exacerbated if those non-participating jurisdictions are themselves not harmonized with each other.

290 See *e.g.*, Cristie Ford & Hardeep Gill, "A National Systemic Risk Clearinghouse?" in Anita Anand, ed., *What's Next for Canada? Securities Regulation After the Reference* (Toronto: Irwin Law, 2012) at 145.

Instruments result from a lengthy process (although that lengthy process can also sometimes lead to a better product when regional perspectives are canvassed). Many provinces still maintain "carve-outs" for particular provisions, even in National (or Multilateral) Instruments. The overall result has been a complex and unintuitive collection of provincial legislation, National or Multilateral Instruments, Policies and Forms (sometimes with detailed appendices concerning the scope of coverage); provincial instruments and carve-outs, blanket orders and, sometimes, additional provincial rules or regulations. The fact that the law is fractured across different legislative instruments makes it difficult to understand, and unwieldy to work with.[291] Moreover, the limitations of the CSA that the *Crawford Report* identified in 2003 persist.[292]

If Canadian jurisdictions were to change the regulatory regime for securities, it could be an opportunity to revise, update and consolidate the securities laws. Any new model would ideally want to avoid U.S.-style pitfalls. The United States has the most complicated and highly regulated securities system in the world. Although the SEC regulates nationally, each state also has a role.[293] The basic 1933 and 1934 U.S. Acts have seen a plethora of modifications and additions. Canada has the opportunity to develop a system with some of the U.S. advantages (a system with extensive coverage, which still maintains regional flexibility), without its major disadvantage (excessive complexity due to over-regulation built on an outdated base). However, the possibility still exists that as a pre-condition to participation, some provinces would demand retaining autonomy over certain aspects of securities regulation, resulting in an undesirable plethora of regulation.[294]

The CCMR contemplates that each participating provincial jurisdiction would enact an identical provincial statute. Identical Acts would automatically eliminate much duplication. For example, definitions could be standardized across the jurisdictions and legislation could be altered to reflect

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291 While consolidation and updating of provincial statutes has improved in recent years, this has also been a serious concern at times: see, *e.g.*, Crawford Panel, *A Blueprint for A New Model: A Discussion Paper by the Crawford Panel on A Single Canadian Securities Regulator* (Toronto: Government of Ontario, 2005) at 16.

292 See 17.02 Outline of Various National Securities System or Reform Initiatives, F. 2001 to 2006, 4. Crawford Report.

293 For more details, see Joel Seligman, "The United States Federal-State Model of Securities Regulation" in Wise Person's Committee, *It's Time: Wise Person's Committee to review the structure of securities regulation in Canada* (Ottawa: Department of Finance, 2003) at 77.

294 See John B. Laskin and Darryl C. Patterson, "Moving Forward after the *Securities Act Reference*: The Future of Securities Regulation in Canada" (2012) 1:1 Com. Litig. & Arb. Rev. 5 at 10.

technological advances.[295] Any other jurisdiction that chose to participate in the CCMR after the initial uniform legislation was enacted in those jurisdictions would have less scope to influence it (except that some amendments may be made as part of that new jurisdiction agreeing to join).

If there were to be initial new securities laws under a common regulator such as the CCMR, the issue of updating legislation and passing regulations would depend on important mechanical questions. Moving to a more platform statute and leaving details to subordinate legislation could reduce the reliance on provincial legislatures, if the central regulator were empowered to make rules.

For the proposed CCMR, for example, the *Amended* Agreement in Principle contemplates that the Council of Ministers (comprising the federal Minister of Finance and the relevant ministers from all participating jurisdictions) would be the only body within the CCMR authorized to propose legislative amendments — and, indeed, provincial legislative amendments would require the Council's approval.[296] The Council would only request that the board consider regulatory changes, and approve those changes. In contrast, more fundamental changes to the terms of the agreement between the parties, or to the CCMR, would have to be approved by the Council. The degree of consent needed varies by subject matter.[297]

Difficulties would, of course, also continue to exist with continued harmonization in a decentralized system. Proponents of a more decentralized system have also argued that decentralized but coordinated regulatory systems can learn from each other, and thereby improve their practices, more effectively than a unified regulator.[298] If the CCMR does not succeed, the CSA would seem to be the most pragmatic option for continuing to reform Canadian securities legislation as needed.

