

How will the Proposed Pan-Canadian Securities Regulator Change the Game for Environmental Reporting Obligations?

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On November 9, 2018, the Supreme Court of Canada (“SCC”) opened the door for a proposed national securities regulator in *Reference re Pan-Canadian Securities Regulation* (“*Pan-Canadian Securities Reference*”).¹ The SCC found that the federal government and six provinces/territories were allowed under Canada’s Constitution to delegate their respective authority to regulate securities to a single regulator.

Public companies and other reporting issuers will need to report material environmental information to a Pan-Canadian securities regulator once the proposed Cooperative Capital Markets Regulatory System (“CCMR Proposal”) is implemented.

The CCMR Proposal

Participating Jurisdictions and the federal government created the CCMR Proposal to harmonize securities regulation across Canada. Currently, each province/territory regulates securities within their respective borders.² Previous attempts to create a national securities regulator have failed.³

The CCMR Proposal is set out in a memorandum of agreement between six provincial/territorial governments⁴ (“Participating Jurisdictions”) and the federal government:⁵

- ◆ Participating Jurisdictions will enact uniform legislation and regulations based on the draft *Capital Markets Act*;⁶

¹ *Reference re Pan-Canadian Securities Regulation*, 2018 SCC 48 [*Pan-Canadian Securities Reference*].

² Provinces/territories have implemented several initiatives to adopt uniform securities legislation. A committee of representatives from each jurisdiction known as the Canadian Securities Administrators proposes draft national and multilateral instruments that each jurisdiction can choose to adopt. Other initiatives exist to harmonize the regulation of securities in Canada.

³ See for example *Reference re Securities Act*, 2011 SCC 66 [*Securities Reference*].

⁴ The jurisdictions that support the CCMR System are Ontario, B.C., Saskatchewan, New Brunswick, P.E.I, and the Yukon. Alberta, Quebec, and Manitoba currently oppose the CCMR System. Nova Scotia and the Northwest Territories have not signed on to the CCMR System, although Nova Scotia intends to join the system.

⁵ Memorandum of Agreement Regarding the Cooperative Capital Markets Regulatory System, dated 23 September 2016 [Agreement].

- ♦ the federal government will enact the *Capital Markets Stability Act* to address systemic risk, related criminal law measures, and national data collection;⁷
- ♦ the federal government and Participating Jurisdictions will delegate powers to an independent Capital Markets Regulatory Authority, who will administer the CCMR Proposal;⁸ and
- ♦ representatives from the federal government and Participating Jurisdictions will establish a Council of Ministers to supervise the Capital Markets Regulatory Authority and propose amendments to the CCMR Proposal.⁹

Timing of the CCMR Proposal

The CCMR Proposal is the latest proposal for a national securities regulator in Canada.¹⁰ On September 23, 2016, Participating Jurisdictions and the federal government finalized the Agreement. The Participating Jurisdictions and the federal government agreed to the following timeline to implement the CCMR System:¹¹

- ♦ By the summer of 2015, the Council of Ministers would publish a revised consultation draft of the provincial/territorial *Capital Markets Act*, the federal *Capital Markets Stability Act*, and the initial draft regulations for public comment.¹²
- ♦ On or before June 30, 2018, each Participating Jurisdiction would enact the provincial *Capital Markets Act*.¹³ The federal government also agreed to enact the federal *Capital Markets Stability Act* by June 30, 2018.

On July 15, 2015, the government of Quebec launched a constitutional challenge to the CCMR Proposal in the Quebec Court of Appeal.¹⁴ On May 10, 2017, the Court held that the CCMR Proposal was unconstitutional. The federal government appealed the Quebec Court of Appeal's decision to the Supreme Court.

On November 9, 2018, the Supreme Court ruled that the CCMR Proposal as proposed was constitutional. The Court held that the provinces and the federal government were entitled to delegate their respective legislative competence to a single entity and that the CCMR Proposal

⁶ Agreement, s 3(a)(ii); see also Co-operative Capital Markets Regulatory System, *Capital Markets Act: A Revised Consultation Draft*, August 2015 [Model Provincial Act]; the draft *Capital Markets Act* was drafted by six provinces.

⁷ Agreement, s 3(a)(ii); see also Co-operative Capital Markets Regulatory System, *Capital Markets Stability Act — Draft for Consultation*, January 2016 [Draft Federal Act].

⁸ Agreement, s 3(a)(iii); see also Draft Federal Act, s 73; Model Provincial Act, s 202.

⁹ Agreement, ss 3(a)(iv), 4.2.

¹⁰ See *Securities Reference* at paras 11-28; *Pan-Securities Reference* at paras 10-15.

¹¹ Agreement, s 10.3(b).

¹² See Memorandum of Agreement Regarding the Cooperating Capital Markets Regulatory System, dated July 29, 2015, s 10.3(a).

¹³ Participating Jurisdictions and the federal government agreed that they would “use their best efforts to cause their respective legislatures to enact or approve” the draft legislation; see Agreement, s 10.1(b).

