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SECURITIES REGULATION IN CANADA:

STATUS, ISSUES AND PROSPECTS

Kathleen M. Doyle
Faculty of Law
Graduate Programmes in Law
McGill University, Montreal
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ABSTRACT/RESUME

Canada's fragmented, provincially-based securities regulatory system is facing domestic and international pressures to become more coherent and efficient. This paper outlines various factors and proposals, concluding that the system must become nationally-based, but only if the change is properly planned, implemented and administered. There should be uniform (or, at least, coordinated) legislation, with federal and provincial joint delegation to a single commission. Interprovincial coordination must improve before, during and after the change. While feasibility requires most provinces to participate, the scheme should not be rejected if unanimity is lacking. Although important, regional autonomy cannot be allowed to outweigh national authority. Market participants will be somewhat reassured if presented with a realistic transitional plan and definite time-table. A national system should proceed only if the federal and provincial governments can plan and implement it with common sense and without damaging compromises.

Fragmenté et provincial, le système Canadien régulateur des valeurs mobilières est aujourd'hui confronté à des pressions nationales et internationales pour plus de cohérance et d'efficacité. Cette thèse trace les grandes lignes de divers facteurs et propositions, concluant que le système devrait s'étendre à l'échelle nationale, mais dans la seule mesure où le changement est correctement conçu, exécuté et administré. La loi devrait être uniforme (ou du moins coordonnée) et les délégations fédérales et provinciales ne former qu'une unique commission. La coordination interprovinciale doit pour cela s'améliorer avant, pendant et après le changement. Bien que cela nécessite la participation de la plupart des Provinces, le schéma ne doit pas être rejeté s'il n'y a pas d'unanimité. Bien qu'importante l'autonomie régionale ne peut pas pour autant l'emporter sur l'autorité nationale. Les acteurs du marché seraient rassurés s'il leur était présenté un projet transitoire réaliste avec un plan d'exécution défini. Un système national ne devrait avancer que si les gouvernements fédéraux et provinciaux sont en mesure de le concevoir et le mettre à exécution avec du bons sens et sans entâmer les compromis.

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I. INTRODUCTION

The provincially-regulated Canadian securities system faces serious problems and obstacles which it must soon address. This paper identifies some of these problems, discusses proposed solutions, and analyzes the prospects and feasibility of different levels of change. As outlined in the final section of this paper, the two main alternatives are: increasing provincial cooperation and coordination; or developing a national securities system to replace or supplement the current provincial systems. A third alternative combines those two options.

Canada is a rarity - an industrialized state without a central or national voice in securities regulation;[1] however, each of the Canadian provinces and territories[2] has a securities regulatory system. These range from comprehensive and detailed (*e.g.*, Ontario, Quebec and British Columbia) to nominal (*e.g.*, Prince Edward Island and the territories). The regulations are inconsistent from one jurisdiction to another - varying in minor and major ways.[3] Therefore, an issuer (initial or control block) selling securities, or a dealer wishing to liaise with investors, must meet the initial and continuous disclosure requirements of up to twelve jurisdictions. Current coordination and cooperation efforts are insufficient to keep Canada's markets attractive to domestic and foreign participants.

The ideal theoretical solution is a national securities system which would handle all interprovincial and international securities matters, while preserving regional concerns and intraprovincial autonomy. Unfortunately, this is not feasible in the current political and economic environment. It may, however, be possible to have a national system acting only for the federal government and "opting-in" provinces. This would only be

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[1] A. Toulin, "Eight Premiers Support Idea of a National Securities Agency" *The Financial Post* (22 June 1996); K. Howlett, "OSC Chair Seeks Regulation Reform" *The Globe and Mail* (17 May 1996) B5; *The Financial Post*, "Take Securities Regulation National" (16 March 1996) 18; and N. Le Pan, Letter to E.J. Waitzer (9 September 1994) (1994) 17 *O.S.C.B.* 4396 at 4400 [Canada is "effectively alone" in primarily regulating securities at the sub-national level].

[2] Throughout this paper, "provinces" should be read as "provinces and territories", where the context so indicates.

[3] See *e.g.*, Part III.E., below.

worthwhile if most provinces, with a majority of securities volume and centres of activity, opt-in to the national system. Even then, it would have to be carefully implemented to prevent even worse duplication and inefficiencies than are in the current system.

The second option is to increase and enhance cooperation, coordination and harmonization among the provincial systems. The advances so far have been adequate (barely). However, more and faster progress is needed for Canada to thrive domestically and to compete internationally.

The two options are not mutually exclusive, but should be pursued together. If the national system concept were abandoned, cooperation must be ready to substitute. If the national system were implemented across the country, cooperation would be a valuable interim measure and an invaluable transitional tool. If the national system were implemented with the participation of only some provinces, cooperation would be the only hope for a rational and efficient link between the national system and the opted-out provinces.

This paper begins with a brief outline of the general securities regulatory issues in developed economies, including underlying theories and differing implementations. It then discusses the structure of Canadian securities regulation, including the constitutional issues, current features, methods of regulating, federal involvement, cooperative efforts and results, and a sampling of differences among the provincial systems.

The third section addresses internationalization, including the reasons for it, the pressures it imposes on all securities systems, the major obstacles to it, and methods of achieving it. Many of the obstacles and potential solutions are equally applicable within Canada as well as internationally. The fourth section expands on the specific pressures in Canada stemming from its duplicative and inefficient system.

The fifth section discusses the periodic and repetitive calls for a national securities system in Canada. The latest renewed interest began in 1994, alternatively gaining and losing momentum. After outlining various proposals, the paper examines their practical reality in the current Canadian economic, social and political context. The final section assesses the prospects and format for reform.

II. APPROACHES TO SECURITIES REGULATION

A. What Are Securities?

A "security" is essentially an instrument evidencing an investment or any interest in that investment; however, it is virtually impossible concisely or precisely to define. The American definitions, which heavily influenced Canadian provincial definitions, are very detailed and functional ("security" includes anything which acts like a security). Regulators can obviously use a broader definition to oversee more types of instruments; whether this is desirable depends on the underlying motives of the regulatory system.[4] Also, a functional definition allows regulators to keep pace with rapidly evolving markets. That is, innovative instruments are regulated if they act like securities, even if they do not precisely fit into a legislated category.[5]

Each provincial regime has its own definition of a security. Although these definitions are functionally equivalent, they range from relatively simple (*e.g.*, the *Prince Edward Island Securities Act* ("*P.E.I.S.A.*"))[6] to detailed and complex (*e.g.*, the *Ontario Securities Act* ("*O.S.A.*")).[7] Because of the equivalence, provincial differences in this area are not a significant barrier to efficient securities regulation in Canada; however, there is room for improvement. Obviously, for example, one uniform definition would

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[4] See Part II.B., below.

[5] This prevents market innovations from thwarting regulatory objectives. This is extremely important because the legislature, bureaucracy and regulators are inherently slow in responding to changes in the business community. Without this safeguard, innovations would be unregulated (because they would not fit within a narrow, inflexible definition) - severely compromising the objectives of securities regulation.

[6] R.S.P.E.I. 1988, c.S-3 [as amended by S.P.E.I. 1985, c.40; 1990, c.59, ss.1, 2; 1993, c.29, s.4; 1994, c.58, Sched.], s.1(1).

[7] R.S.O. 1990, c.S-5 [as amended by S.O. 1992, c.18, s.56; S.O. 1993, c.27, Sched.; S.O. 1994, c.11, ss.349-381; S.O. 1994, c.33], s.1(1).

eliminate uncertainty and potential inconsistency among provinces.[8]

In the 1979 *Proposals for a Securities Market Law for Canada*,[9] Iacobucci discusses the definition of a security.[10] First, the definition is vital, as it affects all aspects of securities regulation; however, he cautions against over-regulation and unnecessary duplication (hallmarks of the current system).[11] Second, he stresses that the definition must be similar both within Canada and to that in the United States of America ("U.S.A."), as many securities cross the Canada-U.S.A. border.[12] Finally, he

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[8] As this paper frequently states, a mostly uniform approach would be ideal. It is, however, extremely unlikely, largely due to political concerns and posturing. If all of the provinces are unwilling or unable to approach uniformly a basic definition which is already very similar in most Canadian jurisdictions, what hope is there for consensus on inherently contentious issues?

In practice, there would be differences even with uniform definitions. For example, in *Re Pacific Coast Coin Exchange of Canada Ltd. et al. and Ontario Securities Commission* (1977), [1978] 2 *S.C.R.* 112, 80 *D.L.R.* (3d) 529, the majority of the Supreme Court of Canada ("SCC") decided that certain agreements were "investment contracts" - therefore, that they were "securities" under the *O.S.A.* However, in a very strong dissent, Chief Justice Laskin held that the agreements were not securities. This shows that even the highest judicial level in Canada can have difficulty identifying a "security". Therefore, even if the definitions were identical in all provinces, there could still be different results. However, the results will be more similar if interpretations start from the same basis.

The Canadian Securities Administrators ("CSA") recently requested comments on a proposal to have uniform definitions in all National Instruments (the securities regulatory instruments - see Part III.B.3., below): Canadian Securities Administrators, "Request for Comments - National Definition Rule and Numbering Systems - Notice of Proposed National Instrument" 19 *O.S.C.B.* 4253. The idea is to have standardized definitions to increase consistency and interpretation of regulatory instruments.

[9] P. Anisman *et al.*, *Proposals for a Securities Market Law for Canada*, 3 vols. (Ottawa: Consumer and Corporate Affairs Canada, 1979) [hereinafter *1979 Proposals*].

[10] F. Iacobucci, "The Definition of Security for Purposes of a Securities Act", in *1979 Proposals, supra* note 9 at 221.

[11] *Ibid.* at 230. See, *e.g.*, Parts V.A. and V.B., below.

[12] *Ibid.* at 230-31. His argument for Canada to have similar definitions to the U.S.A. is even more valid today - the increasingly international securities markets are pressuring individual states to coordinate and harmonize their regulations. In my opinion, coordinated definitions would give regulators an internationally consistent regulatory basis. As discussed below (Parts IV.B. and V.D.), international pressures heighten Canada's need to have an internally consistent regulatory scheme.

approves of a broad definition, but recommends increasing its clarity and decreasing its duplication and inefficiencies.[13]

B. Why Are Securities Regulated?

Several theories underlie securities regulation. Different countries emphasize different ones over time, as reflected in their securities legislation[14] and the administration of that legislation.

1. Underlying Theories

Various practical and economic realities prevent the regulatory theories from operating perfectly in the real world:

> ...imperfect knowledge, restraints to the free and direct access of all persons to the market, less than perfect mobility of financial resources for a variety of economic, legal, physical and institutional reasons, and tolerance of interference with the free operation of the market. Moreover, in practice it is difficult to organize the market so that it will always function in the best interests of the development of the economic resources of the country.[15]

According to the *Kimber Report*, the underlying purpose of securities legislation is public protection;[16] however, efficient capital markets are also important:[17]

> ...to assure the optimum allocation of financial resources in the economy, to permit maximum mobility and transferability of those resources, and to provide facilities for a continuing valuation of financial assets.[18]

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[13] *Ibid.* at 341-43.

[14] For simplicity, "legislation" in this sense encompasses legislation, regulations and policy statements. Part III.B.3., below, discusses Canadian instruments.

[15] *Report of the Attorney General's Committee on Securities Legislation in Ontario* (Toronto: March, 1965) [hereinafter the *Kimber Report*] at 7.

[16] See Part II.B.1.a., below.

[17] See Part II.B.1.b., below.

[18] *Kimber Report, supra* note 15 at 7.

The same principles were emphasized one year earlier:

> The role of securities regulation is to assist and encourage the securities industry to develop and maintain a deserved reputation for skill and integrity, to protect investors from deception by either the financial community or corporate "insiders" who stand in a fiduciary relationship to them, and to ensure that adequate information is made available to them to allocate their savings rationally.[19]

a) investor protection

A principal underlying rationale for regulating securities is investor protection. There are two main types of investors: individual (lay) and institutional.[20] The investor protection theory is primarily based on equity or fairness; that is, some market participants (*e.g.*, issuers and brokers) should not be allowed to take advantage of others (*e.g.*, unsophisticated investors).

Canadian and American systems, for example, are largely dedicated to protecting lay investors. Therefore, they mandate extensive disclosure in the primary and secondary markets - to prevent fraud and manipulation by putting market participants in a "fishbowl".[21] However, many studies show that lay investors usually ignore, and are

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[19] *Report of the Royal Commission on Banking and Finance* (Ottawa: 1964) [hereinafter the *Porter Report*] at 345.

[20] Individual (or lay or retail) investors invest in securities on their own behalf (using brokerage services). They generally invest relatively small amounts, have limited access to information, and have a limited ability to interpret information they do receive. Institutional investors (*e.g.*, banks, mutual funds and pension funds) invest large amounts of money and have a high level of sophistication and access to information. Institutional investors account for a rapidly increasing proportion of funds invested in securities in Canada and the U.S.A. - see J.G. MacIntosh, "The Role of Institutional and Retail Investors in Canadian Capital Markets" (1993) 31 *Osgoode Hall L.J.* 371 [hereinafter "Institutional and Retail"] at 373-74, note 1; and 433-37.

[21] R.L. Knauss, "Disclosure Requirements" (1968) 24 *Bus. Law.* 43 [hereinafter "Disclosure Requirements"] at 44. See Part III.B.4., below, regarding disclosure of material information.

confused by, the ever-increasing quantities of disclosure.[22] Therefore, a natural question is whether the system is adequately serving those for whom it is designed.[23]

A related issue is whether the protectionist emphasis should be on lay or institutional investors. Grover and Baillie argue that:

> The furnishing of excess information to the uninterested or incapacitated is a waste that the system can ill afford. But lack of ability to understand on the part of the recipient should not preclude all disclosure to that recipient - the disclosure should be put in terms that he can understand.[24]

b) efficient capital markets

Another prime regulatory motive is to increase capital market efficiency: "An efficient capital market is typically defined as a capital market in which all relevant and ascertainable information is reflected in the prices of securities".[25] This theoretically

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[22] See, *e.g.*, "Institutional and Retail", *supra* note 20; and H. Kripke, "The Myth of the Informed Layman" (1973) 28 *Bus. Law.* 631 [at 632: "...the theory that the prospectus can be and is used by the lay investor is a myth. It is largely responsible for the fact that the securities prospectus is fairly close to worthless."].

[23] An in-depth discussion of this topic is beyond the scope of this paper (but see Part II.C.1., below, for some elaboration). Also see, *e.g.*, Kripke, *ibid.*; "Institutional and Retail", *ibid.*; J.W. Hicks, "Protection of Individual Investors Under U.S. Securities Laws: The Impact of International Regulatory Competition" (1994) 1 *Global Legal Studies J.* 431; "Disclosure Requirements", *supra* note 21; and R.L.Knauss, "A Reappraisal of the Role of Disclosure" (1964) 62 *Mich. L.Rev.* 607 [hereinafter "Reappraisal of Disclosure"].

[24] W.M.H. Grover & J.C. Baillie, "Disclosure Requirements", in *1979 Proposals, supra*, note 9, 349 at 387. Although the topic is beyond the scope of this paper, see Part II.C.2., below, for some discussion.

[25] M.R. Gillen, "Capital Market Efficiency Assumptions: An Analytical Framework with an Application to Disclosure Laws" (1994) 23 *Can. Bus. L.J.* 346 [hereinafter "Analytical Framework"] at 349. Note that there is no reliable empirical evidence as to how efficient the capital markets are at disseminating information - weak; semi-strong; or strong. A weak form market is one where past stock prices cannot predict future price directions (see M.R. Gillen, *Securities Regulation in Canada* (Scarborough: Carswell-Thomson, 1992) [hereinafter *Securities Regulation*] at 45-46). In a semi-strong market, stock prices quickly "reflect all currently available public information" (*Securities Regulation* at 46-47). A strong form market quickly reflects all public and non-public information in the market price - this form likely does not exist (*Securities Regulation* at 47-48).

works by increasing investor confidence and awareness, so that investment capital is directed towards its best or most efficient use. As it is for protecting investors, disclosure is the preferred method for increasing efficiency.

The goals of investor protection and efficient capital markets inherently conflict. To a degree, market efficiency is enhanced when investors are protected through substantial mandatory disclosure. However, beyond a certain optimal point, increased disclosure actually decreases efficiency, as there is too much information for investors to process, and its quality is more suited to lay investors than to sophisticated analysts.[26]

MacIntosh[27] cites "informational efficiency" as the crux of capital market efficiency - a security's price in an informationally efficient market will reflect all relevant information about its value. This is lay investors' best protection - they can "...free ride on the self-protective efforts of institutional investors, since the latter['s]...activities determine share prices and make securities markets more efficient."[28]

Canada seems to be, at best, weak to semi-strong. See "Analytical Framework" at 351; and *Securities Regulation* at 43-50. However, large, closely-followed companies are likely semi-strong - see *infra* note 44.

[26] Much mandatory disclosure becomes so simplified and certain (*e.g.*, accounting numbers which are historical, not future-oriented) that it is of little use to institutional investors. Also, as mentioned, *supra* note 22, lay investors may not even try to use this disclosure. Therefore, much time, effort and money is expended on lightly-used information.

The extensive disclosure causes lay investors two main problems. First, the sheer volume is imposing, if not insurmountable. Second, much of the information is beyond the investors' interpretation skills, or is simplified and sanitized to the point of virtual uselessness. See, *e.g.*, Kripke, *ibid.* at 633-35; A.G. Anderson, "The Disclosure Process in Federal Securities Regulation: A Brief Review" (1974) 25 *Hastings L.J.* 311 at 321, 329-30, 339-44 [perhaps use disclosure for information purposes, but protect investors through direct regulation of fraudulent and undesirable activities]; Hicks, *supra* note 23; and "Analytical Framework", *supra* note 25 at 375 [promote market confidence through direct attacks on fraudulent transactions, instead of attempting to combat fraud through disclosure regulation]. Further analysis is beyond the scope of this paper.

[27] "Institutional and Retail", *supra* note 20 at 375.

[28] *Ibid.* He argues throughout that the present mandatory disclosure system is unnecessary because it does not add to informational efficiency, since institutional investors would obtain and process such information even in a less-regulated environment.

c) paternalism

Securities regulation also contains a paternalistic assumption that investors cannot look after themselves and, therefore, must be protected from making bad investments. This is significantly different from protecting investors from fraud or manipulation,[29] as regulators use this "merit review" in an attempt to prevent investors from making business judgment errors.

The U.S.A. "Blue Sky" regulations[30] are well-known examples of this paternalism. Using generally discretionary regulations, a regulator can refuse registration for an investment which does not appear to be a good business risk. Canadian provincial statutes give regulators similar authority - they can reject a prospectus where receipting it would prejudice the "public interest" (or words to that effect).[31]

This paternalistic attitude is contrary to the *Kimber Report's* assertion that the market itself should evaluate business risks:

> This is not to suggest that the public must be protected against itself; rather, it is a matter of ensuring that the investing public has the fullest possible knowledge to enable it to distinguish the different types of investment activity available.[32]

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[29] See Part II.B.1.a., above.

[30] This is the layer of state regulation on top of the regulations of the federal Securities and Exchange Commission (the "S.E.C."). Many, but not all, of these state regulations are based on merit review. For discussions of state Blue Sky law, see, *e.g.*, L. Loss & E.M. Cowett, *Blue Sky Law* (Boston: Little, Brown, 1958); L. Loss & J. Seligman, *Fundamentals of Securities Regulation*, 3rd ed. (Boston: Little, Brown, 1995) [more recent; less detailed]; and M.A. Sargent, "State Disclosure Regulation and the Allocation of Regulatory Responsibilities", in M.I. Steinberg, ed., *Contemporary Issues in Securities Regulation* (Massachusetts: Butterworth, 1988).

[31] *E.g.*, *O.S.A.*, *supra* note 7, s.61(1); British Columbia *Securities Act*, S.B.C. 1985, c.83 [as amended by S.B.C. 1987, c.42, ss.95-103; 1987, c.59, s.20; 1988, c.58; 1989, c.30, s.47; 1989, c.40, ss.192-193; 1989, c.47, ss.397-398; 1989, c.78, ss.1-9, 11-45; 1990, c.3, s.7; 1990, c.11, ss.107-108; 1990, c.25, ss.1(d)(part), (g), (h), (j), (q), 3, 17, 18, 19(a), 20(a), (b), (f), 21, 24(d), 26, 30(a), (b), (f), 35, 39, 43(a), (d), 46, 47(d), 50(d), (h), 53-56; 1992, c.52, ss.1-6, 8, 10-13, 15-23, 25-30, 31(b)-33; 1994, c.51, ss.10(a)-(e), 11(a)-(d); 1995, c.15, ss.1-7; 1995, c.45, ss.1-3, 6-8, 10-43, 45-51; 1995, c.53, s.36] [hereinafter *B.C.S.A.*], s.46(2).

[32] *Kimber Report*, *supra* note 15 at 8.

Paternalism has its place in a securities regulatory system. However, it should not have a central role, and the discretion should be carefully monitored.[33] As Kripke states:

> The Commission's function should be to give the information to the people straight and let them make their own judgements in their own way....those who try to use disclosure rationally are going to use professional help in doing so anyway.[34]

Further, in a system with merit regulation, regulators could possibly be held liable for a failure to exercise this discretion properly. For example, losing investors could argue that they would not have invested had they not been "encouraged...to suspend their own judgment regarding the viability of a venture".[35]

d) regulations beget regulations

When an area is first regulated, further regulation is never far behind.[36] Once again, the best example is the U.S.A., where loopholes and gaps in the 1933 and 1934 Acts[37] have been addressed by substantial amendments and supplements. The U.S.A.

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[33] This is beyond the scope of this paper. Basically, such discretion should only be exercised under specific guidelines. If a national system were established, one essential feature and advantage could be the consistent exercise of discretion in such matters - see Part VII.B.1.b., below (there would still be interpretive differences - *e.g.*, *supra* note 8 - but these could be minimized through the supervision of a single appellate body).

[34] Kripke, *supra* note 22 at 637.

[35] D.L. Johnston, *Canadian Securities Regulation* (Toronto: Butterworth, 1977) [hereinafter *Canadian Securities Regulation*] at 19. This is not, in itself, a reason to discontinue merit regulation, but it does emphasize the burden which regulators take upon themselves when they attempt to control all aspects of the marketplace.

[36] There are two main reasons. First, legislators see the need (real or imagined) to expand and clarify the original legislation, especially (as in securities) where certainty and predictability are highly valued. They may forget that excessive regulation can cause rigidity and inhibition. Second, administrators and other participants (*e.g.*, lawyers) have a vested interest in ensuring that the system becomes irreversibly entrenched, so that their services will always be required.

[37] *Securities Act of 1933*, Act of May 27, 1993; 48 Stat.74; 15 U.S.A. Code, Secs.77a-77aa, as amended.

Securities Exchange Act of 1934, Act of June 6, 1934; 48 Stat.881; 15 U.S.A. Code,

now has the most detailed, complicated and built-upon regulatory system in the world.[38]

In Canada, constantly increasing regulation is a concern for two reasons. First, increasingly complex rules may further drive away investment.[39] Second, even if Canada were to establish some degree of consistency among the provinces, they would soon diverge again, as regulations would evolve slightly differently in each province. The best solution to this problem would be a single, uniform piece of legislation, with consistent and rational requirements. This would have to be comprehensively and frequently updated, to ensure it effectively kept pace with market innovations.[40]

2. Regulatory Emphasis

Different jurisdictions emphasize one or more of the above theories at various times. Canada and the U.S.A., as mentioned, have primarily focussed on protecting lay investors. Although some say the desire for efficient capital markets is a simultaneous priority, it has historically been second to investor protection.[41]

However, this emphasis seems to be shifting - efficient capital markets may

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Secs.78a-78jj, as amended.

[38] *E.g.*, Hicks, *supra* note 23 at 459 [describing the levels of regulations and regulators involved].

[39] According to D.Tse, "Establishing a Federal Securities Commission" (1994) 58 *Sask.L.R.* 427 at 439: "In 1989, the Economic Council of Canada concluded that Canada was losing market share, even in markets based on Canadian dollar securities" (citing W.Grover & N. Cheifetz, "Federal Regulation of Securities Activities of Banks and Other Financial Institutions" in Law Society of Upper Canada, *Special Lectures of the Law Society of Upper Canada (1989): Securities Law in the Modern Financial Marketplace* (Toronto: De Boo, 1989) 9).

The vast majority of literature blames this exodus on Canada's combination of a small capital market and onerous regulations.

[40] Of course, the optimal theoretical solution may not be practical or feasible.

[41] See Parts II.B.1.a. and II.B.1.b., above.

become the unquestioned priority in the near future.[42] First, some jurisdictions, such as Japan, already prioritize efficient capital markets.[43] Second, European countries tend to protect institutional investors rather than lay investors; in my opinion, protecting institutional investors is equivalent to promoting market efficiency.[44]

Third, the International Organization of Securities Commissions ("IOSCO")[45] mandates cooperation "...in order to maintain just and efficient securities markets".[46]

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[42] See, *e.g., supra* notes 23-24. A detailed discussion of the desirability and effects of this potential development is beyond the scope of this paper.

[43] Y.Shimada, "A Comparison of Securities Regulation in Japan and the United States" (1991) 29 *Col.J. Transnat'l L.* 319 at 321-22 and 363.

[44] See M. Lorenz, "EEC Law and Other Problems in Applying the SEC Proposal on Multinational Offerings to the U.K." (1987) 21 *The Int'l Law.* 795 at 817. Because disclosure is aimed at institutional investors, it is more sophisticated and useful. This means that securities' prices will more accurately and quickly reflect the information disclosed - i.e. the capital markets will be more informationally efficient. Note that this analysis assumes a moderate degree.of information dissemination efficiency.

A recent event illustrates that market prices do reflect information almost immediately. P. Waldie, "Voisey's Stocks Take Wild Ride" *The Globe and Mail* (26 June 1996) B1, describes how the market prices of Diamond Fields Resources and Inco Ltd. fluctuated dramatically following the release of incorrect information on the progress of a lawsuit crucial to both companies. This also emphasizes the role of institutional investors in securities valuation, as few, if any, lay investors would have received this information in time to act upon it. Of course, dissemination would be slower for smaller companies, which institutional investors do not follow as closely.

[45] IOSCO facilitates international cooperation and communication on securities matters. Its members have resolved:

- to cooperate with the aim of ensuring better regulation, on the domestic and international level, in order to maintain just and efficient securities markets;
- to exchange information on their respective experiences in order to promote the development of domestic markets;
- to unite their efforts to establish standards and the effective surveillance of international securities transactions;
- to provide mutual assistance to ensure the integrity of markets by rigorous application of the standards and by effective enforcement against offenses.

(E.J. Waitzer, Letter to the Honourable Paul Martin (3 October 1995) (1994) 19 *O.S.C.B.* 2818 [hereinafter "Letter to P. Martin re IOSCO"] at 2821).

[46] *Ibid.*

This may encourage (or force) jurisdictions such as Canada and the U.S.A. to shift their regulatory emphasis to efficient capital markets (and, therefore, to achieve investor protection through other means).[47]

C. How Securities Are Regulated

Canada and the U.S.A.[48] primarily regulate securities through mandatory disclosure of all "material" facts and information.[49] A secondary method is the registration of securities, issuers and dealers. Penalties for contraventions (including omissions, misstatements and fraud) support and enforce all of these regulations.[50]

To be valuable, disclosure must be current, accurate and accessible. The latter is the most important, because it determines when market values reflect available information.[51] "Accessible" in the sense of "comprehensible" should be the current focus, as physical accessibility issues have largely been resolved.[52]

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[47] See *supra* note 26 and accompanying text.

[48] Although disclosure has long been the foundation of securities regulation in Canada and the U.S.A., it has also become increasingly important in Europe. The European Union ("EU") has passed several securities regulatory directives, including, *e.g.*, the Listing Conditions Directive (Council Directive 79/279, 1979 O.J. (L66) 21); the Listing Particulars Directive (Council Directive 80/390, 1980 O.J. (L100) 1); and the Prospectus Directive (Council Directive 89/298, 1989 O.J. (L124) 8). See S. Wolff, "Recent Developments in International Securities Regulation" (1995) 23 *Denv.J. Int'l L. & Pol'y* 347 at 371-76.

[49] Part III.B.4., below, discusses materiality.

[50] See *infra* note 226 and accompanying text.

[51] M.H. Cohen, "'Truth in Securities' Revisited" (1966) 79 *Harv. L.Rev.* 1340 at 1408. Also see, *supra* note 25.

[52] *E.g.*, news releases are available on newswires and the Internet almost instantaneously (*e.g., supra* note 44). Also, the proposed System for Electronic Document Analysis and Retrieval ("SEDAR") should greatly increase physical accessibility - see Part III.B.7.b, below.

1. Extent of Regulation

The extent of regulation in a particular scheme depends on three factors: the underlying objectives; the degree of coordination; and the cost/benefit equation. Most systems regulate both the primary (issuing) and secondary (trading) markets:[53]

> An efficient secondary market for securities is a critical ingredient to the effectiveness of the overall financial markets and to the allocation of resources within society. By providing potential liquidity to investors, the secondary market permits a more variable investment horizon for investors in primary issues and permits a greater flow of funds into these securities thus reducing the cost of financing.[54]

a) underlying objectives

More highly protectionist systems need more regulation. For example, the lay-investor focus of Canada and the U.S.A. leads to elaborate and detailed systems. European systems, on the other hand, have less extensive systems because institutional investors require less protection.

b) degree of coordination

Where more coordination is required among systems, the regulation will have to

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[53] See Part III.E.1.a., below [provincial "closed systems" ensure regulation in primary (through issuing regulations) and secondary (through continuous disclosure) markets].

[54] D.C. Shaw & T.R. Archibald, *The Management of Change in the Canadian Securities Industry - Study One - Canada's Capital Market* (Toronto: Toronto Stock Exchange, 1972) at 33. Although some Canadian jurisdictions do not have continuous disclosure systems for the secondary markets (New Brunswick, Northwest Territories, Prince Edward Island, and the Yukon Territory - *Securities Regulation, supra* note 25 at 184) - this is because other Canadian jurisdictions effectively do the work for these four. That is, those four jurisdictions do not have a philosophical objection to continuous disclosure, but have merely found that they do not need to legislate it. For further discussion, see Part III.E.1.a., below.

be less complex within each system. For example, the securities directives in the EU.[55] set out minimum standards[56] for the sake of uniformity, partly because it is too difficult to establish and maintain more complex and detailed standards among so many members. Canada must be aware of this, both domestically and internationally.

Domestically, Canada is deciding whether to have a national securities presence. The degree to which the provinces can agree on national standards will affect the structure of any national system. Canadian regulators may attempt to have very detailed minimum standards (for example, at the level in the *O.S.A.* or the *B.C.S.A.*), but that could fail because provinces which initially agreed may eventually want to alter some details, or may resist future alterations.[57] A less strict approach, with a built-in allowance for regional flexibility, is more feasible.[58]

In the international context, Canada must decide whether it wishes to remain tied to the U.S.A. securities system,[59] or whether it will move towards a less onerous regulatory system. While the former is attractive because of Canada's proximity and economic ties to the U.S.A., it could backfire if the U.S.A. loses its economic

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[55] *Supra* note 48.

[56] Note that each member state can go beyond the minimums and can choose its own method of meeting the minimums. Therefore, this system will never be truly unified or harmonized (see M.G. Warren III, "Regulatory Harmony in the European Communities: The Common Market Prospectus" (1990) 16 *Brook.J. Int'l L.* 19 at 34). For a discussion of unification and harmonization, see Parts IV.D.3. and IV.D.4., below.

[57] For example, when nine provinces adopted the uniform *Security Frauds Prevention Act* in 1930, there was temporary uniformity. However, it lasted only shortly, until the provinces naturally diverged because of local interests. See *Canadian Securities Regulation, supra* note 35 at 15; and J.P. Williamson, *Securities Regulation in Canada* (Toronto: University of Toronto Press, 1960) at 24.