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[295] Such features can be seen in the Minister of Finance, *Proposed Canadian Securities Act*, online: <http://www.fin.gc.ca/drleg-apl/csa-lvm.pdf>, which would have harmonized definitions across all jurisdictions (including non-participating jurisdictions) and would have created a system for regulating exchange-traded derivatives. The securities-related provisions in the *Criminal Code of Canada* and even the *Canada Business Corporations Act* could also be incorporated into the complementary new federal securities legislation.

[296] Department of Finance, *Amended Agreement in Principle to Move Towards a Cooperative Capital Markets Regulatory System* (July 9, 2014) *[Amended Agreement in Principle]* at s. 3.5.

[297] *Ibid*. at ss. 3.2, 3.5, 3.6 and 3.7.

[298] See, *e.g*., Jeffrey MacIntosh, "Canada's Passport to Regulatory Competition", *National Post* (March 18, 2004). Perhaps the best-known argument in favour of cross-jurisdictional regulatory competition in securities regulation is Roberta Romano, "Empowering Investors: A Market Approach to Securities Regulation" (1998) 107 Yale L. J. 2359.

5. Costs and Risks Associated with Change

While considerable resources have been allocated to establishing first a national, and now a common, capital markets regulator for Canada, these are sunk costs that will not be recouped no matter what decisions are taken in future. Actually creating a CCMR will incur additional costs and raise new risks, and having to integrate the CCMR's activities with non-participating jurisdictions would present additional risks. Developing a national systemic risk regulator for the securities markets (a new entity or within an existing entity), and integrating it in some fashion with existing provincial securities regimes, would involve less change to the securities regulatory system itself (though potentially not less risk, in terms of integration challenges).

The main advantage to foregoing a common system would be avoiding the risk of more large-scale regulatory change. Even if a common, nation-wide system were unanimously considered the best route, it is onerous to change a complicated administrative system. For this reason, some argue that (partial) reform should be sought through increased cooperation and coordination of the existing system.[299] There is no guarantee that a common system would be properly planned or implemented, in a way that avoids causing a separate set of problems. Provinces, policy makers, and scholars differ on whether the marginal benefits of a common regulatory regime outweigh the marginal benefits of continuing with interprovincial cooperation (with or without a federal role in managing systemic risk).

6. Criminal Jurisdiction and Regulatory Jurisdiction

Proponents of a common or unified system point to enhanced enforcement as a key potential benefit of such a system.[300] There are three avenues for enforcement: administrative, quasi-criminal and criminal.[301] Increased harmonization or a common regulator with no federal

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[299] See, *e.g.*, Jeffrey G. MacIntosh, "A National Securities Commission? The Headless Horseman Rides Again"; and Stéphane Rousseau, "The Provinces' Competence over Securities Regulation in Canada: Taking Stock of the Supreme Court's Opinion" in Anita Anand, ed., *What's Next for Canada? Securities Regulation After the Reference* (Toronto: Irwin Law, 2012) at 223 and 279 respectively.

[300] This would somewhat address what some consider a "Canadian market discount" arising in part from the disjointed nature of securities law enforcement across the country. See, *e.g.*, Peter Cory & Marilyn Pilkington, Research Report prepared for the Task Force to Modernize Securities Legislation, "Critical Issues in Enforcement", *Canada Steps Up* (2005).

[301] Chapter 14 Enforcement, 14.04 Administrative Sanctions, 14.08 Penal (Quasi-criminal) Sanctions, 14.09 Criminal Code Offences..

involvement could have a direct impact on the first two. A national regulator, a single regulator, or a common regulator with federal involvement could affect the third. For example, the CSTO envisioned stronger criminal enforcement as an advantage that would have flowed from implementation of the Proposed Act, which incorporated criminal law provisions. The office's Transition Plan stated that "these offences are harmonized with the provisions for general regulatory obligations and regulatory offences". The CSTO envisioned that "significant cooperation and coordination among police and regulatory and prosecution authorities" would move on the most appropriate path and in a timely way. It was also anticipated that the CSRA (the national regulator that would have been created under the Proposed Act) would have worked to have some Commission enforcement staff qualified to conduct securities-related criminal investigations.[302]

