SCC Paves the Way for National Securities Regulator, but What Will It Look Like?

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1. INTRODUCTION

Compliance with securities regulation in Canada can be characterized as fragmented, and as a result, duplicative, expensive, and time consuming. Despite the aim of provincial and territorial securities regulators to promote "efficient" capital markets, the current regime often falls short of that goal.

Previous attempts at creating a national regulator in Canada have not succeeded. However, a recent decision by Canada's highest court has provided further guidance as to the form a national securities regulator could take in Canada.

2. REGULATORY BACKGROUND

Canada remains an anomaly as the only G20 country that does *not* nationally regulate trading of securities. This is a result of the constitutional division of powers in Canada in which the provinces, not the federal government, have the authority to legislate in respect of the trade of securities within their borders. Provinces and territories have jurisdiction over property and civil rights (s. 92(13)) and matters of a merely local nature (s. 92(16)), such that the federal government is unable to create a federal securities regime binding on the provinces and territories. Accordingly, Canada is a veritable patchwork of regulatory schemes.

Each province and territory has its own securities laws and maintains its own regulatory agency. The regulatory agencies govern the day-to-day aspects of securities trading and are responsible for everything from reviewing and clearing prospectuses and overseeing disclosure requirements, to enforcing compliance and regulation of investment advisors and stock exchanges.

Attempts have been made to harmonize securities regulation amongst the provincial and territorial securities commissions through the Canadian Securities Administrators (CSA), an umbrella group of representatives from each of the provincial and territorial securities regulators. Through the CSA, provinces have intermittently adopted the use of the national and multilateral "instruments". These standardized rules and regulations govern specific aspects of securities trading. A national instrument generally applies to all Canadian jurisdictions (although it may contain provincial or territorial carve-outs) while a multilateral instrument applies only to those jurisdictions specified within the instrument.

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However, provinces and territories have often declined to sign on to particular harmonization efforts or have carved out exceptions to the general rules that apply only in their jurisdictions.

For example, one attempt to stitch together Canada's regulatory patchwork is the "passport" system, of which all provinces and territories are members except for Ontario. Prior to the implementation of the passport system, an issuer would need to file a prospectus with the securities regulator in each province or territory in which they intended to sell securities. Each securities commission would review and provide comments on the prospectus, which would need to be satisfied (and often reconciled) before the securities commissions would issue receipts for the prospectus and the sale of securities could be made in the provinces. Under the passport regime, only a prospective issuer's principal regulator will review and clear a prospectus, and its approval will apply to all other jurisdictions participating in the passport system.[1]

The CSA's efforts to harmonize Canada's securities regulatory framework are laudable in dealing with the difficult situation created by the division of powers. However, these best efforts may be insufficient as Canada's economy continues to become increasingly globalized, technology-driven and fast-paced.

3. HISTORICAL BACKGROUND

Attempts at national regulation in Canada can be traced back to the early 20th century. In 1935, the Royal Commission on Price Spreads was the first to propose the formation of an investment securities board for the purpose of overseeing the issuance of securities by federally incorporated companies. Proposals and discussions followed throughout the 1960s, 1970s, and 1980s but ultimately failed in their attempts to reshape securities regulation. In 1994, a draft memorandum of understanding was written in response to a request from the Atlantic provinces to the federal government for the creation of a national securities regulator.

This request heralded the intensification of efforts towards the development of a national securities regulator that have characterized recent years. In 2003, the Wise Persons' Committee (WPC) recommended enacting a single piece of federal legislation for the regulation of capital markets. The WPC's vision provided that provincial participation would arise out of an obligation borne by the federal government to consult with the provinces. The Crawford Panel on a Single Canadian Securities Regulator published a "Blueprint" in 2006 that called for the enactment of the *"Canadian Securities Act"* and establishment of the "Canadian Securities Commission." In 2009, a report published by the Expert Panel on Securities Regulation came to a similar conclusion as the Blueprint and recommended that a "Canadian Securities Commission" be established in order to oversee a national "*Securities Act*." It is this report that informed the draft

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[1] "Improving Securities Regulation in Canada" *Provincial-Territorial Securities Initiative*, online: < https://securitiescanada.org/ > .

