December 8, 2014

VIA E-MAIL
commentonlegislation@ccmr-ocrmc.ca

Dear Sir or Madam:

Re: Cooperative Capital Markets System: The Consultation Drafts of the Provincial Capital Markets Act (PCMA) and the Capital Markets Stability Act (CMSA)

Executive Summary

In witnessing major policy change, and the politics that come with it, it is easy for key stakeholders, in this case registrants and investors, to get forgotten. It is similar to a divorce, where an interpersonal battle ensues and the fight becomes nasty and based on power. The children, and their needs and best interests get lost in the mix. This proposal of the PCMA and CMSA, and the associated political maneuverings is reminiscent of that. The federal government, pushing its parental authority, created the proposed PCMA and CMSA. This proposal is a systematic threat to Canada's capital markets at a time where we need to be more innovative to compete globally. The political, regulatory and industry costs of this proposal could be insurmountable and possibly irreversible at a time in Canadian history that could not be more critical.

About Us

The National Exempt Market Association (NEMA) was originally founded in 2011 as the Western Exempt Market Association. We are an organization dedicated to the growth of the Canadian Exempt Market's public profile and the improvement of its reputation. Through our members, NEMA has firsthand insight and knowledge of the operation and corresponding needs of the Exempt Market in Canada. By nature, our members are generally small businesses that raise capital for other small businesses. As such, our members are much more vulnerable to changes in securities laws than larger firms and organizations who have the resources, both legal and financial, to absorb and adapt to such changes. NEMA appreciates the opportunity to comment on the proposed Co-operative Capital Markets System, specifically the PCMA and CMSA proposals.

(I) Reasons for a National Regulator

When asked, our members were generally in favor of a co-operative national regulator, <u>if</u> it resulted in: lower costs to them, increased efficiency, more cohesive communication, greater ease for compiling and enforcing compliance rules, better monitoring of registrants (especially ones that move or work across provinces), and increased fairness. Members also mentioned that Ontario was not what they considered, 'small business friendly,' so it concerns our members that they will lead the co-operative regulator. While it is true that the current MOU spells out that the larger markets have equal say (currently BC and Ontario), pragmatically it appears that the influence is almost fully weighted in favor of Ontario rules and systems.

NEMA agrees with the desired positive outcomes for a national regulator, but believes this proposal will not create such outcomes. Detailed in the Canadian policy makers and leaders draft proposal are positive outcomes. As stated in the proposal, the five benefits include greater efficiency, global competitiveness, facilitation of responsive and flexible capital raising, increased investor protection, and more effective enforcement. "Ontario has for many years taken a leadership role in the creation of a co-operative securities regulator because it is in the best interests of all provinces and will help our businesses grow."[1] stated the Minister of Finance for Ontario Charles Sousa to the mainstream media. Our appendix, an essay written by legal scholar Jeffrey MacIntosh details why these ourcomes cannot be achieved by this particular proposal.

(II) Systematic Risk

The main benefit of the proposed co-operative regulator being cited by Canadian policy makers and leaders is the reduction of systematic risk. It can be argued that these efforts, especially in terms of this current proposal, increase systematic risk. For the purposes of this letter, we are defining *systematic risk* in alignment with the Bank of Canada, as "…the probability that the financial system will not function as needed to support economic activity. Mitigating systemic risk is challenging because it requires identifying the essential elements of a complex, modern financial system. What are essential changes as the system evolves. In reducing some aspects of systemic risk, policy-makers will undoubtedly increase others."[2]

It may seem logical to look to other domiciles, like the EU and US, and emulate their regulatory framework. Unfortunately, this cannot work, as Canada has a small resource based economy, and issuers do not have the economies of scale to successfully mimic the bureaucratic structures of larger economies. To focus on success in Canada, our regulations need to be as flexible as possible, with accommodation of small business in mind. In addition, Canada is vast geographically with differing provincial economies.

> "Alberta remains a very distinct market, especially compared to Ontario (where a national regulator would be based), For example, Alberta has about 28 per cent of the TSX companies, but only three per cent of Canada's venture capital. Companies and individuals closest to the local aspects of the Alberta market, such as financing for early-stage companies, are the ones most concerned about the implications of a national regulator. Larger companies participating primarily in international markets are less concerned and see mainly the advantage in dealing with only one regulator. Romano's research is interesting for Canada because she focuses not on how many times you must file an offering document, but on the quality of the regulation you get out of various regulatory systems," stated Canadian legal expert Bryce Tingle on a recent industry panel.[3]

International research on the reduction of systematic risk does not support this co-operative proposal. In fact having one co-operative regulator could create more systematic risk through ill-advised and wrong-headed policy. Research has indicated that centralization of regulation decreases incentives for regulators to create good regulation, reduces the ability for issuers involved in innovation, reduces regional customization, and actually increases the risk of systematic error in the regulation policy.[4]

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[1] Bruce Cheadle, The Canadian Press (2014) Ontario-B.C. Securities Regulator A Step Towards National Oversight Body

[2] The Bank of Canada. Mark Carney *The G-20's Core Agenda to Reduce Systemic Risk.* 2010. pp. 2

[3] Bryce Tingle (2014) *A national securities regulator: At what cost? http://www.ucalgary.ca/utoday/issue/2014-10-09/national-securities-regulator-what-cost*

[4] Roberta Romano (2002) *The Advantage of Competitive Federalism for Securities Regulation.* The AEI Press.