Some of this may still be relevant under the current CCMR proposal. In particular, the federal government intends to delegate its criminal law power in the capital markets area to the CCMR.[303] The *Amended Agreement in Principle* is silent as to what coordination and cooperation steps would be undertaken under the CCMR model, or what the scope would be of the "complementary" federal legislation, relative to what the Proposed Act would have tried to accomplish.[304]

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[302] CSTO, "Transition Plan for the Canadian Securities Regulatory Authority," July 12, 2010 at 9. Note that there are potential issues when Commission staff gather information using their extensive powers under securities laws, with the potential for passing that information to police or prosecutors for criminal-offence purposes, because the information may not have been gathered in accordance with Charter rights. See, for example, *R. v Jarvis*, [2002] S.C.J. No. 76, [2002] 3 S.C.R. 757 at para. 84 (S.C.C.) (also discussed in Chapter 4 Machinery, 4.06 Charter Issues, D. Section 8 (Protection from "Unreasonable Search or Seizure")). And see Glen Jennings and Catherine Weiler, "Regulatory Investigations: Applying *Jarvis* in the Securities Context", online: <http://www.gowlings.com/KnowledgeCentre/PublicationPDFs/20120709_ Regulatory-Investigations-Applying-Jarvis-in-the-Securities-Context.PDF> at 11 and 15; see also David Stratas, ""Crossing the Rubicon": The Supreme Court and Regulatory Investigations" (2002) 6 CR (6th) 74.

[303] Department of Finance, *Amended Agreement in Principle to Move Towards a Cooperative Capital Markets Regulatory System* (July 9, 2014) *[Amended Agreement in Principle]*, at ss. 1.1, 2 respectively.

[304] Another type of approach could be a new, dedicated capital markets enforcement agency, which would incorporate what is now the jurisdiction of the Integrated Market Enforcement Teams under the RCMP (although this proposal is apparently not being pursued). See Poonam Puri, "A Model for Common Enforcement in Canada: The Canadian Capital Markets Enforcement Agency and the Canadian Securities Hearing Tribunal", Research Study prepared for the Expert Panel on Securities Regulation, *Creating an Advantage in Global Capital Markets: Final Report and Recommendations* (Ottawa: Department of Finance Canada, 2009) at 10-15. Puri also argued for a new independent adjudicative tribunal for hearing regulatory matters, a proposal that in broad terms has been pursued by the Hockin Panel and subsequent initiatives.

7. Location of Head Office

A national, single or common securities regulator would need a head office and regional offices. The location of these offices has been a contentious political issue in the past. All administration for a country of such great size and numerous time zones cannot be in a single location. Therefore, the issues are: the location of the head office; the number and location of the regional offices; and the functions of each. With a large number of offices, the administrative cost savings might be nominal compared to the current system.

Previous proposals (whether proposing a national securities regulator or a cooperatively established common regulator) took different approaches to this issue. CANSEC proposed a formal head office in Ottawa (likely nominal), a chief executive office in Toronto, and chief regional offices in centres with substantial securities business. It also envisioned "offices with more limited functions in each of the other provinces as required".[305] The *1979 Proposals* also anticipated regional offices across the country, or at least administrators in regions with a high workload.[306] Under the *1994 Proposal*, the CSC's head office would have been in Toronto,[307] with regional offices in British Columbia, Alberta and one of the Atlantic Provinces.[308] Other provinces might have "local representation", if justified by demand and costs.[309] The *WPC Report* envisioned a central office in the National Capital Region, with several regional offices performing most day-to-day functions.[310] The *Crawford Common Regulator Discussion Paper* proposed a larger head office role (at an undetermined location), with specialized regional offices where appropriate.[311] The CSTO's proposal under the Proposed Act would have

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305 "CANSEC" (November 1967) O.S.C.B. at 65.

306 Canada, Department of Consumer and Corporate Affairs, *Proposals for a Securities Market Law for Canada*, 3 Vols. (Ottawa, 1979), Vol. 2 at 332.

307 *Memorandum of Understanding Regarding the Regulation of Securities in Canada* (1994) 17 O.S.C.B. 4401, s. 15 [*1994 Proposal*].

