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Québec Court of Appeal finds aspects of the proposed co-operative capital markets model unconstitutional

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Authors: Lawrence E. Ritchie, W. David Rankin

In response to a reference from the Government of Québec, the Québec Court of Appeal has concluded that while the governance framework for the co-operative capital markets regulatory regime, as proposed, is unconstitutional, the federal government's proposed *Capital Markets Stability Act* (the *CMSA*) is substantially within its constitutional competence.[1]

Background

The Supreme Court of Canada held in 2011 that the then-proposed *Securities Act* to establish a national securities regulatory regime under the administration of a single national securities regulator would have been unconstitutional.[2] Although the Supreme Court found that the proposed *Securities Act* overreached into the provinces' constitutional powers over property and civil rights, it left open the possibility of targeted federal securities legislation addressing issues that transcend provincial boundaries, such as provisions to control systemic risk and nationwide data-collection.

Following the Supreme Court reference, in 2014, the federal government and the governments of five provinces and one territory entered into the *Memorandum of Agreement regarding the Cooperative Capital Markets Regulatory System* (MOA). The MOA called for the creation of a co-operative capital markets regulatory regime under the oversight of a national regulatory authority. The primary components of the co-operative model set out in the MOA are as follows:

- **Multi-jurisdictional oversight:** The model would be administered by a single regulatory authority, the Capital Markets Regulatory Authority (CMRA), and supervised by a Council of Ministers consisting of the Minister of Finance of Canada and the responsible ministers in each of the participating provinces. The Council of Ministers would supervise the CMRA and approve amendments to the legislative framework and regulations made under it. The MOA outlines the intended voting mechanisms for the Council of Ministers.
- ***Capital Markets Act* (the *Uniform Act*):** Participating provinces would each enact the *Uniform Act* for the regulation of capital markets within that province. The administration of the *Uniform Act* in each participating province would be delegated to the single CMRA.
- ***Capital Markets Stability Act* (the *CMSA*):** In addition to the provincial *Uniform Acts*, Parliament would enact the *CMSA*, the administration of which would be delegated to the CMRA. The *CMSA* would address systemic risk, national data collection, and criminal law,

and would apply across the country.

Although Québec was not a signatory to the MOA, there was a mechanism in the MOA inviting governments of non-participating provinces to join the co-operative model. Québec took issue with the constitutionality of this regime – arguing that it amounted to a disguised constitutional amendment – and referred two questions to the Québec Court of Appeal for advisory opinions:

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 MOA?
2. Does the most recent version of the draft of the *CMSA* 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*?

Majority finds the overall model unconstitutional

In response to the first question, the majority of the Québec Court of Appeal held that the overall co-operative model, as contemplated by the MOA, would be unconstitutional for two principal reasons. First, the majority held that the mechanisms for amending the *Uniform Acts* would unconstitutionally fetter parliamentary sovereignty within the participating provinces.[3] According to the majority, it is constitutionally impermissible for provincial legislatures to subject the exercise of their legislative jurisdiction to an external body, in this case, the Council of Ministers.[4]

The majority was concerned not only with the legislative competence of participating provinces being fettered by an external body, but also with Ministers of the Crown (i.e., the executive branch) dictating statutory amendments to the legislative branches of reluctant participating provinces.[5] This, according to the majority, is contrary to fundamental principles of the Canadian constitution.

Second, the majority held that the proposed voting mechanisms for the Council of Ministers to approve regulations adopted under the federal *CMSA* would be unconstitutional.[6] As provincial Ministers would be involved in these decisions, the majority was concerned that this effectively gave participating provinces a veto over federal initiatives to control systemic risk.[7]

According to the majority, the constitutional foundation for federal regulation of systemic risk in the capital markets depends on the necessity of federal intervention to address systemic risk as a national issue that cannot be resolved provincially because the exercise of a provincial veto or the failure of a province to participate would jeopardize the scheme. In the majority's view, granting a veto to participating provinces undermines this constitutional foundation and would render the *CMSA* constitutionally invalid.[8]

The majority finds that the *CMSA* would be constitutional standing alone, with caveats

In answer to the second question, the majority held that the *CMSA* – standing alone – would be constitutional to address systemic risk and nationwide data collection, subject to removing the provisions regarding the role and powers of the Council of Ministers. The

majority held that the pith and substance of the *CMSA* (when examined on its own) is "to promote the stability of the Canadian economy through the management of systemic risks related to capital markets."[9] Relying on the Supreme Court's 2011 *Reference re Securities Act*, the majority held that Parliament has the necessary legislative jurisdiction to adopt legislation with this dominant purpose,[10] provided that the approval and oversight powers of the Council of Ministers were removed. With those powers intact, in the majority's opinion, the *CMSA* as a whole would be unconstitutional.[11]

Opinion of Justice Schrager

Schrager J.A. wrote his own opinion, concluding that the draft *Uniform Act* and *CMSA* before the Court were constitutionally valid provincial and federal legislation, respectively.[12] Schrager J.A. did not agree with the majority that the provisions of the *CMSA* referring to the role and powers of the CMRA rendered the *CMSA* constitutionally invalid.[13] However, Schrager J.A. declined to answer the broader question of whether the co-operative model reflected in the MOA would be, as a whole, constitutional. Although there were aspects of the MOA that Schrager J.A. found may constitute illegal delegation of legislative power or abandonment of legislative sovereignty,[14] the constitutional validity of the MOA itself could not be subject to judicial scrutiny on the reference.[15]

Implications

While the Government of Québec was quick to characterize the Québec Court Appeal's conclusions as a victory, the decision is unlikely to be the end of the story for the co-operative regulatory regime. The majority's decision is focused on the governance role of the Council of Ministers in relation to amending the legislation and rule-making. One can imagine that these measures could be revised in the MOA to accommodate the Court's concerns without undermining the core of the framework. Furthermore, the decision is striking in its clear-cut affirmation that the federal government's proposed approach to regulating systemic risk as reflected in the *CMSA* may proceed if separated from the offending governance provisions.

The legislation to form the framework for the co-operative model, including the draft *CMSA*, has yet to be finalized and introduced into Parliament or the provincial legislatures. The parties accordingly have plenty of runway to make appropriate revisions in order to be able to proceed with a co-operative framework. Furthermore, the federal government could, should it wish to do so, bring questions concerning the proposed governance model before the Supreme Court of Canada, either through an appeal of the Québec reference, or as a reference directly to the Supreme Court. Should this happen, the advisory opinions of the Supreme Court will take precedence and direct the future of any proposed co-operative model.

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[1] *Renvoi relatif à la réglementation pancanadienne des valeurs mobilières*, 2017 QCCA 756 [QCCA Decision].

[2] *Reference re Securities Act*, [2011] 3 S.C.R. 837.

[3] QCCA Decision, paras. 55, 61.

[4] QCCA Decision, para. 55.

[5] QCCA Decision, paras. 64-65.

[6] QCCA Decision, para. 56.

[7] QCCA Decision, paras. 56, 87-88.

[8] QCCA Decision, paras. 91-97.

[9] QCCA Decision, paras. 114-128.

[10] QCCA Decision, paras. 125, 131-135.

[11] QCCA Decision, paras. 137-138, 140.

[12] QCCA Decision, para. 146. Schrager J.A. could not rule, however, one way or the other on whether the Uniform Act was valid absent legislation constituting the CMRA (which was not available for the reference) (para. 210).

[13] QCCA Decision, para. 147.

[14] QCCA Decision, para. 146. In addition, draft federal legislation to create the CMRA was not before the Court.

[15] QCCA Decision, para. 174.