Arguably, systematic risk is enhanced by central policies, not reduced by it. In terms of Canadian issuers, the largest risks come from fiscal and monetary policy. In fact, economic crisis's post world war two are often associated with mistakes in government macroeconomic policies. [5] Currently, the timing and amount of an increase of the bank of Canada's prime lending rate is one of the greatest risks faced. Another current risk, commodities price fixing by OPEC with oil is affecting Alberta based companies. It is unclear how a co-operative regulator would be able to aid in these issues, as opposed to aggravate them.

(III) Reduced International Credibility

The PCMA and CMSA proposals are politically motived by the externalities of international politics**.**

> **"**Canada has not enacted any reforms to its financial system that can be directly connected to the commitments made at various G8 and G20 summits. The reason for this is that the Canadian financial system was left remarkably untouched by the US sub-prime mortgage crisis. Thus the Canadian government concluded that no regulatory reforms were needed. However, two significant regulatory reforms have been proposed recently. On May 26, 2010, the federal government proposing a new Canadian Securities Act which would establish a federal securities regulator by the middle of 2011 to replace the current system of provincial regulators."[6]

It has been widely stated by Federal Minister of Finance Joe Oliver that the international community looks at Canada's regulator system of thirteen regulators with "bemusement." He went on to state that "the result has added cost, regulatory uncertainty, weakened enforcement capacity and an uneven oversight of systematic risk." [7] The predominant push for a National Regulator, in the G8 and G20 commitments made by Canadian federal politicians, was to give Canada a better appearance on the world stage however this proposal will give Canada even less international credibility than it has at present.

Canada's explanation of our securities regime will not be moving from the current provincial system to the much sought federal system but will now be a convoluted explanation of a system that is constantly in flux with provinces opting in and out of a co-operative regulator.

The international credibility gained by adopting this co-operative regulator proposal is questionable, as it inevitably leads Canada in a fractured, three regulator system; comprised of the co-operative regulator, Alberta and Quebec (plus additional small markets). This situation would be arguably more difficult to justify to our international G20 peers. As former Alberta Minister of Finance Doug Horner stated, "Our worry is that they are going to proceed without consultations, without the next two largest markets − Alberta and Quebec − and you are going to end up with an even more fractured system at the end of the day. It's far better for everyone concerned that we are all on the same page."[8]

If Canada wishes to gain international credibility in regards to capital market regulation, consensus must be reached by all provinces in regards to a co-operative regulator or the existing system should remain.

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[5] Kern Alexander, Rahul Dhumale, & John Eatwell (2006) *Global Governance of Financial Systems the International Regulation of Systemic Risk*

[6] Ivan Savic & Nick Roudev, G20 Research Group (2010) Progress on G20 Financial Regulatory Commitments from Washington 2008 until Toronto 2010

[7] Julian Beltrame, The Canadian Press. (2014) National securities watchdog coming by 2015, Ottawa says

[8] Julian Beltrame, The Canadian Press. (2014) Tiffs Over National Securities Regulator Could Lead To A More Fractured System: Horner

(IV) Concerns with how the PCMA and CMSA are being implemented

Even if one agreed with this proposal, the process in which this material change has been proposed and brought for comments is inadequate. While it is our understanding that draft regulations are forthcoming, their lack of presence makes commenting on these current proposals extremely difficult. As the draft regulations speak to the actual operation of this regulatory body, it would have been prudent to present them at the same time so that all of the opinions you received gave due consideration to the proposal in its entirety. As stated by one of our members: "In my opinion, it would not make sense to be in favor of a regulatory change without knowing what systemic changes, or changes in regulations, would actually follow, and without an opportunity to consider how those changes in regulations would impact our province's capital markets. It does not automatically follow that because a system in harmonized or national, it is also desirable."

The timelines are too condensed for meaningful study of the effects on investors and industry. Given the timelines stated by the Federal Minister of Finance in the mainstream media of having the co-operative regulator implemented in 2015, it gives inadequate timelines to consider the actual details of the legislations, which have not come out for comment yet. This is wholly inadequate to provide the investment community and public with when such a fundamental proposal is made. The whole processed feels rushed and devoid of any meaningful industry and investor outreach.

