BLUEPRINT FOR A CANADIAN SECURITIES COMMISSION

FINAL PAPER

CRAWFORD PANEL
ON A SINGLE CANADIAN
SECURITIES REGULATOR

June 7 2006

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A Canadian Securities Commission

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The Panel and Its Mandate

This paper is the work of the Crawford Panel on a Single Canadian Securities Regulator (the "Panel"), charged with recommending a model for a common securities regulator for Canada. The Panel's terms of reference are to recommend a securities regulatory framework that features a common securities regulator, a common body of securities law and a single fee structure.

In May 2005, the Hon. Gerry Phillips, Ontario's Minister of Government Services, who is also responsible for securities regulation in the province, asked Purdy Crawford to chair the Panel. Panel members are drawn from all regions of Canada and a diversity of relevant backgrounds. The Panel members, whose biographies are included below, are:

Purdy Crawford	Counsel, Osler, Hoskin & Harcourt LLP (Panel Chair)
Brian A. Canfield	Chair, TELUS Corporation
Claude Lamoureux	President and Chief Executive Officer, Ontario Teachers' Pension Plan
John A. MacNaughton	Corporate Director and former President and Chief Executive Officer, Canada Pension Plan Investment Board
L. Jacques Ménard	Chairman, BMO Nesbitt Burns and President, BMO Financial Group, Québec
Gwyn Morgan	Vice-Chairman and Director, EnCana Corporation
Dawn Russell	Associate Professor and former Dean, Dalhousie Law School

The Panel acknowledges the contribution of John Watson, Executive Advisor, EnCana Corporation; Janet Salter and Lori Stein, lawyers at Osler, Hoskin and Harcourt LLP, who managed this project and who were primarily responsible for researching and writing this paper; and Alexandra Raphael, a lawyer with the Ontario Ministry of Finance, who provided legislative guidance on the December discussion paper.

The Panel published a discussion paper, *A Blueprint for a New Model*, on December 8, 2005. Since then, the Panel has held consultations with capital market participants at a series of regional roundtables in Vancouver, Calgary, Winnipeg, Toronto, Montreal and Halifax. In addition, Panel members presented the discussion paper to the provincial ministers responsible for securities regulation and have met with the chairs of most securities regulatory authorities across the country, various federal and provincial public servants and members of the private sector. Finally, interested parties have had the opportunity to provide input through a questionnaire on the Panel's website at www.crawfordpanel.ca.

The Panel is grateful to the numerous capital markets participants, ministers and regulators who gave so generously of their time, knowledge and insights.

Notwithstanding the fact that Minister Phillips appointed this Panel, the recommendations in this paper are solely those of the Panel and are not made on behalf of the Province of Ontario.

Executive Summary

During the six months since we issued our discussion paper proposing a blueprint for a new model for a single Canadian securities regulator, Panel members have consulted widely with capital market participants as well as federal and provincial ministers and officials, securities regulators and other informed parties.

Five messages have come through loud and clear.

First, those who rely on regulated capital markets to make investment and business decisions believe that market efficiencies and Canada's economic competitiveness will be enhanced by a single Canadian securities regulator and a single act (the "Canadian Securities Act" or the "Act").

Second, provinces that have invested in regulatory innovation and responsiveness are rightfully proud of the expertise, specialized knowledge and professionalism they have created. These strengths must be preserved within the new regulator (the "Canadian Securities Commission" or "CSC").

Third, small and medium-sized enterprises require special regulatory attention to reduce compliance costs and help them access capital as efficiently as possible. The needs of these enterprises are the same throughout Canada and deserve a consistent national response.

Fourth, our blueprint is a practical structural solution that transcends the weaknesses inherent in a multi-jurisdictional system. Consolidating responsibility for securities regulation in a single organization will bolster Canada's reputation as a fair, open and accountable marketplace in which to invest with confidence and integrity.

Fifth, to provide Canadian capital markets with a competitive advantage globally without hampering investor protection and fundamental fairness, it is desirable to have as much principles-based regulation as is feasible, to replace bureaucratic legalese with plain language and to make the system more user friendly.

The Challenge

Canadian capital markets are in many respects among the best regulated in the world. Market participants are heartened by the progress of the provinces and territories through the Canadian Securities Administrators in developing greater regulatory consistency. Many applaud the passport system introduced by the provincial and territorial governments other than Ontario (the "Passport System") as a needed evolution and encourage Ontario to participate. Nevertheless, there is still room to build even better regulation of our capital markets. Market participants see continuing weaknesses in a system with 13 separate provincial and territorial jurisdictions. Regulatory fragmentation erodes confidence. Canada is the only major country in the world without a single securities regulator. As well, there is profound concern about ineffective enforcement of securities regulation – a domestic and international embarrassment for Canada.

It is well understood that a single securities regulator will only succeed if it is built on existing provincial strengths and if it safeguards against domination by one jurisdiction. The fear

expressed repeatedly across the country is domination by the Ontario Securities Commission ("OSC") or the federal government. Strong feelings surfaced that the proposed Canadian Securities Commission should not emerge as a re-branded OSC.

