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Can't We All Get Along?: A Federal and Provincial Tribunal as Part of Securities Reform

November 14, 2014 | Ke-Jia Chong and Adam D.H. Chisholm

The latest attempt at reforming the regulatory system governing Canada's capital markets involves a cooperative approach between some Provincial Governments and the Federal Government. This Cooperative Capital Markets Regulatory System has administrative law implications. Among other things, it will create a tribunal that will administer both federal and provincial legislation.

The Cooperative System currently involves two drafts of legislation which have been circulated for public comment. There is a uniform provincial legislation, the *Provincial Capital Markets Act* (PCMA) and the complementary federal *Capital Markets Stability Act* (CMSA). The CMSA deals with criminal matters and systemic risk in national capital markets and national data collection.^[1] The PCMA retains elements of the current provincial legislation, but also introduces new elements to modernize the law.^[2]

The Cooperative System, as it is currently devised, will have a common regulator called the Capital Markets Regulatory Authority ("the Authority") and will administer both the PCMA and the CMSA.^[3]

One facet of the Cooperative System is the creation of a new adjudicative tribunal. The tribunal will be a separate division of the Authority and will operate independently from the Authority's Regulatory Division.^[4] The tribunal is unique in that both provincial and federal legislation will enable the tribunal. The new tribunal is established from the Memorandum of Agreement Regarding the Cooperative Capital Markets Regulatory System ("the MOA").^[5] The MOA is between the governments of British Columbia, Ontario, Saskatchewan, New Brunswick, the Federal Government, and most recently, Prince Edward Island.^[6] Both the CMSA and PCMA refer to the tribunal mentioned in the MOA.^[7]

Separate provincial and federal statutory provisions about capital market offences will be governed by each. Under both the CMSA and PCMA, the tribunal's powers include the ability to order compliance with capital markets law, and the ability to make cease trading orders.^[8] The CMSA also allows the tribunal to order systemically important securities issuers and credit rating

organizations to change their practices and procedures.^[9] The PCMA enables the tribunal to reprimand a person, to exempt a person from capital markets law, to order resignations of directors or officers, to prohibit persons from acting in the capital markets industry, to prohibit or force the dissemination of information, and to order a market participant to submit to a review and even change its practices and procedures.^[10]

Penalties vary. Under both the CMSA and PCMA, the tribunal can determine an administrative penalty up to \$1 million per contravention of capital markets law for an individual, and up to \$15 million for persons other than an individual.^[11] In addition, the CMSA sets out general offences, where proceedings by way of indictment can result in a fine of up to \$5 million and imprisonment for up to five years for individuals guilty of an offence, or up to \$25 million for persons other than an individual.^[12] The PCMA has also regulatory offence provisions, which can result in a fine of up to \$5 million and imprisonment of less than five years.^[13]

As it now stands, the tribunal poses an interesting administrative law concept: that an adjudicative body could be created not from legislation, but from the MOA. Perhaps in recognition of this unusual process, the Federal Department of Finance has stated that the elements of the MOA will be included in separate legislation.^[14] However, this legislation has not yet been released.^[15]

The final statutory structure may be comparable to other administrative tribunals by analogy. Parallel legislation for regulation and a tribunal dealing with alleged conduct may resemble, for example, the regime of the *Competition Act*^[16] and *Competition Tribunal Act*^[17] which are used to deal with particular competition law matters. Nonetheless, if the Cooperative System as contemplated in the MOA is carried out, such paired statutes will have to be passed both at the provincial and federal levels.

It will be interesting to observe how appeals from decisions of the tribunal are made. At this time, the tribunal's decisions under the PCMA can be appealed.^[18] The CMSA does not provide for appeals from the tribunal's decisions but would be subject to judicial review to the Federal Court.^[19]

One interesting situation may result if a person is convicted of an offence under both the PCMA and CMSA. Will it be the case that some of two parallel appeals/reviews are necessary? Surely the duplicative proceedings on related issues could become a topic of debate. Will those enforcing the statutes instead be forced to select between jurisdictions? Will some attempt be made to reconcile the fashion in which persons can seek appeal of the entirety of the tribunal's decisions without bifurcation?

This dual framework of a coordinated provincial act and federal act was created in response to the 2011 Supreme Court of Canada decision, *Reference Re Securities Act*, 2011 SCC 66.^[20] This reference held that the Federal Government's proposed *Securities Act* infringed constitutionally protected provincial powers, and in particular, the provincial s. 92(13) powers on civil rights and property.

[21] Under the Cooperative System, the PCMA will be adopted in each participating province to allow for both the coordination of law and respect for provincial powers.[22]

The Cooperative System has administrative law implications beyond those related to the tribunal. It also provides for expansive powers of investigation. The Chief Regulator of the Authority can make investigation orders, compel evidence, and grant inspections of business premises according to the PCMA.[23] The PCMA and the CMSA also allow for peace officers and the Authority's staff to apply to court for specific production orders. These include compelling a trading facility, marketplace, clearing house or agency, self-regulatory organization, or dealer to provide names of all persons that traded a specific security or derivative during a specified time period.[24]

These expansive powers may be of increased interest as a result of the Supreme Court of Canada's recent decision in *Imperial Oil v. Jacques*, 2014 SCC 66. Comprehensive discussion of this decision is beyond the scope of this article. However, it is worth noting that the Supreme Court of Canada ruled that civil litigants could access 220,000 private communications intercepted by the Competition Bureau of Canada. As a consequence, the Chief Regulator's investigative powers may be of interest not just to those focused on the regulatory regime, but also civil litigation counsel.

