A view from Alberta on the Supreme Court's Decision to allow a National Securities Regulator

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In the fall of 2018, the Supreme Court of Canada (SCC) issued its decision in *Reference re Pan-Canadian Securities Regulation*.[i] It unanimously found that the proposed national securities regulatory regime, the National Cooperative Capital Markets Regulatory System (Cooperative System), is constitutional. This decision will allow the Federal Government and a coalition of participating provinces, which currently does not include Alberta, Quebec, or Manitoba, to establish a national scheme for regulating securities in Canada.

The SCC considered two questions:

1. Does the Constitution authorize the implementation of pan-Canadian securities regulations under the authority of a single regulator, according to the model established by the *Memorandum of Agreement regarding the Cooperative Capital Markets Regulatory System* (the Agreement)?

2. Does 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 the *Constitution Act, 1867*?

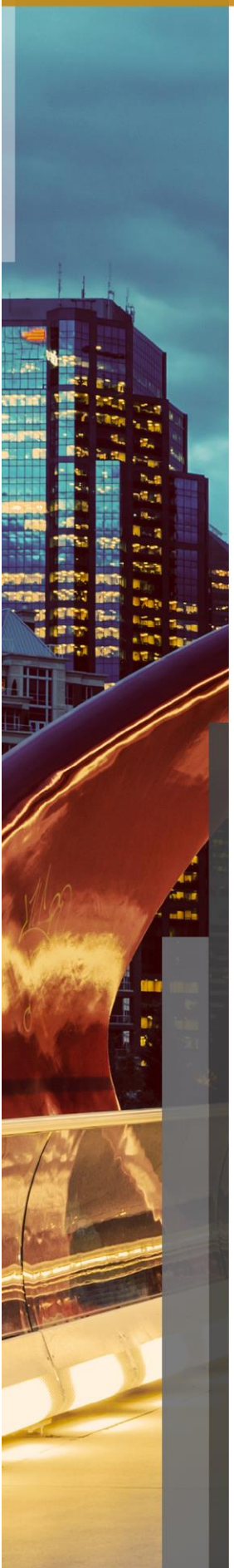
The Court found that the Cooperative System does not violate the principles of parliamentary sovereignty, nor does it hinder the law making powers of participating provincial legislatures. It also found that the proposed federal statute falls within Parliament's power over general trade and commerce as it deals only with matters of national concern.

What effect this decision will have on the regulation of securities in Canada remains to be seen. Alberta continues to oppose the consolidation of securities oversight in a national regulator. The effect this decision has on Alberta will depend on whether the Federal Government and the participating provinces have the political will to pursue the initiative and, if so, whether the interface between the new federal regulator and the non-participating provinces will continue to allow the regulatory regime in Canada to operate in an efficient and harmonized manner.

Background to the Establishment of the Cooperative System

Previous SCC decisions have confirmed that the constitutional division of provincial and federal powers grants the provinces the authority to legislate on the day-to-day intra-provincial trade of securities. This has resulted in each province and territory establishing their own securities regulatory authority. Over the years, the various regulatory regimes across Canada have largely been harmonized and there is cooperation between the regulatory authorities to streamline and reduce commercial parties' interactions with multiple authorities across the country. The provincial and territorial securities regulatory authorities have also established the Canadian Securities Administrators (CSA), an umbrella organization that coordinates policy and regulatory change to promote this harmonization and cooperation.

In a 2011 reference, the SCC unanimously found that a proposed federal *Securities Act*, which sought to establish a national scheme for the regulation of capital markets, administered by a single national securities regulator, would be unconstitutional. The Court held that because the proposed legislation purported to regulate all aspects of the trade of securities in Canada, it encroached on the provinces jurisdiction over property and civil rights. However, the Court acknowledged that certain aspects of securities regulation, including the prevention and management of systemic risk (risks to the stability



of the financial system), fall under federal jurisdiction. The SCC also recognized that a cooperative approach to Canadian securities regulation, whereby Parliament and the provincial legislatures exercised their respective powers harmoniously, might be constitutional.