Our blueprint proposes that the provinces and territories develop a national framework that pools regulatory responsibilities and resources, respects the constitutional authority and oversight of each jurisdiction and ensures that no jurisdiction or government dominates the regulator's operations or policy agenda. Furthermore, we recommend inclusion of the federal government as a participant so as to augment the powers of the Canadian Securities Commission. Federal government participation will strengthen the ability of the CSC to regulate across the country, facilitating a seamless enforcement structure as well as comprehensive regulation of all inter-provincial matters. A federal presence will also strengthen the CSC's position internationally as Canada's capital markets regulator. The potential role of the federal government attracted considerable comment and support, especially with regard to enforcement.

Our consultations attracted little discussion on costs or cost savings to be achieved at the regulatory level by moving to one regulator. It is generally understood that the revenue needs of smaller jurisdictions need to be addressed, and that cost-efficiencies should be an organizational priority. However, market participants consider building confidence in Canada's regulatory system under a single organization to be a more important goal than the synergistic administrative savings anticipated from a single securities regulator.

There are many issues that participating jurisdictions need to resolve in moving to a Canadian Securities Commission. Market participants told us that after 40 years of discussion and study, Canada's political leaders must find a way to agree that a single regulator will improve the efficiency and cohesion of our capital markets for the benefit of all Canadians and to move forward in achieving that goal.

Our Vision

In an era of accelerating globalization, Canada needs to grasp every opportunity to improve its economic competitiveness. The regulation of capital markets on a province-by-province basis is out of step with world trends. Companies raise funds where they are most readily available and least expensive. Investors place risk capital anywhere in the world where they believe markets are reliable and fair – the more reliable and the fairer, the more likely they are to invest there. Issuers and investors think nationally, internationally and globally in large part thanks to advances in technology that make it easy to conduct business, file and share information, and move capital quickly to best advantage. In this fast-paced global environment, Canada's relatively tiny capital market (approximately 3 per cent of the world market) must compete for attention in bringing capital-seeking companies together with investors so that they can transact business efficiently at the lowest possible cost.

At the same time, entrepreneurship and innovation, especially by small and medium-sized enterprises, are a cornerstone of the history and ongoing development of Canadian business. Our securities regulatory system must be able to support these businesses by assisting them to raise capital for growth and development without imposing a disproportionate regulatory burden.

Removing inter-provincial constraints on securities regulation will help to facilitate market efficiencies and capital formation by making it easier for business owners and investors to make decisions that ultimately promote economic growth and jobs.

Our blueprint builds in checks and balances on two critical levels. One is political oversight of the Canadian Securities Commission by a Council of Ministers. The other is arm's length governance by competent fiduciaries on the Board of Directors of the Canadian Securities Commission. These checks and balances will prevent domination by any jurisdiction. Our model incorporates considerable transparency and lines of accountability to governments, the public and the investment community.

We envisage a self-funded agency that brings together regulators working in the provinces and empowers them to apply their high standards of professionalism, best business practices and innovative capabilities. We envision the establishment of local and regional offices that will respond to local priorities within a national framework.

Our vision promotes the availability of innovative financial products and services across Canada, ending the current practice of some dealers and marketplaces that only register in the larger provinces where most of their potential clients reside.

We envision a Canadian Securities Commission that preserves the best of provincial expertise and specialized knowledge, administers a single Canadian Securities Act, treats all issuers and investors with consistent fairness, respects jurisdictional constitutional rights and welcomes the world to participate in our economic opportunities. In summary, we envision a regulator that:

- positions Canada as the best place in the world to invest and raise money for both small and large businesses. To this end, to provide Canadian capital markets with a competitive advantage globally, it is desirable to have as much principles-based regulation as is feasible, to replace bureaucratic legalese with plain language and to make the system more user friendly

- demonstrates leadership through innovative and cost effective responses to the needs of capital market participants, and

- enforces the rights of investors on a consistent, tough and fair basis throughout Canada.

A Relevant Governance Precedent

Constructing an acceptable governance framework for a single securities regulator should not be a lengthy, costly or complex process.

The Canada Pension Plan Investment Board is an example of federal/provincial ingenuity in creating a solution to a challenge shared by multiple jurisdictions. While its mission and day-to-day activities are distinctly different from the proposed Canadian Securities Commission, its governance model is a proven solution to surmounting potential political obstacles. Developed in the late 1990s, the governance and operational model for the Canada Pension Plan Investment Board has been in place now for eight years. It delivers:

- ministerial oversight and legislative control
- a board of independent and qualified directors to provide governance oversight
- a process for nominating directors that is controlled by the participating jurisdictions
- professional day-to-day management
- political accountability, and
- public transparency.

Our vision adapts the best of this governance model to the regulation of capital markets through a Canadian Securities Commission. The framework we propose will protect and advance the political rights and responsibilities of the provinces and territories and augment the powers of the CSC through the involvement of the federal government.

The Proposed Model

The proposed model has five components. They protect the constitutional and political interests of each province; ensure integrity in selecting qualified individuals to provide knowledgeable governance oversight of the securities regulator; provide a career path for professionals committed to securities regulation and enforcement; and aggressively protect the rights of investors wherever they reside. Furthermore, we believe the proposed model incorporates safeguards that ensure no jurisdiction would be able to dominate or control the Canadian Securities Commission:

1. A **Council of Ministers** with political accountability to the Canadian public in their respective jurisdictions. Under our proposed model, each participating jurisdiction would be treated as an equal with each minister having one vote in the selection of the Board of Directors, the adjudicators for the Canadian Securities Tribunal and the adoption of Rules made by the Canadian Securities Commission.