Securities Act that was assessed on constitutional grounds in the 2011 *Reference re: Securities Act* ("*2011 Reference*").[2]

(a) *Reference re: Securities Act (2011)*

In the *2011 Reference*, the federal government asked the Supreme Court of Canada (SCC) to determine the constitutionality of the proposed *Canadian Securities Act* ("2011 Act"). The immediate purpose of the 2011 Act, as stated in its preamble, was the creation of a national securities regulator which would create a single scheme governing the trade of securities throughout Canada. Section 9 of the 2011 Act set out three additional goals: a) investor protection; b) fostering fair and efficient competitive capital markets; and c) contribution to the integrity and stability of Canada's financial system.[3] To achieve these goals, the 2011 Act was designed to replace provincial schemes and regulate the day-to-day aspects of securities trading, such as registration requirements and prospectus filings. The Government of Canada, the Attorney General of Ontario, and several interveners contended that the 2011 Act fell within the federal government's general power to regulate trade and commerce, granted by s. 91(2) of the *Constitution Act (1867)*. They argued that the superficial appearance of duplicating provincial legislation was actually directed at genuine federal concerns and that the 2011 Act went beyond provincial powers by addressing elements such as systemic risk and national data collection.[4] Conversely, the governments of Alberta, Québec, Manitoba, and New Brunswick, along with other interveners, claimed that the proposed 2011 Act was no more than a "thinly disguised attempt to regulate . . . the securities industry"[5], which would encroach upon provincial jurisdiction over property and civil rights as well as matters of a local or private nature, offending sections 92(13) and (16) of the *Constitution Act (1867)*.[6]

In order to assess whether the 2011 Act fell within the federal government's trade and commerce power under section 91(2), the SCC engaged in a two-step "pith and substance" analysis of the proposed legislation. The first step (the "characterization stage") examined the purpose and effect of the 2011 Act. The Court concluded that the "main thrust of the [2011 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."[7] However, this alone was not dispositive of the 2011 Act*'s* constitutionality. The second stage of

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2 *Reference re Securities Act (Canada)*, 2011 SCC 66, 2011 CarswellNat 5243, 2011 CarswellNat 5244, [2011] 3 S.C.R. 837, 519 A.R. 63, 97 B.L.R. (4th) 1, 339 D.L.R. (4th) 577 (S.C.C.).

3 *Ibid*. at para. 95.

4 *Ibid*. at para. 102.

5 *Ibid*. at para. 34.

6 *Ibid*.

7 *Ibid*. at para. 106.

the analysis (the "classification stage") involved determining whether or not the 2011 Act fell within an accepted federal power (here, the regulation of trade and commerce), through the application of indicia adopted by the SCC in *General Motors of Canada Ltd. v. City National Leasing* ("*General Motors*").[8] The SCC found that the 2011 Act "chiefly [regulated] contracts and property matters within each of the provinces and territories, [and was overlaid] by some measures directed at the control of the Canadian securities market as a whole."[9] The Court concluded that the day-to-day regulation of securities within the provinces remained essentially a matter of property and civil rights within the provinces and therefore subject to provincial powers, although some aspects of the 2011 Act (for example, those aimed at management of systemic risk and national data collection) appeared to fall within federal powers.

As a result, the Court decided that the extent to which the 2011 Act would regulate the day-to-day actions of securities trading "simply [could not] be described as a matter that is truly national in importance and scope".[10] Accordingly, the Court concluded that the 2011 Act was "not valid under the general branch of the federal power to regulate trade and commerce."[11] Notably, however, the SCC suggested that a "cooperative approach" which recognized the "essentially provincial nature of securities regulation while allowing Parliament to deal with genuinely national concerns . . ." may be constitutionally valid.[12]

