NOVEMBER 12, 2018

Canada Gets Go-Ahead for a National Securities Regulator

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The Supreme Court of Canada (SCC) has now unanimously ruled on two reference questions from the Government of Québec, holding that the federal government's second attempt to create a national securities regulator is constitutional.

Key Takeaways

1. The proposed cooperative pan-Canadian system does not unduly fetter provincial legislative discretion to regulate securities in the province.
2. The proposed cooperative pan-Canadian system is not an impermissible delegation of provincial legislative authority.
3. The proposed federal *Capital Markets Stability Act* is constitutional because its pith and substance is to regulate systemic risk across Canada's capital markets, falling within Parliament's general trade and commerce powers under section 91(2) of the *Constitution Act, 1867*.

Proposed Cooperative Capital Markets Regulator

In 2011, 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. However, the Court left open the possibility that a voluntary federal regulatory scheme could be constitutional.

Heeding the SCC's advice, 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* to create a cooperative pan-Canadian securities regulator (Cooperative System). Québec and Alberta did not join the Cooperative System.

The Cooperative System has four components:

1. A national securities regulator called the Capital Markets Regulatory Authority (CMRA).
2. The *Capital Markets Act* (Model Provincial Act), which is a standardized provincial and territorial statute 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.
3. The *Capital Markets Stability Act* (Draft Federal Act), which is a complementary federal statute that regulates systemic risk in Canada's economy.
4. 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 proposes amendments to the Model Provincial Act.

Québec Court of Appeal

The Government of Québec referred two reference questions on the constitutionality of the Cooperative System to the Québec Court of Appeal (QCCA).

1. Does the Constitution of Canada 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 of the federal Capital Markets Stability 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 Act, 1867?*

A majority of the QCCA answered "no" to both questions. The Court held that the Cooperative System was unconstitutional because it unduly fetters the provinces' legislative authority. As to the second question, the majority concluded that the Draft Federal Act is not *ultra vires* Parliament under the general trade and commerce power, except with respect to the provisions that set out the role of the Council of Ministers in the making of federal regulations.

The Supreme Court

The Attorney General of Canada appealed the QCCA's opinion on both questions; the Attorney General of British Columbia appealed on the first question; and the Attorney General of Québec appealed on the second question.

Cooperative System Does Not Fetter Provincial Sovereignty

The SCC, in its decision released on November 9, 2018, disagreed with the Québec Court of Appeal, holding that the Cooperative System does not improperly fetter the provinces' sovereignty for three reasons:

1. The Cooperative System is clear that the Council of Ministers does not have the power to unilaterally amend the provinces' securities legislation and that the provinces retain the ability to amend their securities legislation.
2. Even if the Cooperative System purported to fetter the provincial legislatures' right to control their own securities legislation, it would be ineffective in light of the principle of parliamentary sovereignty. Parliamentary sovereignty renders ineffective (not unconstitutional) any executive agreement that binds a provincial legislature.
3. The Cooperative System does not entail an impermissible delegation of law-making authority. The Cooperative System does not allow the Council of Ministers to bypass provincial legislatures to implement legislation. Provincial legislatures must approve the implementation of the Model Provincial Act, as well as any amendments.

The Draft Federal Act Is *Intra Vires*

Using the two-stage analytical framework for review of legislation on federalism grounds, the SCC held that the Draft Federal Act falls within the general branch of Parliament's trade and commerce powers under s. 91(2) of the *Constitution Act, 1867*.

1. At the first stage, the Court determined that the true characterization or "pith and substance" of the Draft Federal Act is to control material adverse systemic risk in Canada's economy and promote stability in Canada's capital markets. The Draft Federal Act is clearly not intended to displace provincial and territorial securities legislation, but rather to complement these statutes by addressing economic objectives that are national in character.
2. At the second stage, the Court held that that while provinces have the capacity to legislate in respect of systemic risk in their own capital markets, they do so only from a local perspective, and the Draft Federal Act addresses matters of genuine national economic importance that transcend provincial borders. The management of systemic risk across Canadian capital markets falls within Parliament's general trade and commerce power under section 91(2) of the *Constitution Act, 1867*.

Further, the Court 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.

Going Forward

Although Canada is the last country in the G20 to implement 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. This will result in a period of growing pains as the Cooperative System sets up new rules to streamline regulation across Canada.

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