(V) Conclusion

Provided the underlying regulations are sound and well-reasoned, having one unified national securities regulator with uniformed rules is palatable to many, a number of our members included, but this proposal in its current form will ultimately harm our capital markets, both in Canada and abroad. Until an agreement can be reached amongst all provinces and territories as to what a federal regulator would look like and how it would operate, securities legislation should, as ruled by the Supreme Court of Canada, be left in the hands of provincial governments.

The lack of participation of the provincial governments in Quebec and Alberta in this proposal speaks volumes in regards to this proposal's shortcomings. While considerable resources have been expended creating these drafts, this proposal should be put on hold until draft legislation that is acceptable to all provinces and territories in Canada can be put forward to industry. The draft legislations should be built in accordance with the two main stakeholders as primary beneficiaries: capital markets participants and investors.

Regards,

Craig Skauge

President & Chair

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Appendix

The Grand Market Regulator

by Jeffrey MacIntosh

(I) Be afraid, very afraid

Proposed new powers would give regulatory authorities powers worthy of a North Korea or China

Anyone in the business community who draws breath will be aware that for some time now the federal government has been on the warpath to eliminate the provincially-based system of securities regulation and substitute a single national regulator. Unfortunately for the feds, in 2011 the Supreme Court ruled that the federal government does not have the constitutional power to enact a comprehensive scheme of securities regulation. The Court, however, did suggest that the feds have the power to enact securities laws designed to address nation-wide systemic risks, and to collect securities market information on a national basis.

Following this decision, the federal government and Ontario spearheaded an effort to get as many provinces as possible to sign on to a common piece of legislation known as the "Provincial Capital Markets Act" (PCMA) and to delegate their respective authorities to administer this statute to a common regulator – the Capital Markets Regulatory Authority (CMRA). Under the cooperative agreement (known as the "Cooperative Capital Markets Regulatory System," or CCMRA), the federal government is to adopt a statute called the "Capital Markets Stability Act (CMSA)," which will deal with those matters within the feds' constitutional capacity. They will also delegate their authority to administer the statute to the CMRA.

Those many business folk who have supported the creation of a pan-provincial regulator over the years need to take a very close look. In this article, I will discuss various reasons why, to paraphrase Geena Davis in *The Fly*, they should be afraid. Very afraid.

In a provision that would be very much at home in Albania, North Korea, or The Peoples Republic of China, the federal legislation empowers the "Chief Regulator," without holding a hearing or even giving advance notice, to "issue a notice of violation [for breach of the statute or regulations]… if the Chief Regulator has reasonable grounds to believe that the person has committed a violation." The notice may specify a penalty of as much as $1-million for an individual and $15-million for non-individuals.

It is only after this notice is delivered that the person from whom the fine is demanded has an opportunity to make representations, and these representations are made to the very person who levied the fine in the first place – the Chief Regulator. Despite the potential economic burden, the pertinent burden of proof in the hearing is the civil standard (balance of probabilities) rather than the more demanding criminal law standard (beyond a reasonable doubt). Any director or officer "who authorized, permitted or acquiesced in the contravention" is potentially liable for the full amount of the fine.

The Chief Regulator can also order any person with a connection to capital markets to furnish the regulator (the "Authority") with any kind of information, including information that is personal and/or confidential. No judicial warrant is required.

This information can be passed on to a law enforcement agency or "a governmental or regulatory authority, in Canada or elsewhere." Indeed, it can be passed on to anyone of the Authority's choosing. It can also be made public, if "the public interest in disclosure outweighs any private interest in keeping the information confidential."

The statute specifically excludes any appeal to a court; the only appeal is to the regulatory tribunal (although the tribunal's decision can then be appealed to a court). But let's face it; once the information has been collected and disseminated, the right of appeal is useless in any case. All this means that there is no obvious check on the ability of the Authority to use its new information-gathering powers to conduct any number of speculative fishing expeditions into the affairs of anyone connected with the capital markets, looking for violations of securities laws – or perhaps other laws.

Under existing provincial legislation the licensing powers of the regulators are limited to "registrants," a limited set of "recognized entities," and "market participants." Under the new legislation these powers can arbitrarily be extended as the Authority chooses to virtually anyone connected with capital markets. Under the PCMA, this is achieved by allowing the regulators to designate virtually anyone as a "market participant," a "recognized entity," or a "designated entity" and then regulate these persons much as it regulates registrants or self-regulatory organizations. Once subject to a designation, the Chief Regulator will have the power to tell these parties what they can and cannot do by way of carrying on business, in addition to making orders relating to any "by-law, regulatory instrument, policy, procedure, interpretation or practice" of the entity.