4. THE COOPERATIVE SYSTEM AND *REFERENCE RE: PAN-CANADIAN SECURITIES*

(a) The Cooperative System

Reference re: Pan-Canadian Securities Regulation[13] ("*2018 Reference*") is the latest decision in an effort to create a national securities regulator in Canada. Taking into account the guidance of the SCC in the *2011 Reference*, the federal government has proposed the creation of the "Cooperative System." As of January 2019, the seven proponents of, and potential participating jurisdictions in, the Cooperative System are Canada, British Columbia, Ontario, Saskatchewan, New Brunswick, Prince Edward Island, and the Yukon

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8 *General Motors of Canada Ltd. v. City National Leasing*, 1989 CarswellOnt 956, 1989 CarswellOnt 125, EYB 1989-67447, [1989] 1 S.C.R. 641, 68 O.R. (2d) 512 (note), 43 B.L.R. 225, 24 C.P.R. (3d) 417, 58 D.L.R. (4th) 255, 93 N.R. 326, 32 O.A.C. 332, [1989] S.C.J. No. 28 (S.C.C.).

9 *Reference re Securities Act (Canada)*, *supra* note 2 at para. 125.

10 *Ibid.*

11 *Ibid.* at para. 134.

12 *Ibid.* at para. 130.

13 *Reference re Pan-Canadian Securities Regulation*, 2018 CSC 48, 2018 SCC 48, 2018 CarswellQue 9836, 2018 CarswellQue 9837, 41 Admin. L.R. (6th) 1 (S.C.C.) [*2018 Reference*].

Territory (collectively the "Participating Jurisdictions" and each a "Participating Jurisdiction"). The Cooperative System consists of the following elements outlined in the *Memorandum of Agreement Regarding the Cooperative Capital Markets Regulatory System* (MOA or the "Memorandum"):[14]

i. ***Capital Markets Act*** ("*Model Provincial Act*") — The Model Provincial Act aims to standardize provincial and territorial legislation with respect to the day-to-day aspects of securities trading and will "address all matters of provincial or territorial jurisdiction in the regulation of capital markets."[15]

ii. ***Capital Markets Stability Act*** ("*Draft Federal Act*") — The Draft Federal Act will act as complementary piece of legislation to the Model Provincial Act. Unlike the 2011 Act, the Draft Federal Act will only address criminal matters, national data collection, and matters involving "systemic risk in national capital markets," all of which should fall within the federal government's trade and commerce power.[16] Section 3 of the Draft Federal Act defines "systemic risk" as "a threat to the stability of Canada's financial system that originates in, is transmitted through or impairs capital markets and has the potential to have material adverse effect on the Canadian economy."[17]

iii. ***Capital Markets Regulatory Authority*** (CMRA) — The CMRA will operate independently as a single authoritative body responsible for regulatory, enforcement, and adjudicative functions of the Cooperative System.[18] The CMRA will have the authority to identify and manage the systemic risk contemplated within the Draft Federal Act and will also be tasked with representing Canada at the international level in matters of capital market regulation.[19] Composed of a board of directors with capital markets expertise ("Board of Directors"), a regulatory division, and an adjudicative tribunal ("Tribunal") the CMRA will be responsible for administering the Model Provincial Act, the Draft Federal Act, and the corresponding regulations under the authority delegated by the Participating Jurisdictions.[20]

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[14] Canada, Department of Finance, *Memorandum of Agreement Regarding the Cooperative Capital Markets Regulatory System*, online: <https://www.fin.gc.ca/n14/docs/moa-pda-eng.pdf>.

[15] *Ibid.*, s. 3(a)(i).

[16] *Ibid.*, s. 3(a)(ii).

[17] *Ibid.*

[18] *Ibid.*, s. 3(a)(iii).