[58] See Part VII.D.1.b., below.

[59] For a discussion of the facts and consequences of Canada's ever-increasing ties to the U.S.A. securities regulatory system, see C. Jordan, "The Thrills and Spills of Free-Riding: International Issues before the Ontario Securities Commission" (1994) 23 *Can. Bus. L.J.* 379 [hereinafter "Thrills and Spills"].

dominance.[60] The latter approach may, therefore, be preferable, as states with simpler securities regulatory systems could be increasingly influential.[61]

c) cost/benefit equation

All regulatory systems should strive for an optimal level of regulation - that is, where the benefits of regulating are greater than or equal to the costs. Costs include, for example, administration costs, compliance costs, and lost business due to increased regulation.[62] The main benefit of a regulatory system is the existence of an honest and efficient system that both issuers and investors want to use.[63]

The net regulatory burden ("NRB") is the "incremental costs incurred less the marginal benefits realized as a result of regulation."[64] Perry advises jurisdictions to strive for a NRB of zero (where the marginal costs of regulation do not exceed the marginal benefits).[65] This will attract and keep issuers and investors. Many authorities

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[60] Other centres (*e.g.*, London and Tokyo) are increasingly attacking the U.S.A.'s importance. If the U.S.A.'s importance decreases, it will lose its ability to affect international securities regulations to any great degree - see, *e.g.*, B. Longstreth, "A Look at the SEC's Adaptation to Global Market Pressures" (1995) 33 *Col.J.Transnat'l L.* 319 at 334; and M.B. Perry, Note, "A Challenge Postponed: Market 2000 Complacency in Response to Regulatory Competition for International Equity Markets" (1994) 3 *Virg.J. of Int'l L.* 701.

[61] See Parts II.C.1.c. and IV.B.1., below.

[62] J. Higgins, *Financing Emerging Business: Canada and U.S.A. Cost Comparisons of Initial Public Offerings (IPOs)* (Ottawa: Conference Board of Canada, 1994) at 5-7; B. Sutton, *The Cost of Regulatory Compliance in the Canadian Financial Sector* (Ottawa: Conference Board of Canada, 1994) at 4-6.

[63] E.g., increased economic activity; issuers financing increased research and development; issuers financing increased employment; and investors directing increased earnings into the economy.

[64] Perry, *supra* note 60 at 706-08.

[65] Of course, it is difficult (or impossible) to measure accurately the various costs and benefits, especially as the market dynamics constantly change - see N. Campbell, "Compulsory Disclosure of 'Soft' Information" (1993) 22 *Can.Bus.L.J.* 321 at 362.

consider that the U.S.A., especially, has failed at this, and that its NRB is sometimes prohibitively high. As Canadian regulation becomes ever-closer to U.S.A. regulation, this is increasingly true for Canada as well.[66]

By focussing the analysis on an optimal regulatory level, the NRB analysis defuses concerns of a race-for-the-bottom, as the optimal level has to have some regulation to engender efficiency and trust. Jurisdictions will:

> ...attract activity by offering the most efficient regulatory environment in which to operate. A regulatory environment is efficient if it offers participants precisely the regulation for which they are willing to pay.[67]

d) conclusion

A more complex system (*e.g.*, the U.S.A.) attracts investors, but finds it more difficult to attract issuers because it lacks efficiency. A less complex system (*e.g.*, Germany) attracts issuers, but finds it more difficult to attract investors because it lacks protections for them.[68] Therefore, the key is balance.

Canada's market is so small and fragmented[69] that foreign issuers can easily justify avoiding the hassles and expense of adding Canada to an international offering, especially with other world markets more easily accessible. Therefore, Canada must strive for a balanced system, which again raises the inherent conflict between investor protection and efficient capital markets.

Even domestic issuers may avoid the quirks of the provincial regulatory systems, either by issuing outside of Canada or by issuing through exempt means (*e.g.*, a private

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[66] See *supra* note 59 and accompanying text.

[67] Perry, *supra* note 60 at 705.

[68] A.J. Roquette, "New Developments Relating to the Internationalization of the Capital Markets: A Comparison of Legislative Reforms in the United States, the European Community, and Germany" (1993) 14 *U.Pa.J. Int'l Bus.L.* 565 at 569.

[69] Canada has twelve securities jurisdictions, despite its markets having only 2.3% of global capitalization: see P. Hughes, "Canada Revises Proposed Foreign Issuer Prospectus System" (June 1995) *Int'l Fin. L.Rev.* 16.

placement.[70] These actions obviously deprive lay investors of investment opportunities.[71] As Cohen states:

> Since the present laws fundamentally assume that disclosure is good, presumably the more disclosure - by every dimension - the better. Ideally, or rather, theoretically, the objective of full disclosure would best be served by having (1) as many issuers as possible (2) disclose as many facts as possible (3) as completely as possible (4) on a fully current basis (5) with perfect accuracy and objectivity (6) in such form as to be most readable and accessible by all interested investors. But this theoretical maximum is unrealizable for many reasons, of which the most obvious are the enormous burden of effort and expense that would be thrown on corporate providers and governmental processors of the information and the incapacity of the investor community to make use of the volume of information that would be produced. Hence, large compromises of the theoretical maximum are written into the existing disclosure systems, and large compromises will inevitably be involved in any coordinated disclosure system. The real question is whether the present system's compromises are the most sensible and desirable ones in light of the practicalities.[72]

2. Type of Regulation

Securities regulation in Canada (as in most states) is based on broad inclusions, tempered by legislated and discretionary exemptions. For example, most Canadian jurisdictions require a prospectus where a "trade" in a "security" falls within the definition of "distribution".[73] The three terms are broadly defined,[74] so that a prospectus would be required in most situations, if there were not exemptions.

This "catch-then-exclude" approach is logical, because regulators are never able to keep ahead of, or even keep up with, changes and innovations in the capital markets. By regulating on a functional rather than a categorical basis, this philosophy therefore allows

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[70] See, *e.g.*, "Institutional and Retail", *supra* note 20 at 452-53.

[71] This is ironic, as the very system which theoretically protects lay investors is now depriving them of opportunities - *ibid.* at 449 and 453.

[72] Cohen, *supra* note 51 at 1367.

[73] *E.g.*, *O.S.A.*, *supra* note 7, s.53(1).

[74] *E.g.*, *ibid.*, s.1(1).

regulators to supervise all relevant transactions.[75]

What is considered "relevant" in a system depends on the system's underlying objectives. Many systems give regulators the discretion to grant exemptions which do not fall within the specifics of the legislation, but do fall within its spirit.[76]

3. Regulating Entity

Most industrialized states have a national securities presence. Some may have a sub-national as well as a national presence (such as in the U.S.A. and as proposed for Canada).[77] Each system has its advantages and disadvantages.[78]

Self-regulatory agencies and professional associations are increasingly important - both because regulators recognize the expertise of such bodies, and because regulators do not have the resources to perform all the regulatory functions themselves.[79] MacIntosh feels that perhaps: "...the devolution of more and more regulatory powers to both national and trans-national self-regulatory organizations is the wave of the future".[80]

For example, the *O.S.A.* relies on the *Canadian Institute of Chartered Accountants* to set auditing and accounting standards for its prospectus and continuous

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[75] See Part II.A., above.

[76] *E.g., O.S.A., supra* note 7, s.74. These discretionary exemptions are basically a cost/benefit analysis on an individual basis, and may be absolute or conditional.

A discussion of exemptions from the prospectus requirement is beyond the scope of this paper. The rationale is that some investors will not benefit from prospectus-type disclosure, either because they already have access to such information or the information is not germane to their decision - see *Securities Regulation, supra* note 25 at 191.

Also see Part III.B.5., below, regarding discretion in Canada.

[77] See Parts II.B.1.c., above (U.S.A.) and VI.A.4., below (Canada).

[78] See Parts VI.B., VII.A., VII.B. and VII.C., below.

[79] See, *e.g., Canadian Securities Regulation, supra* note 35 at 18-19 [self-regulation versus government regulation versus a combination]; and P.Dey & S. Makuch, "Government Supervision of Self-Regulatory Organizations in the Canadian Securities Industry", in *1979 Proposals, supra* note 9 at 1399.

[80] "Institutional and Retail", *supra* note 20 at 456, note 347.

disclosure requirements.[81] Another example is the recent transfer of increased and more comprehensive authority over dealer registration from the Ontario Securities Commission ("OSC") to the Investment Dealers Association ("IDA") and the Toronto Stock Exchange.[82] In addition, all of the Canadian stock exchanges are self-regulatory.[83]

III. CANADIAN SECURITIES REGULATION

Current Canadian securities regulation is far from ideal: "if we were starting from scratch today, no one would dream of creating the regulatory design we actually have".[84] Parts VI. and VII., below, discuss proposals for change. However, it is first necessary to canvass briefly the background and characteristics of the present system.

A. General Framework

1. Constitutional Division of Powers

a) general

Part of Canada's current problem is that the provinces have been the sole legislators in the securities field. Despite some convincing constitutional analysis that the

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[81] *O.S.A. Regulations*, s.1(3).

[82] Ontario Securities Commission, "OSC Enters into an Agreement with the TSE and the IDA for the Use of a Common Registration System"(1996) 19 *O.S.C.B.* 2160; formally approved 10 July 1996 ((1996) 19 *O.S.C.B.* 3845). For a further discussion, see Part III.E.4., below.

[83] The Alberta, Montreal, Toronto and Vancouver stock exchanges have also been increasing their cooperative efforts with each other - Montreal Exchange, *1995 Annual Report* at 4.

[84] E.J. Waitzer, "Crisis Performance & Collaboration in Financial Regulation" (Remarks to Monetary and Financial Integration in an Expanding (N)AFTA: Organization and Consequences, 16 May 1996) (1996) 19 *O.S.C.B.* 2788 [hereinafter "Crisis Performance"] at 2789.

federal government could, and indeed should, be involved,[85] it has continued to leave the field almost entirely to the provinces.[86]

b) provincial versus federal jurisdiction

The provinces ground their securities jurisdiction in s.92(13) of the *Constitution Act, 1867*, which gives them the power to make laws relating to "property and civil rights in the province". Apart from a limited restriction on the provinces' ability to affect federally-incorporated companies, the courts have generally interpreted provincial powers in this area very broadly.[87]

However, there have been some indications that the courts would recognize federal regulation in the securities field, under s.91(2) of the *Constitution Act, 1867* - the federal interprovincial[88] or general[89] trade and commerce power.[90] This is especially

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[85] See, especially, P. Anisman & P.W. Hogg, "Constitutional Aspects of Federal Securities Legislation", in *1979 Proposals, supra* note 9, 135. At 141, they stress that the federal government should play a role, in order to counter the provinces' emphasis on local issues. Internationalization is increasing this pressure - see Parts IV. and V.D., below.

[86] The federal government has become involved in the criminal and corporate areas. See Part III.C., below.

[87] See, *e.g.*, Anisman & Hogg, *supra* note 85; P.W. Hogg, *Constitutional Law of Canada*, 3rd ed. (Toronto: Carswell Company, 1992) at 560 and 612-17; and *Securities Regulation, supra* note 25 at 51-53. Further constitutional issues are discussed in Part VI.B.1., below, in the specific context of a national securities system.

[88] *I.e.*, that the federal government has jurisdiction over trade and commerce matters which affect more than one province, but not over those which are intraprovincial (entirely within one province).

[89] *I.e.*, that the federal government has jurisdiction over trade and commerce matters which affect all provinces, even if some aspects occur solely within a single province.

[90] In *R. v. W. McKenzie Securities Ltd.* (1966), 56 *D.L.R.* (2d) 56, 55 *W.W.R.* 157 (Man.C.A.), the court stated that one reason for upholding a provincial securities law was the lack of a federal law to fill any gap. Therefore, it implied a potentially different result if there were a federal law.

More recently, in *General Motors of Canada Ltd. v. City National Leasing et al.*,

true with the increasing recognition that securities activities and effects are no longer in merely a single province.[91] Although the federal government could, arguably, regulate all aspects of securities, it may be wiser to exclude deliberately intraprovincial matters (such as secondary market trades between residents of the same province), in order to make stronger its constitutional authority for the rest.[92]

c) concurrent jurisdiction

Another constitutional possibility is for the provinces and the federal government to exercise concurrent jurisdiction over securities regulation. That is, each province could regulate aspects within that province, while the federal government would regulate

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[1989] 1 *S.C.R.* 641, 58 *D.L.R.* (4th) 255 [hereinafter cited to *S.C.R.*], Dickson, C.J.C., for the court, set out five factors to help determine whether legislation is valid under the federal trade and commerce power; the factors are indicative, not exhaustive or conclusive (at 661-62):

> First, the impugned legislation must be part of a general regulatory scheme. Second, the scheme must be monitored by the continuing oversight of a regulatory agency. Third, the legislation must be concerned with trade as a whole rather than with a particular industry...[Fourth,] the legislation should be of a nature that the provinces jointly or severally would be constitutionally incapable of enacting...[Fifth,] the failure to include one or more provinces or localities in a legislative scheme would jeopardize the successful operation of the scheme in other parts of the country.

There, the court found that competition law could only be effectively regulated nationally, not provincially (at 680), and that federal legislation had to include intraprovincial matters to be effective (although the provinces could be involved) (at 681-82). This reasoning could be extrapolated to securities regulation - see, *e.g.*, Tse, *supra* note 39 at 436-39. However, I believe this approach would be too uncertain and confrontational; federal-provincial negotiations would be a more efficient and effective route. Also see Anisman & Hogg, *supra* note 85 at 165-66 [securities regulation would not be directed at a particular industry, but at the capital markets as a whole].

[91] Tse, *ibid.* at 435.

[92] Anisman & Hogg, *supra* note 85 at 168. If the federal government took this route under trade and commerce (regulating all but intraprovincial), it could still attempt to regulate intraprovincial matters through its power over "peace, order and good government" ("POGG") - *Constitution Act, 1867*, s.91. However, Anisman and Hogg do not think this would be wise (at 177-85).

interprovincial and international aspects. The federal government has not yet, however, tried to exercise such a jurisdiction.[93]

d) conclusion

Although the federal government apparently could significantly participate in Canadian securities regulation, it has not done so. Should it choose to, however, its role would likely have some limits:

> It is, however, unlikely in the light of recent judicial applications of the paramountcy doctrine that a federal law could completely displace the provincial acts even in overlapping areas...the provinces would generally be able to supplement disclosure requirements and the duties of market actors so that at least two regulatory regimes would remain in most circumstances.[94]

Practical considerations also advocate cooperation and negotiation among the federal government and the provinces:

> Although sovereign in their respective spheres, the federal and provincial governments of the Federation are interdependent and must act in concert with each other. The interests of all the citizens and communities, more than any constitutional provision, make this cooperation at all times imperative.[95]

The best solution may be federal and provincial delegation to a single commission.[96]

2. Historical Development

Securities regulation in Canada is essentially based on three principles:

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[93] According to Anisman & Hogg, *supra* note 85 at 150-53, the mere fact that provinces are limited in their powers to matters in the province "...indicate[s] that jurisdiction to legislate in relation to the securities markets is concurrent" (at 153, note 90). For further discussion of concurrent regulation of securities, see Hogg, *supra* note 87 at 382-83.

[94] Anisman & Hogg, *ibid.* at 219-20.

[95] P.E. Trudeau, *A Time for Action: Toward the Renewal of the Canadian Federation* (Canada: 1978) at 11.

[96] See Parts VI.A.2., VI.A.4., VI.B.1.b. and VII.D.2.a., below.

"registration of persons, registration of securities and anti-fraud measures".[97] A detailed historical discussion is beyond the scope of this paper.[98]

B. Current Features

1. Provincially Run

The provinces (and the territories) are the primary securities legislators and regulators. Each province has a securities act,[99] although several are rudimentary.[100]

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[97] *Canadian Securities Regulation, supra* note 35 at 9.

[98] For a detailed account of provincial securities history, see *ibid.* at 9-15; and Williamson, *supra* note 57, chapter 1. Part VI.A., below, discusses various national proposals in a historical context.

[99] Alberta *Securities Act*, S.A. 1981, c.S-6.1 [as amended by 1981, c.B-15, s.284(27); 1982, c.32; 1984, c.64; 1985, c.R-21, s.53(10); 1988, c.P-4.05, s.96; 1988, c.7, s.1; 1989, c.C-31.1, s.229(7); 1989, c.15, s.4; 1989, c.17, s.24; 1989, c.19; 1991, c.L-26.5, s.335(42); 1991, c.33; 1992, c.21, s.44; 1994, c.23, ss.43(2)(a), (b), 43(3), 43(4)(a)(i), (ii), 43(4)(b), 43(5), 51; 1994, c.C-10.5, s.155; 1994, c.G-8.5, ss.89, 94; 1995, c.28, ss.1-46, 48-62] [hereinafter *A.S.A.*]; *B.C.S.A., supra* note 31; Manitoba *Securities Act*, R.S.M. 1988, c.S50 [as amended by 1989-90, c.54, ss.2-9; 1991-92, c.22, ss.2-6; 1992, c.35, s.58; 1992, c.58, s.32; 1993, c.4, s.238; 1993, c.14, s.88 (not yet in force); 1993, c.29, s.203 (not yet in force); 1993, c.48, s.38] [hereinafter *M.S.A.*]; New Brunswick *Securities Act*, R.S.N.B. 1973, c.S-6 [as amended by 1978, c.D-11.2; 1979, c.41; 1980, c.32; 1982, c.3; 1983, c.8; 1985, c.4; 1985, c.24; 1985, c.M-14.1; 1986, c.4; 1986, c.6; 1986, c.8; 1987, c.L-11.2, s.285; 1989, c.37, s.1; 1991, c.27, s.39(a), (b); 1992, c.15, ss.1, 2, 3] [hereinafter *N.B.S.A.*]; Newfoundland *Securities Act, 1990*, R.S.N. 1990, c.S-13 [as amended by 1992, c.39, s.15; 1992, c.48, s.24] [hereinafter *Nfld.S.A.*]; Nova Scotia *Securities Act*, R.S.N.S. 1989, c.418 [as amended by 1990, c.15, ss.19-80] [hereinafter *N.S.S.A.*]; Northwest Territories *Securities Act*, R.S.N.W.T. 1988, c.S-5 [as amended by R.S.N.W.T. 1988, c.8 (Supp.), s.247] [hereinafter *N.W.T.S.A.*]; *O.S.A., supra* note 7; *P.E.I.S.A., supra* note 6; Quebec *Securities Act*, S.Q. 1982, c.V-1.1 [as amended by 1983, c.56; 1984, c.41; 1985, c.17; 1985, c.30; 1986, c.95, ss.338-340; 1987, c.40; 1987, c.68, ss.120, 121; 1988, c.21, s.134; 1988, c.64, ss.561-563; 1988, c.84, s.700(16); 1989, c.48, ss.254-256; 1990, c.4, ss.897-900; 1990, c.77, ss.1-59; 1992, c.21, s.357; 1992, c.35, ss.1, 3-12, 14-18; 1992, c.57, ss.708(1), (2), 709(1), (2); 1992, c.61, ss.622, 623; 1993, c.67, s.122; 1994, c.13, s.15(36); 1994, c.23, s.23(55); 1995, c.33, s.29] [hereinafter *Q.S.A.*]; Saskatchewan *Securities Act*, S.S. 1988, c.S-42.2 [as amended by 1989, c.15, s.3]

A main purpose of this paper is to examine whether this provincial system is appropriate and, if not, how it could, theoretically and practically, be changed.[101]

2. Commissions System[102]

Two-tiered commissions administer securities regulation in the major securities provinces.[103] The top tier (the panel of commissioners) makes orders and rulings, hears appeals from the lower tier, formulates policies, and recommends legislative changes to the provincial government. The lower tier (the administrative body, headed by a chief administrative officer - with a different title in each province) runs the day-to-day aspects of the commission, and implements the commissioners' orders.

Although this system is relatively effective in each province, it is unwieldy when viewed nationally. That is, a market participant wishing to conduct business (issuing, investing, advising, counselling) in more than one province must be familiar with the structures and personalities in each province.[104]

[hereinafter *S.S.A.*]; Yukon Territory *Securities Act*, R.S.Y.T. 1986, c.158 [hereinafter *Y.T.S.A.*].

[100] Alberta, British Columbia, Manitoba, Newfoundland, Nova Scotia, Ontario, Quebec and Saskatchewan [hereinafter the "major securities provinces"] have well-developed legislation. New Brunswick, the Northwest Territories, Prince Edward Island and the Yukon Territory [hereinafter the "minor securities jurisdictions"] have rudimentary securities legislation.

[101] See Parts VI. and VII., below.

[102] This discussion is taken from *Securities Regulation, supra* note 25 at 71.

[103] The minor securities jurisdictions have less complex administrative systems, which will not be discussed here (see *ibid.* at 71).

[104] *E.g.*, when securities lawyers attempt to obtain a prospectus receipt in more than one province, they must deal with several commissions. Some initiatives - *e.g.*, National Policy No.1 ("Clearance of National Issues") [hereinafter NP 1] (see Part III.B.3., below) - alleviate, but do not solve this problem.

3. Securities Regulatory Instruments[105]

There are several types of regulatory instruments. Legislation and regulations are enacted by each particular provincial government, often acting on advice from its securities commission.

Next are the three types of policy statements. First, and narrowest, are the Local Policy Statements ("LPs"). These are passed by each commission to deal with matters of a local nature or concern, although several provinces may have similar LPs. LPs cover such matters as: prospectus requirements; technical report specifications; exemption application procedures; and the commission's relationship with local stock exchanges and other self-regulatory organizations.

One problem with LPs is their inconsistency from province to province. Even a common format or labelling system would help market participants assess and react to the similar and different requirements of each province. Currently, however, it is difficult and time-consuming to determine the variations among provinces.

Second are the Uniform Act Policies - developed when Alberta, British Columbia, Manitoba, Saskatchewan and Ontario shared a uniform securities act. These policies are of limited use, as they are gradually being replaced by National Policy Statements.[106]

National Policy Statements ("NPs") are the third, and most important, type of policy statement. These are joint policies agreed upon by the Canadian Securities Administrators[107] and are in effect in every province. Since the provincial regulatory system is not optimally consistent or efficient, the NPs are the only reason that it is manageable at all - they decrease duplication and increase coordination among the provinces. For example, NP 1[108] simplifies the receipting process when an issuer

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[105] This discussion is based partly on *Securities Regulation, supra* note 25 at 69-76.

[106] *Ibid.* at 74-75.

[107] The Canadian Securities Administrators ("CSA") is an umbrella organization of the provincial securities commissions. It meets semi-annually to discuss ways to improve coordination and cooperation among the provinces. See Part III.D.1., below.

[108] *Supra* note 104.

submits a national issue. New NPs are always in progress; however, their adoption is often lengthy, with many compromises required to accommodate all of the jurisdictions.[109] Some believe NPs show that coordination works; therefore, that Canada does not need a national regulator. Conversely, others argue that NPs' existence proves that the provinces cannot regulate entirely on their own.[110]

Blanket orders increase efficiency in the "catch-then-exclude"[111] system. Under "catch-then-exclude", market participants can apply for exemptions from the securities legislation if they feel that the spirit of the legislation did not intend to include them. A commission which receives repeated exemption requests from participants with the same characteristics may issue a blanket order automatically exempting all those who meet the specified criteria. These exemptions increase certainty for market participants, and decrease the commissions' workloads.

The decisions of commissions and courts are the final source of securities law. These precedents also increase certainty and predictability for market participants.

4. Materiality

"Materiality" is vital to the disclosure-based securities system. The essence of the disclosure system is that all the information that the market needs to set an appropriate value for a security will be provided. Materiality is the test of importance or relevance of that information - that is, of what must be disclosed.

The securities acts require a prospectus to "provide full, true, and plain disclosure

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[109] NPs are in transition. Since *Ainsley Financial Corp. v. Ontario (Securities Commission)* ((1995), 121 *D.L.R.* (4th) 79, 21 *O.R.* (3d) 104 (Ont.C.A.)), the O.S.C. can no longer claim that NPs have mandatory force. The OSC is reworking all of its LPs and NPs, in conjunction with the Ontario legislature's grant to it of rule-making authority - see J.A. Geller, "Comments on Rule-Making" (Remarks at the Securities Forum '96, 25 January 1996) (1996) *O.S.C.B.* 596; and J.G. MacIntosh, "Securities Regulation and the Public Interest: Of Politics, Procedures and Policy Statements" (1995) 24 *Can. Bus. L.J.* 77, 287.

[110] *E.g.*, Tse, *supra* note 39 at 428.

[111] See Part II.C.2., above.

of all material facts relating to the securities issued or proposed to be distributed...".[112] In addition, a "material change...in the affairs of a reporting issuer..."[113] must be immediately reported under the continuous disclosure requirements in the major securities provinces. Finally, National Policy No.40[114] extends the continuous disclosure requirements to all "material information".[115]

NP 40 states the disclosure philosophy:

> It is a cornerstone principle of securities regulation that all persons investing in securities have equal access to information that may affect their investment decisions. Public confidence in the integrity of the securities markets requires that all investors be on an equal footing through timely disclosure of material information concerning the business and affairs of reporting issuers and of companies whose securities trade in secondary markets. Therefore, immediate disclosure of all material information through the news media is required.[116]

5. Discretion

Discretion is integral to the regulatory system.[117] The two types of discretionary authority are merit review and exemption orders.

First is merit, or "blue sky" review, which is the paternalistic discretion discussed earlier. Grover and Baillie canvass several aspects of this discretion, concluding both

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[112] *O.S.A., supra* note 7, s.56(1). The other securities acts have similar wording.

[113] *Ibid.* s.75(1).

[114] ("Timely Disclosure") [hereinafter NP 40].

[115] This appears broader than material facts or changes; however, a detailed discussion of materiality issues is beyond the scope of this paper. For a recent SCC decision, see *Pezim v. B.C. (Superintendent of Brokers)* ([1994] 2 *S.C.R.* 557, 114 *D.L.R.* (4th) 385 [hereinafter *Pezim* cited to *S.C.R.*]).

The NP 40 requirements are "guidelines" because they do not have the force of law - see *supra* note 109.

[116] NP 40, *supra* note 114, para.B.

[117] See Parts II.B.1.c. and II.C.2., above.

that it is necessary, and that it should be done at a federal, not provincial, level.[118]

Second, a commission may make an exemption if it feels the applicant should be exempted from certain legislative requirements. This important part of securities regulation gives regulators and market participants the flexibility to use innovative instruments and ideas.

Neither type of discretion is uniform across the country. As the *Porter Report* found, uniformity is not possible where different branches and levels have discretionary power, even if they are dealing with uniform legislation.[119] Therefore, any national system must have only one ultimate level of discretionary decision-makers, whether the legislation allows for discretion in merit regulation, exemption orders or both.[120]

6. Deference on Appellate Review

Each securities commission has complete discretion over securities matters in its jurisdiction, subject to appellate review.[121] Their legislation does not, however, contain an explicit privative clause (a clause attempting to limit the scope of appellate review, either partially or entirely, depending on its wording).[122]

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[118] See Grover & Baillie, *supra* note 24 at 393-99. Further, any legislation must provide adequate appeal rights.

[119] *Porter Report, supra* note 19 at 346. *E.g.*, comments on a preliminary prospectus can vary widely among jurisdictions, although all are based on "full, true and plain disclosure" (*supra* note 112).

[120] One exception from this could be a national system with allowances for regional disparity and local emphasis. *E.g.*, there could be a separate discretionary authority for specific industries in specific regions. See Parts VI.B.3. and VII., below.

[121] *E.g., O.S.A., supra* note 7, s.9(1), allows an appeal to the Divisional Court. Section 9(5) enables a court to: "...direct the Commission to make such decision or to do such other act as the Commission is authorized and empowered to do under this Act or the regulations and as the court considers proper...".

[122] *See, e.g., Hogg, supra* note 87 at 196-200.

In *Pezim*,[123] the Supreme Court of Canada ("SCC") examined the appropriate appellate review standard of a British Columbia Securities Commission decision, in the absence of a privative clause.

Mr. Justice Iacobucci, for the court, made several initial points. First, the primary purpose of securities legislation is investor protection, with secondary purposes of efficient capital markets and public confidence in the system. Second, "...securities regulation is a highly specialized activity which requires specific knowledge and expertise...".[124] Third, the essential question in determining the scope of appellate review is the legislature's intent in giving the administrator jurisdiction. This intent can exist even without a privative clause.[125] Fourth, restricted appellate review is more likely when the issue under review is at the core of the commission's expertise and mandate, and when the commission has a role in developing policy (both the case in *Pezim*).

He concluded that the commission had an extremely high level of expertise, with a very broad mandate to protect the public interest. In addition, the *B.C.S.A.* definitions at issue were part of a broad regulatory context and, therefore, must be interpreted by someone with securities' expertise.[126]

Therefore, even without a privative clause, the SCC concluded that securities commissions are expert bodies, whose decisions must be treated with judicial deference.

7. Technological Advances

Technological advances are important stimuli in domestic and international[127]

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[123] *Pezim, supra* note 115 at 403-11. This reasoning should also apply to the other securities acts.

[124] *Ibid.* at 404.

[125] However, a privative clause increases certainty.

[126] *Pezim, supra* note 115 at 408.

[127] See Part IV.A.2.a., below.

securities markets.

a) communications technology

Telephone conferencing,[128] fax machines,[129] and computer links[130] greatly facilitate the work of market participants. Regulators also benefit - both on the regulatory side (*e.g.*, more and faster access to information) and on the enforcement side (*e.g.*, faster recognition of disclosure or trading irregularities).

b) computerization

Ever-expanding word processing capabilities increase issuers' ability to issue securities and meet continuous disclosure requirements.[131] This is, however, only a minor part of the computer revolution, as computers are also important in enforcement, trading, tracking, etc.

The most important and pervasive effect of computers in the Canadian securities context will be the System for Electronic Document Analysis and Retrieval (SEDAR), a CSA initiative which will be effective in all provinces.[132] This mandatory computerized

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[128] *E.g.*, for due diligence meetings with geographically scattered management.

[129] *E.g.*, for immediate written communication with securities commissions, issuers, underwriters, counsel for each party, and auditors.

[130] *E.g.*, the Internet allows issuers to communicate virtually instantaneously with their market. News releases and home pages offer, respectively, breaking and background information.

[131] *E.g.*, black-lining is quick, efficient and accurate; last-minute revisions can be quickly executed (then transmitted to all commissions via fax); and documents and forms can be easily prepared and updated.

[132] Ontario Securities Commission, "Request for Comments on System for Electronic Document Analysis and Retrieval (SEDAR)" (1996) 19 *O.S.C.B.* 2345 [hereinafter "Request re SEDAR"].

registration, filing, and fee-submitting system should start phasing-in in October 1996.[133] Reporting issuers will be required to file prospectuses, continuous disclosure documents and other offering documents using SEDAR. They need only make a single electronic filing, regardless of the number of provinces targeted, as each province (and the public) will be able to download information from a central system.[134]

The OSC anticipates SEDAR will:

> ...make the process more efficient for: filers, in preparing and filing documents with the securities regulatory authorities; the securities regulatory authorities, in retrieving, storing, processing and disseminating such documents; and investors, in gaining access to and reviewing the filed documents.[135]

Initially, at least, filing costs will likely increase, but the OSC believes the above benefits will outweigh any such increased costs.[136]

C. Federal Legislative Involvement to Date

Although the federal government is not involved in securities regulation,[137] it has acted in the criminal law and corporate law fields.

1. Criminal Code Provisions

The securities provisions in the *Criminal Code*[138] are basically directed at

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[133] *Ibid.* - phase-in will be done in stages, with some groups having slightly more leeway. Phase-in is currently scheduled for completion by the end of 1996.