One class of persons who can explicitly be designated as a "market participant", for example, is mediators. At the whim of the Chief Regulator, they will be required "to provide the Authority with any information, record or thing in [their] possession or under [their] control that relates to the administration or enforcement of capital markets law or the regulation of the capital markets." It is an offense to fail to cooperate.

Under the CMSA, the regulator may similarly expand the reach of its regulatory jurisdiction by designating virtually anyone as a "systemically important capital markets intermediary" and again regulating them like a registrant.

"Control persons" (which includes not just controlling shareholders, but those who have the power to materially affect the control of an issuer) are also drawn under the regulatory umbrella, and will be subject to many aspects of regulatory control now reserved for "registrants." Like mediators, they will become subject to an obligation to supply whatever information the Chief Regulator demands. They can also be required to submit to a review of their practices and procedures; to make changes to those practices and procedures; and to submit to a review of their business and conduct.

Another provision effectively allows the Authority to re-write the coverage of the legislation at will. Under the current Ontario Securities Act, the Commission may designate any person as a "reporting issuer" or an "insider of a reporting issuer," or a derivative as a designated derivative. Under the PCMA, the Authority would have the power to make *seven additional designations*, including: orders designating any trade to be a distribution (requiring a prospectus or exemption from the prospectus requirement); any issuer to be a mutual fund or a non-redeemable investment fund; any person to be a market participant or a market place; a security, or class of securities, to be a derivative; and a derivative, or class of derivatives, to be a designated derivative. Unlike under existing legislation (where the person affected may appeal the Commission's decision to a court) under the PCMA there is no appeal to anyone (either court or tribunal) regarding any of these arbitrary designations.

Procedural protections against ill-considered, wrong-headed, arbitrary, or even malicious rule-making by the Authority have been greatly weakened. Thus, for example, the new legislation effectively allows the Authority to issue what were colloquially known as "blanket rulings" under their discretionary powers to exempt a class of market actors from any provision of the legislation or rules. While this sounds harmless, the current legislation expressly prohibits regulators from doing so. The reason? Under the guise of granting "exemptions," the regulators previously misused this power to effectively create entire new regulatory structures replete with a plethora of positive obligations. The short-form prospectus system, for example, was at one time entirely a creation of an "exemption" from the prospectus requirement.

In like fashion, the new provincial legislation allows the Authority to formulate rules defining anything at all as an "unfair practice." While this can only be done via a regulation, it nonetheless represents an abandonment of the current legislative practice of expressly defining the matters in respect of which the regulator can make rules. Instead we are now to have a regulatory carte blanche. Indeed, the federal legislation makes this quite express, simply stating that "the Authority may make regulations for carrying out the purposes and provisions of this Act." The legislation thus turns the regulator into its own legislature.

The regulators are also taking a stab at implementing a measure that failed in a previous attempt in Ontario because of widespread opposition – giving the regulatory tribunal the power to "compensate or make restitution to one or more persons" where they have determined that there is a violation of securities law. This is a startling usurpation of the role of the courts. It allows the tribunal to function like a court, but without any of the evidentiary or procedural protections associated with a lawsuit. The tribunal, for example, can decide its own rules of evidence. Worse, because it has no obligation to follow its own prior decisions, it can do so in an ad hoc manner. Nor will the vast majority of other procedural protections associated with a civil suit be available.

The power to award compensation or restitution arises in any case in which "capital markets law" is violated. That term is broadly defined to include a discretionary finding by the tribunal that a person has breached "the public interest." Past tribunal and court decisions have made it clear that the public interest may be breached without any violation of the statute, or the rules or regulations made under the statute. Thus, the tribunal will be empowered to award the equivalent of civil damages without any violation of pertinent legal requirements, and it will be able to do so in a case in which there is no violation of the Act or the regulations.

The proposed legislation also adds a new offense – doing anything that "results in an unjust deprivation or a risk of an unjust deprivation." This is a completely undefined term. Precisely because no one knows what it means or how the tribunal or courts will interpret it, it can be dangled by the regulators (like the power to award compensation or restitution) like a Sword of Damocles over the supine body of any market actor it chooses. A fine way to secure a settlement or dictate a course of action.

(II) A category 5 blizzard of red tape is headed for Canada's market players

New legislation will radically — and in unpredictable ways — affect securities markets

When securities laws are changed in material ways, a wide variety of market actors are potentially affected. Under current legislation, to guard against precipitous, ill-considered, or wrong-headed new laws, members of the public must be given at least 90 days to comment on proposed changes to rules promulgated by the regulators. Remarkably, despite the epic changes embodied in the CCMRA proposal, the public was initially given only 60 days in which to comment. This was increased to 90 days only after earnest representations from the business and legal communities. But in any case, the CCMRA would make such numerous and radical changes to existing laws that, for all intents and purposes, the notice and comment procedure is inadequate to the point of futility. Here are some of the reasons why.