[19] *Ibid.*

[20] *Ibid.*

iv. ***Council of Ministers*** — The Council of Ministers will oversee the CMRA and be comprised of the Ministers responsible for capital markets regulation in each Participating Jurisdiction. Specifically, the Council of Ministers shall:[21]

   a. appoint members of the Board of Directors and the Tribunal;

   b. provide policy oversight regarding capital markets regulation and consider reports submitted by the Board of Directors;

   c. propose amendments to the Model Provincial Act and the Draft Federal Act; and

   d. make request to the Board of Directors for the regulation of specific matters, in compliance with the appropriate processes for the making of such regulations.

v. ***Offices*** — Each province that is a Participating Jurisdiction will house a regulatory office that will provide the same range of services currently offered by its current securities regulatory office. Should all provinces join the Cooperative System, regulatory offices shall be located in Vancouver, Calgary, Regina, Winnipeg, Toronto, Montreal, Saint John (NB), Halifax, Charlottetown, and St. John's (NS); although they may be relocated upon Minister consent.[22]

vi. ***Fees*** — The CMRA will be self-funded through a simplified fee structure that is designed "not to impose unnecessary or disproportionate costs on market participants."[23]

Needless to say, the scope and level of complexity mean that transitioning from existing provincial schemes will involve a great deal of work. To aid with this transition, a non-profit organization called the Capital Markets Authority Implementation Organization (CMAIO) was incorporated in July 2015. Its purpose is to act as an interim body and "assist in the transition to and implementation of [the CMRA]."[24]

While the implementation of the Cooperative System may be complex, significant benefits stand to be realized, provided that implementation closely mirrors design and most, if not all, provinces and territories participate. Broadly speaking, these benefits can be classified as improvements to market efficiency and increased investor protection.

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[21] *Ibid*., s. 4.2.

[22] *Ibid*., s. 9.1(d).

[23] *Ibid*., s. 3(a)(iv). "Improving Securities Regulation in Canada" *Provincial-Territorial Securities Initiative*, online: < https://securitiescanada.org/ > .

[24] *Capital Markets Authority Implementation Organization*, online: < https://www.cmaio.-ca/ > .

Given the overarching goal of unification underpinning the Cooperative System, it is not surprising that improved market efficiency is among its most touted benefits. According to the Cooperative System's website, efficiency will be improved by "[facilitating] 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 common standards reflected in cooperatively-developed regulations consistently applied."[25] Perhaps most obviously, issuers should experience a reduction in the cost to qualify their securities for sale in multiple provinces and to go public. Assuming participation of each province and territory, issuers will only be required to file a prospectus with one regulator, which should save time and money. Such a simplification of the securities regulatory system might increase the number and variety of companies choosing to go public in Canada, giving greater investment options to potential investors and more potential value to shareholders.[26]

It is not only sophisticated or institutional investors who would benefit from efficiency improvements. Retail investors (who trade in securities on their own, rather than an organization's, behalf) may derive benefit from a simplified system, as well as the ability to rely upon a single regulator for information and guidance. Additionally, such investors would be able to retain their advisors even in the event of relocating to another Canadian jurisdiction. Currently, advisors must be licensed in the province or territory in which the client resides.[27]

Increased protection for investors is the second purported main benefit of the Cooperative System, and will arise "through a combination of more consistent and active compliance activities, more effective enforcement against misconduct and improved coordination with police and prosecution authorities both within and outside Canada."[28] It is easy to see how this might be true. A national regulator will provide greater consistency in the application of protectionary measures for investors across Canada. It will also be much easier to monitor and enforce sanctions against problematic parties throughout Canada. Currently, advisors, promoters, or other market participants who have been sanctioned or banned in one province or territory can relocate to a new province or territory and continue their activities. With a national regulator, this will no longer be possible.

The Cooperative System also represents a potential improvement in the fight against white collar crime. The Royal Canadian Mounted Police (RCMP) currently tackles criminal offenses, with provinces remaining in charge of securities law violations.[29] Invariably there is overlap, and inefficient

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[25] "About", *Cooperative Capital Markets Regulatory System*, online: <http://ccmr-ocrmc.ca/about/> ["About"].

[26] Bryan Boryzkowski, "Will a national securities regulator really help Canadian investors?" *Maclean's* (20 November 2018), online: <https://www.macleans.ca/economy/will-a-national-securities-regulator-really-help-canadian-investors/>.