In response to the Court's guidance, the Federal Government and the governments of five provinces and one territory entered into the Agreement, setting out the framework for the Cooperative System.

Summary of the Cooperative System

The Agreement includes four principal components:

1. **Uniform Provincial Legislation** – each participating province will enact a statute that mirrors a Model Provincial Act (the *Capital Markets Act*) which addresses the day-to-day aspects of securities trade.

2. **Complementary Federal Legislation** – Parliament will enact a federal statute (the *Capital Markets Stability Act*) which legislates on issues of national concern such as criminal matters and systemic risk.

3. **National Regulator** – the Federal Government and the participating provinces will delegate certain regulatory powers to a single Capital Markets Regulatory Authority (CMRA) responsible for administering the entire cooperative scheme.

4. **Council of Ministers** – the creation of a supervisory council, made up of the Ministers responsible for securities regulation in each participating province and the federal Minister of Finance. The Council of Ministers would oversee the CMRA and has authority to approve proposed amendments and regulations.

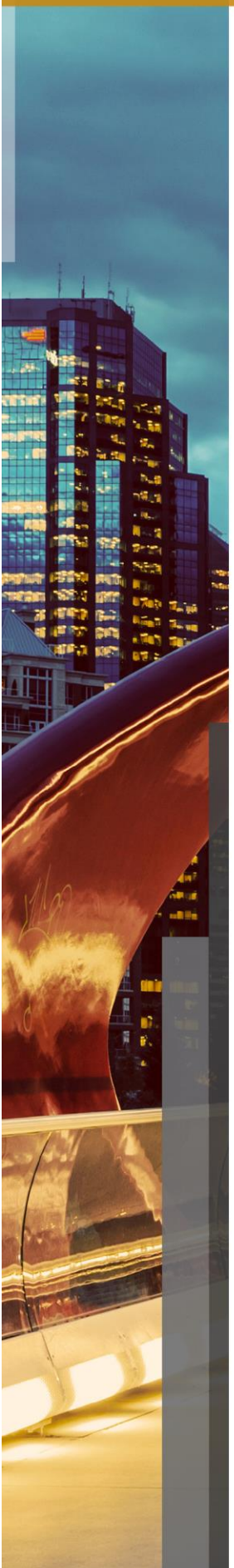
The Supreme Court of Canada's Decision

The SCC overturned the decision of the Quebec Court of Appeal, finding that both the Cooperative System and the draft federal statute are constitutional.

With respect to the first question, as set out above, the Court held that the terms of the Agreement do not, and cannot, fetter the provincial legislatures' primary law-making authority. In particular, It found that nothing in the proposed system empowers the Council of Ministers to unilaterally amend the provinces securities legislation. Further, no element of the Cooperative System imposes any legal limits on the participating provinces legislative authority to enact, amend, and repeal their respective securities laws as they see fit. The principle of parliamentary sovereignty precludes the executive signatories of the participating provinces from binding their respective legislatures. Therefore, the decision whether to opt-in or out of the Cooperative System and to adopt the required implementing legislative changes, remains under the authority of the particular provincial legislatures.

For these reasons, the SCC found no constitutional impediment to the implementation of the Cooperative System in accordance with the terms set out in the Agreement. While the Court took a legalistic approach in its decision it did note that, from a practical perspective, participation in the Cooperative System by the partaking provinces requires a significant commitment. It requires them to effectively dissolve their existing securities commissions, to merge the administration of those commissions into the national structure and that, once this is done, it would undoubtedly be impractical for those jurisdictions to extricate themselves from a national system.

With respect to the second question, it was determined that the *Capital Markets Stability Act* falls within Parliament's jurisdiction over general trade and commerce pursuant to the *Constitution Act,*



1867. The Court found that the pith and substance of the *Capital Markets Stability Act* was to control systemic risks having the potential to create material adverse effects on the Canadian economy. Nothing in the draft federal statute purports to regulate, on an exclusive basis, all aspects of securities trading in Canada. Specifically, it does not contain provisions that go to the day-to-day regulation of securities trading. The Court went on to note that while provinces have the capacity to legislate in respect of systemic risk in their own capital markets, they cannot effectively address national concerns which transcend their own respective concerns. The *Capital Markets Stability Act*, with its carefully tailored scope, constitutes a response to this provincial incapacity, and addresses risk that "slips through the cracks" and poses a threat to the Canadian economy as a whole.