In a move that is utterly without precedent, draft legislation has been published for comment with key provisions missing. These include the sections dealing with how the new cooperative regulator will interface with non-participant provinces. These go to the core of how Canada's regulatory system, consisting both of participants in the cooperative scheme and non-participants, will function. Even more incredibly, the extent of the regulator's rule-making authority under the provincial legislation and the draft regulations themselves – the real meat and potatoes of the regulatory scheme – remain under wraps. Thus, the public has been asked to comment on a set of rules that is woefully incomplete.

The legislation seeks to put in place an extraordinarily long menu of fundamental changes to securities laws. Simply documenting these changes is itself a labour of Hercules, not to mention coming to grips with the legal and practical ramifications of the changes.

Insider trading laws, for example, will now apply to any public company, and not just one that is a reporting issuer in Canada. They will also apply not merely to a purchase or sale of securities, but to any act in furtherance of a trade, a change with completely unknown ramifications. While under current rules in the Ontario Securities Act and most other securities regulatory statutes, certain insiders are liable to the company in whose securities they trade for any "benefit or advantage" they receive, the new legislation extends the liability to include any benefit or advantage received by "all other persons as a result of the contravention." Similarly, under most current statutes, only persons who actually trade with an insider have a right of action. Under the proposal, all persons trading on the opposite side of the market when an insider trades will have a cause of action, with no limitation on the aggregate damages that may be claimed. In a large public company, an insider trading profit of $100 could lead to an aggregate liability in the millions.

Indeed, under the PCMA the inside trader or tipper is potentially exposed to no fewer than seven overlapping and non-exclusive monetary liabilities, in addition to potential jail terms under both the PCMA and the CMSA. This is regulatory overkill of heroic proportions.

Further complicating a comparison of old and new is that there are a myriad of unexplained changes in statutory wording. Thus, for example, the trigger for the all-important and wide-ranging public interest powers changes from "if in [the Commission's] opinion it is in the public interest" to if "[the Commission] considers that it is in the public interest to do so." In one of the most critical definitions in the statute (that of "misrepresentation"), "an untrue statement of material fact" morphs into "a false or misleading statement of a material fact." These and many other new formulations have never been tested in any court or tribunal. They therefore introduce an unnecessary (not to mention bewildering) wildcard into the scope and application of the securities laws.

The Sisyphusian task of commenting on the proposed legislation is exacerbated by a number of other factors. One is figuring out how the federal and provincial statutes will work together, as little attempt has been made to consolidate them into a seamless whole. Rather, there are innumerable overlaps with inexplicable differences in wording. In some cases, there are express contradictions. The insider trading provisions are an example. There are, in material respects, differences in the substantive triggers for liability, defences, onuses of proof, and penalties. Lucky CMRA. It gets to pick whichever statute is more likely to result in a congenial result for the regulator. Not an enviable situation, however, for a hapless defendant.

Contrary to one commentator's assertion, these differences are not explicable on the basis that the federal law is "criminal" law while the provincial law is "regulatory" law. True "criminal" law requires proof of a "*mens rea*" or guilty mind, as is the case under the current *Criminal Code* offence of insider trading.

However, the proposed CMSA abandons the requirement that the Crown prove a full *mens rea*, and thus abandons its claim to be true criminal law. But even if it were, the many differences between the provincial and federal insider trading liabilities owe little or nothing to this distinction.

In addition, comments on features of the proposals covered by the Memorandum of Understanding between the provinces and the feds (such as the CCMRA's governance structure) are likely to have little or no impact. Re-negotiating the MOU will require complex political manoeuvring. It is very unlikely that there is any political appetite to do so.

In the past, major overhauls of corporate or securities laws have invariably been effected by appointing a blue ribbon panel of experts to consult widely with stakeholders, ruminate at length, and publish a detailed report indicating not only the panel's recommendations for change but the whys and wherefores of the proposed changes. Not in this case. A massive overhaul, replete with an enormous expansion of regulatory powers, has been proposed with nary an explanatory peep. For an association of authorities that earnestly and piously sing at the altar of good corporate governance, impressing upon us daily the indispensable importance of fulsome disclosure, well-crafted decision-making procedures, and accountability, this is a truly astonishing feat of legerdemain.

All of these changes reek of unabashed opportunism. The proponents of the scheme have apparently decided that they can trade on the strong support of the Canadian business and financial communities for a multi-jurisdictional regulator to make whatever changes they want to the regulatory regime. Perhaps the hugely expanded array of regulatory powers is designed as a strategic inducement to get non-participating jurisdictions to sign up. Needless to say, neither of these is a legitimate motive for affecting such an expansionistic sea change in the legislation.