[134] This should greatly increase efficiency and decrease duplication in the current Canadian system. Part VII., below, discusses whether a national system is still necessary or desirable in light of these, and other, cooperative measures.

[135] "Request re SEDAR", *supra* note 132 at 2347.

[136] *Ibid.* at 2348. Note, however, that these increased costs will ultimately be passed on to investors and consumers.

[137] See Part III.A.1., above.

[138] The *Criminal Code*, R.S.C. 1985, c.C-46 [as amended] [hereinafter *C.C.C.*].

fraudulent and manipulative activities. For example, s.382 makes "wash-trading" an offence (where one party buys and sells the same securities to give the illusion of market activity and to move the market price). Similarly, manipulating the market price of securities or transactions, with fraudulent intent, is an offence under s.380.

Section 383 makes it illegal to "game" in securities (to profit without a *bona fide* intention of owning the securities). Under s.384, a broker cannot sell on its own account, if that would reduce its holdings below what it is required to hold for its clients.

Section 400 makes it an offence to have a prospectus which is false in a material particular, with the intent to defraud, deceive, or to induce purchases. Conversely, the provincial legislation "makes questions of reliance, negligence and causation defences rather than elements of the claim".[139] As the *C.C.C.* burden of proof is much harder to meet, investors are less protected.[140]

The federal *C.C.C.* provisions have a significant advantage over the provincial securities acts. Provincial regulators need a cooperative agreement to investigate suspected frauds outside of their jurisdictions.[141] However, international investigation

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[139] *Securities Regulation, supra* note 25 at 125.

[140] This seems obvious. The greater the risk of being ensnared by a punitive section, the less incentive there is to engage in the impugned conduct. If issuers faced only the remote chance of a criminal conviction for prospectus misstatements, they would be more likely to cross the line between self-promotion and outright falsehoods.

In fact, regulators such as the OSC have recently begun to review offering documents on a selective basis (due to staff and funding shortages). Therefore, they are relying on the prospect of statutory and civil liability to discourage inappropriate conduct, without the additional safeguard of a regulatory review. If the only potential sanctions were the high burden of proof criminal sanctions, the regulators would not dare follow this selective course.

[141] The OSC has recently joined with, among others, the R.C.M.P. to form the Securities Enforcement Review Committee ("SERC"), to investigate and punish major securities crimes. One of SERC's main attractions is that any investigations beyond the Ontario border would be handled by the R.C.M.P. (presumably other provincial commissions would cooperate with the R.C.M.P. as necessary, although those commissions are not part of SERC). See M. Den Tandt, "Ontario Unveils Securities Crime Buster" *The Globe and Mail* (19 June 1996) B1; and J. McNish, "Securities-Crime Deal Close" *The Globe and Mail* (18 April 1996) B1.

and enforcement are still problematic.[142]

2. Canada Business Corporations Act Provisions

Four parts of the *Canada Business Corporations Act*[143] are relevant to securities regulation: insider trading;[144] proxies;[145] continuous disclosure;[146] and take-over bids.[147] This is, in part, to address certain precedents, which held that federally incorporated companies cannot be limited by some aspects of provincial regulations.[148]

D. Uniformity and Harmonization

As mentioned, the current system is not uniform[149] or harmonized.[150] The

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[142] See Part IV.C.4., below.

[143] R.S.C. 1985, c.C-44 [as amended] [hereinafter *C.B.C.A.*]. Current reform proposals, if passed, could change this information.

[144] *Ibid.*, Part XI.

[145] *Ibid.*, Part XIII.

[146] *Ibid.*, Part XIV.

[147] *Ibid.*, Part XVII.

[148] *E.g.*, *John Deere Plow Co. Ltd. v. Wharton*, [1915] 18 *D.L.R.* 353, 7 *W.W.R.* 706 (P.C.) - see discussion in *Securities Regulation, supra* note 25 at 52-53. The consensus seems to be that federally-incorporated companies are not subject to all aspects of provincial regulation.

[149] A uniform system has identical laws among the different jurisdictions - see Part IV.D.3., below. In Canada, this would mean having one set of laws for the entire country (*e.g.*, the NPs are uniform).

[150] In a harmonized system, different jurisdictions have different legislation, but with the same effect across all - see Part IV.D.4., below. In Canada, this would mean having the same effective legislation in all provincial and territorial jurisdictions, even if the actual legislation were different in each. Most parts of the current system are not harmonized, as the effects vary (in at least minor ways) in each jurisdiction.

provinces are trying to improve coordination, as discussed in this section.

1. Canadian Securities Administrators[151]

The CSA's goal is to improve cooperation and coordination among the provinces. It has had some considerable success in this, most notably through the NPs.[152] It has also been responsible for important initiatives such as the Multi-Jurisdictional Disclosure System ("MJDS") and the proposed Foreign Issuer Prospectus and Continuous Disclosure System ("FIPS").[153] In addition, the CSA gives Canada a somewhat uniform voice in international fora, although it obviously does not have the force of a single, nationally-empowered and legislated body.[154]

According to Waitzer, the CSA's structure is no longer appropriate.[155] Although it began by seeking uniformity, a later shift to harmonization decreased the emphasis on uniformity. He feels this has caused increasing bureaucratization in both the CSA and the individual commissions. As a result, the fragmented, informal and politicized CSA striving for "[i]ncremental harmonization and coordination is no longer adequate. We must alter the mechanisms to provide for the leadership required to respond to current challenges."[156]

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[151] *Supra* note 107.

[152] See Part III.B.3., above.

[153] The MJDS was adopted by Canada in NP 45 ("Multijurisdictional Disclosure System") [hereinafter "NP 45"], and by the U.S.A. in Sec. Act Release No.33-6902 (1 July 1991). FIPS is still in draft form: Ontario Securities Commission, "National Policy Statement No.53 - Draft - Proposed Foreign Issuer Prospectus and Continuous Disclosure System" (28 April 1995) (1995) *O.S.C.B.* 1893. MJDS and FIPS are discussed in Part III.D.2., below.

[154] See Part V.D.2., below.

[155] E.J. Waitzer, "Too Many Cooks..." (Remarks to the Annual Meeting of the Investment Dealers Association of Canada, 17 June 1996) (1996) 19 *O.S.C.B.* 3422 [hereinafter "Too Many Cooks..."] at 3423.

[156] *Ibid.*

Waitzer also believes that one of the CSA's major problems is that it ignores possibilities for progress and reform.[157] For example, the CSA-commissioned *Report of the Task Force on Operational Efficiencies in the Administration of Securities Regulation* recently submitted its final report.[158] Although several securities commissions have tried to address matters raised by the *Efficiencies Report*, the CSA itself has largely ignored it.

Therefore, although the CSA has been a useful organization for alleviating some strains and inconsistencies of the non-national system, it has "become increasingly ponderous and defensive"[159] and has become "most effective as a mechanism for the maintenance of the status quo".[160]

The status quo is inadequate. The solution could be a national securities system, or expanded coordination under a formalized and updated version of the CSA.[161]

2. MJDS and FIPS[162]

The MJDS has been operating since 1991. FIPS is still at the proposal stage.[163]

a) MJDS

The MJDS is a system between Canada and the U.S.A., under which Canadian

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[157] "Crisis Performance" *supra* note 84 at 2790-91.

[158] (19 June 1995) (1995) 18 *O.S.C.B.* 2971 [hereinafter *Efficiencies Report*]. Some inefficiencies are discussed in Part V.B., below.

[159] "Crisis Performance", *supra* note 84 at 2790.

[160] "Too Many Cooks...", *supra* note 155 at 3424.

[161] See Part VII., below.

[162] *Supra* note 153 and accompanying text.

[163] Although the OSC has said that it will consider applications under the proposed terms on a case-by-case basis, until such time as FIPS comes into force.

and American issuers who meet certain size and reporting history requirements can issue securities in the non-home jurisdiction using the home offering document, with a "wrap-around" (a short document which is literally wrapped-around the prospectus to add any additional disclosure required by the non-home jurisdiction). Therefore, a qualifying Canadian issuer can use its Canadian prospectus to issue securities into the U.S.A. in certain circumstances,[164] and vice-versa. In addition, the issuer can largely meet the non-home continuous disclosure requirements by filing its home continuous disclosure documents.

The MJDS has significantly benefited many Canadian issuers, who can now more easily enter the vast U.S.A. market. American issuers are also more likely to offer securities to Canadian investors than before.[165]

b) Proposed FIPS

FIPS is to be used:

> ...to facilitate offerings of securities of foreign issuers in Canada while seeking to ensure that Canadian investors remain adequately protected. This is expected to enable Canadian dealers and retail investors to participate directly in global securities offerings, including foreign privatizations.[166]

The idea is to allow Canadian investors access to issues that, in the past, have been too difficult and expensive for foreign issuers to justify distributing in Canada. FIPS's usefulness will, however, be limited, as few issuers will meet the required standards.[167]

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[164] With wrap-around disclosure for, *e.g.*, taxes, civil liability and GAAP reconciliation (Part IV.C.1., below, discusses Generally Accepted Accounting Principles ("GAAP") and their significance in the international securities context).

[165] However, American issuers still must file in all of the provinces in which they wish to offer securities, at least until SEDAR comes into effect (see Part III.B.7.b., above). Lay Canadian investors likely will not have access to these U.S.A. issues, as they will be sold primarily at the institutional level.

[166] FIPS, *supra* note 153 at 1893.

[167] *Ibid.* - a post-offering market value and public float of $3 billion and $1 billion (Canadian), respectively; contemporaneously offered and registered in the U.S.A.; and no more than 10% of the worldwide distribution to be offered in Canada.

FIPS will accept the same documents as the foreign issuer files for the U.S.A. offering, with some additions.[168] Canadian continuous disclosure requirements will basically be met using U.S.A. documents.[169] Issuers will not need to reconcile to Canadian GAAP, and there will be limited, if any, review in Canada. Unlike MJDS, which is reciprocal between Canada and the U.S.A., FIPS is not reciprocal.[170]

Until FIPS is finalized, foreign issuers can apply on a case-by-case basis to use the proposal for their issues. This has been done only once so far.[171] For now, FIPS does not give foreign issuers enough stability and certainty to encourage issues into Canada.[172] Canada must eliminate duplicative filings under FIPS, as it currently would require filings in each Canadian jurisdiction.[173] Despite the efforts to date, Jordan fears that FIPS might actually not have much practical value, as many issuers may still prefer the private placement system because of the small size of the Canadian market.[174]

c) conclusion

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[168] These additions theoretically give Canadian investors their accustomed civil liability protections. However, the actual level of protection may be different, as international enforcement can be problematic or impossible - see Part IV.C.4., below. Therefore, the benefit of Canadian civil liability provisions may be largely illusory - see "Thrills and Spills", *supra* note 59 at 388.

[169] FIPS, *supra* note 153 at 1894.

[170] Therefore, the U.S.A. will not accept foreign issues based on Canadian documentation, nor will third countries accept Canadian issues based on U.S.A. documentation. These scenarios could be negotiated on a case-by-case basis, although the latter is far more likely than the former. Obviously, a formalized and certain system is more attractive than ad hoc and slow negotiations.

[171] ENI S.p.A. Initial Public Offering (November 27, 1995).

[172] Hughes, *supra* note 69 at 16.

[173] R. Lococo, Letter to the Ontario Securities Commission (24 January 1996) at 7. His other comments on revisions to FIPS are beyond the scope of this paper.

[174] Thrills and Spills, *supra* note 59 at 387.

Although MJDS and FIPS (if ever finalized) are impressive examples of provincial coordination in some respects, they still fall short of what Canadian issuers and investors deserve. While MJDS benefits Canadian issuers, FIPS does not, because it lacks reciprocity.[175] The benefits of both are still limited by the duplicate filing and clearance requirements, which will discourage some issuers from offering into Canada, except through exemptions.

3. IOSCO[176]

This umbrella organization, founded in 1983, tries to improve international levels of cooperation and coordination in such areas as accounting standards, clearance and settlement systems, and enforcement.[177] Canada would have a more effective voice in IOSCO if it were represented by a single, national securities body.[178]

4. Enforcement

Investigation and enforcement are currently fragmented and inefficient. Provincial regulators do not have the jurisdiction to investigate activities outside of their own province,[179] nor can they force other provinces to respect and enforce their

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[175] Perhaps a national regulator would be able to negotiate a reciprocal FIPS with at least some foreign jurisdictions, as long as the underlying regulatory goals were fairly similar. The CSA could not effectively do this, because it must make too many compromises to accommodate all of the regional demands and self-interests. Depending on its structure, a national regulator could face similar limitations - *e.g.*, see Part VI.B.3., below.

[176] *Supra* note 45 and accompanying text.

[177] See Part IV.C., below.

[178] See Part V.D.2., below.

[179] Even a national regulator would have jurisdiction only within Canada - see Part IV.C.4., below.

orders.[180] Also, enforcement provisions and priorities vary among the provinces.[181]

E. Illustrative Differences Among the Provinces

The provincial regulatory systems are different in both minor and significant ways. In practice, some of these differences do not undermine investor protection in Canada. However, the existence of twelve varying jurisdictions does undermine the efficient market goal.[182] This section highlights some of the provincial differences.

1. Substantive Differences

a) closed system[183]

Seven of the major securities provinces are "closed" systems.[184] This requires a prospectus for all "distributions" of "securities", unless they fit within specified

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[180] There is an informal understanding among provincial commissions to respect each other's orders. However, it is not mandatory, as shown in the Lawrence Ryckman case.

On January 18, 1996, the Alberta Securities Commission removed Mr. Ryckman's exemptions and trading privileges under the *A.S.A.* for eighteen years (for market manipulation). Months later, the OSC has still not decided if it will impose parallel sanctions (the OSC recently adjourned the hearing again - (1996) 19 *O.S.C.B.* 4123). Even this hearing is based on certain of Mr. Ryckman's Alberta activities which used accounts in Ontario, rather than purely on implementing Alberta's order for its own sake - see Ontario Securities Commission, "Statement of Allegations" (1996) 19 *O.S.C.B.* 3433. In the interim, however, at least the OSC has removed Mr. Ryckman's right to use exemptions under the *O.S.A.*

[181] See Part III.E.5., below.

[182] *E.g.*, even the minor differences increase the knowledge and compliance workload for issuers and their counsel.

[183] This discussion is based on *Securities Regulation, supra* note 25 at 181-90.

[184] Manitoba is the exception - it does not have a closed system, but its legislation is effectively designed to mimic the effects of the closed system. Theoretically, issuers could avoid closed system restrictions by issuing only into the minor securities jurisdictions; however, the small populations would not justify such an issue.

exemptions. Therefore, securities can only be traded without prospectus-type disclosure if they fall within an exemption. The exemptions are basically for those whose sophistication or access to information makes such disclosure unnecessary. Trades can continue indefinitely within the closed system, as long as they are confined to this group.

Reporting issuers' securities issued without a prospectus are subject to a hold period;[185] the securities cannot be traded outside of the closed group without a prospectus until the hold period expires.[186]

If a "distribution" (essentially, an issue, a secondary offering of a control block, or a resale of exempted securities during the hold period)[187] is made outside the closed group, the securities must be "qualified" with a prospectus. This ensures an appropriate level of disclosure to the market.

b) levels of regulation

Because each jurisdiction has its own legislation and administrators, the level of regulation naturally varies from one to another in two respects. First, the legislation itself ranges from cursory to extensive in the different jurisdictions. Second, even where the legislation is similar, the administrators may apply it differently in similar situations, due to their background, experience, personal views, and political or public pressure.

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[185] See Part III.E.3.a., below.

[186] Theoretically, continuous disclosure requirements during the hold period will allow build-up of enough information that the market price by the end of the hold period will reflect the appropriate information - investors will consequently be protected.

Securities issued by prospectus are not subject to a hold period, as the required base information is immediately available through that prospectus disclosure and is constantly supplemented by the continuous disclosure requirements.

Hold periods are irrelevant to securities of non-reporting issuers. Because they are not subject to the continuous disclosure requirements, their securities cannot be traded without a prospectus or a further exemption.

[187] *E.g., O.S.A.* s.1.(1) defines a distribution to include an original issue and a sale of a control block. Section 72(4) - (6) deems as distributions resales of previously exempted securities. The other major securities provinces have similar provisions.

c) language differences

Where securities are distributed into Quebec, documents must be filed in French, and may be filed in English.[188] For example, under NP 1 (which simplifies national prospectus and AIF[189] filings), Quebec, New Brunswick and Ontario all require at least some documents to be filed in French (if there is distribution in Quebec). Of course, the required French documents vary even among those three provinces, as there is rarely consistency among jurisdictions.

Although French-speaking investors naturally desire disclosure in their language, the requirement undeniably discourages domestic and foreign issuers for three reasons. First, translation costs can be prohibitive relative to the proceeds of the issue, especially for smaller issuers. Second, even if those who must sign the prospectus do not understand French, they will be liable for misrepresentations (including inadvertent ones). Third, a prospectus often must be completed quickly to seize market opportunities; lengthy translation delays may ruin this schedule.

There are two consequences. First, domestic and foreign issuers may decrease Canadian issues or avoid Canada entirely. Second, they may issue in the rest of Canada, but avoid Quebec.[190] There does not seem to be a solution that will satisfy all parties.[191]

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[188] *Q.S.A.*, s.40.1. See, *e.g.*, Part III.D.2.b., above - FIPS documents must be translated into French, which will dissuade some foreign issuers.

[189] Annual Information Form - used by qualified issuers as an initial level of disclosure, so that they can subsequently issue securities with less than the traditional prospectus disclosure.

[190] See, *e.g.*, G. Ip, "Stock Issues Bypass Quebec" *The Globe and Mail* (16 May 1996) B1. The article cites "a new wave of recent incidents" where stock issues are bypassing Quebec. This is blamed on the translation requirements, which can cost "between $20,000 and $40,000 and take weeks" (at B2). Although the problem also runs in reverse (small Quebec issuers cannot afford to translate into English for issues outside Quebec), the primary problem is translation into French.

[191] One concern with a national system is that it may require all documents in both French and English, regardless of the provinces of issue. See Part VI.B.2.d., below.

d) different local/regional focusses

Each province is currently free to encourage or discourage certain sectors or ventures in its securities markets. There are concerns that a national system would destroy this regional flexibility, by requiring conformity to a single, inflexible standard. The Chairs of the Alberta and British Columbia Commissions, for example, believe that one positive feature of current Canadian securities regulation is its "considerable depth and diversity".[192] British Columbia and Alberta are especially concerned with preserving their junior and venture capital markets, which they believe play a vital role in the growth of industries in those provinces.[193]

2. Prospectus Filing Differences

Even under NP 1's "simplified" filing procedure,[194] each province requires different documents, including: the number of signed and unsigned prospectuses; French language requirements;[195] different supplementary documents in some provinces;[196] and different fees payable in each jurisdiction.[197]

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[192] *Joint Submission of the Chairs of the Alberta and British Columbia Securities Commissions*, "Structure of the Proposed Canadian Securities Commission" (1996) 19 *B.C.S.C. Weekly Summary* 1 [hereinafter *A.S.C. & B.C.S.C. Joint Submission*] at 2.

[193] *Ibid.* at 7, citing as examples "the $25,000 sophisticated purchaser exemption in British Columbia and the junior capital pool provisions in Alberta". A detailed discussion of regional initiatives is beyond the scope of this paper, but see Parts VI.B.3. and VII.D.1.b., below, regarding maintaining regional flexibility in a national system.

[194] This section uses NP 1 as an example of the different filing requirements.

[195] See Part III.E.1.c., above.

[196] *E.g.*, the undertaking in British Columbia to provide a breakdown of sales; the underwriters' certificate required in several provinces; and the cross-reference sheet required in some, but not all, jurisdictions.

[197] One problem is that the chart of fees payable in NP 1 is not updated. Issuers and their counsel must, therefore, constantly track twelve different statutes and regulations to ensure that the proper fees are paid. Another problem is that the calculations are based

3. Timing Differences

a) hold periods[198]

Hold periods, which impose resale restrictions on securities distributed without a prospectus,[199] vary among the provinces. For example, British Columbia has a single hold period for all types of securities, while other provinces have variable length periods, depending on the characteristics of the securities.[200]

b) insider trading reports ("ITRs")

In the major securities provinces, insiders (those considered to have access to undisclosed information about the issuer) must file ITRs within a specified time period after they become insiders and after they trade in securities of the issuer. The *Kimber Report* thought this would discourage insiders from using undisclosed information for personal gain.[201]

Unfortunately, ITR time periods vary among the jurisdictions. This causes

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on different parameters in some jurisdictions. *E.g.*, in Alberta, the filing fee is $500 for offerings not exceeding $200,000 and $1,000 for others; in British Columbia, the fee is $2,500 for one class of securities and $500 for each additional class; and Manitoba adds a $600 fee if Manitoba is chosen as the principal jurisdiction.

These variations cause confusion and inefficiency. In addition, issuers resent having to pay revenue-generating fees in each jurisdiction (see Parts V.C.3. and VI.B.5., below, for concerns with the current revenue-generating system). Ultimately, of course, at least part of the fees are passed on to investors and consumers.

[198] This discussion is taken from *Securities Regulation, supra* note 25 at 187-88.

[199] See Part III.E.1.a., above.

[200] These range from six to eighteen months, depending on predictions of how long it will take for adequate information about the securities to be reflected in the market. However, with the increased speed of information dissemination in today's technological climate, twelve and eighteen month hold periods may be unnecessarily long. It certainly would make sense to standardize hold period lengths across all provinces.

[201] *Kimber Report, supra* note 15 at 10-11.

administrative problems and costs, as issuers have to monitor constantly the different jurisdictions to ensure they comply with the varied requirements.

In Alberta, British Columbia, Quebec and Saskatchewan, insiders must file an ITR within ten days of becoming an insider.[202] However, Manitoba, Newfoundland, Nova Scotia and Ontario do not require this filing until ten days after the end of the month in which the insider became an insider.[203]

When an insiders' holdings change, those in Alberta, Quebec and Saskatchewan must file within ten days of that change.[204] Insiders in British Columbia, Manitoba, Newfoundland, Nova Scotia and Ontario must file within ten days after the end of the month in which their holdings changed.[205]

c) material change reports ("MCRs")[206]

MCRs are required when there has been a "material change...in the affairs of a reporting issuer".[207] In addition, NP 40[208] encourages[209] disclosure (a press release,

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[202] *A.S.A.*, s.147(1); *B.C.S.A.*, s.70(2); *Q.S.A.*, s.96; and *S.S.A.*, s.116(1).

[203] *M.S.A.*, s.109(1), *Nfld.S.A.*, s.108(1); *N.S.S.A.*, s.113(1); *O.S.A.*, s.107(1).

[204] *A.S.A.*, s.147(2); *Q.S.A.*, s.97 and *Regulations* s.174; *S.S.A.*, s.116(2).

[205] *B.C.S.A.*, s.70(4); *M.S.A.*, s.109(2), *Nfld.S.A.*, s.108(2); *N.S.S.A.*, s.113(2); *O.S.A.*, s.107(2).

[206] MCRs are required only in Alberta, British Columbia, Newfoundland, Nova Scotia, Ontario, Quebec, and Saskatchewan.

[207] *O.S.A.*, s.75(1). *O.S.A.*, s.1(1) defines "material change":
> ...where used in relation to the affairs of an issuer, means a change in the business, operations or capital of the issuer that would reasonably be expected to have a significant effect on the market price or value of any of the securities of the issuer and includes a decision to implement such a change made by the board of directors of the issuer or by senior management of the issuer who believe that confirmation of the decision by the board of directors is probable...

The other major securities provinces use similar phrasing.

[208] *Supra* note 114.

and filing of that release with the relevant commissions) of "material information"[210] "forthwith upon the information becoming known to management, or...forthwith upon it becoming apparent that the information is material". There are confidentiality provisions for both MCRs and NP 40 disclosure, so that confidential material information whose release would prejudice the issuer does not have to be released immediately.[211]

In each province which requires MCRs, except Quebec, the MCR process has two stages. First, the issuer must issue a press release and file it with the commission. Second, the issuer must prepare and file a MCR with the commission within a certain time frame. In Quebec, however, only the press release is required, with no follow-up MCR. This latter approach is more efficient and rational; there is no logical reason to require both stages, as each contains the same information.

Each province describes differently the time by which the press release must be issued: Alberta is "promptly"; British Columbia is "as soon as practicable"; Newfoundland, Quebec and Saskatchewan are "immediately"; and Nova Scotia and Ontario are "forthwith".[212] These words all mean the same; the fact that they are different is just another example of the unnecessary inconsistencies among the jurisdictions.[213] At least the timing requirements for filing the MCR are consistent - it

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[209] NPs do not have the force of law - see *supra* note 109.

[210] Although functionally similar to the definition of "material change", this is broader, as material information under NP 40 does not have to be a "change".

[211] The issuer must file this information with the appropriate commissions and convince the commissions at regular intervals to preserve the confidentiality. If trading patterns indicate the information is being used for unfair trading gains, it must be immediately disclosed.

[212] *A.S.A.*, s.118(1)(a); *B.C.S.A.*, s.67(1)(a); *Nfld.S.A.*, s.76(1); *Q.S.A.*, s.73; *S.S.A.*, s.84(1)(a); *N.S.S.A.*, s.81(1); and *O.S.A.*, s.75(1).

[213] It is discouraging that the provinces are unable to agree on uniform wording when they mean exactly the same thing. This suggests that the differences among the jurisdictions are mainly political; that is, each jurisdiction wants its own legislation with its own wording, largely for the sake of autonomy. This example also typifies the lethargy encountered when dealing with securities regulation. It simply is not a high-profile or high-priority topic; therefore, the legislation is not updated and standardized as it should be.

is to be filed "as soon as practicable" or, in any event, within ten days of the date of the change (except Alberta, which does not mention "as soon as practicable").[214]

4. Broker/Dealer Registration[215]

Most of the provinces require registration for persons who trade, underwrite or advise regarding securities. Generally, both the firm and the individual must register. Of course, the categories and qualifications vary among the provinces. Registrants must apply for renewal before expiry (typically every year).[216] Provincial coordination or national registration would greatly help registrants. If there were a single registration encompassing every Canadian jurisdiction, registrants would not have to be concerned with up to twelve renewals per year, each on a different style of form.

In addition to the lack of coordination or mutual recognition in each province of registration in another, there is also a residency requirement for traders.[217] This forces

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Newfoundland is a significant exception to this selfishness and lethargy. It extensively revised the *Nfld.S.A.* in 1992, modelling it very closely on the *O.S.A.* Other Canadian jurisdictions should do likewise. Whether such standardization is to the *O.S.A.*, another act or a new standard is irrelevant - but there should be consistency.

[214] *A.S.A.*, s.118(1)(b); *B.C.S.A.*, s.67(1)(b); *Nfld.S.A.*, s.76(2); *S.S.A.*, s.84(1)(b); *N.S.S.A.*, s.81(2); and *O.S.A.*, s.75(2).

[215] A discussion of the categories, qualifications, registration and jurisdiction over brokers and dealers (financial intermediaries) is beyond the scope of this paper. This section merely provides another example of the frustrating and unnecessary differences among the provinces.

[216] See *Securities Regulation, supra* note 25 at 368-70.

[217] Draft National Policy No.54 ("Expedited Registration System for Advisors") [hereinafter "NP 54"] would require registration and renewal of advisors only in the principal jurisdiction. The other jurisdictions would accept the principal jurisdiction's grant and renewal; only Quebec would still have a residency requirement. However, non-residency could decrease effective investor protection by making it more difficult for an investor to serve and sue a registrant in the investor's province.

traders either to open an office in each jurisdiction or to trade in fewer jurisdictions.[218]

Draft NP 54[219] and delegation to the IDA are encouraging. Alberta, British Columbia and Ontario have authorized the IDA to grant investment dealer registration approval on their behalf.[220] Hopefully, other jurisdictions will follow this lead.

Canadian fragmentation is costly for registrants. Recently,[221] 40% of respondent firms applying for registrant status in a non-principal jurisdiction estimated extra internal costs of over $25,000 per year (20% estimated more than $100,000).[222]

Registrants themselves overwhelmingly favour national registration, citing as advantages: lower costs, consistency, uniformity, improved efficiency, greater understanding of the requirements, and less unintentional non-compliance.[223]

5. Enforcement Issues

Enforcement across jurisdictional boundaries is very difficult. This is an

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[218] *Report to the Standing Senate Committee on Banking, Trade and Commerce on the Transaction Costs of a Decentralized System of Securities Regulation* (Ottawa: April, 1996) [hereinafter *Transactions Costs Report*] at 26.

[219] *Supra* note 217.

[220] See Part II.C.3., above; and *Transaction Costs Report, supra* note 218 at 28. This paves the way for the IDA to handle national dealer registration.

[221] *Ibid.* The survey was not scientific or statistically significant, because it was based on questionnaires sent to selected participants, not all of whom responded. No percentage of accuracy or margin of error could be calculated for the survey. The serious concerns it raises cannot, however, be discounted.

[222] Maintaining those non-principal registrations cost an additional $25,000 or more for 37% of the respondents - *ibid.* at 30.

[223] *Ibid.* at 31. Some, however, were concerned about a potential decrease in flexibility and speed if there were a national registration system (at 32). In addition, the Quebec branch of the IDA recently opposed a national commission (K. Yakabuski, "Quebec Brokerages Say No to Ottawa" *The Globe and Mail* (30 July 1996) B1), contrary to the national body's stand (Investment Dealers Association of Canada, "Position Paper - Canadian Securities Commission" (April 1996) [hereinafter "IDA Position Paper"]).

increasing problem in the securities field, as transactions expand across boundaries faster and more innovatively than regulators can handle.[224]

Because of its fragmented system, Canada has investigation and enforcement problems internally as well as internationally.[225] The main provincial enforcement mechanisms are: penal sanctions, administrative sanctions, civil sanctions, and common law civil actions. This paper only discusses the limitations and punishment aspects of penal sanctions.[226]

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[224] *E.g.*, transactions on the Internet can be erased almost immediately, making tracing and proof difficult; old-fashioned "boiler-rooms" (physical locations) have been replaced by constantly-moving, computer-operated scams, which are harder to trace and catch.

[225] See Parts III.D.4., above, and IV.C.4., below.

[226] Details of each mechanism are beyond the scope of this paper. As a brief summary:

Penal offenses (with sanctions of fines and/or imprisonment) are: false statements to administrators, investigators or auditors; failure to file required documents; misrepresentation; contravention of the act or regulations; failure to comply with a decision made under the act; and insider trading or tipping (*Securities Regulation, supra* note 25 at 421-25).

Administrative orders include: compliance orders; cease trade orders; denial of exemptions (*e.g., supra* note 180); resignation or prohibition from acting as a director or officer; prohibition of or required dissemination of information; and reprimand of registrant or suspension, cancellation or restriction of registration (*Securities Regulation* at 425-30).

Statutory civil sanctions are for: failure to deliver a prospectus (rescission or damages); misrepresentation in a takeover bid circular or directors' circular (rescission or damages); insider trading or informing (compensation or an accounting); and failure by registered dealers to make required disclosure (rescission) (*Securities Regulation* at 430-31). There is also a movement to impose statutory civil liability for continuous disclosure misrepresentations, to ensure a high standard of preparation (J.C. Smart & P.L. Olasker, "Disclosure Standards in Canada" (Report prepared for the International Bar Association, International Litigation and Securities Law Committees of the Section on Business Law, September 1995) (1996) *O.S.C.B.* 221 at 259-60).

There may be common law civil actions for misrepresentations in disclosure documents or transactions which violate securities legislation (rescission or damages); and against brokers/dealers (negligence, breach of contract, breach of fiduciary duty) (*Securities Regulation* at 431).