2. An arm's length **Nominating Committee** appointed by participating jurisdictions and charged with finding, screening and recommending qualified candidates to serve on the Board of Directors and the Canadian Securities Tribunal. This mechanism has worked well for the Canada Pension Plan Investment Board in ensuring that directors have the requisite expertise to provide informed oversight with due regard to regional representation. The ministers will elect Board members only from the list submitted by the Nominating Committee and would not substitute their own nominees.

3. A **Board of Directors** comprised of individuals with investment and regulatory expertise as well as governance experience, having due regard for the interests of relevant stakeholders and regional diversity. The directors will be appointed by, and be accountable to, the Council of Ministers. The nominating process defuses the risk of any jurisdiction politically dominating the Board. With a non-executive Chair, the Board will provide governance oversight of management in regulating capital markets throughout Canada. The directors will act in the best interests of issuers, investors, market

intermediaries and the public. Consequently, directors would not represent the interests of a specific government or region.

4. An **Executive Management Team** led by a chief executive officer (the Chief Commissioner) appointed by and reporting to the Board of Directors. Senior managers (vice-commissioners) will for the most part be recruited by the Chief Commissioner from existing provincial regulators and will lead a cohesive team of regulatory professionals who can respond effectively to local, regional, national and international priorities. While no recommendation is made on the location of the head office, it is anticipated that regional offices will be established as "centers of excellence" for specific policy areas, such as small businesses, each led by a vice-commissioner. A vice-commissioner would also be responsible for enforcement.

5. A **Canadian Securities Tribunal** with panels of adjudicators recommended by the Nominating Committee and appointed by the Council of Ministers. Led by a Chief Adjudicator, the tribunal will operate separately from the Canadian Securities Commission with its own offices, administrative staff and budget. The panels of adjudicators will conduct hearings throughout Canada. The tribunal's rules of procedure would be approved by the Council of Ministers, based on the best practices of existing provincial agencies.

   Under this model, the lines of accountability are clear:

   - Management is accountable to an independent Board, comprised of experienced and knowledgeable directors
   - The Board is accountable to the Council of Ministers, where all jurisdictions sit as equals, and
   - The Council is accountable to the respective governments and legislatures of participating jurisdictions.

Public transparency will be a common thread throughout with full and timely communications obligations assigned to Management, the Board and the Council of Ministers.

A Single Canadian Securities Act

Markets regulated consistently from a single platform of rules and policies encourage capital to be invested where it can drive economic expansion, entrepreneurial innovation and productivity gains. Uniform regulation fosters responsible corporate behaviour and investment practices by removing uncertainties about how rules and practices may be interpreted in different domestic jurisdictions at different times under different political regimes.

A single regulatory framework will assure foreign investors that Canada is an attractive place in which to place risk capital.

And average Canadians, who directly and indirectly are the largest shareholders of Canada's publicly traded companies, primarily through mutual and pension funds, can gain

comfort from knowing that their rights – indeed, their financial wealth and future retirement incomes – are being protected consistently throughout the country.

To achieve uniform regulation, it is proposed that all participating jurisdictions would adopt by reference legislation enacted by one province as the Canadian Securities Act.

It is proposed that this Canadian Securities Act set out the powers, responsibilities and duties of the Canadian Securities Commission, Council of Ministers, Board of Directors, Nominating Committee and Canadian Securities Tribunal along with basic principles of securities law. Rulemaking and the ability to grant exemptions would be delegated to the Canadian Securities Commission.

Rules proposed by CSC staff will be presented to the Board of Directors for preliminary approval and then published for public comment. Final Rules, including changes arising from public consultation, will be formally approved by the Board. The Board will then notify the Council of Ministers of its decisions and Rules will become effective on a date determined by the Board unless a majority of the Council of Ministers vetoes the proposed Rule within 45 days of it being referred to the Council.

A Single Fee Structure

The Canadian Securities Commission will be self-financing. A single securities regulator should result in less administrative expense than the aggregate costs of the current multi-jurisdictional system. Fees will be set on a cost-recovery basis, with an allowance for a reasonable reserve fund for unexpected expenses.

Benefits of a Single Canadian Securities Regulator

The proposed framework gives considerable shape to how a single securities regulator could be governed in the best and equal interests of all jurisdictions:

- It will build a single Canadian organization with strong lines of accountability from professional regulators to an independent and experienced Board, and from the Board to the Council of Ministers
- It will create consistent securities regulation and enforcement across Canada
- It will consolidate regulatory expertise by economic sectors or size of companies in regional centers of excellence
- It will reduce the compliance frustrations and costs of small and medium-sized firms seeking to expand within and beyond their home province
- It will bring Canada into line with other major nations that have a single securities regulator, overcoming perceptions among would-be investors of a fragmented regulatory system
- It will enhance Canada's attractiveness as a destination for both domestic and foreign capital

- It will promote the availability of innovative financial products and services across Canada

- It will facilitate communications between the capital markets regulator and other Canadian financial services regulators, stock exchanges and self-regulatory organizations

- It will enable Canada to speak with one voice at the International Organization of Securities Commissions and other international forums.

Next Steps

Across the country, market participants have a sense of déjà vu about discussing a single securities regulator. There was genuine praise for our blueprint, with its checks and balances, respect for jurisdictional equality, leverage off the existing expertise at the provincial securities regulatory authorities and commitment to strengthening the competitiveness of Canada's capital markets. Yet there is widespread scepticism about the political will to move the model forward.