The public comment period on the draft consultation for the PCMA and CMSA has recently been extended from Friday November 7, 2014 to Monday, December 8, 2014.[25]

About the Authors

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[1] "Memorandum of Agreement Regarding the Cooperative Capital Markets Regulatory System", October 9, 2014. See <http://ccmr-ocrmc.ca/wp-content/uploads/Oct-9-MOA-English.pdf> at s.3(a), p. 3.

[2] "Memorandum of Agreement Regarding the Cooperative Capital Markets Regulatory System", October 9, 2014. See <http://ccmr-ocrmc.ca/wp-content/uploads/Oct-9-MOA-English.pdf> at s.3(a), p. 3; Memorandum of Agreement on the Cooperative Capital Markets Regulatory System and Consultation on the Cooperative Legislation" (Backgrounder to the MOA), October 9, 2014. See <http://ccmr-ocrmc.ca/wp-content/uploads/Oct-9-Bkgrder-PEI-English.pdf> at p. 2.

[3] "Memorandum of Agreement on the Cooperative Capital Markets Regulatory System and Consultation on the Cooperative Legislation" (Backgrounder to the MOA), October 9, 2014. See <http://ccmr-ocrmc.ca/wp-content/uploads/Oct-9-Bkgrder-PEI-English.pdf> at p. 1.

[4] "The Cooperative Capital Markets Regulatory System Governance and Legislative Framework" (Federal Department of Finance Commentary), October 31, 2014. See <http://ccmr-ocrmc.ca/wp->

[content/uploads/Oct_31-Commentary-English.pdf](#) at p. 2.

[5] “Memorandum of Agreement Regarding the Cooperative Capital Markets Regulatory System”, October 9, 2014. See <http://ccmr-ocrmc.ca/wp-content/uploads/Oct-9-MOA-English.pdf> at p. 12.

[6] “Memorandum of Agreement Regarding the Cooperative Capital Markets Regulatory System”, October 9, 2014; “Prince Edward Island Agrees to Join the Cooperative Capital Markets Regulatory System”, October 9, 2014. See <http://ccmr-ocrmc.ca/wp-content/uploads/Oct-9-Press-Release-PEI-english.pdf> at p.1.

[7] See the definition of “Tribunal” under s. 2 of both the *Provincial Capital Markets Act* and *Capital Markets Stability Act*.

[8] *Provincial Capital Markets Act*, s. 89(1)(a)-(d); *Capital Markets Stability Act*, s. 49(1)(a)-(d).

[9] *Capital Markets Stability Act*, s. 49(1)(e).

[10] *Provincial Capital Markets Act*, s. 89(1)(e)-(p).

[11] *Capital Markets Stability Act*, s. 43(4).

[12] *Capital Markets Stability Act*, s. 58(1).

[13] *Provincial Capital Markets Act*, s. 112(1).

[14] “The Cooperative Capital Markets Regulatory System Governance and Legislative Framework” (Federal Department of Finance Commentary), October 31, 2014. See http://ccmr-ocrmc.ca/wp-content/uploads/Oct_31-Commentary-English.pdf at p. 1. Note, the original version was released here, prior to the extension of the public comment period: http://www.fin.gc.ca/n14/data/14-119_2-eng.asp

[15] Government representatives have established a website for the Cooperative Capital Markets Regulatory System. The legislation replacing the MOA would likely be released here. For the essential documents, see <http://ccmr-ocrmc.ca/publications/>

[16] *Competition Act*, R.S.C. 1985, c. C-34.

[17] *Competition Tribunal Act*, R.S.C., 1985, c. 19 (2nd Supp.).

[18] *Provincial Capital Markets Act*, s. 100; “The Cooperative Capital Markets Regulatory System Governance and Legislative Framework” (Federal Department of Finance Commentary), October 31, 2014. See http://ccmr-ocrmc.ca/wp-content/uploads/Oct_31-Commentary-English.pdf at p. 12.

[19] “The Cooperative Capital Markets Regulatory System Governance and Legislative Framework” (Federal Department of Finance Commentary), October 31, 2014. See http://ccmr-ocrmc.ca/wp-content/uploads/Oct_31-Commentary-English.pdf at p. 12.

[20] The Supreme Court of Canada suggests to implement a cooperative scheme that recognizes the essentially provincial nature of securities regulation while allowing Parliament to deal with genuinely national concerns. The Court also states this cooperative solution would resolve the governance problems that arises in countries founded in federalism. See *Reference Re Securities Act*, 2011 SCC 66 at paras 130 and 132.

[21] *Reference Re Securities Act*, 2011 SCC 66, at paras 100, 101, 116 and 128.

[22] "Memorandum of Agreement Regarding the Cooperative Capital Markets Regulatory System", October 9, 2014. See <http://ccmr-ocrmc.ca/wp-content/uploads/Oct-9-MOA-English.pdf> at s.1(a), p. 1-2. "Memorandum of Agreement on the Cooperative Capital Markets Regulatory System and Consultation on the Cooperative Legislation" (Backgrounder to the MOA), October 9, 2014. See <http://ccmr-ocrmc.ca/wp-content/uploads/Oct-9-Bkgrder-PEI-English.pdf> at p. 1;

[23] *Provincial Capital Markets Act*, s. 104(8); s.103(4).

[24] *Provincial Capital Markets Act*, s. 110(1); *Capital Markets Stability Act*, s. 54(1).

[25] "The Cooperative Capital Markets Regulatory System Governance and Legislative Framework" (Federal Department of Finance Commentary), October 31, 2014. See http://ccmr-ocrmc.ca/wp-content/uploads/Oct_31-Commentary-English.pdf at p. 14.

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