Finally, there are offenses in the *C.C.C.* - see Part III.C.1., above.

a) limitation periods

Limitation periods for bringing a securities proceeding vary greatly among the provinces - causing uncertainty, confusion and a perception of unfairness.[227]

In Alberta and British Columbia, the limit is six years from the date of the impugned event; in Ontario it is five years from then.[228] In Manitoba, the limit is eight years from the date of the offence, but also no more than two years from the date the commission had knowledge of it.[229] The Northwest Territories' and Yukon Territory's limitations are two years from knowledge.[230] The limit in New Brunswick is six months from knowledge.[231] Saskatchewan allows a court proceeding up to two years from knowledge, but a commission proceeding up to five years from knowledge; Newfoundland and Nova Scotia have the same requirement, but with limits of one year for court proceedings and two years for commission proceedings.[232] The limit in Quebec is five years from when the investigative record was opened.[233] Prince Edward Island does not provide for penal proceedings.

b) sanctions

As with limitations periods, the varied sanctions among the jurisdictions cause confusion, uncertainty and inequality. Five jurisdictions provide different sanctions for

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[227] Arguably there is no actual unfairness, as the limitation periods are clearly set out in each act. However, the general public could perceive unfairness when a violator can be prosecuted in only some jurisdictions.

[228] *A.S.A.*, s.167; *B.C.S.A.*, s.142; *O.S.A.*, s.129.1.

[229] *M.S.A.*, s.137.

[230] *N.W.T.S.A.*, s.50(2); *Y.T.S.A.*, s.47(2).

[231] *N.B.S.A.*, s.41(4).

[232] *S.S.A.*, s. 136(1); *Nfld.S.A.*, s.129(1), (2); *N.S.S.A.*, s.136(1), (2).

[233] *Q.S.A.*, s.211.

individuals and non-individuals.[234] In Alberta, a non-individual can receive a fine of not more than $1 million; an individual can receive the same fine, or imprisonment of not more than five years less a day, or both.[235] The parameters are the same in British Columbia, except that the maximum prison term is three years.[236] New Brunswick and Prince Edward Island can impose a maximum fine of $1,000 for a person's first offence, $2,000 for subsequent offenses, or maximum six months in prison, or both; companies are subject to the same fines, but the judge may raise it to $5,000 (New Brunswick) or $25,000 (Prince Edward Island).[237] In Quebec, a natural person can be fined $1,000 to $20,000; a non-natural person $1,000 to $50,000.[238] Manitoba, Newfoundland, Nova Scotia, Ontario and Saskatchewan each allow a fine of not more than $1 million, or imprisonment of not more than two years, or both.[239] Finally, the Northwest Territories and Yukon Territory both provide for a fine up to $2,000, or one year imprisonment, or both.[240]

IV. INTERNATIONALIZATION

The increasing internationalization of today's securities markets pressures states to adjust their securities regulations to the needs of domestic investors and foreign issuers. Domestic investors want access to foreign securities to diversify their risks and increase their returns. Therefore, the investors' state must encourage foreign issuers by not

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[234] Alberta, British Columbia, New Brunswick, Prince Edward Island and Quebec. This distinction is implicit in the other jurisdictions; *i.e.*, it is not strictly necessary to state that a corporation cannot be imprisoned.

[235] *A.S.A.*, s.161(2).

[236] *B.C.S.A.*, s.138(1)(a)-(e).

[237] *N.B.S.A.*, s.41(1), (2); *P.E.I.S.A.*, s.28(1), (2).

[238] *Q.S.A.*, s.202 (unless otherwise specified in the *Q.S.A.*).

[239] *M.S.A.*, s.136(1); *Nfld.S.A.*, s.122(1); *N.S.S.A.*, s.129; *O.S.A.*, s.122(1); *S.S.A.*, s.131.

[240] *N.W.T.S.A.*, s.49(1); *Y.T.S.A.*, s.46(1).

making offerings prohibitively difficult, time-consuming or expensive.

Small market states like Canada must deliberately make themselves attractive to issuers, or risk being left out of international issues. Even with a large capital market, the U.S.A.'s S.E.C. has had to relax its foreign issuer rules to keep issuers interested.[241] Conversely, some states have toughened their regulations to make them consistent with others, or to give issuers and investors a sense of fairness and security.[242]

This part discusses some of the international pressures on states. It then discusses some of the remaining significant barriers to internationalization, and some potential methods of facilitating internationalization.[243]

A. Definition and Causes of Internationalization

1. Definition

The internationalization of the securities markets is the process by which the boundaries and distinctions between formerly national securities markets are becoming blurred. Despite this blurring, however, regulation and enforcement are still important nationally, with states loath to surrender their power. As internationalization increases, issuers have more opportunities to issue securities in the most advantageous state or states. Heavy regulatory and administrative requirements can discourage, or even derail, issuance into a particular state. The tension between the need to accommodate international capital flows and the desire to preserve sovereignty over securities regulation will continue to shape the development of world markets.

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[241] See Part IV.D.2., below.

[242] The EU is an example of the former, where the United Kingdom had rigorous securities regulations, but some member states had very lax ones. All member states now have certain minimum requirements which they must implement (*supra* note 48) - see Parts IV.D.4. and IV.D.5., below. China is an example of the latter.

[243] The discussion focusses primarily on offerings; international aspects of securities regulation in general are beyond the scope of this paper.

2. Causes of Internationalization[244]

a) technological advances[245]

b) innovations

Investors can use new securities (*e.g.*, derivatives and swaps) to take advantage of opportunities and to hedge some of the risks involved in international investing.[246]

c) funds need investment opportunities

Large pools of investment money are available due to the increasing popularity of investment and pension funds. Not only do investors want to take advantage of international diversification, but also domestic markets simply do not have the capacity to handle the available investment capital.[247] However, some jurisdictions, such as Canada and the U.S.A., zealously protect their investors with very strict disclosure rules, and do not want to compromise this severity to accommodate foreign issuers. Several commentators believe that this investor protection is largely illusory and ineffective for the individuals it is supposed to benefit.[248]

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[244] See, *e.g.*, Perry, *supra* note 60 at 710-11; and D.E. Van Zandt, "The Regulatory and Institutional Conditions for an International Securities Market" (1991) 32 *Virg.J.Int'l L.* 47 at 61-65.

[245] See Part III.B.7., above.

[246] *E.g.*, investors can use currency exchange swaps to limit their exposure to unfavourable currency fluctuations between their home currency and their investment currency. For a discussion of innovative instruments, see "Institutional and Retail", *supra* note 20 at 464-70.

[247] International Briefings, "North America - USA - Coordination of Financial Regulation" (October 1994) *Int'l Fin.L.Rev.* 43 [hereinafter "Briefings - Regulation"].

[248] See, *e.g.*, Hicks, *supra* note 23 at 442-45; and "Institutional and Retail", *supra* note 20. Although the Canadian and American regulations are too detailed and extensive, I believe the mere existence of a disclosure system, coupled with liability for

d) internationalization begets internationalization

The general deregulation of financial markets has spurred internationalization to new levels. That is, since internationalization has forced market barriers to decrease, the decreased barriers have fuelled further internationalization.

B. Implications for Securities Regulation

As mentioned, internationalization pressures have increased states' willingness to accommodate foreign issuers for the sake of domestic investors. This happens because issuers now have more options; that is, they can choose to avoid jurisdictions which they consider to be too highly regulated.[249]

1. "Optimal" Level of Regulation

As discussed,[250] there is an optimal level of regulation - an NRB of zero. Under this theory, Canada will only attract foreign issuers if it decreases its level of regulation and becomes more accepting of the systems and practices of the foreign issuer's home states.[251]

Ideally, the world's regulatory systems would converge at the same NRB

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misrepresentations and deemed reliance by investors on disclosure documents, is a valuable safeguard for lay investors.

[249] N.S. Poser, "Big Bang and the Financial Services Act Seen Through American Eyes" (1988) 14 *Brook.J.Int'l L.* 317 at 372.

[250] Part II.C.1.c., above.

[251] Although E.J. Waitzer ("International Securities Regulation: Coping with the 'Rashomon Effect'" *1994 ASIL Proc.* 400 (Panel on International Harmonization Efforts in Securities and Banking Regulation, 8 April 1994) [hereinafter "Rashomon Effect"] at 402) believes issuers will "...bear the costs of higher regulatory standards in order to gain access to an attractive market", this is a matter of balance. The small size of the Canadian market and the increasing ease of entry into alternative markets both limit his assertion.

equilibrium.[252] However, this ideal is currently unrealistic, as shown by the fundamental deviations among states' securities regulation.

2. Pressure to Conform versus Desire for Sovereignty over Regulation

There are two consequences of internationalization and the economic interdependence it creates.[253] First, as regulatory systems become more interdependent, domestic regulators lose autonomy. Second, competition increases as each jurisdiction tries to impress issuers with its liquidity, depth and stability. Although "[r]egulation of an international market requires a great deal of open-mindedness and flexibility",[254] most states are reluctant to sacrifice their autonomy for that flexibility. Canada, as mentioned, has been forced to be more accommodating than it would like. Although the S.E.C. claims to include foreign issuers, it still insists such inclusion be "in a way that is consistent with our rules."[255] It complacently believes it can retain its financial importance without making fundamental changes.[256]

C. Barriers to Further Internationalization

There are still several significant barriers to further internationalization, including: accounting standards; clearance and settlement systems; underwriting practices; enforcement; liability; and regulatory emphasis.

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[252] Perry, *supra* note 60 at 703.

[253] "Rashomon Effect", *supra* note 251 at 400.

[254] L. Quinn, Remarks, *1994 ASIL Proc.* (Panel on International Harmonization Efforts in Securities and Banking Regulation, 8 April 1994) 398 at 398.

[255] *Ibid.*

[256] But, see *supra* note 60 and accompanying text.

1. Accounting Standards

Each jurisdiction has its own method of disclosing financial information through accounting standards - Generally Accepted Accounting Principles ("GAAP"). Most states have their own version of GAAP, but there is movement towards developing an "international GAAP". There are two problems with establishing an international GAAP. First, different states express the same information in different ways, and may be reluctant to change their presentation. Second, different states do not always require or allow the same information; for example, European states focus less on segmented information and more on future-oriented information than do Canada and the U.S.A. (this is discussed further below).

IOSCO[257] and the International Accounting Standards Committee ("IASC") are currently working on internationally acceptable standards.[258] IOSCO focuses on a wide range of international securities issues, one of which is accounting standards. It can make recommendations, but is not able to impose standards on its members. IASC is a non-specialized private organization, which also cannot impose any requirements. It is having some success, as International Accounting Standard (IAS) No.7[259] (cash flows) has been accepted by many states, even the U.S.A. However, most accounting issues are more complex than cash flows, so it remains to be seen how much can be agreed upon in the future. It does seem that IASC will be more effective than IOSCO.

As mentioned, a major problem is states which refuse to accept standards that are not identical to their own. The U.S.A. is probably the worst offender, insisting that:

> The SEC judges the international accounting standards by the quality of the financial reporting they produce. The result does not have to be the same as the

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[257] See Part III.D.3., above.

[258] This discussion is largely taken from R.S. Karmel, "Progress Report on Securities Law Harmonization" *1994 A.S.I.L. Proc.* (Panel on International Harmonization Efforts in Securities and Banking Regulation, 8 April 1994) 409 [hereinafter "Progress Report"] at 412. Internationally accepted financial statement standards could be used in worldwide cross-border offerings and listings - see "Letter to P. Martin re IOSCO", *supra* note 45 at 2821.

[259] Sec. Act Rel. No. 33-7053 at 85,205 [hereinafter "IAS NO.7"].

> result that obtains under U.S. GAAP. But the result must achieve the same degree of transparency, the same degree of reliability and the same degree of consistency.[260]

However, the U.S.A. can be accommodating if it wishes. For example, the MJDS, in most cases, exempts Canadian issuers from reconciling to U.S.A. GAAP (and vice-versa).[261] The U.S.A. has also recently accommodated some non-Canadian accounting standards.[262] In addition to IAS No.7, it now also accepts statements prepared in accordance with IAS No.22.[263] The S.E.C. also decreased the number of years for which foreign issuers must reconcile past financial statements to two from five.[264]

Segmented reporting is another interesting area. European countries only require segmented reporting when the segments have disproportionate shares of the corporation's profits.[265] Although this seems reasonable, the U.S.A., with its focus on complete (even if unnecessary) disclosure to shareholders, resists it.

The disclosure of future-oriented financial information (forecasts of how the corporation will do in the future) is less of an issue than it used to be. Canada, for example, used to forbid completely any mention of such forecasts. However, Canadian

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[260] L. Quinn, remarking on "Rashomon Effect", *supra* note 251 at 408.

[261] Canadian issuers do not have to reconcile to U.S.A. GAAP for rights offerings (Form F-8); exchange offers or business combinations (Forms F-8 and F-80); or preferred shares or investment grade debt (Form F-9). They must, however, reconcile for securities offered with a registration statement using Form F-10. See Shearman & Sterling "U.S. Financing Opportunities under the Canada-U.S. Multijurisdictional Disclosure System - A Practical Guide for Canadian Issuers" (January 1996) at 8.

U.S.A. issuers only need to reconcile to Canadian GAAP for securities offered in reliance on s.3.3 of NP 45 (*supra* note 153, s.3.10). This covers the same types of securities as are covered under the U.S.A.'s Form F-10.

[262] This discussion is largely taken from Wolff, *supra* note 48 at 381-84.

[263] Sec. Act Rel. No. 33-7119 [hereinafter "IAS No.22"]. This allows foreign issuers using a business combinations reporting method equivalent to IAS No.22, but different than U.S.A. GAAP, to avoid quantifying differences between the two methods.

[264] Sec. Act Rel. No. 33-7053. This applies to first-time Form 20-F foreign issuers. There have been various other changes, but a detailed accounting standards discussion is beyond the scope of this paper.

[265] Lorenz, *supra* note 44 at 807.

regulators now have the discretion to allow forecasts, as long as they are prominently disclaimed as not reliable.[266]

Therefore, most states are starting to be more flexible in accepting international accounting standards that are not identical to their own. However, many states still protect their own standards, accepting others only on a strict and selective basis. This resistance by major capital markets will slow down international reforms and standards, perhaps even derail them entirely.[267]

2. Clearance and Settlement Systems

The U.S.A. recently proposed to examine international financial regulation issues, including clearance and settlement systems:

> ...large differences in the operation of the world's major clearing and settlement systems, in terms of both efficiency and risk, pose a threat to the stability of the international financial system.[268]

While international clearance and settlement standards are essential for complete and consistent internationalization, I do not believe that international financial markets will collapse without them (although their expansion will be restricted).

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[266] In Ontario, see *e.g.*, O.Reg.61, passed under the *O.S.A.*; and National Policy No.48 ("Future-Oriented Financial Information"). Although the disclaimer may prevent lay investors from relying on the forecasts, they will still find them of interest (if they actually read the disclosure). Institutional investors may find forecasts useful, although they would likely have some similar information from their own research. Therefore, forecasts' utility may be limited.

See Parts II.B.1., above, and IV.C.6., below, regarding the influence of different regulatory emphases on such matters.

[267] Less powerful capital markets are increasingly forced to accommodate to the standards of more dominant markets. One danger for the U.S.A. is that if it loses power to other capital markets, it risks being left behind or being forced to comply, while other markets develop international and reciprocal standards among themselves. If the U.S.A. compromised now, while in a position of power, such compromises would lean more towards U.S.A. standards than if the U.S.A. were not as powerful. Canada's position is currently tied to that of the U.S.A., and seems likely to remain so - see, *e.g.*, "Thrills and Spills", *supra* note 59.

[268] "Briefings - Regulation", *supra* note 247 at 43.

"Clearing" is confirmation that a securities transaction has been completed, while "settlement" is the actual exchange of money for the security. Completion times vary widely: Canada is a few days, the U.K. is fourteen, and France is one month.[269] Obviously, problems arise if an issuer from one state is accustomed to one period, and buyers from several states are accustomed to various different periods. Not only are the differences inconvenient and costly, but 1989 studies showed that over 40% of all international trades did not settle by the designated date, causing uncertainty and lower participation in international markets.[270]

The method used to effect settlement is another problem. Some jurisdictions rely on computer clearance and settlements; some use central depositories; others still exchange physical documents for actual currency.

Van Zandt notes that there cannot be a truly international market until these systems are unified. The current situation means buyers and sellers will choose to operate in their own domestic markets, even for a lower return, instead of risking uncompleted and complicated transactions in foreign markets. Therefore, to compensate for the risks, foreign market participants have greater costs than domestic participants in the same market:

> In effect, access to that market for a foreign participant is not equivalent to that for a domestic participant. Consequently, due to this inequity, there will not be sufficient arbitrage pressure to ensure that similar assets bear the same price....Once there is sufficient demand to justify the cost, a common clearance and settlement system will emerge because such a system will be in the interest of all international participants.[271]

The jurisdictional differences are essentially historically based, not substantively grounded. Therefore, there are no policy reasons for refusing to adjust to international standards (unlike, for example, the policy concerns related to developing international

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[269] Van Zandt, *supra* note 244 at 67.

[270] *Ibid.* at 68, citing G. Humphreys, "Closing the time-lag in settlements" (March 1989) *Euromoney* at 31.

[271] *Ibid.* at 68-69. Also see Perry, *supra* note 60 at 737.

accounting standards).[272]

3. Underwriting Practices

Underwriters are the intermediaries between issuers and purchasers; however, the purpose and process of underwriting differs among states.[273] In Canada and the U.S.A., for example, underwriting agreements are on an agency or principal basis. In the former, the underwriter bears no risk, as it never has ownership of the securities. In the latter, however, the underwriter buys the entire issue as principal, and bears the risk until it is sold. There, the underwriting agreement is usually signed on the day the offering document is effective (*i.e.*, cleared by the regulators), at which time the underwriter has ownership and can begin selling. There is usually a "market out" clause, allowing the underwriter to cancel its obligations and risks in certain circumstances.

In contrast, the U.K. underwriting commitment is made on "Impact Day" (the day the terms are announced), and the underwriters generally are not principals, so bear no risk. However, they may guarantee to find purchasers for any shares unsold at the end of the marketing period, in which case they are at risk from Impact Day until the shares are sold. The marketing period runs from Impact Day for a period whose length usually increases with the size of the issue.[274] Although underwriters of large issues are, therefore, at risk for a longer period,[275] they actually contract out most of that risk to sub-underwriters.[276]

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[272] *E.g.*, there is already a working multinational system for clearance and settlement in international debt markets - Perry, *ibid.* at 732.

[273] This discussion is largely taken from S.D. Boughton, "Multinational Securities Offerings" (1988) 14:2 *Brook.J.Int'l L.* 339 at 350-54.

[274] Note that Canada and the U.S.A. do not allow marketing until the offering documents have been cleared.

[275] If they guarantee subscriptions - as explained above and exemplified below.

[276] Canadian and U.S.A. underwriters are also liable for any misrepresentations in the offering documents. U.K. underwriters, however, do not incur such liability.

The best way to illustrate these differences, and the complications that can arise, is with an example: Boughton discusses the 1987 privatization of British Petroleum ("BP"), in which an international offering was made based on U.K. rules.[277]

The differences between the U.K. and U.S.A. underwriting systems caused significant problems. In order to have concurrent marketing periods, the effectiveness of the U.S.A. registration statements was delayed until after Impact Day (October 15th). Otherwise, trading in New York could have started October 15th, although the international offer, including the size and price of the U.S.A. portion, would not be finalized until October 28th.

In addition, U.K. rules do not allow Impact Day to occur until the entire issue is underwritten. However, U.S.A. practice is to underwrite when the registration statement becomes effective (here, October 30th). Therefore, either the U.S.A. underwriters would have to underwrite fifteen days early (and bear the risk for that extended period), or the U.S.A. portion would have to be underwritten twice (once in the U.K. for October 15th and once in the U.S.A. for October 30th). Here, the U.S.A. underwriters committed on October 15th, but were unable to mitigate their increased risk with a market out clause, as that would make their part of the underwriting uncertain and, therefore, violate the U.K. requirement for full underwriting as of Impact Day.

Boughton states that future offerings will likely be done by double underwriting because of the problems with BP. Black Monday (the international stock market crash) was on October 19th - after the underwriting, but before sales had been made.[278] Here, BP's market prices plummeted, but U.S.A. underwriters could not sell shares or terminate the agreement.[279]

Because of problems such as those in the above example, IOSCO and others should develop international underwriting standards. The current process of piecemeal

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[277] Boughton, *supra* note 273 at 341. BP was raising 1.5 billion sterling through its international offering.

[278] The market out clause is designed to protect against this type of event.

[279] Boughton, *supra* note 273 at 353. The Bank of England eventually propped up the offering price.

negotiations for each offering is not a solution, as it increases costs and uncertainty.

4. Enforcement

Internationalization increases the opportunities for fraud, as transactions become more complex (therefore, harder to understand) and more widespread (therefore, harder to track and enforce). There are two major problems.[280] First, national regulators cannot thoroughly investigate transactions which occur partially outside their jurisdiction. Second, laws differ among jurisdictions, so a violation in Canada may not be a violation in the other involved jurisdiction or jurisdictions.[281]

States may try to combat international securities violations in several ways. For "pure" violations (those that all states would condemn - *e.g.* fraud), jurisdictions should be willing to cooperate with and assist one another. Another option is a coordination of efforts, such as the Intermarket Surveillance Group ("ISG"),[282] to which North American and several overseas stock exchanges belong. In the ISG forum, members exchange information about trading activity; their cooperation helps track and catch illegal trading activity. Several "legal and disciplinary actions [are] pending as a result of [this] global cooperation".[283]

Some jurisdictions, most notably the U.S.A., extraterritorially apply their own

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[280] M. Roppel, "Extraterritorial Securities Regulation and The Canada-U.S. Memorandum of Understanding" (1988) 3 *Sec. & Corp.L.Rev.* 183, 185, (1989) 4 *Sec. & Corp.L.Rev.* 193 at 184. Both are also problems in the Canadian domestic context - see Part III.E.5., above.

[281] *E.g.*, Switzerland only recently banned insider trading; it used to be dishonourable, but not illegal. See C.A.A. Greene, Notes, "International Securities Law Enforcement: Recent Advances in Assistance and Cooperation" (1994) 27 *Van.J. Transnat'l L.* 635 at 650.

[282] See N. Olivari, "TSE Steps Up Investment in Market Surveillance" *Investment Executive* (February 1996) 51.

[283] *Ibid.*

securities laws to transactions based in other jurisdictions.[284] Extraterritorial enforcement naturally creates international tension and resentment. States are very protective of their sovereignty and autonomy in the enforcement field, as enforcement is the ultimate way in which a system asserts itself. States do not want others interfering in their processes, nor implying that their systems are inferior to that of the extraterritorial enforcer. Another argument against extraterritoriality is that investors who knowingly invest outside of their own system cannot reasonably expect their home jurisdiction protections.

There are two more formal options for enforcing international transactions: Memoranda of Understanding ("MOUs");[285] and Mutual Legal Assistance Treaties ("MLATs").[286] MLATs outline conditions for cooperation in various criminal matters; therefore, they cover more than merely securities. The pre-conditions to one party

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[284] States use extraterritoriality because of their different regulatory goals. *E.g.*, the U.S.A. stresses investor protection and fraud prevention, and feels that it must protect U.S.A. investors from activities allowed in less protectionist jurisdictions. However, harsh criticisms have recently led the U.S.A. to soften somewhat its extraterritoriality - see, *e.g.*, R.S. Karmel, "SEC Regulation of Multijurisdictional Offerings" (1990) 16 *Brook.J.Int'l L.* 3 [hereinafter "SEC Regulation"]; A.M. Klein, "SEC Streamlines Rules for Non-US Issuers" (June 1994) *Int'l Fin.L.Rev.* 41; and Longstreth, *supra* note 60. Regulation S, *e.g.*, (Adopted in Sec. Act Release No.33-6863 (24 April 1990), is supposed to limit the extraterritorial application of U.S.A. securities laws. However, it may be of limited use, as it does not exempt foreign issuers from the anti-fraud provisions.

The many facets of extraterritoriality (including case analysis of different approaches; "effects" test and "conduct" test for extraterritorial application; the Canadian approach; and attempts to block extraterritoriality) are beyond the scope of this paper. For further discussion, see Greene, *supra* note 281 and Roppel, *supra* note 280.

[285] *E.g.*, Memorandum of Understanding among the United States Securities and Exchange Commission, the Ontario Securities Commission, the Commission des valeurs mobilieres du Quebec, and the British Columbia Securities Commission, (1988) 11 *O.S.C.B.* 114.

[286] *E.g.*, the Treaty on Mutual Assistance in Criminal Matters, May 25, 1973, U.S.A.-Switzerland, T.I.A.S. no. 8302 [hereinafter the "U.S.A.-Switzerland MLAT"].

helping another can be so onerous that nothing effective is achieved.[287] MOUs, on the other hand, are more often useful because they are directed specifically at securities issues. Therefore, they can be tailored to specific situations and concerns, instead of being broadly drafted to cover a multitude of subject areas.[288]

The IOSCO Working Group on Enforcement and the Exchange of Information is focussing on: "...measures available to freeze and repatriate assets, and to enforce foreign freeze and repatriation orders", as well as a "consideration" of ways to increase cooperation.[289]

Aside from the current bilateral initiatives for cooperation and coordination, there will not be significant progress in international enforcement until there is a greater international consensus on the content and purpose of securities regulation. Widespread harmonization of enforcement cannot occur until securities regulations and their underlying reasons are consistent.[290] Until then, differences in enforcement strategies and priorities will continue to cause friction.

5. Liability

The variation of liability provisions and their interpretation causes significant problems among states. Jurisdictions often insist on including their own liability provisions in their portion of an international offering, even where that defeats the compromises that have been made. For example, the proposed FIPS would allow foreign issuers to offer securities in Canada using U.S.A. documents, but Canadian

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[287] *E.g.*, under the U.S.A.-Switzerland MLAT, *ibid.*, one requirement is that the offence be punishable in both states, and be listed in a schedule of offenses to which the MLAT applies. See Greene, *supra* note 281 at 642.

[288] Greene, *ibid.* at 649. Another advantage of MOUs is that they are directly negotiated and implemented by regulatory authorities, rather than by diplomats (who do not normally have extensive expertise and understanding of the issues).

[289] "Letter to P. Martin re IOSCO", *supra* note 45 at 2823.

[290] See Part IV.C.6., below. This reasoning also applies in the Canadian domestic context.

liability provisions theoretically apply[291] (although practical enforcement may be impossible).[292] Investors and issuers both suffer when an offering based on less strict foreign requirements is then subject to liability based on the more strict home jurisdiction rules.

Investors suffer from lost opportunities if the offeror avoids the stricter jurisdiction. Alternatively, investors may shun securities if uncertain of the ability to obtain and enforce judgments for misrepresentations. Issuers also suffer. For example, even if exempted from disclosure requirements, they may be forced to disclose in order to reduce potential litigation. Therefore, the disclosure compromises become purely illusory, and will not have the intended effect of increasing foreign offerings into a state.

Although Canada faces this problem to a degree,[293] issuers do not completely avoid Canada, as it is not very litigious. The U.S.A., however, is extremely litigious, with rampant class actions for both mundane and serious matters. Even Canadian issuers must think twice before entering the U.S.A. markets; although the disclosure and liability provisions are similar, the effects are more onerous in the U.S.A.[294]

6. Regulatory Emphasis

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[291] See Part III.D.2.b., above (this also applies to the MJDS).

[292] See Part IV.C.4., above.

[293] In this area, Canada's domestic problems do not parallel its international ones, because liability standards are fairly well harmonized among the provinces (*i.e.*, the provisions may not be identical, but they do have the same effect).

[294] Recent changes in U.S.A. legislation may woo more issuers into the U.S.A. market, but it is too soon to tell. In December 1995, the U.S.A. passed the *Private Securities Litigation Reform Act of 1995* (15 U.S.C.S. 78a nt.), which should limit plaintiffs' ability to sue using federal securities laws. It does this by imposing substantive and procedural requirements; limiting liability based on projected financial information (*e.g.*, if such information is accompanied by "meaningful cautionary statements"); and providing for proportionate liability (basically to prevent a "deep-pocket" but not deliberately fraudulent party from having to pay all or most of the damages). See Note, "International Briefings" (February 1996) *Int'l Fin.L.Rev.* 55.

As mentioned,[295] differing regulatory emphasis leads to different regulations and priorities in regulatory systems. Where this emphasis is not consistent, the regulations cannot be consistent.[296] An obvious example is the Canadian and U.S.A. primary emphasis on protecting lay investors compared to goals of some other jurisdictions (*e.g.*, structural goals and protection of institutional investors).[297]

Also, the U.S.A. and Canada, because they aim prospectuses at lay investors, stress the negative aspects of the issue (the "risk factors"). European countries, which generally aim prospectuses at investment advisors (more sophisticated and sceptical than the stereotypical "reasonable investor"), have "more balanced and neutral disclosure".[298] As lay investors are decreasingly important in many situations, states such as Canada and the U.S.A., which focus on lay investor protection, should reevaluate their regulatory basis.[299] Until then, it will not be possible for them to:

> ...become less parochially attached to some of the sacred cows of the United States [or Canadian] disclosure system and to recognize the merits of different regulatory approaches.[300]

D. Methods of Internationalization

There are several approaches to increasing ties and similarities among states (some

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[295] See Part II.B.2., above.

[296] This is not a problem for domestic Canadian harmonization or unification, as the basic regulatory emphasis is the same in all Canadian jurisdictions. Because this is not an issue, there is no theoretical reason for Canada not to have a unified system. As discussed below (Parts VI. and VII.), the reasons are largely politics, selfishness and lethargy.

[297] See Part II.B.2., above.

[298] See, *e.g.*, "Institutional and Retail", *supra* note 20; Hicks, *supra* note 23; Lorenz, *supra* note 44 at 817; Kripke, *supra* note 22; "Disclosure Requirements", *supra* note 21; and "Reappraisal of Disclosure", *supra* note 23. Also see Part II.B.1., above.

[299] *E.g.*, they may consider a tiered system - *supra* notes 23-28 and accompanying text. Further discussion of this topic is beyond the scope of this paper.

[300] "SEC Regulation", *supra* note 284 at 17.

apply in the Canadian domestic context as well). This section discusses the different approaches, along with their international and potential Canadian applications.

1. National Treatment

National treatment means that a state's securities regulator gives the same treatment to foreign issuers as it gives to domestic issuers; that is, foreigners are not treated less favourably. This is already the case in many jurisdictions, but has not helped internationalization because there are so many different systems worldwide. National treatment is also the basis of Canada's domestic system, with each jurisdiction demanding that its own requirements be met.[301] Obviously, national treatment has not united Canada's domestic markets any more than it has the world's markets.

2. Special Rules for Foreign Issuers

Under this approach, foreign issuers are exempted from some of the strict requirements facing domestic issuers. One important matter for foreign issuers is an exemption from reconciling their financial information to the host's GAAP. Canada and the U.S.A. have recently been more flexible regarding GAAP.[302]

A recent and significant example of Canada granting exemptions to foreign issuers is the proposed FIPS.[303] The U.S.A. is also accommodating foreign issuers more. For example, Rule 144A creates resale safe harbours for certain private placements by foreign issuers to Qualified Institutional Buyers ("QIBs"), who can trade unrestricted among themselves.[304] Foreign issuers are not exempt from the U.S.'s anti-fraud

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[301] Fortunately, this is somewhat alleviated by initiatives such as the NPs and SEDAR.

[302] See Part IV.C.1., above.

[303] See Part III.D.2.b., above.