B.C.'s support is particularly curious. For some years, B.C. has been on the warpath to reduce, and not enhance regulatory red tape, even publishing for comment a slimmed-down statute that was a bit too radical for the other provinces. Is Michael de Jong, the B.C. Finance Minister, completely asleep at the switch? What about his Ministerial counterparts in the other provinces? Is this proposal okay with Joe Oliver, a Conservative (not to mention conservative) who, at least nominally, is a business-oriented politician? Is this symptomatic of the degree of political oversight that we can expect once the cooperative system is adopted?

(III) Where are the efficiencies?

The proposed reforms to Canada's systems of regulating securities are a misguided jumble of contradictions

The nominal advantages of the proposed CCMRA include the application of a single set of rules in all participating jurisdictions. The CMRA will be endowed with the full panoply of provincial and federal powers relating to securities regulation, allowing for comprehensive and seamless enforcement of securities laws across the participating jurisdictions. Proponents of the legislation tout the fact that market actors will have but a single regulator (and single fee structure) to deal with. For years, supporters of a multi-jurisdictional regulator have also asserted that, by eliminating duplication and exploiting economies of scale, a common regulator will reduce the aggregate governmental costs of supplying regulatory services. Another reputed advantage is that Canada will have a unified voice at the table in international negotiations over securities regulation. And of course, the feds have long championed the view that the CCMRA will lead to more effective control of systemic risk.

The reality may be rather different.

Take the "single voice" problem. At present, there are typically four provincial actors who show up at in international goings-on related to securities regulation: Ontario, B.C., Alberta, and Quebec. If the CCMRA goes through, this will be reduced to three; the CMRA, Alberta, and Quebec. Indeed, as Quebec and Alberta look to be hardened targets resilient to the most spirited barrage of federal bunker-busters, the number may never be fewer than three. Hardly a problem solved.

Nor will the goal of achieving a single regulator be realized. To date, only Ontario, B.C., Saskatchewan, N.B., and P.E.I. have signed on. Thus, if the CCMRA were to be adopted tomorrow, there would still be five provincial and three territorial regulators outside the fold. If Quebec and Alberta continue to be unsympathetic suitors, market actors doing business across the country will have at least three regulators to deal with.

To grease the wheels and ensure a truly seamless regulatory environment for pan-Canadian market activity, logic suggests that the folks at the CCMRA should commit to a fresh iteration – indeed an expansion — of the current inter-provincial passport system, under which each market actor has but a single provincial regulator to deal with. This, however, seems unlikely. Just as Ontario (an enthusiastic supporter of a single Canadian regulator) has done in the past, the CCMRA will likely refuse to formally commit to a passport system. It will do so purely for strategic reasons — i.e. putting pressure on recalcitrants to join up. After all, why let the passport system strut its stuff and show that it can actually work?

Proponents of a cooperative scheme have long claimed that a single regulator will achieve fiscal savings by eliminating the duplication of regulatory functions performed in a multi-regulator system. There is little reason to believe that the CCMRA will achieve this result. Regulation is an activity with a high labour-to-capital ratio. For example, for the past several years the OSC's employee compensation and occupancy costs have totaled about 85% of its annual budget. Thus, if more than marginal savings are to be achieved, this can only be done by reducing the aggregate number of employees involved in securities regulation across the participating jurisdictions.

The agreement between the provinces and the feds, however, provides initially for the secondment, and subsequently for the transfer to the CMRA of all provincial employees currently engaged in securities regulation. In addition, no provincial regulator will disappear. Rather, each will morph into a branch office of the CMRA. Thus, there appear to be essentially no initial economies in moving to a cooperative regulator. Savings can only be achieved in the long run through expensive buy-out packages or attrition.

No doubt this is a handy-dandy inducement to get more provinces and territories to sign up, since no one in any of those respective organizations need hand out any pink slips. And indeed, to the extent that duplication is in fact eliminated, many employees will end up with a substantially reduced workload. As Ella Fitzgerald succinctly stated, "nice work if you can get it" (although those who support a multi-jurisdictional regulator might want to ponder the implications of a horde of underemployed securities regulators actively seeking out ways to fill up their workdays). But in any case, this makes mincemeat of the argument, long one of the stoutest arrows in the quiver of the "one regulator" crowd, that regulatory amalgamation will produce substantial fiscal savings.

Another much-touted advantage of a common regulator is the application of a single set of rules, or, as the Memorandum of Understanding (MOU) states, "common standards reflected in cooperatively-developed regulations consistently applied." However, the meaning of neither legislation nor rules is self-executing. Any legal text is subject to interpretation by the courts, and courts in different provinces may give common statutory provisions different meanings, sundering the much-touted uniformity.