308 *1994 Proposal*, *ibid*., s. 21. The *1994 Proposal* also outlined the services to be provided by regional offices, "subject to *sufficient demand, expertise* and *cost effectiveness*": registering market participants (unless handled by self-regulatory organizations); handling investor complaints; handling regional enforcement and compliance matters; holding regional hearings; granting routine exemptions from the federal legislation; clearing regionally-oriented prospectuses; providing information on file; providing policy input, especially on regional matters; and any additional services decided upon by the CSC. *1994 Proposal*, *ibid*., s. 21 (original emphasis).

309 *1994 Proposal*, *ibid*., s. 23.

310 Wise Person's Committee, *It's Time: Wise Person's Committee to review the structure of securities regulation in Canada* (Ottawa: Department of Finance, 2003) at 58.

311 Crawford Panel, *A Blueprint for A New Model: A Discussion Paper by the Crawford Panel on A Single Canadian Securities Regulator* (Toronto: Government of Ontario, 2005).

been for a "geographically distributed" Canadian securities regulatory organization with "highly mobile" executive leadership and senior management teams situated in local offices across the country.[312]

Relative to earlier agreements, the *Amended Agreement in Principle* has perhaps had a simpler task as it was entered into initially between only two, then four, provincial jurisdictions. As noted above, the CCMR would establish regional offices that provide the full range of local services that Commissions provide today, and staff employment in those offices would continue. In addition, however, the Agreement locates an "effective executive head office" for the CCMR's regulatory component in Toronto, with a "nationally integrated executive management team" and regulatory offices in each participating provincial jurisdiction.[313]

This arrangement is designed not to be reopened easily: "any relocation of geographic-specific elements and functions" under the Agreement constitutes a "fundamental change", which requires the approval of the federal Minister of Finance and the relevant minister from each capital markets jurisdiction.[314] While contentious, the decision to locate a head office in the largest financial centre in the country makes some logistical sense. However, it provides less comfort to other provinces that may be concerned about the dominance of Toronto or Ontario within a capital markets system. In practical terms, enforcement in particular must have a sufficient presence "on the ground" in regional centres.

8. Language Concerns

Any federally-established securities regulator would likely have had to comply with the *Official Languages Act*. Although this is no longer a likely possibility, complementary federal legislation passed pursuant to the CCMR's *Amended Agreement in Principle* would also be subject to that Act, as would regulations made under it — even though regulatory power would be exercised by the joint provincial-federal regulatory body. To the extent that the regulatory power the CCMR exercised derived from federal power, any instruments passed would have to be made in both official languages.[315] To the extent that the CCMR's adjudicative tribunal

312 CSTO, "Transition Plan for the Canadian Securities Regulatory Authority" (July 12, 2010) at 29.

313 Department of Finance, *Amended Agreement in Principle to Move Towards a Cooperative Capital Markets Regulatory System* (July 9, 2014) [*Amended Agreement in Principle*], ss. 5.3 and 5.5.

314 *Amended Agreement in Principle*, *ibid*., s. 3.7.

315 See *Official Languages Act*, R.S.C. 1985, c. 31 (4th Supp.), ss. 6, 7; see also ss. 10(2), (3) (governing federal-provincial agreements and attendant regulations), 12 (instruments directed to the public).

carried out adjudicative functions and was established pursuant to the complementary federal legislation, the Act would apply to its operations as well.[316] One scholar has suggested that compliance with the *Official Languages Act* could create problems with staffing for a common regulator, if there are not enough bilingual adjudicators to comply with that Act while maintaining adequate expertise.[317]

Since the *Official Languages Act* is an Act of Parliament, it does not apply to the provincial legislatures that would pass the securities regulatory components underpinning the CCMR. Nevertheless, given the joint delegation of powers to the CCMR, the *Amended* Agreement in Principle contemplates that the CCMR's adjudicative tribunal would be able to conduct hearings in both languages.[318]

It is probably unlikely that federal involvement in the CCMR would require all issuer filings also to be in both English and French. Even in speaking of its earlier proposed national regulator, the CSTO stated that "no translation requirements on reporting issuers will be imposed beyond the requirements that exist today".[319] This seems even more likely under the CCMR model. If the complementary federal legislation is structured so as to have clearly delineated boundaries vis-à-vis the public, and so that the main aspects of day-to-day securities regulation are covered under provincial legislation (as they are required to be anyway), the scope of the *Official Languages Act* would seem not to apply to issuer disclosure documents. This would be beneficial for issuers which make the business decision not to offer securities in Québec. If they choose to do so, then they should have to file French documents.[320] Since Québec seems likely

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316 *Ibid*., at s. 3(2) (definition of "federal court"); Part III (administration of justice).