[27] *Ibid.*

[28] "About", *supra* note 25.

coordination between the RCMP and provincial/territorial commissions can result. University of Toronto law professor and J.R. Kimber Chair in Investor Protection and Corporate Governance, Anita Anand, claims that the current system has been largely ineffective in addressing white collar crime. She has stated that ". . . the question now becomes how can we better protect our financial markets from fraud?"[30] The Cooperative System may assist, as it should result in better coordination between the RCMP and the CMRA in policing those acting fraudulently or otherwise in contravention of criminal or securities laws.

Taken as a whole, the Cooperative System offers an enticing shift from an embedded status quo. In theory, it has the potential to fundamentally change the regulation of capital markets in Canada and improve virtually every aspect of securities trading for everyone from large institutional investors to retail individuals.

(b) Opinion of the Québec Court of Appeal

Prior to the SCC's *2018 Reference* decision, the Québec Court of Appeal (QBCA) considered the constitutionality of the Cooperative System through a reference that posed the following questions:[31]

1. Does the Constitution of Canada authorize the implementation of pan-Canadian securities regulation under the authority of a single regulator, according to the model established by the most recent publication of the "Memorandum of Agreement regarding the Cooperative Capital Markets Regulatory System"?

2. Does the most recent version of the draft of the federal "Capital Markets Stability Act" exceed the authority of the Parliament of Canada over the general branch of the trade and commerce power under subsection 91(2) of the *Constitution Act*, *1867*?

In response to the first question, the QBCA answered in the negative. The Court held that the MOA entrenched on parliamentary sovereignty by prohibiting participating provinces from amending their securities legislation without the consent of the Council of Ministers and by requiring the implementation of any amendments made by the Council of Ministers. In response to the second question, the majority of the QBCA concluded that while the Draft Federal Act was not *ultra vires*, it was constitutionally invalid as it permitted provinces to exercise a veto power over the federal government, which

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[29] *Ibid.*

[30] *Ibid.*

[31] *Québec (Procureure générale) c. Canada (Procureure générale)*, 2017 QCCA 756, 2017 CarswellQue 3488, 2017 CarswellQue 4199, EYB 2017-279399 (C.A. Que.); reversed in part Reference re Pan-Canadian Securities Regulation, 2018 CSC 48, 2018 SCC 48, 2018 CarswellQue 9836, 2018 CarswellQue 9837, 41 Admin. L.R. (6th) 1 (S.C.C.).

was viewed as being incompatible with the federal government's general trade and commerce power.

(c) Decision of the Supreme Court of Canada

Upon appeal to the SCC, the governments of Canada, British Columbia, Ontario, Prince Edward Island, Saskatchewan, and New Brunswick (collectively under this heading the "Proponents") disagreed with the QBCA's interpretation of the MOA. The Proponents claimed that the MOA neither purported nor had the effect of binding provincial legislatures in the manner found by the QBCA. Moreover, they submitted that the perceived provincial veto power over the federal government amounted to a factual inaccuracy, such that the Draft Federal Act was not constitutionally invalid. On the other hand, the governments of Québec and Alberta, as well as the Barreau du Québec and the Institute for Governance of Private and Public Institutions (collectively under this heading the "Opponents") argued that the decision of the QBCA was correct.

In addressing the first question, the SCC clarified that when the principle of parliamentary sovereignty is invoked, it is done so for the purpose of determining the legal *effect* of the executive action, rather than the underlying validity of that action.[32] Accordingly, the SCC held that "even if the Memorandum actually purported to fetter [legislative power], it would be merely *ineffective* in this regard . . . and not *constitutionally invalid*."[33] Concluding on the issue, the Court found that the Memorandum was neither capable of, nor purported to, bind any province. The SCC stated "as is clear from the foregoing, legislatures in Canada are constrained only by the Constitution — and are otherwise free to enact laws that they consider desirable and politically appropriate."[34] The SCC further clarified that the delegation of authority to the Council of Ministers to approve amendments to the Model Provincial Act was permissible and "plainly distinguishable from the [prohibited] delegation of primary legislative authority . . ."[35] Under the Cooperative System, the Council of Ministers would only *approve* amendments to the Model Provincial Act; the amendments would have no effect unless and until the legislatures of the provinces and territories adopted them.

