BANKING ON CORPORATE

GREEN EGGS AND SECURITIES HAM

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There are countless inspirational sayings, profound parables and charming children's tales about co-operation. And there are comparatively few on constitutional law. One can only imagine what Dr. Seuss might have done. Crazy Cyrus, He's So Ultra Vires! Do I, Do You, Due Process! Or maybe Horton Repatri-ate the Whole Thing. But constitutional law and the concept of co-operation have been intersecting recently outside of the realm of children's literature, specifically in the world of securities law.

Patience has marked the path to a co-ordinated Canadian approach to securities regulation. Due to the constitutional division of powers, which allocates responsibility for property and civil rights — and hence authority to legislate in relation to securities matters — to the provinces, Canada is one of the few industrialized countries without a national securities regulator. There are some harmonized rules among the jurisdictions to standardize certain aspects of securities regulation and a "passport regime" that allows issuers to deal with multiple jurisdictions through a single regulator, but the efforts to centralize securities regulation are still unrealized, despite going on for many years.

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The most recent chapter really started in a Supreme Court's 2011 decision, where the court held that although the national securities regulatory regime, then proposed by the federal government, was unconstitutional, a harmonized system in which the provinces/territories enacted legislation governing their matters and the federal government addressed matters of national concern may be constitutional. In 2014, the federal government entered into a memorandum of agreement with the governments of Ontario, British Columbia, Saskatchewan, P.E.I. and New Brunswick (later joined by Yukon) providing for the creation of the Cooperative Capital Markets Regulatory System as a national co-operative system for the regulation of capital markets in Canada.

The CCMR was clearly developed with this guidance in mind, consisting of the following elements:

- A form of standardized provincial/territorial act that governs the "day-to-day" aspects of securities regulation, addressing matters falling within provincial/territorial jurisdiction;
- A federal statute more limited in scope, addressing only criminal matters, matters relating to systemic risk in Canada's capital markets and national data collection;
- Delegation of certain regulatory powers to a single operationally independent capital markets regulatory authority, to administer the co-operative framework;
- A council of ministers who are responsible for capital markets regulation in each participating province/territory and the federal minister of finance.

The Quebec Court of Appeal, asked by the Quebec government to rule on the CCMR's constitutionality, accepted that the model provision legislation and the proposed federal statute were within the legislative authority of the relevant levels of government. However, the QCA held that the CCMR would be unconstitutional because the role of the council of ministers in relation to proposed amendments to the provincial legislation would improperly fetter provincial sovereignty and the role of that council in adopting regulations for the CCMR would constitute an impermissible delegation of regulation-making authority. Channelling Dr. Seuss again, it looked like Blue Fish, Red Fish, CCMR Fish, Dead Fish. Or maybe No Cigar, CCMR!

Then, in early November, the Supreme Court unanimously overturned the QCA's decision. First, the Supreme Court disagreed that the proposed process for amending the legislation was unconstitutional. The court held that the memorandum of agreement establishing the CCMR did not bind the provincial legislatures. Each legislature would be free to reject any proposed legislation or amendments or enact its own legislation if it so chose. Moreover, the CCMR was not capable of limiting provincial sovereignty. That's the thing about this law here: It would not, could not interfere. Second, the Supreme Court also disagreed that the proposed federal statute would involve an impermissible delegation of regulation-making authority, holding that the federal Legislature has broad authority to delegate administrative powers, including the power to make legally binding regulations.

The constitutional wrangles about securities regulation seem oddly anachronistic in a world where securities transactions are increasingly borderless and the co-operation-based premise of the CCMR itself contrasts with Brexit's threat to the planet's most integrated co-operative market. How successful the CCMR will be will depend on that co-operative spirit, not just in terms of how many provinces and territories join but in how they conduct themselves once joined. Constitutional limits mean that the system can't really bind its participants.

Still, it appears there is some progress for an integrated system. That is what constitutional evolution is intended to be. One last time: Oh, the Securities Regulation You Will See! From Our Litigated, Complicated Living Tree!

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