317 Jeffrey G. MacIntosh, "A National Securities Commission? The Headless Horseman Rides Again" in Anita Anand, ed., *What's Next for Canada? Securities Regulation After the Reference* (Toronto: Irwin Law, 2012) at 223. MacIntosh notes that this would not be a problem if Québec signed on, while recognizing that this will likely never occur.

318 Department of Finance, *Amended Agreement in Principle to Move Towards a Cooperative Capital Markets Regulatory System* (July 9, 2014), s. 5.5 [*Amended Agreement in Principle*]. The *Amended Agreement in Principle* is silent as to whether the regulator would operate in both official languages; likely it would have to, to the degree that it was exercising federally-derived powers. The CSTO's earlier proposal, which would have established a genuinely national regulator under federal jurisdiction, stated, that "[l]ocal offices will provide a high level of service to investors and market participants that is respectful of federal and provincial language laws" and that "documentation prepared by [that national regulator] for the public will be made available in both official languages". CSTO, "Transition Plan for the Canadian Securities Regulatory Authority", July 12, 2010 at 29 [*Transition Plan*].

319 "Transition Plan", *ibid*.

320 Issuers will weigh the size and attractiveness of the Québec market against the difficulties of translation. In many cases, they will still choose to distribute into Québec. Some, however, especially smaller and less affluent issuers, may decide not to distribute into Québec.
As a political matter, it is unlikely that a national, single or common securities system would mandate French for all documents. For a precedent, see Chapter 11 Takeover Bids, 11.04

not to agree to the CCMR in any event, it would not be in a position to exercise countervailing political pressure in favour of dual language disclosure documents.

9. Transitional Challenges

Even if a national, single or common securities system eventually functioned well, that might not entirely compensate for the disastrous effects of a poorly planned or executed transitional strategy. Such a transition would cause delays, uncertainty and confusion, possibly driving away issuers in the short-term. To avoid imposing excessive costs on Canadian market participants, any transition to an integrated regime would have to be transparent and almost perfectly seamless.

In July 2010, before the *Reference* decision, the CSTO developed a comprehensive transition plan for its proposed move to a national securities regulator. Among other things it would have allowed provincial regulatory staff to find employment at the new national regulator, and would have created a division of Change Management and Integration to manage business process transition. The new regulator would have adopted existing National Instruments as its own regulations, and would have worked to resolve any non-harmonized elements. It would have put in place a set of "legal continuity principles" to address issues that were outstanding as of the effective date of the transition.[321] While the CSTO's plan is no longer operative, it provides a foundation for discussing the kinds of transition issues that would have to be addressed in a move to a common regulator. Another source of relevant experience could be the U.K.'s FSA, which transitioned to a single unified (securities/banking/insurance) regulator in 2000 (only to be split into two separately constituted regulators in April 2013).[322]

The *Amended Agreement in Principle* contemplates that the CCMR's participating jurisdictions' ministers would form a committee to oversee transition and implementation. That committee "would establish and supervise an implementation team which would deal with the day-to-day transition and implementation of the Cooperative System", and that implementation team would "work collaboratively with all Participating

Exemptions from TOB Regulation, D. Foreign Takeover Bids (foreign issuer bid materials may be prepared in English only if not directed to Québec, but must be in French or French and English if directed to Québec).

321 See CSTO, "Transition Plan for the Canadian Securities Regulatory Authority," July 12, 2010, especially at 30-53.

322 See the discussion of the FSA in Chapter 21 Outstanding Issues, 21.02 Institutional Arrangements in Capital Markets Regulation.

Jurisdictions" and report at least monthly to the Ministers' oversight committee.[323] The employment of existing participating jurisdictions' Commission staff would be continued.[324]

D. Political Concerns

1. Balancing Regional and National Concerns

One view is that increased provincial coordination could be more efficient and flexible than a national regulator, and would also enhance regional autonomy, with a national regulator potentially creating heavy bureaucratic costs and sacrificing the independent and flexible nature of the current securities systems.[325] This reasoning presupposes regional autonomy and the resulting flexibility are desirable in their own right, and that these would be better and more efficiently provided in a coordinated model than a national, single or common regulator model.