Market participants are pleased with the progress being made by the Passport System. They do not see a single securities regulator as a diametrically opposed alternative to the Passport System. Rather, there is solid support for pursuing the blueprint concurrently with the Passport System to give momentum to what is considered a logical evolution.

We believe that the next steps towards establishing the Canadian Securities Commission can be taken expeditiously by those jurisdictions that are prepared to participate or to seriously consider participating in a single securities regulator. Specifically, they should:

- establish a small task force to write the Canadian Securities Act and identify the current national and multilateral instruments which will be adopted as Rules

- establish a Nominating Committee that should immediately begin identifying candidates for the Board of Directors and the positions of non-executive Chair of the Board, Chief Commissioner and Chief Adjudicator, and

- start negotiating a memorandum of understanding (the "MOU"), including reaching agreement about compensation for loss of revenue to some participating jurisdictions and developing a transition protocol.

We recommend that the location of the head office, the location and role of regional offices and the appointment of the Chief Commissioner should be decided by the Board of Directors. As these are matters which must be settled before the CSC becomes operational, it is important that the work of the Nominating Committee and the appointment of the non-executive Chair and of the members of the Board of Directors proceed in a timely manner.

Undertaking the next steps outlined above will give impetus to our blueprint, which has been well received by investors, issuers and market intermediaries, all of whom are looking for political leadership in positioning Canada as a first-order destination for capital investment regulated consistently by a single common regulator.

Panel Member Biographies

Purdy Crawford, *Counsel, Osler, Hoskin & Harcourt LLP*
Mr. Crawford practised corporate and commercial law at Osler, Hoskin & Harcourt LLP, where he became senior partner. He left Osler in 1985 and spent 15 years at Imasco Limited as chief operating officer, chief executive officer, and executive and non-executive chairman. He was also non-executive chair at Canada Trust and has been a director of several large Canadian and U.S. companies. Mr. Crawford rejoined Osler in 2000. He chaired the committee appointed to review securities legislation in Ontario, and chaired the Securities Industry Committee on Analysts Standards.

Brian A. Canfield, *Chair, TELUS Corporation*
Mr. Canfield's long career in telecommunications includes terms as chief executive officer of BC Telecom Inc. and TELUS during its formative period. He has extensive experience as a board member of major corporations, is a member of the Canadian Public Accountability Board and the board of Suncor Energy, and served as a director of The Toronto Stock Exchange.

Claude Lamoureux, *President and Chief Executive Officer, Ontario Teachers' Pension Plan*
Following a career as a financial executive with Metropolitan Life in Canada and the United States, Mr. Lamoureux was named to this position when the Plan was established as an independent corporation in 1990. He has led Teachers' growth into a $96.1 billion (as of December 31, 2005) investment organization and strong corporate governance advocate. Experienced as a corporate director, he co-founded the Canadian Coalition for Good Governance.

John A. MacNaughton, *Corporate Director*
From 1999 to 2005, Mr. MacNaughton was founding President and Chief Executive Officer of the Canada Pension Plan Investment Board, a federal crown corporation responsible for investing Canada Pension Plan assets. Previously he spent 31 years in the investment business with BMO Nesbitt Burns and its predecessor companies. He served as president of Burns Fry and Nesbitt Burns from 1989 to 1999. A corporate director, he chaired the Investment Dealers Association of Canada.

L. Jacques Ménard, *Chairman, BMO Nesbitt Burns and President, BMO Financial Group, Québec*
Mr. Ménard chairs the board of one of Canada's leading investment firms and oversees the activities of the Bank of Montreal and its subsidiaries in Québec. He has extensive experience as a corporate director, including the Canadian Public Accountability Board, and is past chair of Hydro-Québec, the Montreal Exchange, Trans-Canada Options Corporation and the Investment Dealers Association of Canada. He has worked in the securities field for more than 30 years.

Gwyn Morgan, *Vice-Chairman and Director, EnCana Corporation*
Until 2006, Mr. Morgan was President and Chief Executive Officer, EnCana Corporation. Prior to the merger that created EnCana Corporation, Mr. Morgan was President and Chief Executive Officer of Alberta Energy Company Ltd. which he joined in 1975 during the start-up of operations. He has more than 30 years of technical, operational, financial and management experience in oil and gas exploration, production, marketing and pipelines. He is a director of numerous corporations.

Dawn Russell, *Associate Professor, Dalhousie Law School*
Prof. Russell served for nine years as Dean of Dalhousie Law School and has an academic career in business law and international law dating back to 1987, following a career as a practicing lawyer in corporate and securities law with Stewart McKelvey Stirling Scales in Halifax. She chaired the Nova Scotia Law Reform Commission between 1995 and 2002 and serves as a director of several corporations.

Blueprint For A Canadian Securities Commission[1]

Introduction

This Panel was appointed by the Minister responsible for securities regulation in Ontario[2] to propose a model for a common securities regulator for Canada. Even though a provincial minister appointed us and set our mandate, we are not proposing a model on behalf of the Province of Ontario. We are proposing a model that we, as Panel members, believe is the right one for Canada. We come from a variety of backgrounds, including business and academia, and from diverse regions of Canada that have different views regarding the current securities regulatory regime and the best method for improving it.