What this Decision Means for Alberta Moving Forward

While the SCC's decision represents a victory for supporters of a national securities regime, if and when the Cooperative System will be implemented remains unclear. While the proposed system is constitutional, the Court's decision does not address the various practical and political complexities that may arise. For instance, since the Cooperative System was first suggested, the provincial governments of Ontario and British Columbia, representing the largest capital markets of the participating provinces, have changed. Ontario has indicated that it is still committed to launching the Cooperative System, however, time will tell whether the current leaders of the participating provinces are prepared to expend the necessary political capital required to implement it.

Alberta was firmly opposed to the Cooperative System, specifically to the idea of a national regulator, when it was first proposed, and continues to be. After the SCC released its decision, Joe Ceci, the President of the Treasury Board and the Minister of Finance for Alberta, issued a statement affirming the Government of Alberta's view that the uniqueness of Alberta’s capital market requires a local regulator that understands its complexities.

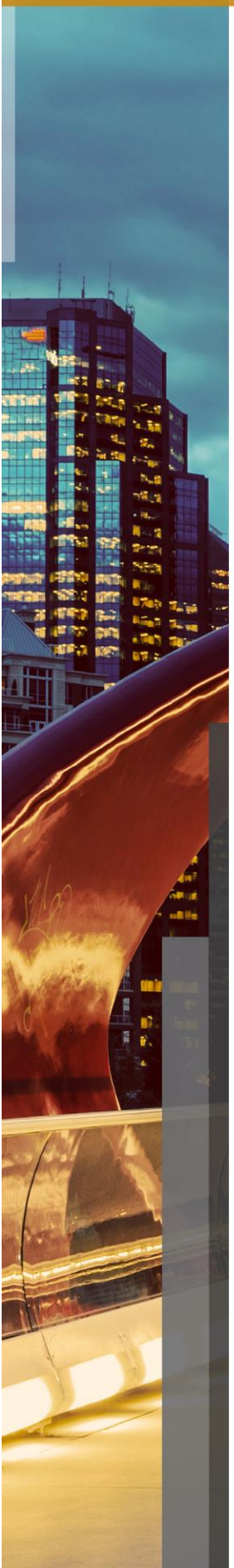
The Government of Alberta's announcement that it remains opposed to a national regulator suggests that the province has no intention of joining the proposed Cooperative System. As a result, it is unlikely that there will be substantial changes to the regulation of securities in Alberta – at least in the short term.

There are a number of practical reasons why a national securities regulator may not be in Alberta's best interest.

Alberta benefits from having a local securities commission that allows the province to have a strong voice in the establishment of harmonized securities regulation across Canada. The CSA has operated effectively to promote the harmonization of rules and policies across the country, through negotiation between the various provincial regulatory authorities. This has resulted in policies and guidelines that take into account the divergent and unique interests of the various provinces and the distinct nature of their capital markets.

Arguably, the Cooperative System would limit the ability of individual jurisdictions (like Alberta) to ensure that there is regulatory balance that meets their specific local needs. With a national securities regulator, there is concern that securities regulation will ultimately become Ontario centric (since Toronto is the national financial center), which could negatively affect Alberta's ability to influence change in a manner that protects the unique characteristics of its local market.

The impact of establishing a national regulator will depend on the nature of the cooperation between the national regulatory authority and the non-participating provinces. Presumably, it is in the interest of all parties to continue to ensure that there is a harmonized and efficient regulatory scheme across the country. Achieving this will require a system similar to the current CSA, with cooperation between the non-participating provincial regulatory authorities and the national regulator. This raises



the question of whether the creation of a national regulatory authority can accomplish anything meaningful if not all provinces are participating.

How these and other administrative issues are addressed will continue to be of considerable interest to those involved in the Alberta capital market.

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[i] *2018 SCC 48.*