A further perusal of the MOU indicates that the rules may in fact differ from one jurisdiction to another. The MOU allows any participating jurisdiction to request special rules in order "to accommodate provincial or territorial government programs that relate to specific economic development initiatives within [the] provincial or territorial Participating Jurisdiction." The meaning of this phrase is conveniently left undefined, and it is fraught with manifold political baggage.

In the past, one of the greatest bones of contention between provincial holdouts such as Alberta (and, at one time, B.C.) is that the capital markets that they administer are "venture capital" markets with a much greater preponderance of small entrepreneurial endeavours than found in Ontario's large-firm-dominated regulatory environment. Westerners have long argued that these small companies require a different regulatory calculus so as not to stifle economic growth. It is difficult to imagine that this concern is merely an artefact of past political wrangling that will easily melt into little-lamented obscurity. Rather, it is likely that these long-standing concerns will create abiding pressure for an expansive interpretation of "specific economic development initiatives." It is not beyond the ken of man to imagine, for example, that some provinces will press the argument that the phrase embraces exemptions from the requirement to file a prospectus when raising capital. The ability to maintain custom-designed exemptions has long been a rallying cry of western opponents of a pan-Canadian regulator, and maintaining different provincial exemptions would be a serious blow to the cause of uniformity.

The tension between the desire for uniformity and the drive to accommodate special needs has given us an MOU that totters on the brink of schizophrenia. The MOU states, for example, that "the Initial Regulations will be drafted taking into consideration the economic and regional interests of each Participating Jurisdiction" and will "reflect the needs of the various participants in those capital markets within a common securities framework." On the other hand, the MOU's explicit aim is to develop "common standards… consistently applied." On its face, this is Orwellian doublethink of an Olympian character. How can you take into account the varying needs of different jurisdictions with a single set of uniform rules?

Will the CCMRA better address systemic risks than the current provincially based scheme of securities regulation? This is highly doubtful, and based on the manifestly false premise that the Credit Crisis of 2008 might have been averted had Canada had a pan-Canadian regulator. The Credit Crisis leaked into Canada from the U.S., which, coincidentally, happens to have a powerful national regulator. There was a regulatory failure in Canada just as there was in the U.S., and it had nothing at all to do with the regulators' respective jurisdictional domains.

Even if we believe that the feds have an ability to deal with systemic risks or gather information on capital markets that the provinces lack, this can be effected without the joint delegation of provincial and federal powers to a common regulatory authority. The proof of this lies in the fact that the CMRA will exercise its federally delegated powers not only in provinces that are a part of the cooperative scheme, but in non-participating provinces as well.

(IV) The regulatory leviathan

Ottawa's power grab in the securities industry is sweeping and unprecedented, and must be opposed

The CCMRA, if adopted, would be a watershed event in the architecture of Canada's political institutions. And in no way for the better.

Since the Great Depression, the rise of the welfare state has been associated with a vastly expanded role for government, and this vast expansion has received its expression in the commensurate growth of the administrative state. Government administrators, who exercise powers delegated to them by government, have tentacles into virtually every walk of life, from the TV we watch to how we behave in the workplace to the pedigree of the hamburgers we throw on the barbecue in the summer.

More and more the leviathan that tells us what we can and cannot do is not Parliament or the provincial legislatures, but administrators exercising delegated power to promulgate rules of their own creation. For this reason, the political and legal accountability of these administrative agencies is of foundational importance to our representative democracy. There must be both timely and effective redress for citizens whose rights are trampled, flouted or ignored by careless, indifferent, or abusive administrators.

Various features of the CCMRA suggest that the administrative officials who staff the agency will be largely unaccountable to anyone. One of these arises out of the pesky little problem of maintaining legislative uniformity going forward, which will require legislative amendments in each and every one of the provinces and territories that are party to the scheme. Given the overwhelming lack of importance of securities regulation to the polity, and therefore the average politician, moving the legislative behemoth in a single jurisdiction is labour enough. Doing it in multiple jurisdictions is like attempting to safely shepherd an army of banana slugs across King and Bay during rush hour.

Unfortunately, the proposed cure for this problem is worse than the disease. The CCMRA essentially cuts the various legislatures out of the regulatory process. This is done by turning the uniform provincial legislation (the PCMA) into a skeleton, and imbuing the CMRA with the authority to tack on the fleshy structures that constitute the pith and substance of the regulatory apparatus. They do this via a purely administrative rulemaking process.