[304] Adopted in Sec. Act Release No.6862 (23 April 1990). This essentially creates an unregulated tier of securities, where QIBs are left to protect themselves.

provisions under Regulation S.[305] However, foreign issuers can now use the U.S.A. shelf registration system, and more foreign issuers are eligible to use the short-form registration statement.[306]

3. Unification

Unification is an ideal which is unlikely ever to occur in international securities regulation. In a unified system, each participating state would have identical laws for issuing, reviewing and monitoring securities. The most aggressive unification attempt was by the EU, when it tried to unify the laws of its member states. However, it was forced to abandon unification, due to the diversity of structures, economies, politics and local interests among its members. It implemented the Directives system instead.[307]

In the Canadian domestic context, unification would mean that each province would enact and maintain identical legislation (or, alternatively, a single federal act applying to all jurisdictions). Although this would, for the most part,[308] be ideal for Canada in the future, the current political climate likely will not allow it.[309]

4. Harmonization

Harmonization is a more practical approach than unification when dealing with

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[305] *Supra* note 284.

[306] Klein, *supra* note 284 at 41.

[307] See *supra* note 48; and Part IV.D.4., below.

[308] I believe the bulk of Canadian securities regulation could be unified. Some aspects - *e.g.*, the local interests which Alberta and British Columbia wish to protect (*supra* note 192) - should not be unified. See Parts VI.B.3. and VII.D.1.b., below.

[309] See Parts VI.B.3., VI.B.4., and VII. (especially VII.D.1.a. and d.), below.

the highly diversified world markets;[310] however, it is also not currently practical.

In a harmonized system, the ends achieved are the same, but the means are allowed to differ. Therefore, issuers and investors can be certain of the end results in each participating state. Unification imposes a single set of requirements; harmonization imposes multiple legislative requirements.[311]

As mentioned, the EU has harmonized a number of areas, including securities. For example, the Listing Conditions Directive, the Listing Particulars Directive, and the Prospectus Directive[312] help ensure that securities regulations in the EU states will meet a certain minimum standard. Each member must implement legislation to achieve the results mandated in each Directive - the means used is up to each state.

However, even the EU is not a truly harmonized system, as the end results vary among members. This is because the Directives provide minimum standards, but allow members to go beyond those minimums, and also allow significant exemptions and exceptions from them.[313] For example, the U.K. has kept much of its fairly strict and complex regulatory system, while some other EU states are much more relaxed.

Harmonization, even more than mutual recognition,[314] is impossible unless the states involved have similar underlying goals; even then, it is difficult. Canada, the U.S.A. and the U.K. all have similar philosophies, but even they have not been able to

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[310] The advantages of harmonization over unification in the Canadian domestic context are less compelling, because of the minuscule portion of world capital markets represented by each Canadian jurisdiction (Canada as a whole has less than 3% of the world's capital markets - *supra* note 69).

[311] Unless there is mutual recognition, allowing an issuer to meet foreign requirements by complying with its home requirements - see Part IV.D.5., below.

[312] *Supra* note 48.

[313] See, *e.g,* Warren, *supra* note 56 at 34 [EU will not be able to achieve unification or true harmonization]; and Roquette, *supra* note 68 at 597-98 [exemptions and exclusions are major drawbacks to the EU Directives system; however, competition may eventually eliminate most of these and result in a single standard].

[314] See Part IV.D.5., below.

harmonize some of the most basic disclosure and accounting issues.[315]

Harmonization is especially difficult because systems are different in: distribution mechanics; disclosure requirements; GAAP; and liability provisions.[316] Although total harmonization is unlikely, states must prioritize harmonization in accounting and auditing standards.[317] As mentioned, the fact that issuers need to reconcile financial statements to a variety of accounting standards is a significant barrier to international offerings.[318]

Lorenz also feels that harmonization would be hard to implement, especially because some states (*e.g.* the U.S.A.) do not seem willing to make the necessary compromises.[319] In addition, if each jurisdiction retained authority to review the harmonized documents, there would be additional time, effort, expense and uncertainty involved.

Waitzer has called for:

> ...international consensus on the "big picture" principles coupled with some flexibility to interpret them in the context of local economic circumstances....Harmonization will fail if its objective is an international detailed rule book.[320]

This means that the inflexible and complex U.S.A. system[321] cannot be used as a model for an international system, much to the chagrin of the U.S.A. regulators (but to the delight of Canadian, U.S.A. and foreign issuers and investors).

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[315] The MJDS (see Part III.D.2.a., above) shows some progress by Canada and the U.S.A., although it is more of a mutual recognition system than a harmonized system.

[316] "SEC Regulation", *supra* note 284 at 9. Also see Part IV.C., above.

[317] *Ibid.* at 11-12.

[318] Issuers may conclude that reconciliation at the offering stage alone would be worth the trouble and expense; however, issuers must also reconcile all their continuous disclosure documents. This ongoing and substantial burden could discourage issuers from the outset.

[319] Lorenz, *supra* note 44 at 805.

[320] "Rashomon Effect", *supra* note 251 at 408.

[321] Which includes Canada in this context, as Canada has closely aligned itself with the U.S.A.'s regulatory goals and system - see "Thrills and Spills", *supra* note 59.

Total international harmonization is not achievable, as many states are too unwilling to compromise or to give up their regulatory review autonomy. Although Canada has shown some flexibility,[322] others, such as the U.S.A. and the EU, have not. While partial harmonization is desirable, securities regulation must remain flexible enough to respond to rapidly-changing conditions and innovations. Full harmonization would essentially freeze international securities regulation, making any future changes difficult, if not impossible.[323]

In light of the EU's harmonization difficulties, Karmel does not believe that international harmonization can occur until an internationally powerful interest group demands it. She sees institutional investors as the only group able to do this.[324]

5. Mutual Recognition

Mutual recognition (or reciprocity) seems to be the most realistic method of linking international securities regulatory systems.[325] Under mutual recognition, one state accepts another's regulations as being as valid and as effective as its own; "...[the] essence of any reciprocity approach is to keep the amount of supplemental information as small as possible."[326] For example, Canada would agree to recognize as valid a prospectus filed according to U.S.A. standards and followed up by continuous disclosure

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[322] *E.g.*, the proposed FIPS (see Part III.D.2.b., above).

[323] Even if states agreed on the desired ends, such agreement would not survive market changes and innovations. Then, there would be no international legislative body to approve or reject worldwide changes - such a global system would suffocate itself. In the Canadian domestic context, a national regulator would not have this trouble; harmonized provincial regulators would - see Part VII.B.1.e., below.

[324] R.S. Karmel, "Securities Law in the European Community: Harmony or Cacophony?" (1993) 1 *Tul.J. Int'l & Comp.L.* 3 at 20. Also see Van Zandt, *supra* note 244 at 74-77 [no driving incentives towards an international securities market].

[325] However, it is not a desirable solution for Canadian domestic regulation, as it would still leave Canada with twelve different jurisdictions and sets of standards.

[326] Lorenz, *supra* note 44 at 819.

meeting U.S.A. standards.[327]

The EU's Directives system[328] also uses mutual recognition. For example, the Listing Particulars Directive and the Prospectus Directive are both based on mutual recognition.[329] In fact, the EU mandates mutual recognition once listing particulars are approved by the home state regulatory body:

> ...listing particulars must, subject to any translation, be recognized by the other Member States in which admission to official listing has been applied for, without it being necessary to obtain the approval of the competent authorities of those States and without their being able to require that additional information be included in the listing particulars.[330]

The above is, however, restricted to issuers whose registered office is in an EU member state - to prevent corporations based outside of the EU from taking advantage of the EU's mutual recognition benefits. Recent provisions also allow exemptions from the listing requirements in certain circumstances for issuers with a reporting history in another EU member state.

The Prospectus Directive provides for further mutual recognition:

> ...where public offers are made within short intervals of one another in two or more member states, a public offer prospectus prepared and approved in accordance with the requirements for listing particulars must be recognized as a public offer prospectus in the other member states "on the basis of mutual recognition."[331]

Again, this is limited to issuers based in other EU states. Outside states can only take

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[327] This already happens under MJDS, and is proposed under FIPS for more states - see Part III.D.2., above.

[328] *Supra* note 48; and Part IV.D.4., above.

[329] The basic difference between the Prospectus Directive and the Listing Particulars Directive is that the latter applies to listed securities and the former applies to those for which a listing will not be sought - Wolff, *supra* note 48 at 371-76.

[330] *Ibid.* at 373, footnote 158, quoting Council Directive 87/345, 1987 O.J. (L185) 81. He further states that the "...authorities of any EC country may, however, compel the inclusion of certain limited information specific to the country in which listing is sought."

[331] *Ibid.* at 374, citing the Prospectus Directive at 14.

advantage of the EU's coordinated system by agreeing to accept the EU requirements.[332]

One problem with mutual recognition is that it requires underlying similarity both in the regulation of securities and in the enforcement of those regulations.[333] However, many systems do not share these features.[334] Lorenz worries that although mutual recognition is easier, faster and less expensive to implement than the other methods discussed, it may discourage future harmonization efforts.[335] Therefore, mutual recognition could be a dangerous first step if harmonization is the ultimate goal.[336]

One main advantage of mutual recognition is that documents would generally be reviewed only in the home jurisdiction, thereby giving issuers more certainty.[337] Also, new participating states are easier to add to a mutual recognition system than to the other internationalization alternatives.[338]

As a unified or harmonized international system seems unlikely and undesirable in the near future, the best option is likely a mutual recognition system. This would allow foreign issuers to use their home documents, without the need for redrafting and

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[332] Warren, *supra* note 56 at 31.

[333] *E.g.*, in the MJDS. See "Progress Report", *supra* note 258 at 413. Regarding MJDS as not based on true mutual recognition, see C. Jordan, "Multi-Jurisdictional Disclosure System - Just Over the Horizon" (1990) 5 *Sec.&Corp. Reg'n. Rev.* 109 at 110.

[334] See Parts II.B.2. and IV.C.6., above.

[335] Lorenz, *supra* note 44 at 805.

[336] As discussed in Part IV.D.4., above, I do not believe that full international harmonization is realistic or desirable, so this argument should not be used as an excuse to avoid mutual recognition. However, the argument has more validity in the Canadian domestic context - see Parts VII.A.2.a. and VII.D.1.d.i., below.

[337] Issuers would not have to worry about being derailed by the quirks or agenda of non-home regulators. In addition, timing is much more certain if only one regulator is involved than if several must be coordinated.

[338] T.R. Gira, "Toward a Global Capital Market: The Emergence of Simultaneous Multinational Securities Offerings" in M.I. Steinberg, ed., *Contemporary Issues in Securities Regulation* (Massachusetts: Butterworth, 1988) 195 at 217.

reformatting.[339] Cross-referencing would facilitate such a system by putting investors at ease with unfamiliar documents and organization.[340]

However, despite the example set by the Canada-U.S.A. MJDS and the EU Directives, there have not been many recent international initiatives towards mutual recognition. For example, the MJDS has not been extended to other states, and proposed FIPS is not reciprocal.

Many commentators believe that, although Canada has shown flexibility, the U.S.A. is not willing to be flexible enough to recognize other regulatory systems as adequate to protect U.S.A. investors.[341] This apparently stems from two factors. First, the U.S.A. feels its system is the best in the world; therefore, others should follow its lead. Second, the U.S.A. does not see a pressing need for radical changes, because it believes its large capital market will continue to draw in foreign issuers.[342]

Until states overcome their fear of internationalization and cooperation, potentially

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[339] *Ibid.* at 818.

[340] As a practical matter, any mutual recognition system would need a cross-referencing procedure - see Lorenz, *supra* note 44 at 816. *E.g.*, while Canadian prospectuses have a separate "Risk Factors" section, not all states follow such a format. Therefore, in order for Canadian investors to follow foreign prospectuses, they should provide cross-referencing to Canadian categories, and vice-versa.

Such cross-referencing is required by many provinces under NP 1 for domestic national issues. It is rather sad that Canada's domestic system is so fragmented that parts of it can be used to demonstrate pros and cons of internationalization options.

[341] According to Longstreth, *supra* note 60 at 333-34, whether the U.S.A. can effectively participate in international reciprocity:

> ...would depend in part on whether and to what extent the U.S. remains the world's preeminent capital marketplace--that is, a place from which no major foreign firm can afford to be absent. The answer to this question, in turn, depends on two factors: first, how successful the SEC is in paring away unnecessary regulatory burdens and otherwise adjusting its rules to accommodate foreign issuers and financial intermediaries; and second, how aggressively other global market centers bid against the United States for preeminence.

This is relevant to Canada, as Canada's alignment to the U.S.A. basically commits it to follow the U.S.A.'s lead - see "Thrills and Spills", *supra* note 59.

[342] This is a dangerous assumption for the U.S.A. to make - *supra* notes 60 and 267, and accompanying text.

valuable initiatives such as mutual recognition will not develop.

V. DOMESTIC PRESSURES ON THE CURRENT CANADIAN SYSTEM

As mentioned, each domestic securities regulatory system is facing considerable international pressure to find and conform to an international set of standards. Canada has a similar problem internally - its current domestic system is fragmented and disorganized. Although this has historically led to discussions of jurisdictional reform, there is also a pressing need to consider modifications to the system, with or without jurisdictional reform.[343] This section discusses some of the most significant pressures on the current system, drawing on Part III., above. Canada must address these problems, regardless of whether some form of national securities system proceeds.

A. Provincial Duplication

Despite the differences catalogued in Part III.E., above, there is a great degree of duplication among the major securities provinces,[344] as their legislation is very similar in many major respects. However, these similarities have not stopped each provincial legislature and administration from often acting as if it were a sole regulator.

For example, an issuer must file all offering documents with and receive administrative clearance from each province in which it is distributing securities. That issuer must then constantly file continuous disclosure documents with each relevant commission. These requirements are costly, inefficient, unnecessary and wasteful.[345]

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[343] E.J. Waitzer, "Coordinated Securities Regulation: Getting to a More Effective Regime" (Paper presented at the Queen's Annual Business Law Symposium, 4 November 1994) (1994) 24 *O.S.C.B.* 5371 [hereinafter "Coordinated Regulation"] at 5372. Also, see Part VII., below.

[344] As the minor securities jurisdictions have simplistic legislation, this section only covers the major securities provinces.

[345] SEDAR should eliminate the duplicative filing (see Part III.B.7., above). However, nothing in SEDAR will eliminate multi-provincial reviews.

This is somewhat alleviated by the issuer's ability to select a principal jurisdiction for multi-provincial offerings.[346] However, the system is not always efficient in reality. The *Transaction Costs Report* found that non-principal jurisdictions did not follow NP 1's time limits, hurting efficiency and increasing duplication.[347] Further, 46% of the respondents felt that the non-principal jurisdictions made comments "materially different" from those of the principal jurisdiction.[348]

Duplication also causes time losses. In the increasingly competitive domestic (and international) markets, issuers must be able to access windows of opportunity in the market. Multiple legislation and regulators delay this by forcing issuers to repeat essentially the same process in several jurisdictions, and to subject themselves to the discretion of those jurisdictions.[349]

This duplication can be reduced, even under Canada's current provincially-based system, as shown by two recent examples. First, "Saskatchewan Local Policy Statement 1.10":

> ...is intended to avoid duplicate detailed review of applications in situations where the Saskatchewan Securities Commission has routinely granted identical relief as that granted in other jurisdictions....the Saskatchewan Securities Commission will continue to exercise its discretion, [but] it will not issue detailed decisions....enabling the Saskatchewan Securities Commission to concentrate its resources on local issues and issues of a new or unique character.[350]

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[346] See Part V.C.1., below.

[347] *Transactions Costs Report, supra* note 218 at 8.

[348] *Ibid.* at 9. This demonstrates both duplication and inefficiency: duplication because 54% of the comments were substantially similar among all the jurisdictions; inefficiency because 46% of the respondents had to address different comments from different jurisdictions - see Part V.B., below.

The *Transactions Costs Report* also quantifies the multiple-review costs: 50% said these costs were 1% to 5% of the total offering costs; and 10% said they were greater than 5%. Although this is interesting, it is not scientific or verifiable.

[349] *Efficiencies Report, supra* note 158 at 2972.

[350] Saskatchewan Securities Commission, "Saskatchewan Local Policy Statement 1.10 - System for Expedited Review of Certain Exemption Applications" (1995) 18 *O.S.C.B.* 566 [hereinafter "Sask.LP 1.10"].

This should eliminate duplication, while increasing speed and efficiency.[351]

Second, the Nova Scotia Securities Commission ("NSSC") has recently designated the OSC to accept ITRs on behalf of the NSSC:

> Insiders of issuers that are reporting issuers in both Nova Scotia and Ontario (other than those for which Nova Scotia is the "Designated Jurisdiction"...or where the issuer has been notified by the NSSC that their insiders cannot rely on the he [sic] designation order) may discontinue filing insider reports in Nova Scotia immediately.[352]

B. Regulatory Inefficiencies

Inefficiencies abound in Canada's current system, including differences in prospectus filing requirements, ITRs, MCRs, hold periods, broker/dealer registration and enforcement. These are discussed in detail in Part III.E., above.

1. Problems

The *Efficiencies Report* divides its criticisms of efficiencies in the provincially-based system into four areas.[353] First is the tremendous paper burden caused by excessive filing requirements for issues, continuous disclosure and broker/dealer registration.[354] Second are the time pressures caused by multiple jurisdictions, "especially when rules, policies or views of Commission staff responsible for review differ".[355] Third are inadvertent and deliberate violations. Inadvertent violations are caused by the unreasonable compliance burden, while deliberate violators may be able to

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[351] *Efficiencies Report, supra* note 158 at 2973.

[352] Nova Scotia Securities Commission, "Designation of OSC to Accept Insider Reports" (1996) 19 *O.S.C.B.* 1663.

[353] *Efficiencies Report, supra* note 158 at 2972.

[354] SEDAR will improve this - see Part III.B.7.b., above.

[355] *Efficiencies Report, supra* note 158 at 2972.

avoid sanctions merely by operating in another province.[356] Fourth:

> Procedures and technical requirements of all types are rarely identical notwithstanding the absence of apparent policy differences between [sic] jurisdictions, the result being unnecessary complexity, delay and frequent errors in compliance. The inconsistency is itself an important contributing factor to the first three problems cited.[357]

2. Initiatives to Date

There have been some useful initiatives.[358] The first is SEDAR, which has already been discussed.[359] Second, the OSC now selectively reviews prospectuses (*i.e.*, not all are reviewed). This speeds up the process by concentrating resources on the selected issues. Issuers and underwriters of non-selected prospectuses are still liable for any misrepresentations. Third, issuers may elect expedited reviews for multi-provincial filing, by selecting a primary reviewing jurisdiction.[360] Also, policies such as Sask.LP 1.10 should increase efficiencies in granting exemptive relief.[361] Fourth, improvements to broker/dealer registration should increase efficiency, partly by freeing commission resources for other purposes.[362] Fifth, the NP approach has been fairly successful.[363]

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[356] But, see *supra* note 180 and accompanying text.

[357] *Efficiencies Report, supra* note 158 at 2972.

[358] *Ibid.* at 2973.

[359] See Part III.B.7.b., above.

[360] See *infra* notes 556-57 and accompanying text. Although Quebec is not formally part of this process, it has cooperated in the expedited reviews.

[361] *Supra* note 350 and accompanying text.

[362] See Part III.E.4., above.

[363] See Part III.B.3., above.

3. Recommendations

The *Efficiencies Report* makes several recommendations.[364] First, commissions must have adequate funding.[365] Second, it advocates expanding the "designated jurisdiction" concept (underlying the expedited review process) to encompass: other prospectuses; continuous disclosure filings; broker/dealer registrations; exemption applications; and hearings and investigations. If not all provinces can agree, those that can should proceed without the dissenters.

Third, SEDAR, once implemented, should be expanded to handle other filings, including: continuous disclosure documents; broker/dealer registrations; ITRs;[366] and applications for identical discretionary relief in several provinces. It could also be used as a source of administrative information for issuers.[367] Fourth, each commission should internally improve its efficiency by better designation of staff, increased delegation of authority, and greater use of precedents.

4. Conclusion

Basically, inefficiencies will only disappear through increased coordination:[368]

> [There is a] necessity for a shared commitment to enhanced regulatory efficiency and greater coordination of effort on the part of Canadian securities regulators and their governments. Inconsistencies between jurisdictions, not justified by substantive policy differences, are a fundamental and increasingly unacceptable

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[364] *Efficiencies Report, supra* note 158 at 2974-77.

[365] However, they should not charge excessive fees - see Part V.C.3., below.

[366] See Part III.E.3.b., above.

[367] *E.g.*, the information currently scattered in the commissions' periodic and non-coordinated securities bulletins (such as the *Ontario Securities Commission Bulletin* and the *British Columbia Securities Commission Weekly Summary*).

[368] See Part VII., below, for various alternatives. The *Efficiencies Report, supra* note 158 did not recommend a particular option.

source of inefficiency.[369]

C. Compliance Costs

1. Multi-Provincial Public Offerings

Public offerings are expensive, and the costs are exaggerated in multi-provincial offerings because of the fragmentation and duplication. Higgins divides these costs into three categories: direct, indirect and intangible.[370] He found that initial public offerings in Canada cost less than those in the U.S.A.[371]

Direct expenses are the issuer's out-of-pocket expenses, including: the underwriter's commission (the largest direct expense); legal, accounting and audit fees; registrar and transfer fees; printing costs; fees for filing with commissions; and fees for

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[369] *Ibid.* at 2976.

[370] Higgins, *supra* note 62 at 5-7.

[371] Based on a comparison of Canadian and U.S.A. small and medium IPOs from first quarter 1992 to first quarter 1993. While this may seem to contradict the conventional wisdom that the fragmented Canadian system is expensive for issuers, there are, in my opinion, several logical explanations (also, further empirical research is obviously required).

First, the U.S.A. IPOs were only firm underwritings, while the Canadian ones were both firm and "best efforts" underwritings. This would, in my opinion, skew the Canadian results lower, as best efforts offerings are less expensive for the issuers (the underwriter does not receive a risk premium).

Second, Canadian underwriting fees are lower than those in the U.S.A. (Higgins, *ibid.* at 16); therefore, Canadian results would again be skewed lower. This may be because the U.S.A. is a more attractive market, so that underwriters can demand a higher premium for giving issuers access to it.

Third, Canadian professional fees are lower; *e.g.*, lawyers' due diligence fees are lower in Canada partially because U.S.A. due diligence has to be more extensive (to limit exposure to frequent and exorbitant investor lawsuits). Finally, the U.S.A. system is bureaucratic and stifling. Therefore, Higgins' results should warn Canada not to move to an over-administered, multi-levelled regulatory system.

Therefore, Higgins' findings are more a condemnation of the U.S.A. system than a commendation of the Canadian system. Canada should remember these figures when structuring a national system, to avoid American pitfalls (see Part VII.B.2.c., below).

listing on exchanges. Of these, legal fees, printing costs, and commission filing fees are greatly increased by having to file in several jurisdictions.

Indirect expenses include: searching for an underwriter (which can be considerable); promotional "road shows"; the issuer's increased dilution and decreased control; restrictions on future issues or debt; change in management style;[372] and change in tax status.[373] The first two are currently more expensive for a multi-provincial offering than if there were a single national system. The underwriter search will be more expensive, because the issuer needs an underwriter (or syndicate) experienced in dealing with different, often conflicting, requirements from multiple regulators. Varied provincial rules for promotional activities make road shows more expensive.

Intangible costs are less definable and acknowledged. The major intangible cost may be the "underpricing phenomenon" of initial public offerings, in which "shares immediately trade at a price in excess of the issuing price".[374] The greater the difference between that new price and the price the issuer and underwriter select as the issue price, the greater the issuer's intangible cost. This is not likely affected in either direction by the current fragmented system.

2. Continuous Disclosure

Continuous disclosure costs include: the reporting issuer's time and effort to meet the requirements;[375] legal fees to ensure all the varied requirements are met; accounting and audit fees to prepare the periodical financial disclosure; and filing fees for continuous

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[372] When a formerly private company goes public, it takes on fiduciary responsibilities to its new shareholders, which affect (or, at least, should affect) its management style.

[373] *E.g.*, going public costs a company its tax-related status as a "Canadian-controlled private corporation".

[374] Higgins, *supra* note 62 at 7.

[375] *Ibid.* at 6.

disclosure in all jurisdictions (financial statements, MCRs, ITRs, AIFs, etc.). These are unquestionably higher now than they would be if Canada had a better coordinated or national system. Although SEDAR will alleviate the logistical difficulties of filing in multiple jurisdictions, the OSC predicts it will actually increase issuers' filing costs.[376]

3. Securities Commission Surpluses

Recently, more than 50% of provincial commission revenues went to general revenue in their provinces, instead of being used for securities regulation.[377] In 1995, the OSC had a budget of $19 million for 1995, but charged fees of $46 million - the difference went to the Ontario government's general revenues.[378] Longstreth views this revenue-generating system as an unjustifiable tax on capital markets,[379] which increases the cost of capital in Canada. Therefore, Canadian markets are less attractive for both domestic and foreign issuers.

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[376] "Request re SEDAR", *supra* note 132. However, the OSC also believes that the benefits to issuers, regulators and the public will more than compensate for this increased cost (*supra* note 135 and accompanying text).

[377] *Efficiencies Report, supra* note 158 at 2974 (for the fiscal year ended March 31, 1994).

[378] A. Willis, "Crusader for a National Regulator" *The Globe and Mail* (9 July 1996) B19 [hereinafter "Crusader"]. Although Alberta had a surplus of about $4 million going to the government's general revenues until recently, the ASC now keeps all of its revenue for securities regulatory use (B. Critchley, "ASC Happy with Independent Status" *The Financial Post* (27 June 1995) 5). The BCSC is also self-funding.

One very controversial aspect of the current national system proposal is the possibility of "buying out" Ontario (and other provinces) with a lump sum payment to cover the loss of their future cash flows - see Parts VI.A.4., VI.B.5. and VII.D.1.c., below.

[379] Longstreth, *supra* note 60 at 335-36 [discussing this issue in the U.S.A. context]. This contributes to the high costs of both Canadian and American offerings.

D. International Implications

1. Attractiveness to Issuers and Investors

a) issuers

Authorities who believe that foreign and domestic issuers are avoiding Canadian issues because of the duplications and inefficiencies in its system also believe that simplifying and coordinating Canadian regulation would keep more issuers in Canada, as Canada would then be competitive with other capital markets.[380]

There are two points to the contrary - that is, that improving Canada's regulatory system will not increase foreign offerings into Canada. First, Jordan believes that Canada's market is so small that initiatives such as FIPS may not have any effect.[381] Therefore, no matter what changes Canada made, they likely would not be enough to woo foreign issuers away from using exempt distributions for Canada or avoiding Canada altogether.[382]

Second, as the proportion of institutional investments to lay investments increases,[383] there may be more temptation to offer through exempt means. This will continue even if Canada moves to national regulation or improves the current provincial

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[380] See, *e.g.*, A. Freeman & K. Howlett, "Keep IPOs at Home: Martin" *The Globe and Mail* (8 March 1996) B1:

> Canada needs a national securities regulator to stanch the flow of companies raising money in the United States and improve the competitiveness of Canadian securities markets, Finance Minister Paul Martin says.

Martin stated that Canada has to concentrate on becoming more competitive with American financial centres, instead of competing internally (at B2).

[381] "Thrills and Spills", *supra* note 59 at 387. This reasoning can be extrapolated to other initiatives besides FIPS.

[382] I believe that this is too pessimistic. Although exempt distributions will continue to be used heavily by both foreign and domestic issuers, there is still room for public offerings, if the market and the regulations are attractive enough. Therefore, issues in Canada will increase if issuers do not have to pass too many hurdles.

[383] *Supra* note 20 and accompanying text.

coordination. However, some issuers will always want or need to offer to the general public.[384]

b) investors

Domestic investors will unquestionably benefit if more domestic and foreign issuers are able to offer securities in Canada at a lower cost. While one advantage is increased choice for personal preference reasons, the main advantage is diversification. In order to invest profitably and relatively safely, investors need access to a wide variety of investments - a diversified portfolio. Increased issues in Canada would open a wide range of investment characteristics: risk levels; potential rates of return; product, service and industry types; geographic areas; and corporate structures. Therefore, changes in the Canadian regulatory system would increase choices for domestic investors.

2. National Representative in International Fora

Canada has no national voice in organizations such as IOSCO, IASC and ISG. With a national regulator, Canada would have a more recognized and effective voice internationally. If, however, the changes made to the Canadian system are increased coordination and cooperation, Canada will still not have a single international voice.[385]

VI. NATIONAL SECURITIES SYSTEM INITIATIVES

There have been repeated calls for some form of national securities system in Canada since the *Porter Report* (1964) and the *Kimber Report* (1965). The topic's

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[384] *E.g.*, an issuer may feel that lay investors will give a better price, or will monitor less thoroughly the issuer's progress. Also, an issuer may not want any investors to have concentrated control, which is difficult to restrict when massive institutional investors are involved. Finally, an issuer may find relatively naive lay investors to be easier targets, or more willing to take a chance.

[385] See Parts VII.A.2.c. and VII.B.1.c., below.

popularity ebbs and flows; for example, it has been heavily discussed since the latest initiative in 1994, having been dormant for the previous fifteen years. The initiatives all attempt to address the same basic issues and problems. This section outlines those initiatives, examines the general issues facing each, and concludes that a properly planned and implemented form of national regulation could succeed.

A. Outline of Various Initiatives

1. Porter Commission and Earlier

The *Report of the Royal Commission on Price Spreads, 1935* made one of the first calls for a national securities presence.[386] In 1964, the *Porter Report* also advocated uniform securities regulation, either through a national agency with federal legislation or through provincial cooperation with a uniform act. - *i.e.*, a single agency to oversee the growth, development and efficiency of the Canadian securities industry and markets.[387]

Although the former report was on price spreads and the latter on banking and finance, they both felt that the national securities issue warranted attention. The *Porter Report*, especially, was gravely concerned with decreasing duplication, improving enforcement, and providing more information to investors (although it also worried that a national system could become "unduly bureaucratic and costly" or "highly detailed and comprehensive" like the S.E.C.).[388]

2. CANSEC

The CANSEC (Canada Securities Commission) proposal was presented by the

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[386] Williamson, *supra* note 57 at 19, note 30 [citing the *Report of the Royal Commission on Price Spreads*' calls for a "Securities Board", with the federal government either taking over or guiding the system towards uniformity].

[387] *Porter Report, supra* note 19 at 348.

[388] *Ibid.* at 349. Some of the pros and cons of national regulation are discussed in Part VII.B., below.

OSC in 1967, and advocated by Langford and Johnston in 1968.[389] Its main contribution was its proposal that the federal and provincial governments all delegate their authority to a joint agency. After being created by the federal government, the agency would have been delegated securities authority by the federal government and each provincial government.[390] CANSEC was to have three tiers of regulation: a council of ministers with representation from each participating jurisdiction; a commission to hear appeals and decide important matters; and the administrative staff.[391]

CANSEC would have had authority over all interprovincial securities matters, with each province retaining intraprovincial control. This would have avoided constitutional debates and challenges,[392] while preserving regional interests.[393] There would have been a head office in Ottawa; national or regional offices in each of Montreal, Toronto and Vancouver; and local offices in other regions.

Langford and Johnston hoped that CANSEC would lead to a single, uniform filing of prospectuses, ITRs, and other materials,[394] then:

Ultimately it would be hoped that the participating governments could go beyond

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[389] Ontario Securities Commission, "CANSEC - Legal and Administrative Concepts" (November 1967) *O.S.C.B.* 61 [hereinafter "CANSEC Proposal"]; and J.A. Langford & D.L. Johnston, "The Case for a National Securities Commission' (1968) *U.Toronto Commerce J.* 21.

[390] This joint agency and delegation approach was upheld by the Supreme Court of Canada as valid in other areas. *E.g.*, in *Prince Edward Island Potato Marketing Board v. H.B. Willis Inc.*, [1952] 2 *S.C.R.* 392, 4 *D.L.R.* 146 [hereinafter *P.E.I. Potato* cited to *S.C.R.*], the SCC approved a joint federal-provincial agency for marketing agricultural products; in *Coughlin v. Ontario Highway Transport Board*, [1968] *S.C.R.* 569, 53 *D.L.R.* (2d) 30 [hereinafter *Coughlin* cited to *S.C.R.*], the SCC approved a similar scheme regulating interprovincial trucking.