We are sensitive to the concerns of various Canadian jurisdictions that a single regulator risks being susceptible to domination by one or more large provinces or by the federal government. We are also sensitive to concerns that such a regulator may not respond effectively to local issues, adequately service small and medium-sized issuers or draw upon the regional expertise that has developed at certain provincial and territorial securities regulators. Our roundtable consultations confirmed that Canadian market participants share these concerns. Our model has been designed specifically to address these concerns while at the same time achieving three goals set out in our mandate: a single regulator, a single law and a single fee structure.

1. Our Vision

Despite being regulated at the provincial level, Canada's capital markets have long since ceased to be provincial in nature. Canadian issuers and investors look nationally and internationally for the best opportunities to raise money and invest money. In addition, foreign issuers now look to Canadian markets as a source of capital and foreign investors look to Canada as a place to invest their money. Our regulatory system must therefore foster strong Canadian capital markets that are attractive places for Canadian and foreign issuers to raise money, for Canadian and foreign investors to make money and for registrants to facilitate these activities. The system must make our capital markets the most efficient in the world, providing a competitively low cost of capital, superior market transparency and excellent investor protection.

At the same time, entrepreneurship and innovation are instrumental to the history and ongoing development of Canada and Canadian business. In recognition of the key role that small and medium-sized enterprises ("SMEs") play in the Canadian economy, a fundamental tenet of our securities regulatory system should be to support SMEs by assisting them to raise money for growth and development. To do so, our regulatory system must strive to reduce regulatory

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[1] One commenter on the discussion paper suggested that using the word "Commission" could be confusing as many current securities regulatory authorities that are called "commissions" have a dual mandate of securities regulation and adjudication and that in these cases their "commissioners" have both a policy function and an adjudicative function. As we propose an adjudicative tribunal that is separate and independent from the regulator, the concern was that by retaining the names "Commission" and "commissioners" the distinctiveness and independence of the tribunal could be lost for some readers. We recommend that participating jurisdictions consider this concern when establishing and naming the Canadian Securities Commission.

[2] Minister Gerry Phillips, then Chair of the Management Board of Ontario and now, since June 2005, Minister of Government Services of Ontario.

burden and avoid overly complex legislation, potentially by adopting different levels of regulation for different sized companies where appropriate[3], while at the same time ensuring that investors in issuers of all sizes are adequately protected.

Finally, to foster the capital markets that we envision for Canada, regulatory services must be responsive and flexible. Money travels around the globe instantaneously today and it will flow to the markets that are perceived as the most efficient and safest. At the same time, fraud travels around the globe instantaneously today and it will plant roots in the markets that are perceived to have lax enforcement regimes. Canada's capital markets will be best served in the 21st century by one regulator that can quickly and flexibly provide the safest and most efficient environment possible. Currently Canada's reputation abroad suffers from a perception, which is probably justified, that our enforcement record is weak. We must develop a regulatory system which permits us to develop a global reputation as a safe and efficient environment in which to invest and to conduct business.

In summary, our vision and mandate for a single Canadian securities regulator is as follows:

- To make Canada the best place in the world to invest and raise capital for both small and large businesses. To this end, to provide Canadian capital markets with a competitive advantage globally, it is desirable to have as much principles-based regulation as is feasible, to replace bureaucratic legalese with plain language and to make the system more user friendly

- To demonstrate leadership in securities regulation through innovative and cost effective responses to the needs of capital market participants

- To enforce investor rights on a consistent, tough and fair basis throughout the country.

If this vision is achieved, Canadian businesses will grow, Canadian investors will prosper and the standard of living for all Canadians will improve.

2. Why We Need a Common Canadian Securities Regulator

Currently, Canadian securities regulation is performed by 13 provincial and territorial regulators administering 13 bodies of securities legislation and charging 13 sets of fees. This regime increases the cost of capital for Canadian issuers in comparison to their competitors in other nationally-regulated capital markets. Prospective foreign investors have difficulty understanding why Canada, which represents approximately 3.2 per cent of the world's equity capital market[4] and approximately 1.5 per cent of the world's fixed income capital market,[5]

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[3] It would be appropriate to subject smaller businesses to less stringent regulatory standards in circumstances when the regulatory burden places a demonstrably unfair onus on small businesses relative to larger ones and compliance costs per unit of output confer a competitive advantage on larger firms. Less stringent regulatory standards must not, however, result in less strong investor protection.

[4] This percentage figure is derived from data provided by the World Federation of Exchanges. It takes the aggregate total of the market capitalization of the Toronto Stock Exchange, the TSX Venture Exchange and the Natural Gas Exchange (collectively, the TSX Group) as of the end of 2004 as a percentage of the total market capitalization of the nearly 60 stock exchanges that are members of the World Federation of Exchanges. See the official website of the World Federation of Exchanges at www.world-exchanges.org.

requires 13 securities regulators, while the United States, the United Kingdom and the rest of the G-10 nations, many with significantly larger economies, each has one national capital markets regulator.[6]

Canada's fragmented regulatory regime results in inconsistent and inefficient enforcement of securities laws across the country. While the provincial and territorial regulators seek to conduct joint investigations and proceedings where possible, the jurisdiction of and penalties that may be imposed by each regulator are prescribed in different local statutes.[7] Furthermore, some jurisdictions lack the enforcement budgets necessary to thoroughly investigate all potential breaches of securities laws.

