

Intelligence MEMOS



From: Anita Anand
To: The Canadian Securities Industry
Date: November 13, 2018
Re: **THE SUPREME COURT OPENS DOOR TO NEW MODEL OF SECURITIES REGULATION**

In a decision last week, the Supreme Court of Canada held that the proposed Cooperative Capital Markets Regulator (CCMR) does not impede provincial legislatures' ability to enact securities regulation. In addition, the court held that the federal government has the constitutional authority to regulate in the area of systemic risk given that such regulation is not intended to affect provincial jurisdiction over day-to-day securities markets. The court thus gave Ottawa and those provinces which have agreed on the new model the green light to proceed with establishing the CCMR. However, there remain significant policy concerns relating to the CCMR as currently structured.

The CCMR was born after the 2011 *Securities Reference* case in which the court rejected the federal government's proposed statute as unconstitutional, ruling that it fell outside Ottawa's general trade and commerce power. The court also issued a challenge to the federal government to cooperate with the provinces to address the issues raised in the case. The CCMR is a direct result of such cooperative efforts. It began with the federal government, Ontario and British Columbia signing an initial agreement in principle and Saskatchewan, New Brunswick, the Yukon and Prince Edward Island joining thereafter. Under a memorandum of agreement, these parties agreed that a new securities regulator, called the Capital Markets Regulatory Authority (CMRA), would be formed to manage systemic risk and would have the power to sanction financial market crimes.

Despite last week's ruling, significant concerns with the proposed CCMR persist. To begin, what will be the structure of Canada's overall securities regulatory system given that Alberta and Quebec, provinces with significant capital market activity and each home to an exchange, are refusing to join? Presumably they will continue to operate under the Canadian Securities Administrators' umbrella and the passport system of regulation, a system that has been functional for over a decade. It may be that the inefficiencies resulting from the CCMR will be greater than under the current model; issuers and investors will need to deal with separate regulatory regimes within the same country.

In addition, investor concerns will persist under the CCMR as currently structured. For example, in 2010 the Ontario Securities Commission (OSC) created an investor advisory panel to represent investor concerns in the policy-making process. The panel was modeled on the United Kingdom's well-functioning statutory Financial Services Consumer Panel and Australia's Consumer Advisory Panel. Yet unlike these jurisdictions and the OSC, the CCMR does not contain a plan to implement an IAP or similar entity.

Finally, there remain legitimate concerns about how precisely systemic risk can be effectively managed from a regulatory standpoint. The act defines systemic risk as "a threat to the stability of Canada's financial system that originates in, is transmitted through or impairs capital markets and that has the potential to have a material adverse effect on the Canadian economy." But the threat refers to risks that have not yet crystallized and are therefore likely difficult to detect.

The inherent fuzziness is likely to open the door to disputes about whether federal laws truly respond to systemic risk and thus within federal constitutional authority, or comprise day-to-day securities regulation, and thus beyond the bounds of federal powers. The regulation of derivatives stands as but one example. The bundling and trading of these complex securities contributed to the financial crisis of 2008 and are therefore on the radar screen as a systemic risk concern. Yet given that derivatives are traded daily and fall within the broadly-worded definition of "securities" in provincial legislation, one can legitimately question whether they are also within provincial domain.

The Supreme Court's decision leaves the door open for the CCMR to take flight from a constitutional standpoint, but whether the political will exists for the new structure to take shape remains to be seen.

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