[391] "CANSEC Proposal", *supra* note 389 at 65.

[392] See Parts III.A.1., above, and VI.B.1., below.

[393] See Part VI.B.3., below.

[394] Langford & Johnston, *supra* note 389 at 29. Today's technology and innovations makes this even more feasible now - *e.g.*, SEDAR.

the uniform filing stage and develop a model uniform securities act which all participating governments could then enact.[395]

CANSEC's other advantages include: not all provinces would have to join at the same time; dissatisfied provinces could leave at any time;[396] and implementation could occur in stages (*e.g.*, clearance, filing requirements, and registration).[397]

Much of the CANSEC proposal is still valid and valuable today.[398]

3. *1979 Proposals*[399]

The *1979 Proposals* were the result of a massive federal[400] study of securities regulation in Canada. The report is in three volumes: Volume One is a detailed draft *Canada Securities Market Act* (hereinafter the *1979 Draft Act*); Volume Two is a commentary (hereinafter the *1979 Commentary*) on each section of the *1979 Draft Act*; and Volume Three is a collection of the excellent papers[401] which form the background

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[395] *Ibid.*

[396] This flexibility would, of course, be restricted by practical realities, such as having to re-establish a provincial commission with adequate staffing and funding.

[397] Langford & Johnston, *supra* note 389 at 30.

[398] As alluded to throughout Parts VI.B., VI.C. and VII., below.

[399] *Supra* note 9.

[400] Johnston felt that the lack of input from policy makers and the provinces would limit the "practical success" of the *1979 Proposals* (D.L. Johnston, Book Review of *Proposals for a Securities Market Law for Canada*, 3 vols. 26 *McGill L.J.* 626 at 626). Consultation and cooperation are even more important in today's sometimes acrimonious federal-provincial atmosphere. Therefore, any current proposal must not be unilaterally federal - see Part VI.B.4.a., below.

[401] The great depth and comprehensiveness of these papers is readily apparent from the titles alone (a detailed discussion is far beyond the scope of this paper):

J.P. Williamson, "Canadian Capital Markets";

P. Anisman & P.W. Hogg, "Constitutional Aspects of Federal Securities Legislation" (*supra* note 85);

F. Iacobucci, "The Definition of Security for Purposes of a Securities Act" (*supra* note 10);

of the *1979 Draft Act* and are still highly informative.

The *1979 Draft Act* states that:

> ...the purpose of this Act is to further the achievement of the goals enunciated in this section by ensuring the availability of information relating to investment decisions, by protecting investors from fraudulent and deceptive conduct and by ensuring fair competition, all of which can best be accomplished by the creation of an independent public body to regulate the Canadian securities market and securities market actors over which the Parliament of Canada has legislative jurisdiction in cooperation with similar provincial and foreign public authorities.[402]

Therefore, the *1979 Draft Act* is, not surprisingly, based on the twin ideals of investor protection and market efficiency.

The *1979 Draft Act* contains sixteen parts: Part 1 - title and policy; Part 2 - definitions;[403] Part 3 - exemptions (general) ; Part 4 - registration of issuers; Part 5 - distributions; Part 6 - exemptions from prospectus requirements; Part 7 - reporting issuer disclosure (continuous disclosure, proxy solicitation, insider reporting, and takeover

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W.M.H. Grover & J.C. Baillie, "Disclosure Requirements" (*supra* note 24);
D.S. Hall, "Continuing Disclosure and Data Collection";
L.H. Leigh, "Securities Regulation: Problems in Relation to Sanctions";
M. Yontef, "Insider Trading";
J.P. Williamson, Canadian Financial Institutions";
H.J. Cleland, "Applications of Automation in the Canadian Securities Industry: Present and Projected";
M.A. Jenkins, "Computer Communiciations Systems in Securities Markets";
S. Hebenton & B. Gibson, "International Aspects of Securities Legislation";
M.Q. Connelly, "The Licensing of Securities Market Actors";
P. Dey & S. Makuch, "Government Supervision of Self-Regulatory Organizations in the Canadian Securities Industry" (*supra* note 79);
J. Honsberger, "Failures of Securities Dealers and Protective Devices"; and
J.L. Howard, "Securities Regulation: Structure and Process".

[402] *1979 Draft Act, supra* note 9, vol.1, s.1.02, at 2.

[403] Unfortunately, Part 2 does not contain all of the definitions. I believe that it is preferable to consolidate all definitions into one part of an act (see *supra* note 8 and accompanying text). However, the drafters here felt that, *e.g.*, "insider" could not be defined for purposes of the entire *1979 Draft Act* at once (*1979 Commentary, supra* note 9, vol.2, at 64). Perhaps their concerns could be alleviated by using slightly varied terminology for different references, or by cross-referencing each definition to the appropriate part of the act.

bids);[404] Part 8 - market actors; Part 9 - self-regulatory organizations; Part 10 - clearance, settlement and transfer systems; Part 11 - market conduct and regulation; Part 12- fraud and manipulation;[405] Part 13 - civil liability; Part 14 - enforcement; Part 15 - administration;[406] and Part 16 - general.

However, as with CANSEC, nothing came of this enormous effort, and the topic virtually disappeared until 1994.

4. 1994 to Present Proposals

Since 1994, influential people have renewed calls for a national regulator. Unfortunately, this goes against the trend of devolving power away from the federal government,[407] making it a sore political point, especially in Quebec.[408]

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[404] If these requirements were included in a federal securities act, they could be eliminated from the *C.B.C.A.* (see Part III.C.2., above).

[405] This would have included offenses from the *C.C.C.* (see Part III.C.1., above) and the provincial securities acts.

[406] The *1979 Commentary* states that this part:

> ...establishes a commission, the "Canadian Securities Commission", defines its structure, specifies its objects and generally prescribes its powers and the methods by which they may be exercised, all in a manner that leaves the Commission the maximum flexibility to establish its own procedures and to delegate its tasks to its employees and to others within the limits imposed by procedural fairness. In addition, it encourages the Commission to cooperate with other government agencies, federal, provincial and international, where its activities affect institutions regulated by them, and permits a maximum amount of federal-provincial cooperation both in appointments to it and in its activities.

This structure, flexibility and desire for cooperation at all levels may still be a useful model - see Part VII.D., below.

[407] However, some say that centralization of securities regulation could be "traded off" for decentralization in other areas - *e.g.* D. Johnston, Letter to the Honourable John Manley (11 January 1996) [hereinafter "Letter to J. Manley"] at 2:

> If the federal government proposes devolution of powers in a certain number of fields such as immigration, manpower training, housing, municipal affairs, forestry, fish, agriculture, environment, energy, pursuant to the Masse Committee deliberation, it may be appropriate to look at two-way street trade-offs in areas such as securities regulation...

a) 1994 *Memorandum of Understanding Regarding the Regulation of Securities in Canada*[409]

In 1994, the OSC published the federal government's *1994 Proposal*, starting a flurry of discussion and deal-making that continues today. The *1994 Proposal* was to be between Canada and any participating provinces. The federal government clearly contemplated that some provinces (*i.e.*, Quebec) might opt out of a national system. The *1994 Proposal* would not affect in any way the jurisdiction of those provinces.

The Preamble explicitly states the desire to improve regulatory efficiency by decreasing overlap and duplication, including the establishment of "...a uniform securities regulatory structure which will apply comprehensively within and across all participating provinces".[410] It also emphasizes the need to recognize and foster regional characteristics. Finally, it stresses that no Participant would lose "...any jurisdiction, right, power, privilege, prerogative or immunity by virtue of this agreement or any other agreement resulting therefrom".[411]

The agreement contemplated a transition period of one year, with implementation of the new Canadian Securities Commission ("CSC") on January 1st, 1996. During the

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In the February 27, 1996 Throne Speech [hereinafter the *1996 Throne Speech*], the federal government stated that it was prepared to withdraw from "labour market training, forestry, mining, and recreation", although it did not explicitly mention trade-offs with other fields.

[408] *E.g.*, Bloc Quebecois MP Yvan Loubier recently stated that a national commission does not make sense, as Ottawa committed in the *1996 Throne Speech, ibid.* to increase provincial responsibilities in certain areas (R. Carrick, "Ontario Considers Handing Securities Regulation to Ottawa" *The Globe and Mail* (5 March 1996) B2). See Part VI.B.4.b., below.

[409] (1994) 17 *O.S.C.B.* 4401 [hereinafter the *1994 Proposal*].

[410] *Ibid.* at 4401.

[411] *Ibid.*

transition, the federal government was to pass a comprehensive securities act[412] and establish the CSC. The federal legislation would not apply to intraprovincial matters, and would not apply at all to non-participants. Canada was to represent the CSC in international fora.[413] Also during the transition period, participating provinces were to repeal their existing legislation; incorporate as their own the new federal legislation (by reference, as it would exist from time to time);[414] and delegate administrative authority over their legislation to the CSC.

The CSC, headquartered in Toronto, was to be autonomous, reporting to the Minister of Finance of Canada annually. It was to develop its own amendments, regulations and policy statements. There would have been a full-time chair, ten full-time vice-chairs,[415] and two to five part-time commissioners from each region.[416] Staff would initially have come from the current provincial personnel.

For regional flexibility and service, there were to be regional offices in each of British Columbia, Alberta, and one of the Atlantic provinces (and others, if that would increase efficiency). In participating regions without a head or regional office, "there may be local representation...to provide enforcement and information services...".[417]

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[412] This legislation (the act, regulations and policy statements) was to be similar to "existing uniform provincial legislation" (*ibid.*, ss.2-3, at 4402). Presumably, this means the relatively uniform legislation in Alberta, British Columbia, Newfoundland, Nova Scotia, Ontario and Saskatchewan.

[413] *Ibid.*, s.30, at 4407.

[414] This wording satisfies the requirements for delegating administrative authority from one level of government to another - see Part VI.B.1.b., below.

[415] Section 18 of the *1994 Proposal* called for: "...two from British Columbia, two from the Prairie provinces; five from Ontario; and one from the Atlantic provinces". It obviously assumed that Quebec would not participate. Presumably, the distribution of vice-chairs would change if others (*e.g.*, British Columbia) opted-out.

[416] Vice-chairs were to concentrate on overall functioning and on policy formulation; part-time commissioners were primarily to handle day-to-day functions. Each province would have provided Canada with a list of nominees for the vice-chair and commissioner positions within the province, and Canada would make the appointments from that list.

[417] *1994 Proposal, supra* note 409, s.23, at 4406.

The system was to be "closed",[418] with participating provinces allowed to exempt offerings from the federal legislative provisions if they met certain closed conditions.[419] As compensation for lost future revenues, Canada was to make an aggregate lump sum payment of $150 million to all the participating provinces, to be recovered out of future CSC-generated revenues.[420] Fees paid to the CSC were to be used by the CSC (not funnelled into general revenue).[421]

Section 36 provided that:

> [I]n administering the securities legislation...Canada will be bound by the Official Languages Act to communicate and provide services to members of the public in both of Canada's official languages.

This section caused concern that all filings might be required to be in both English and French.[422]

b) responses to the *1994 Proposal*

Waitzer analyzed the *1994 Proposal* according to five "key" objectives:

> ...1. To maximize operational efficiency...2. To ensure regulatory system integrity...3. To optimize managerial and policy-making autonomy for the securities regulatory authority...4. To construct effective, ongoing coordinating

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[418] See Part III.E.1.a., above.

[419] Section 24 allowed provinces to exempt offerings if: the primary offering was only to residents of that province; secondary trading was only among residents of that province; and any secondary trading not restricted to residents of that province was subject to the federal legislative provisions. This ensured that the federal legislation did not encroach upon matters that were clearly intraprovincial - see Parts III.A.1., above, and VI.B.1.a., below.

[420] This is very controversial. In addition, the amounts under consideration have escalated. See Parts VI.B.5. and VII.D.1.c., below.

[421] As is currently done with much of the provincial revenue - see Part V.C.3., above.

[422] See Parts III.E.1.c., above, and VI.B.2.d., below.

mechanisms...5. To design a functional transition process.[423]

First, he believes that the current system has worked fairly well in achieving operational efficiency and decreasing regulatory costs; however, there is further room to improve. He worries that focussing exclusively on a national system could derail attempts to improve the current system.[424] Such improvements will be necessary if the CSC proposal is not achieved or is delayed.

Second, he feels that the fundamental tenets of securities regulation (investor protection and capital market efficiency) must be emphasized throughout the CSC's creation. Otherwise, competing concerns may take over and weaken the resulting regulatory system.[425] Waitzer also believes that the *1994 Proposal* provides an opportunity to implement more ambitious changes in Canadian securities regulation, many of which are required because provincial legislatures have not kept up with their

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[423] E.J. Waitzer, Letter to the Honourable Bob Rae (16 May 1994) (1994) 17 *O.S.C.B.* 4409 [hereinafter "Letter to B. Rae"] at 4410-11. At 4411-17, he evaluates each of these objectives in the context of the *1994 Proposal*, but also emphasizes their relevance to all discussions of increased cooperation and coordination (even proposals not involving federal regulation or administration).

[424] *Ibid.* at 4411-12. However, Le Pan (*supra* note 1 at 4397) of the federal Financial Sector Policy Branch notes that many provincial coordination initiatives have been underway for years without significant progress (although he agrees that those efforts should continue).

[425] "Letter to B. Rae", *supra* note 423 at 4412-13. His main concern appears to be that the *1994 Proposal* is too much a response to pressure from financial institutions, which are federally regulated on a solvency basis. He explains that the objectives of investor protection and institutional solvency often conflict (*e.g.*, solvency regulators are more concerned with releasing information only when absolutely necessary, to prevent a potentially unwarranted or premature decrease in public confidence; investor protection regulators generally believe that information should be released as soon as it is available, to provide the public with full knowledge and a level playing field - see Sutton, *supra* note 62 at 6).

Le Pan disagrees, *supra* note 1 at 4397, stating that the provinces were consulted in the development of the *1994 Proposal*. He also denies that new federal legislation would take an insolvency approach, insisting that it would focus on investor protection, as stated in the *1994 Proposal* Preamble.

changing environment.[426]

Third, he stresses that the CSC would need to be independent (*i.e.*, from political pressures) and autonomous (*i.e.*, self-funding).[427] Further, if the new proposals merely add another layer of legislation and bureaucracy, accountability could decrease.[428] Waitzer also believes that the fundamental principles of the CSC should be developed before political considerations dictate the structure under which it will operate:

> ...[it] appears to respond to vaguely formulated regional concerns by prescribing ex ante, in some detail, how (and where) the Canadian Securities Commission will be managed. At best, this is a superficial response. At worst, it suggests a level of political (or bureaucratic) intervention in internal management issues which would be anathema to the principles of independence and accountability....[429]

Le Pan, however, stresses the primary importance of regionalism:

> Regional sensitivity and representation is of serious and paramount concern to some of the other provinces...A truly national regulatory system must not neglect such regional characteristics as long as they are not incompatible with an efficient and transparent regulatory regime.[430]

Fourth, regarding coordination, Waitzer finds the *1994 Proposal* more ambitious than CANSEC, as the latter did not contemplate immediate legislative uniformity among participants. He stresses the need to develop coordinating mechanisms before

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[426] "Letter to B. Rae", *supra* note 423 at 4413-14.

[427] *Ibid.* at 4414-15. Le Pan, *supra* note 1 at 4398, responds that the *1994 Proposal* already provides for the CSC to be autonomous and independent, and to develop its own amendments. Also, it will be self-funding, and employees will not be covered by the *Public Service Employment Act*.

[428] "Letter to B. Rae", *ibid.* Le Pan, *ibid.* at 4398, does not believe political accountability or responsibility will decrease, as the chair of the CSC will report directly to the federal Minister of Finance, who will be directly responsible to the Canadian Parliament.

[429] "Letter to B. Rae", *ibid.* at 4416.

[430] Le Pan, *supra* note 1 at 4399. I completely agree that regional concerns and characteristics are important, but they must be properly incorporated into the national scheme. See Parts VI.B.3. and VII.D.1.b., below.

implementing the *1994 Proposal*, especially if some provinces are likely to opt-out.[431] Le Pan feels such mechanisms can best be developed once it is known which provinces will participate.[432]

Finally, he is concerned that transitional costs, time and procedures were not adequately considered in the *1994 Proposal* - this could be disastrous, as proper implementation and transition are vital.[433] Le Pan agrees that the issue is vital "to ensure that any transition is handled as smoothly as possible, thus minimizing the costs to governments and uncertainty for market participants".[434] An anticipated part of this process would be to establish a task force of securities experts.

Geller has another view - he favours federal "effective and **exclusive** [securities] regulation" [my emphasis]; that is, Canada must avoid a U.S.A.-style system where the provinces would have concurrent regulatory authority.[435] Until such a federal solution is practical, he, too, is concerned that the "quest for the best [not] frustrate the ability to obtain the merely good" - *i.e.*, Canada should continue to focus on increasing effectiveness and decreasing duplication in the current system.[436]

Jordan[437] is concerned that the *1994 Proposal* is too complicated and too political. She recommends a legislative route (instead of "political, closed-door government-to-government negotiations"). She also feels that the unified legislation and

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[431] "Letter to B. Rae", *supra* note 423 at 4416-17 - see Parts VI.B.2.e. and VII.V.2.c., below.

[432] Le Pan, *supra* note 1 at 4399. I disagree. Coordinating mechanisms should be pursued independently of and concurrently with the development of a national system - see Parts VI.B.2.e., VII.C. and VII.D., below.

[433] "Letter to B. Rae", *supra* note 423 at 4417.

[434] Le Pan, *supra* note 1 at 4399.

[435] J.A. Geller, "Federal Securities Regulation" (Paper delivered at the Securities Forum '95, 15 February 1995) (1995) 18 *O.S.C.B.* 658 at 658. See Part VII.B.2.c., below, but also see Part VI.B.3., below.

[436] *Ibid.* at 660.

[437] C. Jordan, "Canada Needs a National Securities Regulator" *The Financial Post* (24 February 1996) 13 [hereinafter "Canada Needs"].

delegated jurisdiction integral to the *1994 Proposal* would actually take the Canadian system backwards.[438] Third, she would like to see draft legislation to accompany the *1994 Proposal* (as was done for the *1979 Proposals*). Fourth, she believes federal regulation would best be implemented in stages, tackling the international aspects first.[439]

c) February 1996 to present

After an initial flurry of interest and comments, the *1994 Proposal* appeared to have met the same fate as CANSEC and the *1979 Proposals*. However, in the *1996 Throne Speech*,[440] the federal government again revived the idea of a national system. This proposal may actually proceed.[441]

In the *1996 Throne Speech*, the federal government expressed its willingness to work towards a CSC with any interested provinces. Reality inched closer at the June 1996 first ministers' conference,[442] when the federal government and eight provinces

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[438] I disagree. Unified legislation and delegated jurisdiction have great potential to improve the current system, if properly planned and implemented - see Part VII.D., below.

[439] She recognizes herself the inherent danger that this may cause further duplication and over-regulation, as well as the increasing difficulty of demarcating international and domestic issues. I believe this staging method would be too artificial; for other staging options, see Part VII.D.1.d.ii., below.

[440] *Supra* note 407.

[441] Throughout this paper, the 1996 revival will still be referred to as the *1994 Proposal*, as the content is the same in 1996 as in 1994. Although the current reincarnation of the *1994 Proposal* seems destined to succeed, there is no guarantee until it actually happens (the CANSEC Proposal, the *1979 Proposals* and the original *1994 Proposal* all looked promising at various stages).

[442] B. McKenna & A. Freeman, "Eight Premiers Endorse National Securities Commission" *The Globe and Mail* (22 June 1996) B1; and Toulin, *supra* note 1.

(not British Columbia and Quebec)[443] endorsed the idea of "handing over securities regulation to a commission run by the federal government".[444] The parties expected a formal agreement within a few months, then several more months to draft the legislation.[445] The new CSC and legislation would follow the *1994 Proposal*.[446]

B. Issues and Problems Facing a National System

This paper has already touched on several of the issues and problems which have hampered the development of a national system; this section explores these in more detail, along with some potential solutions (or, at least, potentially palatable compromises). Each proposal has had to address concerns in the following five areas: constitutional jurisdiction; administrative practicality; regional flexibility and innovation; political reality; and financing.

1. Constitutional Jurisdiction

a) division of powers

Although the federal government has left securities regulation to the

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[443] Premier Glen Clark of British Columbia stated that: "British Columbia has a unique capital market. We have our own [stock] exchange and we have no interest in co-operating at this time" (McKenna & Freeman, *ibid.* at B4). Premier Lucien Bouchard of Quebec stated that the CSC was going ahead despite opposition by the Quebec financial community, political parties and people, and that this "tells a lot about the openness of the federal government towards Quebec's specific needs in terms of the economy and financial markets" (Toulin, *ibid.*). He also predicted chaos and destructive competition. Regionalism and politics are further discussed in Parts VI.B.3. and VI.B.4., below, respectively.

[444] McKenna & Freeman, *ibid.* at B1.

[445] *Ibid.*

[446] *Supra* note 441.

provinces,[447] it could arguably take partial or entire jurisdiction over the securities field. It could take jurisdiction pursuant to: its constitutional trade and commerce power:[448] its authority over matters of POGG;[449] or its concurrent jurisdiction with the provinces.[450]

There are advantages to a national system;[451] however, constitutional problems would arise. First, some provinces would probably challenge the federal government's claim to constitutional authority. Although the federal government could likely justify its authority based on the trade and commerce power (at least for interprovincial and international aspects), it may have difficulty convincing a court that it should regulate intraprovincial aspects, under either trade and commerce or POGG.[452] Regardless of the outcome, I believe that any such court challenge would bring the entire Canadian securities regulatory system into disrepute and disarray. A constitutional challenge by the provinces[453] would take several years and incalculable resources. In my opinion, this jurisdictional uncertainty would harm the Canadian capital markets.

Second, if the federal government were to succeed in taking over some, but not all, aspects of securities regulation, the system could easily become more bureaucratic,

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[447] See Part III.A.1., above; for exceptions, see Part III.C., above.

[448] See Part III.A.1.b., above.

[449] *Ibid.*

[450] *Ibid.* *E.g.*, in "Canada Needs", *supra* note 437, Jordan proposes the federal government take over securities regulation in stages, beginning with international aspects. However, I do not believe this would be a feasible approach. As she notes, it is increasingly difficult to distinguish between international and domestic matters. Further, this proposal would increase duplication and bureaucracy, as each level of government would need expert securities regulatory staff. See Part VII.D.1.d.ii, below, for another staging proposal.

[451] See Part VII.B.1., below (and see Part VII.B.2., below, for disadvantages).

[452] See Part III.A.1., above.

[453] Or, in reverse, an pre-emptive reference by the federal government - asking the court for a ruling as to the constitutionality of its proposed actions.

complex and fragmented than it is today,[454] driving away issuers and investors.

b) administrative delegation

This is the method proposed under CANSEC and the *1994 Proposal*, under which a single administrative agency would be created, with each participating government then delegating its authority over securities regulation to that agency. In the securities field, it is easier for the federal government to establish the agency (the CSC), as several provinces would be participating.[455] Neither level of government can simply delegate its legislative power over securities to the other level; the SCC has declared this "inter-delegation" invalid.[456]

P.E.I. Potato and *Coughlin* approved this type of administrative delegation for other regulatory matters.[457] This approach could be used in the securities field.[458] One important aspect of *Coughlin* is its finding that Parliament may incorporate by reference provincial legislation as it may exist from time to time. There, the appellants argued that Parliament had invalidly delegated its legislative power over interprovincial trucking to provincial legislatures. The SCC disagreed. It upheld the operation of a joint trucking board, by finding that the federal government adopted rather than delegated:

> ...the respondent Board derives no power from the Legislature of Ontario to regulate or deal with the inter-provincial carriage of goods. Its wide powers in that regard are conferred upon it by Parliament. Parliament has seen fit to enact

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[454] See Part VII.B.2.a., below.

[455] It would make no sense for each province to try to pass legislation creating a single administrative agency.

[456] *Attorney General of Nova Scotia v. Attorney General of Canada*, [1951] *S.C.R.* 31, [1950] 4 *D.L.R.* 369. The rationale is that neither level of government has the right to change the allocation of powers set out in the *Constitution Act, 1867*.

[457] *Supra*, note 390 and accompanying text. See discussion in Hogg, *supra* note 87 at 356-58.

[458] *E.g.*, Langford & Johnston, *supra* note 389; and *1994 Proposal*, *supra* note 409.

> that in the exercise of those powers the Board shall proceed in the same manner as that prescribed from time to time by the Legislature for its dealings with intra-provincial carriage. Parliament can at any time terminate the powers of the Board in regard to inter-provincial carriage or alter the manner in which those powers are to be exercised....there is here no delegation of law-making power, but rather the adoption by Parliament, in the exercise of its exclusive power, of the legislation of another body as it may from time to time exist, a course which has been held constitutionally valid by this Court...[459]

Therefore, the federal government can adopt by reference provincial securities legislation, as it exists from time to time. By logical extension, provincial governments can adopt by reference federal securities legislation, as it exists from time to time.

That latter course is proposed in s.6 of the *1994 Proposal*. As with the establishment of the agency to which all administrative powers will be delegated, the provinces should adopt the federal legislation.[460]

Two recent cases help illustrate how such a scheme would function. In *R. v. Furtney*,[461] the constitutionality and effectiveness of *C.C.C.* lottery provisions were challenged. Section 207(1)(b) allowed charitable or religious organizations to operate lotteries within a province, if the Lieutenant Governor in Council of a province, or its designee granted a licence to that organization; s.207(2) allowed the Lieutenant Governor in Council or its designee to set terms and conditions for such a licence. The SCC held:

> Thus Parliament may delegate legislative authority to bodies other than provincial legislatures, it may incorporate provincial legislation by reference and it may limit the reach of its legislation by a condition, namely the existence of provincial legislation.[462]

In the securities context, therefore, *Furtney* could be used to justify the federal

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[459] *Couglin, supra* note 390 at 575.

[460] Instead of the federal government adopting legislation from several different provinces. However, the federal government could adopt regional additions to the federal legislation - see Part VII.D.1.b., below. Amendments would be much easier if one set of federal legislation were amended (with the provinces automatically incorporating those amendments by reference), than if the legislation of each participating province had to be amended simultaneously.

[461] [1991] 3 *S.C.R.* 89, 129 *N.R.* 241 [hereinafter *Furtney* cited to *S.C.R.*].

[462] *Ibid.* at 104-05.

government delegating authority to a joint federal-provincial agency; incorporating provincial legislation into its own securities act;[463] and limiting its own securities legislation by provincial legislation.[464]

The second case is *B.C. (Milk Board) v. Grisnich*.[465] The Milk Board was constituted by the British Columbia government, with delegated authority from both that government and the federal government. The appellants challenged a judgment ordering them to pay amounts levied by the Milk Board, arguing that the Board's order had not specified on its face whether, in making its order, it relied on its delegated power from the federal government or from the provincial government.

The minority of three gave broader reasons for judgment than the majority of four, but all concurred in the result. The majority held that if an administrative order were challenged, the body would be required to identify and support its jurisdictional basis. "However, this is quite another matter from requiring that every administrative order contain, *a priori*, such a specification."[466] Further, "...when there are multiple sources of power, it is irrelevant which power a board exercises once it is determined that the board had the power from one source or another".[467]

The minority preferred to address the issue from inter-delegation grounds:

> There is no precedent for holding that an administrative body must consciously identify the source of power it is relying on, in order for the exercise of that power to be valid....Courts are primarily concerned with whether a statutory power exists, not with whether the delegate knew how to locate it...Indeed it is well accepted that a delegate can be wrong in identifying its own jurisdiction.[468]
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> Administrative bodies such as the appellant are not in the business of identifying jurisdiction; their function is to regulate a specific, technical industry. Their

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[463] *E.g.*, it could incorporate various provincial provisions regarding regional matters; effectively, there would still be a single piece of legislation - see Part VII.D.1.b., below.

[464] Again, *e.g.*, in the area of regional matters.

[465] [1995] 2 *S.C.R.* 895, 126 *D.L.R.* (4th) 191 [hereinafter *Grisnich* cited to *S.C.R.*].

[466] *Ibid.* at 900.

[467] *Ibid.*

[468] *Ibid.* at 905-06.

members are specifically chosen because they possess expertise in this area, not because they are familiar with jurisdictional issues.[469]

The very point of an administrative inter-delegation scheme...is to ensure that a provincial marketing board is possessed of the totality of regulatory power over one agricultural product. *The very reason such joint federal-provincial schemes are necessary is because no one level of government is constitutionally empowered to regulate all aspects of intraprovincial and extraprovincial trade*....the administrative inter-delegation scheme is a means of allowing Parliament to delegate administrative powers to a body created by the provincial legislature in a manner that avoids the rule against legislative inter-delegation...To require an administrative agency overseeing and implementing a national marketing scheme to "choose" between its federal and provincial authority would defeat the very *raison d'etre* of the scheme.[470]

If we are going to tolerate joint delegation arrangements - permissible as a matter of constitutional law and desirable, in my view, as a matter of practice - then we must accept that the details of these arrangements will be implemented by marketing boards empowered from multiple sources....any potential loss in accountability that results in this situation is more than made up for by the benefits and practicalities of the joint delegation arrangement.[471]

This decision is important, as it obviously simplifies the day-to-day functioning of the proposed CSC.

2. Administrative Practicality

Reorganizing an administrative structure, an extremely difficult task at any time, becomes especially difficult when the underlying market structure creeps across the jurisdictional boundaries of different governments or governmental authorities.[472]

Developing a CSC would not be easy. Its feasibility depends largely on its administrative implementation and operation. The concerns discussed below are all very significant, and any of them could derail a national system. For a national system to

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[469] *Ibid.* at 907.

[470] *Ibid.* at 908-09 [my emphasis].

[471] *Ibid.* at 911.

[472] "Crisis Performance", *supra* note 84 at 2789.

succeed, these administrative issues must be anticipated and addressed.[473]

a) transitional difficulties

The tremendous difficulties that would occur during the transition from a provincially-regulated to a federally-regulated system must not be underestimated.

First, a federal system is not likely to be accepted by all provinces, at least initially.[474] Only if the new system integrates the opted-out systems can there be a semi-coherent whole. Second, a new commission would not have the background and experience now built up in each provincial commission. If arrangements are not made to tap the provincial expertise, the transition will be more painful.[475] Third, issuers avoid uncertainty. Therefore, the transition process and time-frame must be clearly set out in advance and adhered to strictly. This will assure foreign and domestic issuers that any interim problems or delays are temporary.[476] Fourth, the investing public has a great interest in a smooth transition, as it will want to feel confident in the quality of regulation throughout the transition period,[477] and it will want to access documents.[478] Fifth, if no definite and structured transitional plan were in place, the transitional costs and time-frame would almost certainly expand, which could cause great and irreversible harm to the Canadian markets. Despite its flaws, Canada's regulatory system does work

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[473] Without this, I do not believe a national system would succeed. See Part VII.B.3., below.

[474] See *supra* note 443. For potential solutions, see Part VI.B.2.e., below.

[475] See Part VI.B.2.c., below.

[476] If issuers know the duration of problems, they will be less likely deliberately to seek alternate markets.

[477] Investors would be inclined to invest elsewhere throughout the transition period, if they felt that prospectuses were being cleared merely for expediency or because they were lost in the transitional shuffle. Obviously, this would hurt Canada's markets and its ability to attract and keep foreign issuers.

[478] Fortunately, SEDAR should ensure investors continuing, and even improved, access to filed documents.

fairly well,[479] and must not lose that reputation.