Whether regional autonomy is a desirable goal in its own right is connected to both policy and politics. In policy terms, a more nationally integrated system may better reflect the nature of modern securities markets. Canada's capital markets have changed considerably in recent decades, and even in recent years. Trading in securities increasingly takes place in the secondary market, and across provincial and international boundaries.[326] The securities market has also become complex and interconnected, giving rise to uniquely national (or international, but generally not just provincial) risks, as seen in the 2007 asset-backed commercial paper crisis in Canada[327] or the GFC more generally.

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323 Department of Finance, *Amended Agreement in Principle to Move Towards a Cooperative Capital Markets Regulatory System* (July 9, 2014) [*Amended Agreement in Principle*], s. 6.2.

324 *Amended Agreement in Principle*, *ibid*., at s. 5.3.

325 See, for example, the response of some participants contained in the *Report to the Standing Senate Committee on Banking, Trade and Commerce on the Transaction Costs of a Decentralized System of Securities Regulation* (Ottawa: April 1996), Appendix 9 at 13, 18; Appendix 10 at 8 [*Transactions Costs Report*]. For example, a national system "would be more ponderous, embodying the worst of current provincial regulations"; "A national system will only add another level of bureaucratic hurdles to the securities system. Our current system is efficient and very responsive. Please leave it alone!"; and "Generally, the consequence of central regulation in Canada is that the system is inefficient and as does not produce good results [*sic*]. Instead, with multiple securities commissions, there is certain concurrence among the commissions which produces better efficiency".

326 Anita Anand, "Introduction" in Anita Anand, ed., *What's Next for Canada? Securities Regulation After the Reference* (Toronto: Irwin Law, 2012) at 2.

327 See Appendix B, "The ABCP Crisis in Canada: Implications for the Regulation of Financial Markets".

A common securities regulator, empowered by and responsible for implementing a common legislative framework, is likely to be in the best position to react to these common challenges, including important policy concerns concerning systemic risk.

On the other hand, particular provincial markets have distinct features, and their regulators have distinct areas of expertise.[328] British Columbia, for example, is a hub for small and early stage issuers, particularly in the resource sector. Alberta is home to the extremely capital-intensive oil and gas sector, often involving junior issuers and start-up companies. These provinces' respective Commissions have particular depths of expertise in these areas.

The desirability of regional autonomy and consequent system flexibility is also a highly charged political question. Particularly in Québec, the question of a common securities regulator is seen through the lens of the historic deal made, at the time of Confederation, between the provinces of what became Canada. In Alberta, the prospect of a common regulator — even though not a national one — is viewed with the sense that Alberta's capital market is different and with a conviction that Alberta alone is best able to address these differences. Continued interprovincial cooperation has the advantage of respecting these provinces' views to a degree that potentially is not possible within a workable common regulatory regime (that is, one without too many regional carve-outs). This goes beyond efficiency; rather, it involves an assessment of the degree to which Canadian securities markets are, or can become, a coherent object of regulation at a larger geographical scale.

The question of how to balance regional concerns and national regulation is not easily resolved. The CCMR anticipates general legislation, with details in the rules — this would mean that battles about regional carve-outs would be held at the level of regulation-making stage and in the Council of Ministers. If regional offices were not granted enough autonomy to respond to local concerns and to address enforcement issues, this would produce frustration and inefficiency. (If regional offices were granted too much autonomy, the potential benefits of a common system would be reduced or even eliminated.)

The CCMR would have an "effective executive head office" in Toronto, with Deputy Chief Regulators and executive management and staff in other regulatory offices. The voting structure at the Council of

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[328] See, *e.g.*, John McCoach, "TSX Venture Exchange Value Proposition", *BCSC Capital Ideas*, October 26, 2010, BCSCn, online: <http://www.bcsc.bc.ca/uploadedFiles/news/capital_ideas/John%20McCoach%20Powerpoint%20-%20Capital%20Ideas.pdf>; but, see Poonam Puri, "Local and Regional Interests in the Debate on Optimal Securities Regulatory Structure" Report prepared for the Wise Persons Committee (October 7, 2003).

