OP-ED: Reply to Jeffrey MacIntosh
by
Philip Anisman

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In our bottom-line driven society, reasoning process is too often treated as subservient to ideological goals and results. Even when an element of an argument is correct, it may be used to further a larger misguided agenda. This was the case with Professor MacIntosh's series, which reflected the anti-regulatory ideology that introduced his fourth article and his longstanding opposition to a national regulator. Despite his assertion to the contrary, his rejoinder continues to be unfair, immoderate, sometimes inaccurate, and unreasonably Ontario-centric.

Admitting, in effect, that his criticism overlooked legislation in at least one other province, he now asserts that Ontario's legislation should dominate, again ignoring the fact that a cooperative effort to create a national regulator must involve choices and compromise on the approach and substance of the legislation.

For most of the last century, Ontario has taken the lead in developing our securities laws. This changed with self-funding, after which other commissions began to play a larger role through the Canadian Securities Administrators organization, resulting in a significant erosion of Ontario's dominance in policy and rulemaking. In fact, in many areas of securities regulation Ontario has recently been an outlier. Professor MacIntosh refuses to acknowledge this, as does the comment by Patricia Olasker and Mindy Gilbert.

The PCMA reflects significant compromises by Ontario. It adopts, for example, the platform approach to continuous disclosure, proxy solicitation and takeover bid regulation which

was rejected by Ontario, but accepted by all other provinces. It also integrates provisions from provincial acts other than Ontario's. These and other compromises indicate that despite its market dominance, Ontario has concluded that such cooperation is necessary to achieve a common regulator. While it is fair to disagree, it is not reasonable to argue that the entire scheme should be rejected because Ontario has accepted approaches and provisions from other provinces.

Professor MacIntosh persists in treating such provisions as new. One example will suffice here. (Others are addressed in a detailed reply on the FP website.) His web rejoinder says that an "auditor oversight organization" is a "new type of entity." But the securities acts in BC, Saskatchewan and New Brunswick include such entities, and all provinces have effectively recognized the Canadian Public Accountability Board, which is one, since 2004.

Characterizing a change as incremental or fundamental is a matter of judgment. Professor MacIntosh asserts that discretionary authority to declare a person a "market participant" is far beyond existing powers. But the OSC can do so now by regulation. The PCMA merely allows the regulator to designate a specific person to be a market participant, after a hearing. A market participant, as such, is not required to be registered, and the PCMA does not authorize the regulator to compel a person to become a recognized or designated entity.

Professor MacIntosh continues to treat the prohibition of "unfair practices" as new, despite its existence in BC's and Saskatchewan's securities acts. He admits that the OSC may define unfair practices by rule, but says the power is truncated because it does not use the words, "unfair practice", and is limited to rules "to prevent trading or advising that is … unfairly

detrimental to investors". This "rebuttal" is based on a vacuous verbal argument. More importantly, as the PCMA does not exhaustively define prohibited unfair practices, his position would prevent the regulator from specifying by regulation conduct that would be an unfair practice without the rule. The rulemaking process can assist market participants by permitting comments on a proposed regulation before proceedings are brought based on the same conduct.

He objects to disclosure by the regulator of information obtained in an investigation to other regulatory bodies, but fails to address the increasing globalization of securities markets and the frequent need for cooperation with regulators in and outside Canada. While acknowledging that the PCMA precludes disclosure of privileged information, he does not mention that it also limits disclosure of compelled testimony. This limitation may diverge from Ontario's current provisions, but it is stricter than those in other provinces. (Nevertheless, these disclosure provisions require tightening.)

Professor MacIntosh denies any intention to scuttle the proposed cooperative regulator. He now says the statement in his fourth column that the proposal "should be completely scrapped" meant only that the proposed legislation "should be chucked in the dustbin in favour of a fresh start" based on the current Ontario act. This is at best disingenuous. He must know that using the Ontario act as he wishes would likely destroy the remarkable cooperation shown to date and that withdrawing the proposed legislation would strain existing political support. Thus, while he denies that this is his goal, his recommendation would terminate the initiative for a cooperative regulator. The proposed legislation can be improved in many respects, but Professor MacIntosh has chosen not to address this question. There is no reason to give any credence to his recommendation.

Philip Anisman practises securities law in Toronto. He was the principal author of the 1979 Proposals for a Securities Market Law for Canada *and was a legal adviser to the Canadian Securities Transition Office.*