In order to answer the second question, the SCC once again engaged in the two-stage "pith and substance" analysis. The analysis concluded that the intention of the Draft Federal Act was to complement, not displace, provincial and territorial securities legislation. The Court stated: ". . . viewed as a whole [the Draft Federal Act's] pith and substance clearly does not relate, as Québec suggests, to regulation of the trade in securities generally. Rather, its subject

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[32] *2018 Reference*, *supra* note 13 at para. 62.

[33] *Ibid.* at para. 67. Emphasis in the original text.

[34] *Ibid.* at para. 71.

[35] *Ibid.* at para. 79.

matter accords with its stated purposes: 'to promote and protect the stability of Canada's financial system through the management of systemic risk related to capital markets' and 'to protect capital markets, investors and others from financial crimes'."[36]

The second "classification" stage of the analysis yielded a similar finding. After applying the *General Motors* framework, the SCC came to the conclusion that the Draft Federal Act:

> . . . addresses a matter of genuine national importance and scope that relates to trade as a whole. The preservation of the integrity and stability of the Canadian economy is quite clearly a matter with a national dimension, and one which lies beyond provincial competence . . . we therefore classify the legislation at issue in this case as falling within Parliament's power over trade and commerce pursuant to s. 91(2) of the *Constitution Act, 1867*.[37]

The SCC allowed the appeal and responded to the questions as follows:

1. Does the Constitution of Canada authorize the implementation of pan-Canadian securities regulation under the authority of a single regulatory, according to the model set out by the most recent publication of the "Memorandum of Agreement regarding the Cooperative Capital Markets Regulatory System"? ***Answer: Yes***

2. Does the most recent version of the draft of the federal "Capital Markets Stability Act" exceed the authority of the Parliament of Canada over the general branch of trade and commerce power under subsection 91(2) of the *Constitution Act*, *1867*? ***Answer: No***

(d) Limitations of the Cooperative System

The *2018 Reference* decision builds on the SCC's previous guidance from the *2011 Reference*. Taken together, the decisions confirm the constitutionality of the Cooperative System and, in particular, convey the constitutional limitations a national securities regulator faces in Canada.

As the SCC itself comments, the decision is advisory and "does not take into consideration many of the political and practical complexities relating to the Cooperative System."[38] The extent to which the Cooperative System will continue to develop along its current path is uncertain and will largely depend on political, not legal, manoeuvering. In addition, the decision does not address the constitutionality of the CMRA's enabling statute, as it has not yet been published.[39] Given the contentious nature of the Cooperative System and the

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[36] *Ibid*. at para. 97.

[37] *Ibid*. at para. 116.

[38] *Ibid*. at para. 130.

[39] *Ibid*.

fundamental principles of federalism upon which it impacts, it is possible that this statute will attract similar legal challenge and scrutiny.

Nor can it even be said that constitutionality of the draft Acts is a totally settled issue because neither carry any legal force unless and until legislative approval is obtained and they are enacted by provincial legislatures and Parliament.[40] Almost undoubtedly, there will be those who advocate strongly for changes to each Act in the interim. It will thus be up to provincial and federal legislatures to put forth their best efforts in ensuring that the *Acts,* and the Cooperative System as a whole, do not stray too far from the path that has been laid out.

5. IMPLICATIONS FOR CAPITAL MARKETS

(a) The Problem of Practicality

To what extent would the Cooperative System improve upon the current system? If implemented, the Cooperative System would be hamstrung by substantial practical constraints. These include holdouts by several provinces such as Québec and Alberta, the potential variability in the provincial and territorial acts to be implemented by the Participating Jurisdictions, and the overall possibility of realizing little or no net gain in practical benefit.