¹⁴ *Québec (Procureure générale) c Canada (Procureure générale)*, 2017 QCCA 756 [*Quebec v Canada*] at para 7.

did not legally fetter the ability for a Participating Jurisdiction (or its legislature) or the federal government (or Parliament) to pass legislation.¹⁵

Implications for a Company’s Environmental Reporting Obligations

Entities that must disclose environmental information about their operations to the public pursuant to securities regulation in a Participating Jurisdiction will still need to make these disclosures. These entities will be required to disclose environmental information to the Capital Markets Regulatory Authority instead of provincial or territorial securities commissions.

Reporting to Securities Commissions

Provincial securities commissions require companies that qualify as “reporting issuers” to provide disclosure to the public at various instances.

These disclosures include:

- ◆ annual¹⁶ and quarterly¹⁷ reports about the reporting issuer’s business and affairs (including Management’s Discussion & Analysis (“MD&A”), Annual Information Forms, and other Forward-Looking Information. The reporting issuer must disclose relevant “material information” within these reports. Material information includes facts that, if omitted or misstated, would likely influence or change a reasonable investor’s decision to buy, sell, or hold securities.¹⁸
- ◆ information on a “material change” to the reporting issuer. A “material change” is a change to the reporting issuer’s business, operations, or capital that “is reasonably expected to have a significant effect on the market price or value of a security of the issuer.”¹⁹ When a material change occurs, the reporting issuer must disclose this change to the public²⁰ and applicable securities commissions.²¹

¹⁵ *Pan-Securities Reference* at paras 50, 67, 71

¹⁶ *Continuous Disclosure Obligations*, OSC & ABSC NI 51-102 (7 June 2018, 12 June 2018), s 4.1 [NI 51-102].

¹⁷ *Securities Act*, RSO 1990, c S 5, s 77(1)(b) [*Ontario Securities Act*].

¹⁸ See NI 51-102, Form 51-102F1, “Management Discussion & Analysis” at part 1(f) [Form 51-102F2]; see also NI 51-102, Form 51-102F2, “Management Discussion & Analysis”, at part 1(e).

¹⁹ *Ontario Securities Act*, s 1(1) “material change”; *Securities Act*, RSA 2000, c S-4, s 1(ff) [*Alberta Securities Act*].

²⁰ The reporting issuer must issue a press release to the public describing the material change; NI 51-102, s 7.1(1)(a).

²¹ The reporting issuer must file a Material Change Report; NI 51-102, s 7.1(1)(b); See NI 51-102, s 7.1(2) for exceptions to the material change public reporting requirements, including where the reporting issuer reasonably believes that disclosure to the public would be “unduly detrimental to the interests of the reporting issuer”. The company must still file a report with the securities commission.

Environmental Reporting Obligations

Reporting issuers must report environmental aspects of their operations if the information represents a material change or material information. This determination is highly discretionary and is specific to each reporting issuer.

Reporting issuers should consult with environmental counsel to determine whether an environmental matter would be considered to be material and whether the reporting issuer can benefit from an exemption to these reporting requirements.

Some examples of environmental matters that the Capital Markets Regulatory Authority could require a reporting issuer to disclose include:²²

- ◆ risks to the company's operations arising from exposure to litigation, disrupted supply chains, regulatory prosecutions, permitting requirements, and the company's business model;²³
- ◆ contingent liabilities and obligations, and market trends that could impact the company;²⁴
- ◆ the payment of fines or damages arising from a legal obligation, remediation of current and future sites, the cost of complying with regulatory obligations, and the costs to retire assets;²⁵ and
- ◆ the material impacts of climate change on a reporting issuer's operations, such as the risks of extreme weather events, voluntary initiatives to reduce greenhouse gas emissions, and the potential costs of a regulatory framework(s) to reduce greenhouse gas emissions.²⁶

What's Ahead

Following the SCC's decision in the *Pan-Securities Reference*, we expect Participating Jurisdictions and the federal government to resume their implementation of the CCMR Proposal.

At this time, several matters remain unresolved. In particular, the CCMR Proposal has not yet addressed the status of the Passport System, which allows Reporting Issuers to engage in activities in multiple jurisdictions while dealing with a single principal regulator.²⁷

²² See generally *CSA Notice—Environmental Reporting Guidance*, OSC and ABSC CSA Notice 51-333, (27 October 2010) [CSA Notice 51-333]; Participating Jurisdictions have said that they will determine which interpretive bulletins (including CSA Notices) will continue to apply after publishing draft regulations. The CCMR has not yet determined whether CSA Notice 51-333 will continue to apply.

²³ CSA Notice 51-333 at 8-10; companies must report this information in its Annual Information Form; see NI 51-102, Form 51-102F2, "Annual Information Form", item 5.2.

²⁴ CSA Notice 51-333 at 10-11; reporting issuers must report this information in its MD&A; see Form 51-102F1, Part 1(a) and item 1.4(g).

²⁵ CSA Notice 51-333 at 12-15; companies must report this information in its MD&A; see Form 51-102F1, items 1.2, 1.6, 1.12

²⁶ See *CSA Staff Notice 51-354—Report on Climate change-related Disclosure Project*, OSC and ABSC CSA Notice 51-354, (5 April 2018).

²⁷ Participating Jurisdictions plan to establish an agreement with non-participating jurisdictions in the future.

We look forward to providing further updates as Participating Jurisdictions and the federal government bring the CCMR Proposal into force.

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