Therefore, any national securities regulatory proposal needs to be comprehensive and definite, so that it can be as smooth and non-disruptive as possible. The transition process outlined in the *1994 Proposal* is not adequate. It allows a one year transition period, during which the federal and provincial governments are to pass uniform legislation and delegate authority to the CSC. Prior to the transition period, there would be an initial period (currently anticipated to be a few months) to establish a task force, complete federal-provincial negotiations and reach a detailed agreement.

This seems inadequate and impractical. It is impossible to predict the length and severity of a transition period without a detailed agreement or proposal (or even knowing the participants). In addition, both the initial period and transition period are subject to changes, if agreed to by the participants. I do not believe that the markets would accept this level of uncertainty. All of the planning and preparation should be done during the interim period, whose length should be unalterable. Therefore, the transition period itself should be considerably shorter than one year, as the only task will be to finalize and proclaim the implementing legislation. It, also, should have a specific and unalterable length. These measures should minimize uncertainty and disruption.

A transition period should be virtually invisible to investors; if investors are aware of it at all, it should only be in a positive way.[480] Issuers should be aware of the transition period, but also in a positive way. Any delays or difficulties that issuers may encounter should be explicitly acknowledged by the regulators at the start, along with the expected duration and severity of such problems. Issuers will be willing to accept certain temporary inefficiencies, if they are made aware of them in advance.

b) head office and regional offices

Obviously, any national commission needs a head office and regional offices. It

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[479] Well enough that some argue there should be no national securities system of any design - see Parts VII.A.1 and VII.B.2., below.

[480] *E.g.*, improved access to documents; and increased consistency across Canada.

is unthinkable that all administration for a country of such great size and numerous time zones would be in a single location. Therefore, the issues are: the location of the head office; the number and location of the regional offices; and the functions of each.

CANSEC proposed a formal head office in Ottawa (likely merely a figurehead office), a chief executive office in Toronto, and chief regional offices in centres with substantial securities business (then, Montreal and Vancouver). It also envisioned "offices with more limited functions in each of the other provinces as required".[481] The *1979 Proposals* also anticipated regional offices across the country, or at least administrators in regions with a high workload.[482] Under the *1994 Proposal*, the CSC's head office would be in Toronto,[483] with regional offices in British Columbia, Alberta and one of the Atlantic Provinces.[484] Other provinces might get "local representation", if justified by demand and costs.[485]

The *1994 Proposal* also outlines the services to be provided by regional offices, "subject to sufficient demand, expertise and cost effectiveness":[486] registering market participants (unless handled by self-regulatory organizations); handling investor complaints; handling regional enforcement and compliance matters; holding regional hearings; granting routine exemptions from the federal legislation; clearing regionally-oriented prospectuses; providing information on file; providing policy input, especially on regional matters; and any additional services decided upon by the CSC.

Regarding the head office, Toronto is the logical location. Having a nominal

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[481] "CANSEC Proposal", *supra* note 389 at 65.

[482] *1979 Proposals, supra* note 9, vol.2, at 332.

[483] *1994 Proposal, supra* note 409, s.15.

[484] *Ibid.*, s.21. One of the problems with this proposal is that it does not anticipate certain provinces opting out. For example, if British Columbia opted out, would it still have some type of office or representation to link it to the CSC, thus facilitating coordination between the British Columbia Securities Commission and the CSC? Also, no provision is made for a regional office in Manitoba, which has a stock exchange.

[485] *Ibid.*, s.23.

[486] *Ibid.*, s.21 [original emphasis].

head office in Ottawa and an effective head office in Toronto would only increase bureaucracy and decrease efficiency. However, the federal government must be prepared to deal with regional jealousies if the head office is in Toronto.[487] Most provinces, with the possible exception of some Atlantic provinces, would likely insist on their own regional offices.[488]

The *1994 Proposal* is the most definite of the three regarding proposed functions for the regional offices; however, the proposed functions will not meet some provincial demands. The only two references to regional distinctiveness are: clearing prospectuses for regionally-oriented issues; and input into policy matters of interest to the region. I believe that to get provinces such as British Columbia and Alberta[489] to agree, regional offices must have significant powers to address matters of local concern.[490] As the Alberta and British Columbia chairs state:

> We consider it essential that the CSC have strong regional offices that provide a full range of regulatory services to market participants, exercise discretion locally, play a meaningful role in national legislative and policy development and have authority to issue local rules and policies in certain circumstances....The regional offices would all be equivalent in status, although of differing sizes, and would contain all of the line staff.[491]

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[487] The most likely to object is British Columbia, which historically has felt shunned and discriminated against in favour of Toronto. Although British Columbia is currently planning to opt-out of the proposed CSC, it likely would opt-in at some point. I believe its concerns would largely be alleviated if Toronto were a head office in the administrative, rather than the superiority sense (*i.e.*, if Toronto staff at the same level as British Columbia staff were unable to veto a decision from British Columbia).

[488] See Parts VI.B.3. and VI.B.4.a., below, regarding reasons for this likely attitude.

[489] And even Quebec, if the political situation improves to the stage where Quebec considers participating - see Part VI.B.4.b., below.

Alberta endorsed the idea of a national system at the June 1996 first ministers' conference (*supra* note 442). However, any province could withdraw its endorsement at any time if it disagrees with developments.

[490] See Part VI.B.3., below.

[491] *A.S.C. & B.C.S.C. Joint Submission, supra* note 192 at 4.

c) staffing and expertise

The authorities seem to agree that the CSC offices should be staffed, at least initially, with existing provincial staff members. Those people will already be familiar with the regulatory system upon which the federal legislation would be based. Maintaining the same staff members not only will keep the high level of expertise that has developed, but also will reassure investors and issuers that the transition period will be smoother. The *1994 Proposal* plans to use existing provincial staff.[492]

d) language

Quebec's French language requirements have been keeping some domestic and foreign issuers out of the Quebec markets, to the detriment of Quebec investors.[493] Some commentators are concerned that a new national system would require all issues and filings to be in both English and French, which would discourage many issuers, or at least divert them to the exempt markets.

The *1994 Proposal* does not seem to contemplate such a widespread French language requirement - it merely states that services to members of the public will be available in both French and English.[494] However, this *Official Languages Act*[495] mandate may require more bilingual staff in the regional offices.

If Quebec were to opt-in to a CSC (in the distant future), it may want a French language requirement for all documents, even if there were no Quebec distribution. That would be a mistake, as it would dramatically increase costs for issuers. It would, therefore, decrease returns to investors (as issuers would pass on their increased costs to

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[492] *1994 Proposal, supra* note 409, s.34.

[493] See Part III.E.1.c., above.

[494] *1994 Proposal, supra* note 409, s.36.

[495] R.S.C. 1985, c.O-3.

investors) and increase exempt distributions into all of Canada.[496]

e) coordination with opted-out provinces

If not all provinces participate in a proposed national system, there must be a formal coordination mechanism between the CSC and the opted-out provinces. This should not be difficult - for example, the fairly successful NP system could be used as a model. Self-interest will force opting-out provinces to coordinate their regulations with the CSC, or risk being left out of otherwise national offerings.[497] If, for example, British Columbia and Quebec opted-out and refused to cooperate with the rest of the country, issuers could exclude them from public offerings (perhaps using exempt distributions into those provinces).[498]

Premier Bouchard expressed another fear - when stating his intention to keep Quebec out of a CSC, he predicted chaos in both Quebec and British Columbia (the other current hold-out), as market activity would gravitate even more towards Toronto.[499] This is a not a significant concern, as 80-90% of Canadian market activity is already in Ontario.[500]

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[496] If it ever came to this stage, perhaps Quebec could have a language LP, in the same vein as British Columbia and Alberta's desired developing companies' LPs - see Parts VI.B.3. and VII.D.1.b., below.

[497] McKenna & Freeman, *supra* note 442 at B4.

[498] This would be similar to the Quebec situation, where its translation requirements cost it some public offerings (see Part III.E.1.c., above).

Exempt offerings are not as valuable to lay investors. First, lay investors often do not meet the sophistication or wealth requirements, so would not be able to participate. Second, exempt issuers are not subject to the continuous disclosure requirements in a province; therefore, residents of that province would not have the same access to information as investors in the rest of the country. Finally, it is more difficult to resell exempt securities, as the seller must find a buyer which qualifies for an exemption.

[499] McKenna & Freeman, *supra* note 442 at B1. I believe that prospective loss of regional flexibility is a greater danger - see Part VI.B.3., below.

[500] "Crisis Performance", *supra* note 84 at 2791.

The hope seems to be that opted-out provinces would eventually realize the benefits of a new national system and opt-in. If the new CSC functions as it should, I believe opted-out provinces would inevitably join.[501] However, if the CSC is not planned, implemented and administered efficiently and effectively, it will likely fall apart - returning Canada to a fragmented regulatory system.[502] A fledging CSC would benefit from having all provinces involved from the start, but I do not believe that a lack of such unanimity will, in itself, be fatal.

3. Regional Flexibility and Innovations

There is a consensus that political and practical realities require a national system to provide for regional disparity. The controversy arises in discussing whether this is feasible. Some say that regional powers would undermine any potential gains of centralization; therefore, they believe a national system should not proceed.[503] Others believe it is possible to have an efficient national system which allows certain regional autonomy.[504]

Basically, therefore, there must be a balance between national authority and regional autonomy:

> Undue emphasis on uniformity may, for example, stifle innovation, flexibility and responsiveness or result in "lowest common denominator" compromises. Undue local autonomy, on the other hand, invites evasion of stricter laws through forum shopping and may erect barriers (intended or inadvertant [sic]) to interprovincial

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[501] Except, perhaps, Quebec - see Part VI.B.4.b., below.

[502] Continued coordination activities could ease the problems of such a disintegration - see Part VII.C., below.

[503] See, *e.g.*, the *Transactions Costs Report, supra* note 218, Appendices 11 and 12, where several respondents approved the concept of a single national standard, and the complete elimination of provincial regulation. This implies that they do not wish an accommodation to be made for regional interests. Also see Part VII.A.1.f., below.

[504] See Parts VII.B.1.a. and VII.D.1.b., below. I fall into the latter camp. I believe it is possible to accommodate both national and regional concerns. However, a national system should not proceed based merely on an expressed desire for national and regional cooperation; it first must have detailed and practical regional plans.

> trade. It also may serve to fragment markets and isolate them in the international context, thereby imposing costs on capital formation.[505]

This paper has touched upon various ways to preserve regional interests within a new national system. For example, if a new CSC is based on uniform national and provincial legislation, there could be limited exceptions giving provinces discretionary authority for specific industries in specific regions.[506] There could also be exceptions allowing established regional programs to continue.[507] Regional offices would have to be given enough real authority to carry out the regional goals.[508]

4. Political Reality

a) federal-provincial relations

Federal-provincial relations are at a delicate point. Since Confederation, the provinces' constitutional powers have become more important, while the federal government has been found to have the most effective taxing powers.[509] This has forced the two levels to negotiate on many issues, and those negotiations are not always civil.[510] Also, especially in light of the Quebec situation,[511] all of the provinces are

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[505] "Coordinated Regulation", *supra* note 343 at 5375.

[506] *Supra* notes 463-64; and Parts III.E.1.d., above, and VII.D.1.b., below.

[507] *Ibid.*

[508] See Part VI.B.2.b., above.

[509] Areas given to the provinces by the *Constitution Act, 1867* have become increasingly important; *e.g.* property and civil rights in the province (upon which the provinces base their claim to regulate securities - see Part III.A.1., above). Inferior taxing powers, however, leave the provinces many important powers, but relatively little financing.

[510] *E.g.*, Premier Clark's recent outbursts at the June 1996 first ministers' conference, in which he stated that British Columbia will have to adopt a more confrontational attitude towards the federal government - *supra* note 443.

[511] See Part VI.B.4.b., below.

demanding decentralization - *i.e.* that the federal government devolve more powers to the provincial governments. Obviously, the push for a national securities system is in the opposite direction to this trend. Perhaps, as Johnston suggests,[512] the provinces could be offered some of their coveted decentralization in exchange for centralizing securities regulation.

However, most of this discussion may be moot, as the federal government and eight provinces have now agreed to the idea of a national system.[513] Pessimistically, however, any or all of those eight could renege.[514]

b) Quebec

Quebec's current government is the Parti Quebecois, whose stated goal is to separate Quebec from the rest of Canada.[515] This is important in the securities regulatory context, because such a government would never agree to relinquish or delegate any of its power to a national system. It is, of course, possible that another political party may agree to a national system in the future. However, that does not look feasible at this time, as any future provincial government will likely still want to placate the hard-line separatist element.

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[512] *Supra* note 407 and accompanying text.

[513] *Supra* note 442 and accompanying text. However, we do not know the deals, promises or trade-offs which achieved this sudden surge of cooperation. This paper has already cited Jordan's fear of forming a national system through "political, closed-door government-to-government negotiations" - *supra* note 437.

[514] *E.g.*, Johnston ("Letter to J. Manley", *supra* note 407) relates that Quebec (represented by Jacques Parizeau and Claude Morin) actually supported the CANSEC Proposal in the late 1960s, and would have accepted a national securities system. However, CANSEC was vetoed by the federal government, ironically because it was worried about setting a precedent for diluting federal powers in other areas. If Quebec could monumentally shift from acceptance to unconditional rejection, others also could.

[515] Even a rudimentary discussion of the Quebec separation question is beyond the scope of this paper. What is relevant here is that this complex and pervasive issue colours most aspects of the Canadian political scene.

c) investor protection versus insolvency

Waitzer, for one, fears that a federally-run securities regulatory system might succumb to pressure from financial institutions[516] with two results. First, financial institutions would continue to be regulated separately from the securities markets, despite the institutions' increasingly significant participation in the securities field. Second, the financial institutions' insolvency-based regulatory system (federally-run) would be transplanted into the securities markets' investor protection-based regulatory system (provincially-run). That is, that the emphasis would shift away from investor protection and the current disclosure model.

The *1994 Proposal* does not clarify the first matter, causing the IDA to set as a precondition for its support that: "The CSC has clear regulatory authority over securities activities of banks and other Federal financial institutions...".[517] The second matter appears settled, at least if the *1994 Proposal* is followed, as it emphasizes investor protection and plans to adopt basically the same securities system as used in the major securities provinces. However, should this change during the development of a CSC, it would represent a fundamental and dangerous shift in Canada's regulatory regime.[518]

5. Financing a National System

There are two important issues here. First is the proposed buyout of one or more provincial regulators. Second, and unfortunately related to the first, is the level of fees to be levied by a new CSC.

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[516] *Supra* note 423 at 4412 (and see accompanying text).

[517] IDA Position Paper, *supra* note 223 at 3.

[518] Although there are problems with the current disclosure system and its target audience, I believe that disclosure with statutory and civil liability for misrepresentations and omissions is a very valuable restraint on issuers' actions.

a) proposed buyout

The *1994 Proposal* called for an aggregate payment of up to $150 million to all participating provinces; the latest reported figures are for a payment of $200 million to Ontario alone, with no agreement yet on payments to other provinces.[519]

This scheme evolved because the federal government needs Ontario (as by far the largest securities province) to support the national system concept, but Ontario is loath to lose its current windfall from securities fees. The buyout scheme has been heavily criticized, largely because it will burden a new CSC with a tremendous debt.[520] Corcoran states that Ontario views the OSC as a "lucrative business, a subsidiary ripe for spin-off - at full market value". He feels that the idea of the federal government paying "to take over a regulatory field as if it were a profit-making industry stretches the logical bounds of government to the breaking point."[521] This, of course, is precisely the point. The scheme is entirely political, with no apparent regard for economic or other realities.

Waitzer expressed surprise that the federal government would use a buyout approach, instead of threatening the provinces that the fees they now collect are essentially indirect taxation and, therefore, possibly not within provincial authority.[522]

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[519] *Supra* note 420 and accompanying text.

[520] *Globe and Mail*, "National Unity of National Securities" (25 June 1996) A18 [calls for the compensation proposal to be "watered down"]; P. Hadekel, "Prospect of National Securities Agency Raises Legitimate Fear" *The [Montreal] Gazette* (15 June 1996) [scheme is founded on the "ludicrous premise" that agencies such as the OSC have the right to overcharge]; and "Crusader", *supra* note 378 [federal government should resist the "temptation...to cut a cheque to Ontario and other provinces with cash-cow securities commissions"].

[521] T. Corcoran, "Unlawful Trading in OSC Shares" *The Globe and Mail* (14 June 1996) B2. His typical inflammatory style is helpful in baldly stating one side of this issue.

[522] "Coordinated Regulation", *supra* note 343 at 5381. The buyout approach is not surprising, in light of the fact that the federal government needs provincial support for this venture and would not want to alienate the provinces. In addition, if the provinces were to call that bluff, the matter would be tied up in the court system for years, during which time there would likely be no progress. Of course, the federal government also could have tried to take over securities regulation entirely on a constitutional basis, but

I do not believe the profitable provinces should be compensated for such lost revenues, as they should not have been earning such fantastic sums in the first place. Aside from any constitutional implications charging such obviously high fees either keeps issuers out of Canadian market, forces them to pass the additional costs to investors and consumers to remain globally competitive, or both. The compensation negotiations appear to have stalled, which may terminate the national system proposal.[523]

b) CSC fee level

A new CSC should unquestionably not charge fees which result in a surplus; Canada's securities regulatory system should not be a licence to tax capital markets. It cannot promote efficient capital markets by driving away issuers with exorbitant fees.

The proposed buyout exacerbates the situation. If those payments to various provinces become the CSC's debt, the CSC would have to pay this debt off over many years by charging fees above market value. This would, obviously, have the same dampening effect on market efficiency as the present provincial fee system. One rationale for a national system is to attract and retain domestic and foreign issuers by reducing their costs of dealing with multiple regulators. Much of that improvement would be lost if buyout payments were made a debt of the CSC. If the buyout plan proceeds, it should only be on the condition that the CSC not be responsible for the debt.

In addition, self-financing remains an issue. Alberta and British Columbia are self-funding. They keep the fees they generate for their own purposes, not having to beg or kowtow to another level of government bureaucracy for funding.[524] The CSC

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which time there would likely be no progress. Of course, the federal government also could have tried to take over securities regulation entirely on a constitutional basis, but (as discussed in Part III.A.1., above) that would not be politically expedient (it is also unlikely that the resulting constitutional challenges would be resolved while that federal government was still in power).

[523] P. Brethour, "Securities Watchdog Idea Stalls" *The Globe and Mail* (13 August 1996) B1. See Part VI.B.5.b., below.

[524] *Supra* note 378.

should certainly be self-funded, to retain its autonomy and independence.[525]

C. Could a National Securities System Succeed?

A national securities system in Canada could succeed, but only if properly planned, implemented and administered;[526] otherwise, the current system, with some improvements, would be preferable.[527] Until now, this paper has discussed various features of securities systems, the Canadian securities system, international and domestic pressures for a national system, and specific proposals for a national system. The final section will address the issues which are vital to the proper planning, implementation and administration of a Canadian national securities regulatory system. It will draw on the factors already discussed, attempting to blend them cohesively and comprehensively.

VII. A WORKABLE NATIONAL SYSTEM AND POSSIBLE ALTERNATIVES

As stated in the Introduction, Canada must examine two basic scenarios for the future of its securities regulation.[528] The first option is to increase interprovincial cooperation and coordination; that is, to continue on the path of decentralization. This option will not accomplish enough. The second option is to establish some form of national system; that is, to become more centralized. This is the better theoretical option, although it would likely encounter practical difficulties. There is, however, a third alternative - Canada could plan for and move towards a national system, but ensure

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[525] This may help alleviate concerns about the potential consequences of financial institutions' influence on the federal government's administration of securities regulation (see Part VI.B.4.c., above).

[526] See Part VII.D., below.

[527] See Part VII.A., below.

[528] Maintaining the *status quo* is not a viable option; therefore, this Part discusses tangible changes.

that interprovincial cooperation and coordination also increase.

For the reasons discussed throughout this paper and summarized in this Part, Canada should follow the third option. Canada's domestic and foreign markets must become and remain competitive, but this is not possible under the current completely decentralized system. Therefore, Canada should work towards a national securities regulatory regime and commission. In the meantime, the provinces must continue to increase their cooperation for three reasons.

First, discussions, plans and implementation of a national system will be lengthy, so the provinces should continue their coordination efforts in the meantime. Second, such discussions may ultimately fail (*e.g.*, due to political or compensatory factors); therefore, increased coordination is a valuable contingency plan. Third, Quebec and British Columbia are currently planning to opt-out of a national system, but will have to be linked with the opted-in provinces. The current CSA and coordination system seems to be the best foundation on which to build such a link.[529]

A. Increased Cooperation and Coordination

1. Advantages

a) change is low risk

The main advantage of foregoing a national system is avoiding the risk of radical change. Even if a national system were unanimously considered to be the best route, it is extremely difficult to change a complicated administrative system.[530] For this reason alone, some argue that reform should only be through increased cooperation and coordination of the existing system.[531] There is no guarantee that a national system

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[529] Although it needs improvements - see, *e.g.*, Part III.D.1., above.

[530] See Part VI.B.2., above..

[531] *E.g.*, "Centralization at first blush appears efficient and cost effective. However, like most things with central governments, it will grow into a 'monster and lawyers

would be properly planned or implemented; that is, without causing even more problems.[532] Therefore, additional coordination may provide some of the benefits of a national system (mainly consistency), without an excessive extra regulatory burden.

b) ease of implementation

Increased coordination would not require interminable studies, multiple new bureaucracies, or a disruptive transition period. Instead, the current CSA system, with improvements to address its deficiencies,[533] would be a logical vehicle to implement and oversee such reforms. The recent *Efficiencies Report*[534] is an excellent starting point, and other needed reforms would be uncovered once the reform process started.

c) constitutional simplicity

Retaining the current system would avoid potential constitutional battles over which level of government has jurisdiction for which types of securities transactions.[535]

d) no need for a national system

Some commentators[536] feel that the current system is not "broken"; therefore, does not need to be fixed. However, even they acknowledge that increased cooperation

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haven'" (*Transactions Costs Report, supra* note 218, Appendix 10, at 12). Also see *supra* note 443 and accompanying text for arguments from British Columbia and Quebec.

[532] *E.g.*, the S.E.C.-regulated and state-regulated American system is often cited as proof that a national system can be extremely bureaucratic and complex (*ibid.*, Appendix 9, at 17).

[533] See Part III.D.1., above.

[534] *Supra* note 158; and Part V.B., above.

[535] See Parts III.A.1. and VI.B.1.a., above.

[536] See *e.g.*, the *Transaction Costs Report, supra* note 218, Appendices.

among the provinces would make securities transactions less expensive and more efficient. For example, standardizing the ITR, MCR and hold period requirements[537] would decrease costs and increase efficiency, as issuers and their lawyers would spend fewer resources tracking twelve sets of requirements.

e) technology facilitates increased coordination

Technological advances[538] facilitate increased coordination among the provinces, so that greater harmony can be achieved now than in the past. SEDAR, for example, will enable all provinces to accept a single electronic filing, yet still have immediate access to all the filed materials. Advanced communiciations technology will allow regulators to communicate efficiently among themselves, regarding potential difficulties with applications, filings, registrations, hearings, enforcement, etc. This should all greatly reduce inefficiencies and duplications.[539]

f) balancing efficiency and flexibility

Some contend that increased coordination will increase efficiency, whereas a national system would sacrifice the independent and flexible nature of the current securities systems.[540] Two preconditions must be met before this reasoning will favour

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[537] See Part III.E.3., above.

[538] See Part III.B.7., above.

[539] Of course, communication will only reduce duplication if the regulators so desire. That is, if each regulator is intent on preserving its own jurisdiction and autonomy, it will not cooperate effectively with the others. The technological benefits discussed in this section assume that regulators want to decrease duplication, even at the cost of some power. Perhaps this assumption is too idealistic.

[540] *E.g.*, "[A national system] would be more ponderous, embodying the worst of current provincial regulations"; "A national system will only add another level of bureaucratic hurdles to the securities system. Our current system is efficient and very responsive. Please leave it alone!"; "Generally, the consequence of central regulation in Canada is that the system is inefficient and as does not produce good results [sic].

increased coordination over a national system. First, autonomy and flexibility must be desirable in their own right. This seems fairly well accepted.[541] Second, independence and flexibility must be better protected by increased coordination than by a national system. I believe this is also true.[542] Therefore, on the basis of independence and flexibility, increased coordination is preferable to a national system.

g) equal access to information

Increased coordination would help investors in different provinces to access substantially the same information at approximately the same time.[543] However, increasing use of media (including the Internet) and the advent of SEDAR are making this less of an issue in any event, as investors will have much faster and better access to the same (or even more)[544] information than would be available through mandatory disclosure and its historical channels.[545]

Instead, with multiple securities commissions, there is certain concurrence among the commissions which produces better efficiency" (*Transactions Costs Report, supra* note 218, Appendix 9, at 13, 18; Appendix 10, at 8).

[541] See Part VI.B.3., above.

[542] As discussed in Part VI.B.3., above, loss of flexibility is a major potential disadvantage of a national securities system.

[543] *E.g.*, ITRs and MCRs are currently required at different times in various provinces - see Parts III.E.3.b. and III.E.3.c., above.

[544] *E.g.*, press releases of material changes (which contain basically the same information as MCRs) must be released immediately - see Part III.E.3.c., above. Therefore, investors who monitor the media are likely to discover such information quickly. Also, more information will likely be available on the Internet than is required by mandatory disclosure, as it has virtually unlimited sources and unlimited linkages.

[545] This again questions the need for extensive mandatory disclosure in the entire Canadian securities system - see Part II.B.1.a., above. Until now, institutional investors have been relying, at least partially, on sources other than mandatory disclosure. Lay investors generally rely on their investment advisors or on information from friends, acquaintances or the media. Therefore, few investors seem to use the mandatorily disclosed information. As Internet use increases, even more information will be available about issuers, industries and the markets in general. Also, issuers' mandatory and

2. Disadvantages

a) not the best solution

Increased coordination alone would not solve the inconsistency problems among the provinces. For example, there would still be different definitions in the various securities acts.[546] For such differences to disappear, there would have to be a concerted effort at unification, rather than mere coordination, mutual recognition, or harmonization. Of course, some may not mind having several different definitions in a plethora of acts. In my opinion, the current system is not wrong and valueless, but it could and should function more smoothly and efficiently - while there is arguably nothing inherently wrong with having twelve jurisdictions,[547] there is no real need for it either.

This is especially problematic as the increasingly internationalized environment pressures domestic systems to be efficient and effective.[548] In other words, I believe that Canada could manage adequately by increasing the current cooperative efforts among the provinces, if only the domestic markets had to be considered. However, pressures from international markets make it imperative that Canada quickly improve the quality and efficiency of its securities regulation - increased coordination and cooperation will not be enough.

b) not optimally efficient

Increased coordination or mutual recognition among the provinces would not

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voluntary disclosures will be available on SEDAR, which should make public access easier, faster and more efficient.

[546] *Supra* note 8 and accompanying text.

[547] Although my personal view is that there should not be twelve separate jurisdicitons.

[548] See Part IV.B., above.

likely be as efficient as a national system.[549] Therefore, wasted time and effort would continue, and investment capital would not necessarily find its optimal destination. For example, under the current system, provincial administrations often perform identical functions.[550] While increased coordination could eliminate some of this duplication, there would still always be some overlap and some regional protectionism. A single national system could eliminate much of this duplication.[551]

c) no national voice in international fora

Increased coordination and cooperation would not give Canada a single national voice in international fora. The continuing political power struggles among the provinces make it difficult to imagine unanimous agreement on a single provincial representative.

d) legislation will still be "scattered"

Under an improved version of the current system, there would still be twelve different sets of legislation (acts, regulations, LPs). In addition, there would still be laws in the *C.C.C.* and the *C.B.C.A.*[552] Therefore, securities legislation would continue to be scattered, which would maintain the high monitoring and compliance costs discussed earlier.[553] This could be avoided if the increased coordination actually became

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[549] Depending, of course, on how the national system would be implemented. A cumbersome, heavily bureaucratic, additional level of regulation on top of the current system would be less efficient than increased coordination.

[550] *E.g.*, each province has been independently assessing broker/dealer registration.

[551] Unless, of course, the regional interests are protected to such a degree that the national system becomes merely another bureaucratic layer superimposed on the current system.

[552] See Part III.C., above.

[553] See Parts V.B.1., V.C.1. and V.C.2, above.

unification, although I believe that is unlikely.[554] Also, a national system could maintain harmonized or unified legislation; a provincial system could not.[555]

e) coordination has not yet succeeded

Despite the CSA's efforts, numerous reports and studies, and pressures both domestically and internationally, the provincially-regulated securities system is still not effectively and efficiently coordinated. If considerable effort were invested, many problems could be alleviated or eliminated within the current regulatory framework. The limited success to date could indicate a lack of either openness to change, willingness to compromise, or recognition of the serious difficulties facing the regulatory system. Any of these obstacles would be hard to overcome without wholesale change.

For example, nine of the provinces have agreed to an expedited review process, but Quebec (largely for political reasons) has not officially ratified the agreement.[556] This lack of agreement is not a practical barrier, as Quebec has never held up a national issue.[557] However, this non-united front does not impress domestic or foreign issuers, which can never be completely certain that Quebec will not hold up their issue.

LPs[558] also illustrate the lack of success in coordination. The content and format of LPs varies widely among the provinces. While some of the variations in

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[554] Unification (identical legislation in each jurisdiction - see Part IV.D.3., above) would be virtually impossible without some form of national system to initiate it and keep it from diverging in the future. Even a national administration would not have a completely unified system, as it should maintain some regional autonomy (although it could have a basic uniform act to which regions could make additions or take exemptions - see Part VII.D.1.b., below).

[555] *Supra* note 57 and accompanying text.

[556] *Supra* note 360 and accompanying text; and McKenna & Freeman, *supra* note 442 at B4.

[557] *Ibid.*

[558] See Part III.B.3., above.

content are due to regional differences,[559] some are minor administrative matters that only complicate compliance for issuers and their counsel. In addition, the format, organization and indexing of LPs varies greatly among the provinces, making it very difficult to locate all the content variations.

As a final example, the CSA has had some success with NPs.[560] However, in order to achieve agreement among all the provinces, these are sometimes couched in "fuzzy" language[561] or not passed at all.[562] In addition, the NPs are not kept current, resulting in even more confusion and wasted time.[563] In my opinion, the existence of NPs proves that the provinces cannot individually legislate the entire securities field.[564]

f) inconsistent application of discretion

As long as securities regulation is administered by a multitude of autonomous and independent regulators, discretion will be inconsistent across Canada. It is difficult enough to maintain consistency in applications, hearings and rulings within a single commission, as regulators with different backgrounds and priorities will handle various cases. It is, however, impossible to have consistency among several independent regulators. No amount of legislative or policy coordination will alter that fact.

g) small provinces unlikely to conform

As mentioned, seven provinces have a "closed system" regime, while another is

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[559] These would likely be preserved under any form of national system.

[560] See Part III.B.3., above.

[561] *E.g.*, NP 40, where the NP requirements are referred to as "guidelines", partially because they exceed the requirements set out in the securities acts.

[562] *E.g.*, proposed NP 53 (FIPS - see Part III.D.2.b., above).

[563] *E.g.*, NP 1 filing fees - *supra* note 197.

[564] *Supra* note 110 and accompanying text.

effectively closed; therefore, four Canadian jurisdictions are not so regulated.[565] Proper increased coordination would require those four jurisdictions to conform to the majority's closed system, as the current inconsistencies undermine the securities regulatory system.[566] I believe that those four jurisdictions would not be interested in changing to a closed system for two reasons. First, securities regulation is not a political priority in those areas, which are more concerned with unemployment, economic growth, and harvesting and protecting natural resources. Second, implementing a closed system would require an elaborate, expensive administrative structure.

h) enforcement difficulties

It is very difficult to investigate, prosecute and enforce across provincial and international boundaries.[567] Increased provincial cooperation would be helpful, but still inadequate. Domestically, provincial investigation is likely more efficient than centralized investigation would be,[568] although there must be constant and effective communication regarding matters which do cross provincial boundaries. One problem with relying solely on interprovincial cooperation is, again, the political power struggles which could prevent one jurisdiction from helping another.