(b) The Holdouts

There are currently seven Canadian provinces and territories who have not signed on to the Cooperative System: Alberta, Manitoba, Québec, Nova Scotia, Newfoundland and Labrador, Nunavut, and the Northwest Territories. Nova Scotia indicated in its 2018 budget that it expects to join the Cooperative System within the 2018-2019 fiscal year, however that remains to be seen.[41] The words of the SCC in the *2018 Reference* provide a stark reminder of the situation: ''the various jurisdictions have an unquestioned and equally sovereign right to join or to reject the Cooperative System.''[42] While it is disconcerting that the country's jurisdictions are equally split as to acceptance of the Cooperative System, it is the notable holdouts — Alberta and Québec — who present the greatest challenge.

Following the issuance of the SCC's reasons for judgement in the *2018 Reference*, both Alberta and Québec released statements reaffirming commitment to their provincial schemes and rejecting the Cooperative System. Alberta's opposition stems from what it considers to be the ''unique'' nature of the province's capital market. According to Joe Ceci, President of the Treasury

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[40] *Ibid.* at para. 33.

[41] John Tuzyk & Liam Churchill, ''Supreme Court Hearing Leaves Cooperative Capital Markets Regulatory System in Limbo'' *Blakes Business Class* (28 March 2018), online: < https://www.blakesbusinessclass.com/supreme-court-hearing-leaves-cooperative-capital-markets-regulatory-system-in-limbo/ > .

[42] *2018 Reference*, *supra* note 13 at para. 131.

Board and Alberta's Minister of Finance, it is necessary for the province to maintain a "local regulator that understands the complexities [of Alberta's market]."[43] Québec's refusal is grounded in similar reasoning. A statement put forth by Eric Girard, Minister of Finance, expressed the view that maintenance of the province's autonomy within its "highly strategic" financial sector is crucial.[44] This view is embedded within Québec's deep concern over "defending both the interests of Québeckers and Québec's jurisdiction from any eventual encroachment."[45] Both provinces remain steadfast in their positions. However, Alberta claims it will work "collaboratively with all provinces and territories regardless of their participation in the cooperative system."[46]

Juxtaposed against participants British Columbia and Ontario, Alberta and Québec represent a fracturing of Canada's major capital markets. This is potentially problematic for the future functionality of the Cooperative System for several reasons. First, by refusing to participate, both provinces have given up the considerable influence and power they would otherwise wield in the system's creation. Second, the resources and input lost as a result of these key holdouts constitute a not insignificant hindrance in the system's development process. Finally, other provinces who might be swayed by Alberta or Québec's participation remain unwilling to commit.

(c) Variability in Provincial and Territorial Acts

It is easy to see the inherent problem with a "national" regulator which regulates merely half of the country's jurisdictions. The *2018 Reference* decision reiterates the fundamental nature of parliamentary supremacy and confirms that provincial legislatures can neither be bound by the Memorandum nor by the CMRA. Thus, while the Participating Jurisdictions will no doubt either adopt the Model Provincial Act outright or enact very similar legislation, the extent to which Acts in non-participating jurisdictions will be compatible with the Cooperative System will be decided by those other jurisdictions. Consequently, it is unlikely that the Cooperative System will create a truly national regulator.

To the extent that certain provinces or territories refuse to participate in the Cooperative System, significant differences between the Acts enacted by participating and non-participating jurisdictions could result in inefficiencies similar to those affecting the current securities regulatory system in Canada. Even minor differences between each Participating Jurisdiction's Act carry the

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[43] Government of Alberta, Media Release, "Ruling on national securities regulator: Minister Ceci" (9 November 2018), online: < https://www.alberta.ca/release.cfm?xID = 61979CA1EF945-C03F-E1C8-FE97F001508C26CF > ["Media Release"].

[44] Government of Québec, Media Release, "Supreme Court of Canada ruling on securities regulation: Québec reiterates that it will not be participating" (9 November 2018), online: < http://www.fil-information.gouv.qc.ca/Pages/Article.aspx?aiguillage = ajd&lang = en&idArticle = 2611098404 > .