Ministers level suggests that ultimate decision-making power would remain with the federal government and the major capital markets jurisdictions, and decisions would require a high level of consensus among them. As between the major capital markets jurisdictions (those representing at least ten per cent of the national gross domestic product deriving from financial services), the *Amended Agreement in Principle* treats British Columbia (and would treat Alberta or Québec, were they to join) on the same footing as Ontario. In addition, the language of the *Amended Agreement in Principle* explicitly references regional interests and the need to balance them with national objectives, although its overall purpose is explicitly to use "national standards reflected in cooperatively-developed regulations consistently applied".[329]

2. Links with Non-Participating Jurisdictions

Participation in a national, single or common regulator is, at its most basic, a political decision by the respective provincial governments — which is why there may never be a national or single regulator. Assuming that not all provincial jurisdictions choose to participate in the CCMR, some link or connection between them will be required, perhaps modelled on Ontario's link with the other jurisdictions in the Passport System context. If there were a separate federal systemic risk regulator, that would also require a link to the Commissions.

The *Amended Agreement in Principle* says only that the CCMR "will use its best efforts to negotiate and implement an interface mechanism with each jurisdiction that is not a Participating Jurisdiction such that the cooperative capital markets regulatory system contemplated by this Agreement is, effectively, of national application."[330] The relative strength of the CCMR's bargaining position would depend on how many non-participating jurisdictions there were, but the fact that the CCMR represents a significant portion of Canada's capital market activity may weigh in its favour.

3. Canada's International Voice

Assuming non-participating provinces or territories do not seriously contest a common regulator's legitimacy at the international level, it

[329] Department of Finance, *Amended Agreement in Principle to Move Towards a Cooperative Capital Markets Regulatory System* (July 9, 2014) [*Amended Agreement in Principle*], respectively ss. 3.3, 5.2, 5.3, 1.1.
[330] *Amended Agreement in Principle*, *ibid*., at s. 6.5.

would allow Canada to speak with a single voice in international fora such as IOSCO.[331] This is explicitly contemplated in the *Amended Agreement in Principle*.[332] Canada would benefit from having a regulator that could speak credibly for Canada in international fora. However, it seems likely that a common regulator with only two participating provinces (as currently constituting the proposed CCMR) would not have as much legitimacy as one with broader participation. Of course, the involvement of the federal government would be helpful in international financial conversations that also include banking, insurance, and macro-economic fiscal policy. If the CCMR proceeds, it is not known at this time what role non-participating provinces may play in international fora (broader participation in the CCMR would likely lead to less representation in international fora).[333]

4. Lack of Political Will

The advantages of a common securities regulator diminish as fewer provinces are willing to take part in such a system. Before the *Agreement in Principle* was announced, with only British Columbia and Ontario participating, the federal government had indicated that it was only willing to advance a cooperative approach to creating a common securities regulator if a "critical mass" of provinces participated. While it is unclear which provinces in addition to Saskatchewan and New Brunswick may sign onto the *Amended Agreement in Principle*, neither Alberta nor Québec has done so as of this writing.[334]

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331 At present, each of the ASC, BCSCn, OSC and Québec's AMF are "ordinary" members of IOSCO. There are 124 ordinary members in total.

332 Department of Finance, *Amended Agreement in Principle to Move Towards a Cooperative Capital Markets Regulatory System* (July 9, 2014) [*Amended Agreement in Principle*], ss. 1.1, 2, 5.2, 5.3.

333 IOSCO's website says, that "[e]ach ordinary member of the Organization is a member of the Presidents Committee and has one vote at meetings of that Committee and any other Committees to which they belong. The Presidents Committee meets yearly at the annual conference." However, "In the case of a country where the subdivisions have exclusive jurisdiction over securities, the regulatory bodies of the subdivisions of that country that are ordinary members shall have a maximum of three votes for all the subdivisions together in elections in meetings of the Presidents Committee, IOSCO Board, Growth and Emerging Markets Committee, Regional Committees, and in meetings of any other committee or on any other occasion where elections are held." IOSCO, "Membership Categories and Criteria", online: <http://www.iosco.org/about/index.cfm?section=membership>.

