

The Counterview to a National Securities Regulator in Canada

By Shaun Fluker

I am coming to the aid of an old friend. Having worked as legal counsel at the Alberta Securities Commission, I can tell you the current securities regulatory system works and is far less fragmented than most suggest. Indeed provincial (and territorial) securities regulation serves Canadians very well notwithstanding the challenges of operating within such a large and diverse a nation as Canada. Of all the legitimate reasons to implement a national securities regulator, let's be clear that "fixing the system" is not one of them. In the early part of the 20th century, various provinces enacted securities legislation to regulate the sale of securities in their jurisdiction. In 1932, the U.K. Privy Council upheld Alberta's securities legislation as within the provincial constitutional purview with its *Lymburn v. Mayland* decision, [1932] A.C. 318. Until the 1960s, most provincial governments administered their securities legislation within the executive branch. Presumably growth in the size and complexity of the capital market within certain provinces led governments to create provincial administrative agencies known as securities commissions and delegate regulatory authority to them. Shortly thereafter a federal proposal for securities regulation was published in 1979. Similar national proposals have surfaced more recently with the Crawford Report in 2005 and now the Hockin Report. The point of this history lesson is simply to observe that provincial jurisdiction over securities regulation has been challenged time and time again almost from the day it started.

Not surprisingly, over the past century the securities regulatory framework did fragment across the provinces and territories to address local concerns. In response to concerns over this fragmentation, provincial securities regulators formed the Canadian Securities Administrators (CSA) and tasked it with harmonizing securities regulation across Canada. In 2002 the CSA launched the Uniform Securities Legislation Project to develop uniform securities legislation for adoption in all provinces and territories. While the draft uniform legislation was never implemented, the work led to further harmonization initiatives, including the unique Passport system which will allow someone to clear a prospectus, obtain a discretionary exemption or register in one province or territory and have that clearance, exemption or registration apply automatically in all provinces and territories. With the creation of the Passport system in 2008, it is simply naïve to claim that Canadian securities regulation is fragmented.

Any analysis of Canadian securities regulation must also account for the nationalized self-regulatory organizations that regulate our capital markets. The Investment Industry Regulatory Organization of Canada (IIROC), for example, describes itself as a national organization which

oversees all investment dealers and trading activity on debt and equity marketplaces in Canada. The Mutual Fund Dealers Association of Canada (MFDA) describes itself as a *national* organization regulating the distribution arm of the Canadian mutual fund industry. The provincial securities regulators have delegated a significant portion of their regulatory functions to IIROC and the MFDA such as the setting and enforcing of proficiency and conduct rules applicable to dealer firms and their registered employees, as well as the setting and enforcing of market integrity rules regarding trading activity on Canadian equity marketplaces. Accordingly, much of securities regulation is *already* nationalized thru delegation to IIROC and the MFDA. Again, it is simply naïve to claim Canadian securities regulation is fragmented.

Effective securities regulation depends not only on the written word but also on the people that interpret and apply the rules. To put it another way, effective capital market regulation involves robust monitoring, compliance and enforcement activity. The existing provincial framework ensures all such activity is performed by people attuned in their local jurisdiction. A dealer firm based in Regina is accountable to compliance and enforcement staff located in Regina. Regulatory decisions are made in Regina. Regulatory staff are constantly in dialogue with their counterparts in other provinces through the auspices of the Canadian Securities Administrators to ensure policy-making, compliance and enforcement activity is consistent and as uniform as possible across Canada. A national system with regional offices may promise to retain this attunement and consistency, but that is the best it can promise. Surely an overhaul can only be justified by a significant improvement rather than simply maintaining the status quo.

What about lines of accountability? Do the federal courts have the capacity to oversee another federal regulatory regime? As an analogy, is the federal administration of the criminal justice system less fragmented and more efficient than its provincial counterparts? And why stop at securities regulation when it comes to nationalization? Surely environmental pollution - which knows nothing about provincial or territorial boundaries - should be centrally regulated for efficiencies and effectiveness? Why are we satisfied with a patchwork of provincial, territorial and federal regulation when it comes to environmental protection?

Without a doubt, there are strong political reasons that favour a national securities regulator (although the Alberta government has said that it will constitutionally challenge any federal legislation in this area). But this is supposed to be about more than politics, right? The existing securities regulatory framework is by no means perfect, but it works and the novel Passport initiative is based on harmonized rules across Canada that have significantly reduced fragmentation. We should give it a chance to succeed.