[45] *Ibid.*

[46] "Media Release", *supra* note 43.

potential for negative impact. Harvey Naglie (former senior policy advisor with the Ontario Ministry of Finance) writing for the C.D. Howe Institute, aptly summarized the issue:

> The participating jurisdictions [acknowledge] in the MOA that they would work to ensure that the Co-operative Regulator would be able to work with the non-participating provinces to effectively create a system of 'national application'. This self-imposed imperative highlights the limitations of the Co-operative Regulator not being a single national regulator. Due to many jurisdictions . . . opting not to participate together with a stated desire to ensure national application, the participating jurisdictions effectively [constrain] the latitude available to them for legislative or regulatory streamlining and innovation. For the Co-operative Regulator, when launched, to integrate smoothly and operate as seamlessly as possible with regulators in non-participating jurisdictions, the new legislation and regulations would need to align closely with those of non-participating jurisdictions, leaving little scope to streamline, modernize or even improve existing legislations and regulations.[47]

There is also the possibility that a Participating Jurisdiction might decide to opt out of the system at a later date, although this would require the re-creation of a provincial or territorial securities commission where the previous one was dissolved in favour of the national regulator.[48]

One area *not* subject to the constraint of questionable provincial participation is the Authority's proposed power to enforce *Criminal Code* provisions. The Draft Federal Act can be enacted unilaterally with little or no alternation from its draft form. Should this occur, the relocation of enforcement from the RCMP to the Authority might very well increase the efficiency and accuracy of related criminal investigations.

For these reasons, the Authority's inability to bind provincial legislatures means that it will be difficult for the Cooperative System to operate in a completely unified manner, absent the adoption by every jurisdiction on their own accord of the Model Provincial Act and subsequent approval by the Council of Ministers.

(d) Practical Benefit

For adoption of the Cooperative System to make sense, there must be a net gain in practical benefit, regardless of the form that it ultimately takes. For example, Harvey Naglie points out that, contrary to claims made by proponents of the Cooperative System, the Cooperative System is actually a step *backwards* for Ontario from an investor protection standpoint.[49] Currently, retail investors benefit from the processes for providing feedback on policy issues provided by

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[47] Harvey Naglie, *Not ready for Prime Time: Canada's Proposed New Securities Regulator* (2017), online: < https://www.cdhowe.org/sites/default/files/attachments/research_papers/mixed/Commentary_489.pdf > .

[48] *2018 Reference, supra* note 13 at para. 70.

[49] Naglie, *supra* note 47 at 15.

the Office of the Investor and the Investor Advisory Panel. The Cooperative System currently contemplates no similar feedback mechanism, though the CMRA is apparently aware of the issue.[50]

Going forward, the bulk of any net gain in practical benefit will depend on the decision of the non-participating jurisdictions to join or at least work with the Cooperative System. In order to address the high degree of speculation inherent in provincial adoption of the system, Mr. Naglie recommends commissioning an independent review and cost-benefit analysis of the Authority.[51] In support of this point, he argues that because the Authority will not be a single national regulator,

> its launch will not immediately create a regulatory framework that is unambiguously superior to the one now in place. Consequently, [the CMRA] does not deserve nor warrant a review-free launch. Slowing down the process and taking the time necessary to perform a fulsome review of the proposed new regulator seems reasonable given the implications of a premature launch of a potentially flawed regulator."[52]

6. CONCLUSION

The SCC's decision in the *2018 Reference* provides further guidance on how a national securities regulator may be established in Canada. However, the extent to which the Cooperative System, or any other constitutionally valid national securities regulatory system, is effective in removing the duplication and inefficiencies of the current system hinges on the adoption of the system by all, or at least most, of the provinces and territories. While the *2018 Reference* has made clearer the roles of the federal and provincial/territorial governments in enacting the Cooperative System, cooperation between the levels of government and between the provincial and territorial governments underpins the success of such a system. Ultimately, the extent to which such nation-wide adoption is undertaken will rest not in the hands of Canada's highest court, but in those of provincial and territorial politicians.

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[50] *Ibid.*

[51] *Ibid.* at 19.

[52] *Ibid.*