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Supreme Court of Canada Paves Way for a National Securities Regulator

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On November 9, 2018, the Supreme Court of Canada (SCC) unanimously ruled in *Reference re Pan-Canadian Securities Regulation*[1] that the federal government's second attempt to create a national securities regulator is constitutional. Specifically, the Court held that the proposed cooperative system (i) does not improperly fetter the provinces' sovereignty; and (ii) falls within Parliament's general powers to regulate trade and commerce under subsection 92(1) of the *Constitution Act*, 1867. The SCC's decision overturns the Québec Court of Appeal's 2017 ruling that found the proposed regime unconstitutional and clears the path for a voluntary, national securities regulation regime. While the legal roadblocks to a cooperative national securities regulator have now been cleared, it remains to be seen if sufficient political will exists to make a cooperative regime successful in Canada.

Background

In 2011, the SCC rejected the federal government's attempt to create a national securities regulator. In *Reference Re Securities Act*, the SCC held that the federal government's proposed *Securities Act* was not a valid exercise of the federal government's power to regulate trade and commerce in Canada because the proposed Act impermissibly interfered with the provinces' jurisdiction over property and civil rights. However, the SCC left open the possibility that a voluntary federal regulatory scheme could be constitutional.

Heeding the SCC's ruling, the federal government and the governments of Ontario, British Columbia, Saskatchewan, New Brunswick, PEI and Yukon entered into a *Memorandum of Agreement Regarding the Cooperative Capital Markets Regulatory System* (MOA) in 2014 to create a cooperative pan-Canadian securities regulator (Cooperative System). Seven jurisdictions, including Québec and Alberta, have not joined the Cooperative System.

The Cooperative System proposed by the federal government has four components:

- A national securities regulator called the Capital Markets Regulatory Authority (CMRA).
- The *Capital Markets Act* (Model Provincial Act), a standardized provincial and territorial statute to be administered by the CMRA. The Model Provincial Act would address the day-to-day aspects of securities regulation and each participating province would enact a statute that mirrors the Model Provincial Act.
- The *Capital Markets Stability Act* (Draft Federal Act), a complementary federal statute that would regulate systemic risk in Canada's economy.
- The CMRA and its board of directors would operate under the supervision of a Council of Ministers chosen from the cabinet of each participating province and the federal Minister of Finance. The Council of Ministers would propose amendments to the Model Provincial Act.

Judgment of Québec Court of Appeal

Québec, which did not sign the MOA, had concerns about the constitutionality of the proposed Cooperative System and referred two constitutional questions to the Québec Court of Appeal (QCCA):

1. Does the Constitution 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 Federal 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?

On the first question, the QCCA held that the proposed Cooperative System was unconstitutional for two key reasons: (i) it unduly fettered the provinces' legislative authority by delegating authority to amend the Model Provincial Act to the Council of Ministers; and (ii) the Council of Ministers' role in approving regulations made under the Draft Federal Act conflicted impermissibly with the principles of federalism.

On the second question, the QCCA held that while the pith and substance of the Draft Federal Act is to manage systemic risk related to capital markets in Canada, which was within federal powers, the Draft Federal Act exceeded Parliament's authority to regulate trade and commerce. The QCCA made clear that unless the power granted to the Council of Ministers to approve regulations made under the Draft Federal Act was removed, the Cooperative System as a whole would be unconstitutional.

Judgment of the Supreme Court of Canada

The SCC revisited the same reference questions that were before the QCCA.

Overturning the QCCA's decision, the SCC unanimously held that the proposed Cooperative System is constitutional and that the Draft Federal Act falls within the federal government's trade and commerce powers under section 91(2) of the Constitution. However, the SCC emphasized that although the Cooperative System is constitutional, each province and territory must decide for itself whether to join the Cooperative System.

Question One: The Cooperative System Does Not Fetter Provincial Sovereignty

The SCC held that the Model Provincial Act does not improperly fetter the provincial legislatures' sovereignty nor does it create an impermissible delegation of law-making authority. A key constitutional principle, parliamentary sovereignty ensures that only the legislature can pass, amend or abolish laws. The SCC held that because the proposed Cooperative System does not force provincial and territorial legislatures to pass the Model Provincial Act and the Model Provincial Act does not have the force of law within a province unless it is enacted by the province's legislature, the Cooperative System does not unduly intrude on parliamentary sovereignty.

Moreover, the proposed Cooperative System does not create an impermissible delegation of law-making authority. Provincial legislatures are prohibited from delegating primary legislative authority with respect to matters over which they have exclusive jurisdiction to a legislature of another level of government. The SCC held that although the Council of Ministers would have the power to approve amendments to the Cooperative System, the MOA is clear that the Council of Ministers would not actually have the power to unilaterally amend the provinces' securities legislation. Because the Council of Ministers remains subordinate to the will of provincial legislatures, the proposed Cooperative System will not result in an impermissible delegation of authority.

Question Two: The Draft Federal Act Is *Intra Vires*

The SCC held that the Draft Federal Act falls within Parliament's general powers to regulate trade and commerce under the Constitution. Parliament can use its trade and commerce power to make laws concerning truly national issues, meaning those issues that provinces and territories cannot deal with on their own. The SCC held that the pith and substance of the Draft Federal Act is to control material adverse systemic risks in Canada's economy and promote stability in Canada's capital markets.

The SCC noted that although provinces have the ability to legislate with respect to systemic risk in their own capital markets, they do so only from a local perspective. The Draft Federal Act addresses matters of genuine national economic importance that transcend provincial borders.

Further, the SCC specifically considered the constitutionality of certain provisions of the Draft Federal Act that allow the federal government to delegate authority to make regulations to the CMRA under the supervision of the Council of Ministers. The Court held that the provisions are constitutional because they are consistent with the legislature's broad authority to delegate administrative powers.

Where Do We Go From Here?

Although Canada is the only country in the G20 not to have a national securities regulator, the SCC's decision is likely to be controversial given the resistance to the concept in some provinces. With the launch of the Cooperative System, there will certainly be challenges in reaching consensus on the broad variety of issues that will need to be addressed. In particular, since Québec and Alberta remain opposed to the Cooperative System, it is unclear whether the Cooperative System will be able to create a truly harmonized securities regulatory regime.

The signatories to the MOA have already taken key steps to ensure that the development of the Cooperative System progresses. An expert board of directors and chief regulator of the CMRA have been appointed, and draft prospectus and related registration exemptions have been released for comment. However, when and how the Cooperative System will be introduced remain unknown.

The SCC made clear that while its decision constitutionally clears the way for the implementation of the Cooperative System, the individual provinces and territories retain discretion to determine whether participation is in their best interests. However, it remains to be seen if sufficient political will exists among the participating jurisdictions to move the Cooperative System forward.

[1] *Reference re Pan-Canadian Securities Regulation*, 2018 SCC 48. Full text of decision located here: https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/17355/index.do

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