Working through the forum of the Canadian Securities Administrators (the "CSA") in recent years, Canada's 13 securities regulators have improved our fragmented regulatory regime. The CSA has harmonized a significant amount of securities law and streamlined the prospectus filing, application and registration processes for issuers and registrants that seek to do business in multiple Canadian jurisdictions. Most recently, all of the members of the CSA except for the Ontario Securities Commission have introduced the "Principal Regulator System", the first phase of the Passport System that, for some matters, permits capital market participants to gain access to the capital markets in all passport jurisdictions by complying with the laws of, and dealing only with the regulator in, their principal jurisdiction.

Roundtable participants applauded the CSA's initiatives and the introduction of the first phase of the Passport System, the Principal Regulator System. However, they agreed that more needs to be done to place Canadian capital markets regulation on a more competitive footing in the 21st century.[8] Because the Passport System does not reduce the volume of regulation or the number of securities regulators in Canada, slow policy development and other operational inefficiencies are expected to persist under the Passport System. In addition, under the Passport System a participating jurisdiction retains the ability to adopt a local standard if it disagrees with the national or multilateral instrument endorsed by the CSA in respect of a particular policy area. If this occurs, the local standard applies to all issuers and registrants for which the disagreeing jurisdiction acts as principal regulator and the standards in force in other passport jurisdictions do not apply. As a result, the Passport System may permit issuers and registrants with different principal regulators to carry on business in the same jurisdictions and compete directly with each other for capital or clients while being governed by different securities regulatory standards. In addition, the Passport System does not address the challenges and constitutional limitations of inter-jurisdictional enforcement proceedings, nor does it fully address the disparity in securities

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5 Bank of Canada Review (Summer 2004).

6 We recognize that in the United States, the states retain jurisdiction over certain local securities regulatory issues; however, substantially all regulation is performed by the U.S. Securities and Exchange Commission.

7 From time to time regulators in more than one jurisdiction hold joint enforcement proceedings but these proceedings are difficult to coordinate, raise jurisdictional complications and are, therefore, uncommon.

8 Currently the Passport System applies only to specific areas of securities law that were already highly harmonized among the passport jurisdictions, and more progress is needed in those areas of securities law where there has historically been little harmonization. See also Background Paper A – *Various Models of Securities Regulation*, which provides further analysis of the strengths and limitations of Canada's current regulatory structure, the Passport System and other proposed models of securities regulation.

regulatory resources and expertise across the 13 regulators.[9] Finally, the Passport System does not provide Canada with a single voice at international forums such as the International Organization of Securities Commissions or facilitate coordination with other Canadian financial sector regulators, most of which operate nationally.

We believe that by moving to one securities regulator administering one body of securities law and charging one set of fees, the Canadian regulatory structure will move into step with global standards in the 21st century, improving the efficiency, competitiveness and credibility of our capital markets. This Panel was not asked *whether* there should be a common securities regulator for Canada – various exhaustive studies have already concluded that one is necessary.[10] This Panel was asked to suggest an appropriate structure for the common securities regulatory system.

3. Development of Our Model

We began the process of developing our model Canadian securities regulator by considering various regulatory models that have been proposed by Canadian securities law reformers and/or which are in force in other jurisdictions, as set out in Background Paper A – *Various Models of Securities Regulation*. We then reviewed the history of securities law reform proposals in Canada and considered several sets of criteria for evaluating securities regulatory structures that have been developed by Canadian academics, committees and industry groups, as set out in Background Paper B – *Previous Studies and Reform Initiatives*. Finally, we reviewed the structure of the Canada Pension Plan Investment Board, an effective and innovative example of governance cooperation between the federal and provincial levels of government, as discussed in Background Paper C – *Structure of the Canada Pension Plan Investment Board*. Copies of these Background Papers can be found on our website at www.crawfordpanel.ca.

Based on our review of these materials, we developed a vision and model for a Canadian securities regulator. We outlined our model in a discussion paper published on December 8, 2005 entitled *A Blueprint for a New Model*. The discussion paper formed the basis for the Panel to conduct a Canada-wide consultation process with market participants, government officials, securities regulators and members of the private sector between December 2005 and mid-April 2006. The Panel engaged the Public Policy Forum[11] to organize and facilitate regional roundtables in Vancouver, Calgary, Winnipeg, Toronto, Montreal and Halifax, each chaired by a Panel member. The Public Policy Forum's summaries of the roundtables are available on the Panel's website at www.crawfordpanel.ca under "Consultation Process → Summary of Consultations".

Panel members were invited to present the model to the provincial ministers responsible for securities regulation in February 2006; the ministers' views were carefully considered by the

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[9] The Passport System recognizes that only certain jurisdictions have the resources and expertise necessary to be "principal regulators"; however, it does not propose to allocate additional resources to those provinces and territories where additional resources may be required to deal with, for example, enforcement matters.

[10] See Background Paper B – *Previous Studies and Reform Initiatives*.

[11] The Public Policy Forum is an independent, non-profit organization aimed at improving the quality of government in Canada through better dialogue among the public, private and voluntary sectors.

Panel. Panel members have met with various provincial and federal public servants and members of the private sector. Finally, interested parties have had the opportunity to provide input through a questionnaire on the Panel's website.

