

# Goodmans<sup>LLP</sup> Update

## Supreme Court Gives Green Light to Pan-Canadian Securities Regulator

On November 9, 2018, the Supreme Court of Canada released its decision in the *Reference re Pan-Canadian Securities Regulation*,<sup>1</sup> holding that the proposed pan-Canadian securities regulatory framework known as the Cooperative Capital Markets Regulatory System (CCMR) is constitutionally valid. The decision removes a significant impediment to the implementation of the CCMR. However, its implementation and ultimate effectiveness as a fully harmonized national securities regulatory framework depends primarily on the political will of Canada's federal, provincial and territorial governments to undertake the work necessary to develop and adopt the comprehensive regulatory regime envisioned by the CCMR.

### Background

In 2011, the Supreme Court of Canada unanimously held that the national securities regulatory regime first proposed by the federal Parliament (to which individual provinces/territories could "opt in") violated the *Constitution Act, 1867* because the proposed federal legislation covered matters that were solely within the legislative authority of provincial/territorial legislatures, such as the "day-to-day" regulation of securities trading. In its 2011 decision, the Supreme Court noted that a harmonized system in which the provinces/territories enacted legislation governing provincial/territorial matters and the federal government addressed matters of national concern may be constitutional.

Three years later, in 2014, the federal government entered into a memorandum of agreement with the governments of Ontario, British Columbia, Saskatchewan, Prince Edward Island and New Brunswick providing for the creation of the CCMR as a national cooperative system for the regulation of capital markets in Canada. In 2015, Yukon became the sixth participating jurisdiction.

The CCMR currently consists of the following elements:

- Uniform provincial/territorial securities legislation (based on a model *Capital Markets Act* and associated regulations), governing the "day to day" aspects of the securities trade, which would be enacted by participating provinces and territories.
- A complementary federal statute (the *Capital Markets Stability Act*) that regulates criminal matters, matters related to systemic risk in Canada's capital markets and national data collection, which would be enacted by the federal government.
- A national securities regulator to which the federal and provincial/territorial governments will delegate certain regulatory powers.
- A council comprised of the ministers responsible for capital markets regulation in the participating provinces/territories and the federal Minister of Finance that would supervise the national securities regulator and approve certain proposed legislative changes and regulations.

### The Quebec Reference

In 2016, the government of Quebec asked the Quebec Court of Appeal to rule on the constitutionality of the CCMR. The Court of Appeal accepted that the model provincial *Capital Markets Act* and the proposed federal *Capital Markets Stability Act* were each within the legislative authority of the provincial/territorial and federal legislatures, respectively. However, the Court of Appeal held that the CCMR would be unconstitutional because the role of the Council of Ministers in amending the legislation and adopting regulations for the CCMR would be an infringement of the legislative sovereignty of the participating jurisdictions and an impermissible delegation of regulation-making authority.

This decision was appealed to the Supreme Court of Canada.

## The Supreme Court Decision

The Supreme Court unanimously overturned the Quebec Court of Appeal's decision. The Supreme Court agreed with the Quebec Court of Appeal that the federal *Capital Markets Stability Act* – which the Court accepted was intended to preserve the integrity and stability of the Canadian economy as a whole – was within the federal government's constitutional authority, and did not infringe the provinces'/territories' power to regulate their own capital markets.

However, the Supreme Court disagreed that the proposed process for amending the legislation and adopting the regulations was unconstitutional. The Supreme Court held that the memorandum of agreement establishing the CCMR did not (and indeed legally could not) interfere with the legislative sovereignty of the participating jurisdictions because neither the memorandum nor any of the draft legislation purported to compel their legislatures to enact any of the legislation forming part of the CCMR (or any proposed amendments thereto). Such legislation (and any amendments) would still need to be adopted by each participating jurisdiction's legislature through the conventional legislative process. Each legislature would be free to reject any proposed legislation or amendments, or enact its own legislation, if it so chose. While this feature of the CCMR helps to ensure its constitutional validity, it is also one of the principal limitations of the CCMR relative to a compulsory "national" securities regulatory regime that exists in other jurisdictions such as the United States.

The Supreme Court also disagreed that the *Capital Markets Stability Act* 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 Future of the CCMR

The Supreme Court's decision removes a significant impediment to the implementation of the CCMR. Whether the CCMR is ultimately adopted depends primarily on the political will of the governments of the participating jurisdictions – many of which have changed governments or leadership since the CCMR was first introduced. Since Quebec and Alberta remain opposed to the CCMR, it is still unclear whether the ultimate objective of the CCMR – to create a truly national harmonized securities regulatory regime – will be achieved. However, even if the CCMR is only implemented by the jurisdictions who have championed it, the CCMR may still bring greater efficiencies to the Canadian securities markets.

For further information on any of the information found in this Update, please contact any member of our [Corporate Finance and Securities Group](#).

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<sup>1</sup> <https://scc-csc.lexum.com/scc-csc/scc-csc/en/17355/1/document.do>