For two reasons, investigation and prosecution of matters which cross international borders cannot be effectively handled by several provincial jurisdictions, regardless of their level of cooperation. First, international matters are increasingly complex and ubiquitous, making them difficult and expensive to investigate and prosecute. Individual provinces are unlikely to have the funding or expertise for such

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[565] See Part III.E.1.a., above.

[566] Because few, if any, distributions would be made solely in those four jurisdictions, the system is not technically undermined. However, the mere existence of avoidance opportunities does undermine Canada's entire system.

[567] See Parts III.E.5. and IV.C.4., above.

[568] According to the *A.S.C. & B.C.S.C. Joint Submission, supra* note 192 at 6, "...the vast majority of commission complaint and enforcement activity relates to matters of purely local significance".

tasks. Second, Canada needs a single international voice and authority when dealing with other states on international enforcement matters. A better-coordinated provincially-based system would still not have such a voice.[569]

Coordinated independent provincial systems cannot enforce sanctions as well as a single national regulator could. Although there is a "trend to consider 'reciprocal' orders where one [provincial] jurisdiction has taken enforcement action",[570] this is inadequate because of its uncertainty. First, it is only a "trend"; it is not an official agreement among the jurisdictions. Second, they only need "consider" such orders; the orders are not mandated or automatically imposed. Third, there will inevitably be a time delay, even if such reciprocal orders are made in other jurisdictions.[571] Fourth, jurisdictions may not prioritize enforcement of reciprocal orders from other jurisdictions, resulting in ineffective and uneven enforcement.

The inconsistent limitation periods and sanctions in the various jurisdictions are another problem.[572] Although these could be coordinated, it would be faster and more efficient to replace them with a single national system.

3. Conclusion

In summary, simplicity and certainty are the main advantages of increased coordination: by building on the current system, it would not be disruptive; and by retaining the form of the current system, there would be no doubt as to its ultimate shape and scope. Its main disadvantage, in my view, is that it just does not go far enough to solve satisfactorily Canada's current and future regulatory problems.

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[569] See Part VII.A.2.c., above.

[570] *A.S.C. & B.C.S.C. Joint Submission, supra* note 192 at 5-6. Also see *supra* note 180 and accompanying text.

[571] Even a short time delay would allow the disciplined party to carry on potentially harmful securities activities in another jurisdiction.

[572] See Part III.E.5., above.

B. National Securities System

The second option is a national system, supported by a CSC. Various approaches include: federal legislation, with sole federal jurisdiction; uniform federal and provincial legislation, with joint delegated jurisdiction; coordinated federal and provincial legislation, with federal and provincial commissions; and coordinated federal and provincial legislation, with joint delegated jurisdiction.[573] This section discusses the advantages and disadvantages of a national system in general.[574]

1. Advantages

a) possibility of optimum efficiency

A national system, if properly planned and implemented, could eliminate most of the inefficiencies in the current system, while preserving its regulatory protections and benefits. A national system would bring consistency to provincial differences in such areas as hold periods, ITRs, MCRs, broker/dealer registration requirements, and enforcement.[575] Also, duplication would be reduced if only one commission were responsible for accepting and reviewing filings.

A single reviewer would give issuers greater certainty in two additional ways. First, issuers would have to deal with only one set of responses and concerns to their filings, instead of several sets of comments (which often address identical matters). Second, issuers would only be subject to the time-line of a single regulator; therefore, they could determine more easily when a review would be completed.

b) consistent use of discretion

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[573] See Part VII.D.2.a., below.

[574] The obverse points to Part VII.A., above, are not necessarily repeated in detail.

[575] See Parts III.E.3., III.E.4. and III.E.5., above.

A national system could achieve greater consistency across Canada than the current provincially-based system. First, the provinces apply their discretion from different starting points, as they have varied legislative requirements. A uniform national system would have identical legislative requirements. Second, each province has its own guidelines and directives for exercising discretion. A national system could have a single set of guidelines (if not neutered by excessive regional autonomy), supported by a single appellate body to ensure consistency among all regulators.[576]

c) single national voice

With a national system, Canada would be represented in international fora by a single voice. This is increasingly important, as international pressures and issues are constantly developing. Canada will benefit from having more input internationally.

d) enforcement

It is very difficult for provincial commissions to investigate, prosecute and enforce across borders. A national system would have jurisdiction in all participating provinces for domestic, international, criminal and civil matters. Although each region should still have its own investigators,[577] a national system would enforce securities regulations much more easily and effectively than a provincially-based system.

e) opportunity to update legislation

By changing its securities system, Canada would have a unique opportunity to revise, update and consolidate its surfeit of legislative instruments. This would automatically eliminate much of the current duplication and disarray; for example:

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[576] *E.g.*, similar to the consistency established by the SCC.

[577] See concerns of the *A.S.C. & B.C.S.C. Joint Submission, supra* note 192; and Part VII.A.2.h., above.

definitions could be standardized across the jurisdictions; similar LPs in each jurisdiction could be made national; NPs developed over the years could be consolidated and coordinated;[578] hold periods could be reevaluated and standardized;[579] and legislation could be altered to reflect technological advances.[580]

In addition, the securities-related provisions in the *C.C.C.* and the *C.B.C.A.* could easily be incorporated into new federal securities legislation. Once again, this would simplify awareness and compliance for issuers and their counsel. Obviously, such revisions would be most practical if there were a single federal securities act, with no provincial acts.[581] It would also be feasible if there were uniform federal and provincial acts.[582] It would be inappropriate if there were a federal act coordinated with the current provincial acts, as it would be impossible and impracticable to amend all of the existing provincial legislation.[583]

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[578] As new NPs are drafted and implemented, others are not usually updated or integrated. Therefore, it may be possible to decrease the number and complexity of NPs, or at least to organize them more logically to facilitate awareness of and compliance with their provisions. *E.g.*, there is currently an inconsistency between the "materiality" requirements in the securities acts and in NP 40 - see Part III.B.4., above. This could be remedied in a new national act or a revised NP.

[579] See Part III.E.3.a., above. National legislation could examine the underlying reasons for the current variations, and could likely find a single appropriate length.

[580] There is great potential for such changes. *E.g.*, provinces are amending their legislation to allow prospectuses to be filed electronically without maps and original signatures (see "Request re SEDAR", *supra* note 132 at 2348). Electronic filing of prospectuses and other documents could be detailed in new legislation.

Filing deadlines could also be rewritten - *e.g.*, modern technology would facilitate faster filing of ITRs, MCRs and financial statements.

[581] This is highly unlikely at the present time - see Part VII.D., below.

[582] This is more likely, but still improbable at the moment - see Part VII.D., below. However, matters relating to criminal law and federally-incorporated companies could be included only in the federal legislation.

[583] This is the most likely scenario at the moment. Although, as stated in Part VII.D., below, some provinces would pass legislation uniform with a new federal act, not all provinces would participate (*e.g.*, British Columbia and Quebec). Under these circumstances, a new federal system would be unwise to incorporate radical changes, as it could then not effectively coordinate with the opted-out provinces. This would result

Finally, a single national set of legislation would be simple to amend in the future. No matter how harmonized, it would be virtually impossible for twelve jurisdictions to agree on changes and to implement them simultaneously.

2. Disadvantages

a) possibility of increased bureaucracy

If not properly planned and implemented, a national system could actually increase the bureaucratic and administrative hurdles facing issuers. Obviously, this would discourage issuers and would hurt Canada's markets and investors. Unfortunately, this could occur very easily.

One problem is the determined regionalism of certain provinces.[584] For example, a province could condition its participation in a national system on preserving its autonomy over certain areas. If enough provinces do this in enough areas, the resulting national system would only be an extra administrative layer with no ultimate authority.[585]

It is vital for a national system to avoid this trap. Therefore, if a national system proposal allows regional flexibility (as it should), there must be safeguards to ensure that

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in a complicated and inefficient system for Canada as a whole - which would discourage issuers and harm Canadian investors and capital markets.

[584] *E.g.*, see *A.S.C. & B.C.S.C. Joint Submission, supra* note 192. Also see Part VI.B.3., above.

[585] *E.g.*, the IDA's conditions for supporting a national system include: no residual involvement by participating provinces (except in limited regional matters); and a commitment to ensure regional and investor protection concerns do not outweigh efficiency concerns ("IDA Position Paper", *supra* note 223). Others have stated: "Given the recent degree of harmonization, the current system is effective. A national system may be more effective subject to the forbearance by provincial securities regulators. We believe that it is questionable as to whether such a system can emerge in Canada"; and "[A national system] would increase costs through the imposition of more bureaucracy and create even more inter-provincial disputes over content of regulations and jurisdictions" (*Transactions Costs Report, supra* note 218, Appendix 10, at 12; and Appendix 9, at 13).

the regional autonomy does not outweigh the national authority. If the participating provinces refuse to cooperate in this, there should not be a national system. It would not only waste of time and effort, but also would generate more problems than it would solve.[586]

b) transitional nightmares

Even if a national securities system eventually functioned well, that would not entirely compensate for the disastrous effects of a poorly planned and executed transitional strategy. Such a transition would cause delays, uncertainty and confusion - possibly driving away issuers in the short-term.[587]

c) U.S.A.-style pitfalls

The U.S.A. has the most complicated and highly regulated securities system in the world. Although the S.E.C. regulates nationally, each state also has a role.[588] The basic 1933 and 1934 U.S.A. legislation has had a plethora of modifications and additions. Canada has the opportunity to develop a system which will have the advantages of the U.S.A.'s (a national system which maintains regional flexibility), without the major disadvantage (excessive complexity due to over-regulation built on an out-dated base).

d) potential constitutional difficulties

A national commission with delegated powers from both the federal and

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[586] Part VII.D.1.b., below, discusses some ideas for maintaining the balance between regional autonomy and national authority.

[587] And perhaps in the long-term as well - *e.g.*, if issuers found a suitable alternative capital market in the short-term. See Part VI.B.2.a., above, for further discussion.

[588] See Part II.B.1.c., above.

participating provincial governments would not pose any constitutional problems.[589] However, the federal government would encounter serious constitutional hurdles if it attempted to take sole control of the securities field, either unilaterally or through negotiation.[590] If planned properly, a national securities system does not have to have constitutional problems.[591]

e) language concerns

Several commentators are concerned that a national securities system would require all filings to be in both English and French, instead of French in Quebec and English in the rest of the provinces.[592] In my opinion, such a requirement would, in itself, be a sufficient reason not to proceed with a national system. Although Quebec residents obviously have a strong interest in French documentation, it is extremely expensive for issuers. Should an issuer choose to make a public offering into Quebec, then it should have to file French documents. However, should an issuer wish to avoid the trouble, expense and delays of translation, it should be able to make that business decision.[593]

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[589] See Part VI.B.1.b., above.

[590] See Parts III.A.1. and VI.B.1., above.

[591] If there were still concerns, each provision of a national securities act could be made severable, so that if a court ruled part was unconstitutional, the rest would still be valid. See Anisman & Hogg, *supra* note 85 at 197-201 [discussing the rationale and method for creating severable provisions in national securities legislation].

[592] See Parts III.E.1.c. and VI.B.2.d., above. Issuers must sometimes file French documents in other provinces, but only when the translations are already required in Quebec.

[593] Issuers will weigh the size and attractiveness of the Quebec market against the difficulties of translation. In many cases, they will still choose to distribute into Quebec. Some, however, especially smaller and less-affluent issuers, will decide not to distribute into Quebec.

As a political matter, it is unlikely that a national securities system would mandate French for all documents. Quebec is planning to opt-out of a national system. The federal and other provincial governments will not be willing to accommodate a province

f) additional fees

The *1994 Proposal* would result in excessive fees, in order to recover the initial start-up debt of the CSC.[594] Such fees would be a tax on Canada's capital markets - fining some issuers and discouraging others. Investors and consumers would ultimately bear the increased costs and the decreased investment choices.

There are no circumstances which justify regulatory fees above a self-sustaining amount.[595] In itself, such a fee structure should not derail a national system, but it is definitely a factor in choosing between that and increased interprovincial coordination.

3. Conclusion

In my opinion, therefore, the main advantage of a national system is the great potential for increased efficiency and consistency, accompanied by decreased duplication and cost. However, as a vital *caveat*, a badly planned and implemented national system would have the opposite effect, with harmful consequences for Canadian markets and investors.[596]

The main disadvantages of a national system stem from the dangers of centralizing control over diverse markets and regions. Unless this centralization is balanced by regional interests, the current flexibility and responsiveness could be lost. However, it will be a delicate challenge to achieve an appropriate balance between regional autonomy and national authority.

C. Increased Coordination and a National System

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which refuses to participate in the new system.

[594] See Part VI.B.5., above.

[595] Of course, this does not mean that regulators will have inadequate funds; they should still charge fees enabling them to perform their functions effectively.

[596] It would be far better to abandon the idea than to allow this to happen.

This approach combines the first two options - the ultimate goal is a national system, but increased interprovincial coordination would be a valuable tool before, during and after implementation of a national system.[597]

1. Advantages

a) co-dependent relationship

Working simultaneously on interprovincial coordination and a national system would benefit the development, implementation and functioning of the latter. I believe this approach would result in a more effective national system.

b) risk of national system failure

If the proposed national system fails to materialize (an outcome for which there is ample historical precedent), there must be an operational backup plan. Although increased coordination is not the best option, it is far preferable to the continuing duplications and inconsistencies of the status quo.

2. Disadvantages

a) risk of losing focus

One risk of pursuing two related but different paths is losing focus, so that one or both suffer. If focus on increased coordination were lost, the resulting national system could have a less stable and unified base. If focus on a national system were lost,

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[597] Before a national system is implemented, increased coordination would increase efficiencies and decrease duplication. A better coordinated system would facilitate the transitional implementation of a national system. Finally, if one or more provinces opted-out of a national system, improved coordination will be an important liaising tool between the new national system and the opted-out provinces.

provinces could pursue increased coordination from an even more self-interested viewpoint. Either route would sacrifice the ultimate end for the means.

3. Conclusion

It is essential that one approach not be pursued to the exclusion of the other. In a combination approach, most of the advantages and disadvantages discussed for increased coordination[598] and a national system[599] will apply. If both are pursued in a cohesive and rational manner, the benefits of each can be maximized, while the drawbacks of each can be minimized.[600] The major problem with this approach would be implementational rather than consequential - problems will arise if improperly implemented, but benefits will result if successfully executed.

D. Proposed Structure and Implementation for a National System

In my opinion, the best approach to securities reform in Canada is a national system, pursued simultaneously with increased interprovincial coordination. This section discusses my proposals for the general structure and implementation of this combined approach. A detailed discussion of specific provisions is beyond the scope of this paper.

1. Structure

a) uniform versus coordinated legislation

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[598] See Part VII.A., above.

[599] See Part VII.B., above.

[600] If, *e.g.*, a national system proves to be too problematic, it would be fairly easy to shelve the national system, and focus solely on the increased coordination option. Conversely, if coordination proceeds well, the national system timetable could be accelerated.

The *1994 Proposal* anticipates uniform federal and provincial legislation,[601] administered by a single board (the CSC) with powers delegated from each government. If politically possible, uniform legislation is the best approach for most provisions.

The provinces (except British Columbia and Quebec) appear willing to embrace uniform legislation. If, however, this changes, a national system could still proceed with coordinated federal and provincial legislation. A national system should not be derailed merely because if it is too difficult to develop uniform legislation immediately. If coordinated legislation were used, each participating province would have to agree to recognize the others' provisions as substantially equivalent to its own.[602] However, the participants should still strive for uniform legislation once the national system is underway.[603]

b) regional flexibility

Complete uniformity would, however, destroy regional flexibility, responsiveness and innovation - all of which are lauded features of the current system.[604] I believe that a national system must preserve these characteristics, to assure the viability and versatility of various Canadian capital markets and companies. Therefore, the "uniform" legislation should not be completely uniform.

I propose a compromise based on the U.S.A. state system (but less complex)[605]

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[601] Obviously, only participating provinces would have such uniform legislation.

[602] *I.e.*, mutual recognition - see Part IV.D.5., above.

[603] I believe that Canada's relatively small capital markets and population cannot justifiably support a system which has several different legislative formats. Therefore, uniformity should still be the ultimate goal of a national system.

[604] See Part VI.B.3., above.

[605] See Part II.B.1.c., above. In the U.S.A., the S.E.C. sets national standards, but states may impose additional standards and hurdles, largely in discretionary matters.

and the EU Directives system.[606] Under my proposal, the national legislation would cover standard situations. However, provinces such as British Columbia and Alberta, which are especially concerned with promoting junior companies, could establish LPs allowing certain exemptions for such companies.[607] As another example, Quebec could pass a LP requiring French language documents for distributions and continuous disclosure into Quebec. Regions with shared concerns should have joint LPs instead of individual ones. All of the LPs would ideally be adopted by the national legislation, so there would effectively be only a single piece of legislation, containing both national and regional provisions. This would facilitate administration, knowledge and compliance.[608]

These regional deviations must be negotiated between the CSC and the concerned province, to prevent the complexities and legislative nightmares of the U.S.A.'s state system. The regional autonomy should be also coordinated among the provinces as much as possible. Finally, the CSC should have a master list of these regional deviations, so that issuers can easily determine the existence and content of regional requirements.

c) fee structure

A regulatory system should not operate for a profit, as any revenue in excess of regulatory expenses is a tax on capital markets, which discourages issuers and is

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[606] *Supra* note 48 and accompanying text. The EU passes Directives setting out certain minimum standards. Each member must implement these minimums, but may include other requirements. Members can choose the means of implementation, as long as they achieve the Directives' ends. If Canada were unable to develop uniform legislation in the short-term (see Part VII.D.1.a., above), it could consider using this approach to increase coordination in the interim.

[607] Details of such LPs are beyond the scope of this paper.

[608] *Supra* note 463 and accompanying text. Until there is uniform legislation, regional flexibility will be preserved automatically - each province would retain its own legislation, reflecting and emphasizing regional goals (even if coordinated with the others).

ultimately passed on to investors.[609] SEDAR will greatly simplify fee collection, as fees will be electronically paid to one destination, then distributed to each jurisdiction (instead of being physically delivered to each jurisdiction).

However, even under SEDAR, issuers will still have to pay separate fees to each jurisdiction. A national system would further simplify this, as only one set of fees would be required. The CSC would collect fees for the various documents and registrations, then finance the head office and regional offices from those funds. As the regulatory system should be more efficient than currently, the total fees paid should be lower.[610]

d) contents of federal legislation

i) uniform legislation

If uniform legislation is used, the participating provinces would adopt the federal legislation. A single act would obviously cover all areas now under provincial jurisdiction, and should also include the securities matters currently in the *C.C.C.* and the *C.B.C.A.* The *1979 Draft Act* could be the model for such a structure.[611]

ii) coordinated legislation

If, however, the provinces keep their own legislation,[612] the scope of the federal legislation will have to be carefully determined. It should still include the current *C.C.C.* and *C.B.C.A.* matters, to minimize the legislative sources.

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[609] See Part VI.B.5., above.

[610] Alternatively, the fees may remain the same, but the CSC could have more staff to, *e.g.*, review documents, draft legislative updates, maintain efficiencies, and investigate allegations.

[611] See Part VI.A.3., above, describing the sixteen parts of the *1979 Draft Act*.

[612] Either as a short-term transitional measure or as part of the long-term regulatory structure.

In this scenario, a national system should be implemented in stages. That is, the federal government should take over one or more regulatory areas to start, then gradually add to its jurisdiction over time. The issue, therefore, is when and over what the federal government could and should take jurisdiction. Once again, interprovincial coordination would be vital in the areas which remained with the provinces.[613]

A logical starting place is broker/dealer registration. This should be coordinated across the country, as market actors increasingly operate nationally and internationally. Perhaps the federal government, in conjunction with the IDA,[614] could develop standard registration qualifications and labels. Potential registrants would still have to meet regionally-specific criteria (*e.g.*, the residency requirement), but their backgrounds and qualifications would be reviewed only by the CSC.

Prospectus review (except for matters of regional concern)[615] and continuous disclosure should also be covered in the first stage of federal legislation. The requirement to qualify a prospectus separately in each province of distribution is a major disincentive to issuers. This is exacerbated by having to meet continuous disclosure requirements in those provinces. Current variations in continuous disclosure requirements make compliance confusing and expensive; this would be greatly improved if filing were in a single standard format to a single administrative body.

To the greatest degree possible, the federal legislation should impose uniform definitions among the provinces. Thus, even if implementation or review details still varied, at least market participants would have some certainty as to the scope of the regulatory system.

Exemptions would likely not be part of the first stage of federal legislation. Initially, therefore, regional flexibility and innovations would automatically be preserved. Thought could then be given to the best method of protecting those interests once

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[613] Both to reduce inefficiencies in the system and to ease the future transition of those areas to uniform legislation.

[614] See Part III.E.4., above, regarding the IDA's increasing involvement in registration.

[615] See Parts VI.B.3. and VII.D.1.b., above.

exemptions were incorporated into the federal legislation.[616]

Finally, enforcement (investigation, prosecution and sanctions) should continue at the provincial level initially, with coordination and supervision by the CSC. Although it would be useful to deal with enforcement in national uniform legislation, other outlined areas should have priority in the first stage.

e) head and regional offices

There have been various proposals for dividing the workload among different regions.[617] The most logical approach is to have a head office in Toronto, the site of 80 to 90% of Canada's securities business.[618] This office would also handle general administration, legislative changes and policy reforms.

Regional offices would administer local matters, such as review of documents for companies based in that region, as well as investigations and enforcement in the region - all under the legislation and guidelines of the CSC. In addition, regional offices would administer the LPs (developed in conjunction with the CSC) promoting regional concerns.[619] Not all provinces will demand regional offices,[620] and some which currently have commissions may not be able to justify having a regional office.[621]

I believe there should be regional offices in: Alberta; British Columbia (should it eventually participate in the CSC); Manitoba (for itself and for Saskatchewan, which does not have an exchange); Quebec (should it eventually participate in the CSC); and Nova Scotia.

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[616] *E.g.*, see Part VII.D.1.b., above.

[617] See Part VI.B.2.b., above.

[618] "Crisis Performance", *supra* note 84 at 2791.

[619] See Part VII.D.1.b., above.

[620] *E.g.*, New Brunswick, Prince Edward Island, the Northwest Territories and the Yukon Territory are unlikely to want the trouble and expense of a regional office.

[621] *E.g.*, Saskatchewan.

As much as possible, the head and regional offices should be staffed by current provincial commission staff, in order to maximize consistency, continuity and expertise.

f) appellate review

Final appeals from each would be to a single board, for consistency in interpretation of legislation and exercise of discretion. National legislation (or improved provincial legislation) should include definite parameters for appellate review (*i.e.*, a privative clause) to ensure curial deference to the CSC's expertise.[622]

2. Implementation

a) type of commission

There are four basic alternatives for a national securities system commission: first, a single federal commission operating under comprehensive federal legislation (no provincial legislation or commissions); second, coordinated federal and provincial legislation, with separate federal and provincial commissions; third, coordinated federal and provincial legislation with power jointly delegated to a single commission; and fourth, uniform federal and provincial legislation with power jointly delegated to a single commission.

For the constitutional reasons discussed,[623] the first option is not feasible. The second option is not practical, as it would create more duplication and inefficiency instead of less. Therefore, the best commission for constitutional and practical reasons is a single commission with jurisdiction delegated to it from the federal government and all participating provinces.[624] Choosing between the third and fourth options depends on

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[622] See Part III.B.6., above.

[623] See Parts III.A.1. and VI.B.1., above.

[624] See Part VI.B.1.b., above, regarding the constitutional consequences and the practical benefits of delegated authority.

whether the federal government and participating provinces can agree on uniform legislation.[625]

b) transitional period

To avoid disastrous consequences, the transitional period must be carefully planned and executed.[626] Issuers and investors react poorly to uncertainty; however, transitional uncertainty can only be minimized, not prevented.

The transition will be easier if, as proposed, interprovincial cooperation is used to increase coordination between now and the start of the transition period. For example, if hold periods, ITRs and MCRs were standardized now among the participating provinces, those changes will not be transitional issues. The integration between the new national system and the opted-out provinces would also be easier if such increased coordination were among all provinces, not merely the participating ones.

It would be easy to underestimate the necessary length for the transition period and, therefore, to have it continue for longer than the investment community expected. I believe that this would be a serious error. Any transition period will create uncertainty for its entire duration. Thoroughly preparing the investment community is one way to minimize the destabilizing effects of this uncertainty. Therefore, the federal and provincial governments should set a realistic and achievable transitional time-frame,[627] clearly disclose that time-frame to the investment community, and ensure that time-frame is met. All possible planning and preparation should be done before the transition period, to minimize its length and disruptiveness. Issuers and investors who know with certainty what disruptions to expect over what time period will be less likely to abandon

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[625] See Part VII.D.1.a., above.

[626] See Part VI.B.2.a., above.

[627] This paper does not suggest a specific length for the transition period, as that would be affected by unsettled details.

Canada's capital markets in the short term.[628] Without such certainty, I believe that some issuers and investors will abandon the Canadian capital markets in the short term, and may not bother to return in the long term.

c) opted-out provinces

Because of the current political situation, a national system proposal must assume that one or more provinces will opt-out of the national system. This creates various difficulties, as alluded to throughout this paper. For example, there must be a liaison between the new CSC and the commissions of the opted-out provinces. Attempting to "punish" these provinces would be short-sighted and detrimental to Canada's capital markets as a whole. Therefore, every effort must be made to communicate and coordinate with the opted-out provinces.

Once implemented, SEDAR will presumably continue to apply in the opted-out provinces, thus simplifying document filing and fee payments. Increasing interprovincial cooperation will benefit relations among the CSC and the opted-out provinces.[629]

VIII. CONCLUSION

International and domestic pressures are forcing Canada to make changes to its current securities regulatory system. National system proposals have been made at intervals for many years, but there is still discussion over if, when and how such a system should proceed.

Although a national system supported by all ten provinces and two territories is theoretically ideal, political realities will not allow this to happen in the near future. At this point, the best feasible option is a national system and a national commission (the CSC). The federal government and those provinces which choose to participate would

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[628] Of course, the cost of capital may increase if the transition causes temporary inefficiencies and costs.

[629] See Parts VI.B.2.e. and VII.C., above.

have uniform legislation - eventually, if not immediately.

Additionally, increased interprovincial coordination must continue, for three reasons. First, it will facilitate a national system by decreasing the outstanding variations among the provinces - making negotiations on the content of the uniform legislation less complex and contentious. Second, it will improve coordination between the new CSC and any province which opts-out. Third, if the national system has to be aborted, increased coordination throughout the process will have strengthened the provincially-based system.

Two important *caveats* relate to the transition period and the CSC's fee structure. The transition period must be carefully planned and implemented, to avoid more disruption than absolutely necessary. The CSC should not be saddled from the outset with a large debt (from buying out the future income streams of current provincial commissions). Such a debt would force the CSC to charge fees greater than expenditures, which would be a tax on Canada's capital markets. Issuers would judge the CSC harshly, without waiting to see if the new system functioned well otherwise.

Although I believe that a national system is desirable and feasible, I do not think it should proceed if it is to be held hostage to political agenda. The federal and provincial governments must plan and implement a national system with common sense and without damaging compromises. If they cannot do that, the national system proposal should, once again, be shelved.

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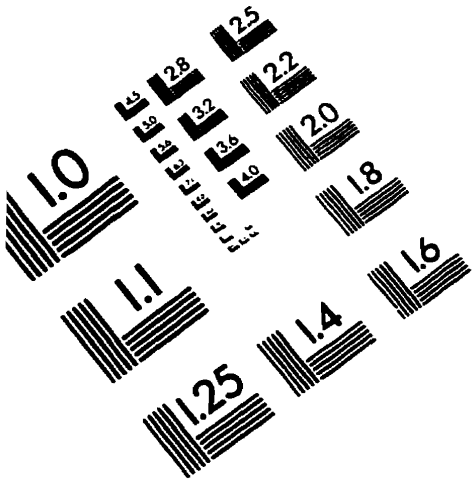

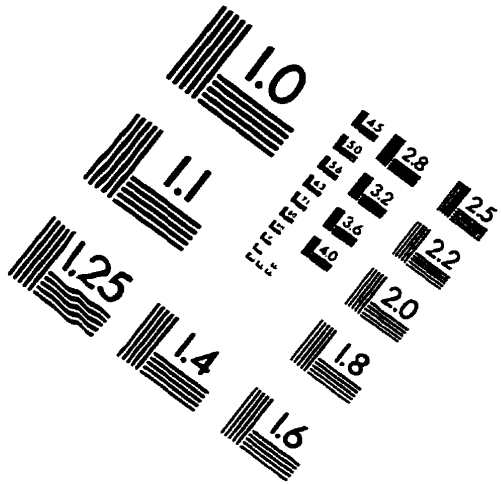

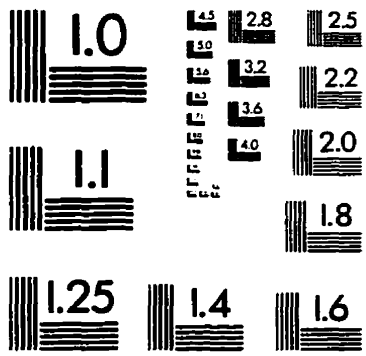

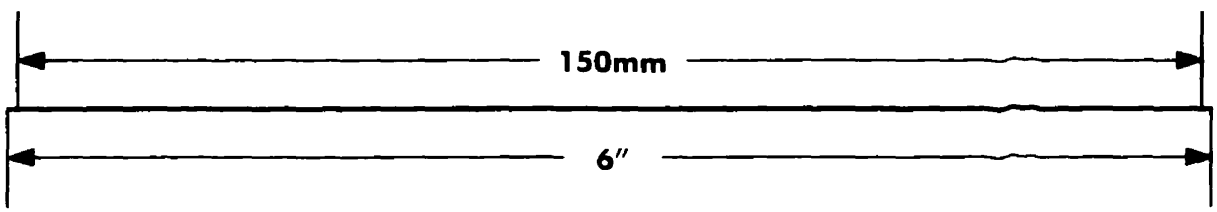

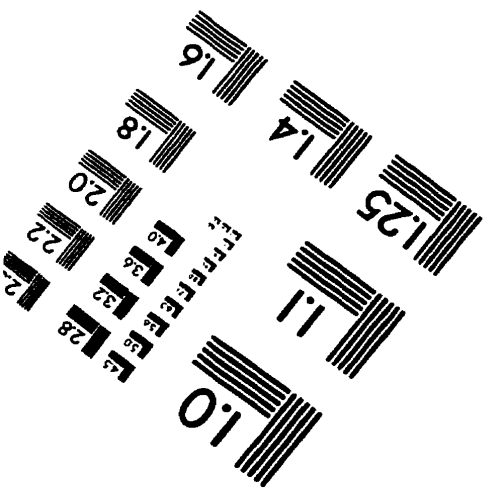

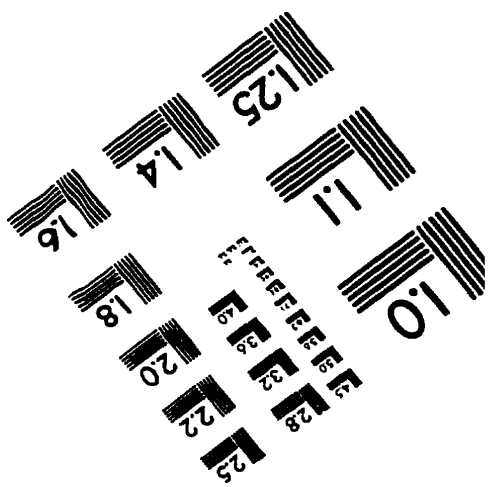

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