4. Structure of the Regulator

In order for any model of a common securities regulator to gain broad acceptance in Canada, it is fundamental that the regulator be structured in such a way that it cannot be dominated or controlled by any one participating jurisdiction. In addition, a Canadian securities regulator must provide (i) accountability to all participating jurisdictions, (ii) transparent governance, and (iii) regulatory expertise, efficiency and flexibility in the areas of investor protection and market efficiency.

The cornerstone elements of our model are:

- a Council of Ministers that provides government oversight over securities regulation
- a geographically representative Nominating Committee which recommends to the Council of Ministers candidates for the Board of Directors, non-executive Chair of the Board and adjudicators for the Canadian Securities Tribunal
- a Board of Directors with a non-executive Chair that provides governance oversight of the Canadian Securities Commission
- executive management of the CSC consisting of a Chief Commissioner as chief executive officer and experienced vice-commissioners
- a separate Canadian Securities Tribunal ("CST") that conducts hearings and determines penalties for breach of securities laws, and
- a single corpus of securities laws including a Canadian Securities Act that has been adopted by all jurisdictions participating in the CSC (the "Participating Jurisdictions") and one set of rules and regulations.

Our model offers a meaningful role to all Participating Jurisdictions through the Council of Ministers and through the Nominating Committee's recommendations for the Board, the non-executive Chair and the adjudicators for the Canadian Securities Tribunal. The Council of Ministers will ensure oversight of the regulatory process by elected officials. Ultimate responsibility for securities regulation will remain with the legislative bodies of the Participating Jurisdictions as they will retain control over the enactment of, and amendments to, the Canadian Securities Act. Concurrently, by vesting primary responsibility for governance of the CSC in an independent Board, we have attempted to ensure there is no possible domination by the government of any one Participating Jurisdiction.

At the roundtables, certain participants urged the Panel to take a more definitive view on certain aspects of our blueprint, such as the location of the head office of the CSC, the locations and policy functions of regional offices and an appropriate mechanism for compensating Participating Jurisdictions that currently generate revenue through their securities regulatory regimes. However, these decisions cannot be made until the identities of the initial Participating

Jurisdictions are determined (as described under "The Model – Participants"). Some of these matters should be decided by the initial Participating Jurisdictions and prescribed in a MOU, including the fee compensation structure, the substance of the Canadian Securities Act and the adoption of existing CSA instruments as Rules. This MOU will be subject to change over time as the CSC matures, in accordance with a process set out in the original MOU. The initial Participating Jurisdictions will also appoint the Nominating Committee.

Matters relating to the supervision of management and operations of the CSC ought to be decided by the Board of Directors, including the location of the head office, the location and role of regional offices and the policy functions assigned to each, and the identity and compensation of the Chief Commissioner (as described under "The Model – Structure – Board of Directors").

The Model

1. Participants

In our view, all provincial and territorial governments and the federal government should participate in the CSC in order to provide the most comprehensive and effective securities regulatory system for Canada. Federal government participation will strengthen the ability of the CSC to regulate across the country, facilitating a seamless enforcement structure as well as comprehensive regulation of all inter-provincial matters. A federal presence will also strengthen the CSC's international position as Canada's capital markets regulator.

The involvement of all provinces, territories and the federal government from the outset is obviously ideal – there will then be one single securities regulator for the entire country. However, involvement of all is not necessary for the CSC to be established. What is essential is that there be an initial core group of Participating Jurisdictions that agrees to enact, or to enact through incorporation by reference, common legislation that establishes the CSC and delegates to it authority over capital markets regulation. The remaining jurisdictions, with the approval of the Council of Ministers, may "opt in" to the CSC over time. As a matter of constitutional law, Participating Jurisdictions will retain the ability to "opt out" of the CSC by repealing the Act (see "The Model – Legislation – A Single Act").

Some roundtable participants voiced concern that if all provinces and territories do not participate from the outset, regulatory fragmentation will persist. In our view, any reduction in the number of capital markets regulators in Canada will be an improvement over the status quo. We expect that the Canadian Securities Commission, if established by less than all of the provinces and territories, would participate in the CSA and continue to work on harmonization initiatives with non-participating jurisdictions. Over time, as the CSC establishes a regulatory track record and gains recognition in Canada and abroad, we hope that remaining non-Participating Jurisdictions, if any, will opt in.

Other roundtable participants suggested that the ability of Participating Jurisdictions to "opt out" will make the CSC unstable.[12] Provided that the CSC operates effectively and in accordance with its mandate and governing principles, we do not perceive the ability of

[12] Some commenters have suggested that a model under which participants may opt out any time is inherently unstable. However, in our view, once the CSC is established, Participating Jurisdictions will have a vested interest in cooperating to make it work rather than going back to the fragmented regulatory structure.

Participating Jurisdictions to opt out as a real threat to its stability. A Participating Jurisdiction that is dissatisfied with some aspect of the CSC would be far more likely to seek resolution of the issue at the Council of Ministers than to opt out of the CSC, since that jurisdiction would then have to re-create its provincial regulator.

2. Structure

(i) Establishment, Mandate and Governing Principles

The CSC will be established as a corporation by the Canadian Securities Act, a special-purpose statute (see "The Model – Legislation – A Single Act").[13] The mandate of the CSC will be the traditional twin mandate of securities regulation – to protect investors from unfair, improper or fraudulent practices, and to foster fair and efficient capital markets and confidence in those capital markets. The CSC will be expected to achieve these mandates as efficiently as possible for the Canadian capital markets as a whole.