A good measure of just how much securities law is to be swept out the collective doors of the provincial legislatures and into the steel and glass towers of the regulatory agencies may be found in the comparative lengths of the new and the old. The draft PCMA is less than half the length of the current Ontario Securities Act (85,000 words versus about 42,000). Some features of the statute have been almost completely gutted. The Ontario Securities Act provisions relating to takeover bids, for example, currently run to about 12,000 words. The PCMA has fewer than 700. Equally astonishingly, the statutory provisions relating to the various continuous disclosure obligations are poised to shrink from about 3300 words to fewer than 300. Thus, where once the legislature erected the framing and basic architecture of the regulatory edifice and allowed the administrative agency to decorate the interior, now the regulators, via rules of their own creation, get to do both.

This is deeply troubling. While our parliamentary system is far from perfect, it is comparatively easy to hold politicians' feet to the fire in relation to primary legislative enactments. The process is fully transparent to the press and to the public at large. The legislative forum invites parties with different regulatory philosophies to engage in an active debate reflecting a variety of viewpoints. There are no kinks or gaps in the causal connection between the legislature and the law that might allow the politicians to evade responsibility. Moreover, whether convenient or not, the process of exposing major changes in the regulatory framework to legislative debate imposes a layer of discipline on regulators that is an important piece of the accountability puzzle.

The rules that are promulgated by administrative agencies are buried one layer deeper in the institutional onion, at one remove from those who are directly accountable to the public via the ballot box. True, securities regulators are required to expose proposed rules to a public notice and comment procedure, to publicly respond to the comments they receive, and to secure the approval (or at least the non-disapproval) of their Ministerial masters. However, aside from periodic scandals that provide a custom-made dais for some spirited posturing, politicians typically take little interest in the arcane and voter-irrelevant world of securities regulation. Thus, little effective oversight originates from that quarter. Similarly, Ministry bureaucrats know little about securities regulation and are largely content to let the regulators do their thing. Indeed, Ontario and many other provinces have moved securities regulators out of Ministry digs and into "independent" crown corporations, precisely to minimize political involvement (or “interference”). This makes it all the easier for politicians and Ministry officials to dodge responsibility for regulatory actions.

Nor do other potential sources of oversight work well. The Supreme Court of Canada has instructed Canadian courts to give a high level of deference to administrative tribunals acting within their expertise. For this reason, judges have largely adopted a hands-off policy and appeals from decisions of the securities regulators almost never succeed.

Market actors who are treated badly by securities regulators have little incentive to fight back. The practical imperative is almost always to get on with the business at hand. And everyone knows that fighting the regulator by insisting on a regulatory hearing is a mugs game. The regulators have made it clear that they will treat those who don’t “cooperate” (i.e. settle on Commission-dictated terms) much more harshly than those who role over and play dead. And if they decide to cream you, your right of appeal plus $4.08 will buy you a Grande Latte at Starbucks. Added to this is the powerful and ever-present incentive of securities lawyers and their clients to remain in the good books of the regulators, lest present squalls breed future tempests.

In short, even under our current system of provincially based securities regulation, where a single Minister is on the hook, there is a something approaching a vacuum of accountability in the securities regulatory domain.

The CCMRA only exacerbates these problems. At the top of the CCMRA governance hierarchy stands a Council of Ministers with as many Ministers as there are provinces and territories participating in the system, plus the federal Minister of Finance. This makes it child’s play for any individual Minister to dodge political responsibility for regulatory actions by blaming the other Ministers who sit on the Council. Since Council debates will be held in private, who can gainsay what any one of them might claim about what went on behind closed doors?

The multiplicity of political overlords also creates a problem of incentives. Since any individual Minister’s vote will not necessarily be pivotal, why waste time and effort monitoring what the regulators are up to? Better to let the other Ministers and their staffs do the work. Unfortunately, as each is subject to the same incentives, there does not seem to be anyone who we count on to supply meaningful oversight.

There is also the question of expertise. How much will the Ministers know about securities regulation? How much will their staffs know? If the past is a reasonable guide to the future, the answer to both of these questions is – virtually nothing.

In fact, the Ministers who sit on the Council of Ministers can further deflect blame by pointing their collective finger at the Board of Directors that stands between them and the regulatory boots on the ground. The Board has the responsibility of supervising the day-to-day management of the regulator. If something goes wrong, the politicians can simply fire one or more directors and sweep their own responsibility under the carpet.

If we consider Canadian capital markets to be the patient, one could be forgiven for thinking that the ghost of Jack Kevorkian (aka "Doctor Death") is the spiritual force animating (dis-animating?) the CCMRA. It is an ill-considered and opportunistic proposal that should be completely scrapped. If pan-provincial legislation is desirable, the adopters owe it to Canadian capital markets to start with something that looks very much like the current legislation that predominates throughout the country, and to institute changes only going forward and on a sufficiently incremental basis to allow for fulsome discussion and reflection. Public comments on the proposed CCMRA are currently open. Please do not sit on your hands.

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