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Supreme Court Clears Path to National Canadian Securities Regulator

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The Supreme Court of Canada has endorsed legislation proposing a national, pan-Canadian securities regulator in a unanimous ruling, paving the way for a unified approach to Canadian securities regulation and enforcement.

Canada is the only nation in the G20 that operates without a national securities regulator. Given the increasingly global nature of capital markets, the patchwork of 13 provincial and territorial securities commissions arguably creates systemic hurdles for efficient, harmonized and coordinated oversight of the capital markets.

Key Takeaways

- **The operation of the proposed regulatory regime is dependent on the involvement of both federal and provincial regulators.** The nature of securities governance within the constitutional framework of Canada will require the continued involvement of both levels of government to achieve a unified system of regulation that maintains a sound constitutional foundation.
- **This is only the first step towards a national securities regulator.** Although this decision has provided a clear constitutional path for the establishment of a national regulator, whether or not such a regime will be implemented depends on the political will and cooperation of the various participating governments.

Summary and Background

In 2011 the Supreme Court of Canada rejected proposed legislation attempting to create a national regulator in *Reference re Securities Act*. In a unanimous ruling, the Court held that the proposed regulator would be too closely involved in governing the securities industry and the day-to-day regulation of Canadian capital markets, a responsibility which was reserved for the provinces pursuant to the *Constitution Act, 1867*.

Although the Court rejected the plan, they did provide guidance to policymakers regarding the creation of a national regulator that could withstand constitutional scrutiny, holding that a scheme that adequately recognized the “essentially provincial nature” of securities regulation, while allowing Parliament to deal with matters of “genuine national concern,” remained a possibility.

In 2013, the federal government, along with the governments of Ontario, British Columbia, Saskatchewan, New Brunswick, Prince Edward Island and Yukon, once again sought the creation of a national system of securities regulation (the Cooperative System), which would be administered by a single national regulator known as the Capital Markets Regulatory Authority (the Authority). The Authority would be overseen by a Council of Ministers, comprised of securities regulators from each of the participating jurisdictions, who were beholden to the various provincial and territorial legislatures.

This proposal sought to implement a national system for the regulation of Canadian capital markets, the framework for which was outlined in an agreement between the federal and participating provincial and territorial governments (the Memorandum). The main components of the Memorandum included a model provincial and territorial statute dealing primarily with the day-to-day aspects of the securities trade, with a proposed federal statute that would manage systemic risk, and establish criminal offences relating to the financial markets.

In opposition to the proposed regulatory regime, the Quebec government referred the plan directly to the Quebec Court of Appeal. In May 2017, the Court of Appeal concluded that the plan was unconstitutional, holding that the inclusion of a Council of Minister conflicted with Parliamentary sovereignty, and led to an “abdication of federal jurisdiction,” contrary to Canada’s constitution.

The Decision

On November 9, 2018, the Supreme Court of Canada unanimously overturned the Quebec Court of Appeal's conclusion, holding that the proposed regulatory regime was constitutionally permissible. In considering the issue, the Court addressed two questions that had been referred to the Court of Appeal by the government of Quebec:

- Does the Constitution of Canada authorize the implementation of pan-Canadian securities regulation under the authority of a single regulator?
- Does the draft of the federal *Capital Markets Stability Act* (the Federal Act) exceed the authority of Parliament over the general branch of the trade and commerce power under subsection 91(2) of the *Constitution Act, 1867*?

In addressing the first question, the Court held that the Cooperative System did not purport to improperly fetter the sovereignty of the provincial legislatures, and did not entail an impermissible delegation of law-making authority. This was largely because under the proposed system, the Council of Ministers remained subordinate to the sovereign will of the various legislatures of the participating governments.

In addressing the second question, the Court held that the proposed Federal Act was *intra vires*, falling clearly within the general branch of the federal trade and commerce power. The Court concluded that the pith and substance of the proposed legislation was to manage systemic risk and protect against financial crimes, both of which were concerns that fall squarely within federal jurisdiction. Further, the Court held that the manner in which the proposed Federal Act delegated power had no impact upon its constitutionality. Further, it held that the delegation of power to a Council of Ministers, comprised of provincial regulators, is not incompatible with the principle of federalism.

The Upshot

This decision will enable Canada to move closer towards the establishment of a national securities regulator, a goal that many Canadian policymakers have been working towards, and capital markets participants have been endorsing for decades. While this decision provides a clear constitutional path for reform, the ultimate decision to adopt the proposed Cooperative System now falls to federal and provincial lawmakers.

The establishment of a national regulator could go a long way to foster fair and efficient capital markets, while contributing to the integrity and stability of Canada's financial system. It would also lead to more efficient and consistent coordination of securities regulation and enforcement. A more consistent approach could foster certainty and thereby promote foreign investment in Canada.

The Supreme Court of Canada's decision in *Reference re Pan-Canadian Securities Regulation* is available here.

If you have any questions about this decision, its implications, or corporate and securities law more generally, please contact Wendy Berman, John M. Picone, Kate Byers, or any other member of the Cassels Securities Litigation Group.

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