334 Québec's longstanding opposition to a national regulatory regime is well-known. While there had been some suggestion that Alberta would be willing to support the delegated responsibility model, more recent statements made by Alberta's Minister of Finance in response to the federal budget suggest otherwise. On March 27, 2013, the Minister stated that while Alberta was willing to discuss increased cooperation with the federal government,

E. Conclusion

The main advantages of a common system like the proposed CCMR would include the potential for increased efficiency and consistency, decreased duplication and cost, and greater capacity to deal with issues of nation-wide import and impact. Nevertheless, a badly planned or implemented common system would have the opposite effects, with harmful consequences for Canadian markets and investors. Particularly if the common system has a low level of provincial participation, Canada's regulatory regime could end up more cumbersome, less transparent, and less effective than a high-functioning decentralized regime (whether or not accompanied by a federal systemic risk regulation function).

A common system's main disadvantages stem from the dangers of centralizing control over diverse markets and regions. Unless this centralization is balanced by regional interests, the current flexibility and responsiveness could be lost. At the level of both politics and policy, achieving an appropriate balance between regional autonomy and nation-wide regulatory capacity would be a delicate undertaking.

Many of the disadvantages of a decentralized approach are essentially the converse of the advantages of a common securities regulator. Even given the substantial harmonization achieved thus far, there is a limit to the ability of increased coordination to address inconsistencies among the provinces.[335]

Inconsistencies become more problematic as the increasingly internationalized environment pressures domestic systems to be efficient and effective.[336] Canada could manage adequately by increasing the current cooperative efforts among the provinces, if only the domestic markets had to be considered. However, international markets view (or want to view) Canada as a single market. Those pressures from international markets have already pushed Canada to improve the quality and efficiency of its securities regulation. While provinces concur on the general need for coordination, this approach becomes practically difficult when confronting more controversial

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the prospect of a single regulator with one office is "off the table" and that Alberta would prefer to improve the current Passport System: Alastair Sharp, "Alberta wants securities regulation to stay with provinces", *Reuters Canada* (March 27, 2013). The resignation of the Province's Premier, Allison Redford, makes future steps unpredictable although Alberta's opposition to a national regulator has continued.

335 While some areas characterized as "inconsistencies" could be understood as "flexibilities", multiple instances of duplicated roles across several provinces cannot be.

336 See Chapter 20 International Issues.

areas, such as governance standards.[337] Whether sufficient progress can be achieved through continued efforts at interprovincial coordination is a question on which views differ.

The main advantages of increased coordination and harmonization going forward are that transitional disruptions could be minimized and regional differences particularly respected. The main disadvantage is that cooperation may not go far enough to solve satisfactorily Canada's current and future regulatory problems, including the separate problem of systemic risk.

Regardless of the ultimate resolution on the common securities regulator issue, the federal government has jurisdiction to manage systemic risk in the securities markets and to collect national data. Whether establishing a federal regulator with a limited mandate is the best available solution will depend not only on law and regulatory design choices, but on what is politically feasible.

While we cannot assume the federal government will act on its jurisdiction, the present government has expressed its intention to do so. Canada's international commitments to help manage systemic risk internationally, including through securities regulation, would encourage such a path. If the federal government does choose to exercise its jurisdiction, the crucial, difficult and interesting question may be how exactly a federal role will be able to coordinate with the provinces' jurisdiction over day-to-day securities regulation.

17.07 CONCLUSION

International and domestic pressures are pushing Canada to make changes to its current securities regulatory system. National system proposals have been made at intervals for many years. The *Reference* has forced proponents of a national regulator to rethink which options are politically and legally feasible.

A national regulator established unilaterally through federal legislation is no longer a likely option. The *Reference* leaves room for the federal government to find other solutions to implement a system with national (or at least extensive) reach, but the SCC was clear that any such developments must be the result of cooperation with the provinces. One option is the delegated authority model, with the federal government and

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[337] Christopher C. Nicholls, "The *Securities Reference*: A Comment" in *What's Next for Canada? Securities Regulation After the Reference*, Anita Anand, ed., (Toronto: Irwin Law, 2012) at 299 (noting "good faith and a cooperative spirit are not always enough").

willing provinces granting regulatory authority to a common capital markets regulator. However, it seems unlikely that a common regulator would have the support of all 10 provinces and three territories. Another alternative is to create a unique federal regulator charged with controlling systemic risk, while relying on the provinces to continue to coordinate among themselves the day-to-day operations of the securities markets. Given the federal government's stated intention to exercise its jurisdiction to manage systemic risk and engage in national data collection, it seems clear that we can anticipate at least some change from the regulatory status quo. It also seems clear that the path ahead will not be straightforward.