In pursuing its twin mandate the CSC should be governed by the following vision:

- To make Canada the best place in the world to invest and raise capital for both small and large businesses. To this end, to provide Canadian capital markets with a competitive advantage globally it is desirable to have as much principles-based regulation as is feasible, to replace bureaucratic legalese with plain language and to make the system more user friendly

- To demonstrate leadership in securities regulation through innovative and cost effective responses to the needs of capital markets

- To enforce investor rights on a consistent, tough and fair basis throughout the country.

(ii) Council of Ministers

The Council of Ministers will be comprised of the minister responsible for securities regulation in each Participating Jurisdiction as well as the appropriate federal minister. The Council of Ministers will represent the ultimate stakeholders in the Canadian Securities Commission, namely, the people of the Participating Jurisdictions. The Council of Ministers will be responsible for:

1. electing directors to the Board and, at least initially, appointing the Chair of the Board based on the recommendations of the Nominating Committee (see "The Model – Structure – Board of Directors")

2. overseeing the Canadian Securities Tribunal, including selecting the location of its head office and appointing a Chief Adjudicator and other adjudicators to the CST based on the

[13] In order to ensure that the CSC and its Board, Chief Commissioner, vice-commissioners and other officers and employees, as well as the Canadian Securities Tribunal and its adjudicators and administrative staff, are provided with immunity against lawsuits for carrying out their duties, it is preferable to incorporate the CSC and create the Canadian Securities Tribunal under a special-purpose statute, as opposed to under an existing corporate statute.

recommendations of the Nominating Committee (see "The Model – A Separate Tribunal")

3. approving Rules proposed by the CSC (see "The Model – Legislation – Rulemaking")

4. approving any changes to the MOU whereby the Participating Jurisdictions may agree on various structural matters relating to the CSC including adding or removing Participating Jurisdictions (see "The Model – Participants" and "The Model – Legislation – Amending the Act"), and

5. arranging for special examinations of the CSC from time to time relating to internal controls and financial reporting.

Other than the specific responsibilities of the Council of Ministers enumerated above, the Board of Directors will be responsible for all aspects of the governance and operations of the CSC (see "The Model – Structure – Board of Directors"). Amendments to the Canadian Securities Act will be enacted by the legislative bodies of the Participating Jurisdictions (see "The Model – The Legislation – Amending the Act").

Some roundtable participants expressed a concern that the Council of Ministers could be an unwieldy group, given both its potential size (14 ministers) and the fact that the ministers will change depending upon cabinet changes, including as a result of election outcomes in each Participating Jurisdiction. In addition, it was suggested that the accountability of the CSC to such a large group could be too diffuse: accountability to many might be akin to accountability to none. We considered these issues while developing the CSC model and ultimately concluded that the Council of Ministers was the best way to ensure accountability to the populations of each Participating Jurisdiction through their elected representatives. In recognition of potential operational challenges relating to the Council of Ministers, the Panel has sought to focus the role of the Council of Ministers on matters that warrant the attention of Ministers and to streamline the process for approving Rules. Further, we note that the Canada Pension Plan Investment Board has the same governance structure and has not found it too cumbersome.

In addition, we believe that these concerns would be partially addressed if each Participating Jurisdiction were to permanently vest responsibility for securities regulation in the ministry most directly responsible for finance in that jurisdiction. This would enable a group of public servants in the relevant ministry of each Participating Jurisdiction to develop sufficient expertise on the topic of securities regulation to support the then-minister in cabinet. This group of expert public servants would provide stability and continuity of analysis and policy approach notwithstanding inevitable changes in ministers and, in some cases, in the portfolios for which they are responsible.

(iii) Nominating Committee

Each Participating Jurisdiction will appoint a representative to serve on the Nominating Committee, providing effective regional representation.[14] Members of the Nominating Committee will not receive compensation for their work on the committee but will recommend

[14] When a member of the Nominating Committee resigns, the Participating Jurisdiction which originally appointed the member will appoint his or her replacement to ensure continuing regional representation.

the remuneration for the initial Board of Directors and its Chair. The Nominating Committee will identify, screen, interview and recommend to the Council of Ministers nominees for the Board of Directors and for the Chair of the Board. The Council of Ministers may initially appoint the Chair of the Board. However, over time, we expect the Board to appoint its own Chair. The Nominating Committee will also recommend to the Council of Ministers candidates for adjudicators (including the Chief Adjudicator) of the Canadian Securities Tribunal and the CST Administrator (see "The Model – A Separate Tribunal"). Nominating Committee members should be experienced in the capital markets, whether at the public service or industry level.

The experience, qualifications and reputation of the first Chair of the Board of Directors and the first Chief Commissioner will be crucial to the success of the Canadian Securities Commission. The Nominating Committee must identify and recommend an exemplary first Chair of the CSC and the Board must retain an exemplary first Chief Commissioner. Under the leadership and guidance of these two individuals, the CSC will possess the credibility, experience and reputation needed to set it on the path towards becoming the best regulator for the Canadian capital markets in the 21st century.

(iv) Board of Directors

The Board of Directors will be appointed by, and will be responsible to, the Council of Ministers. The Nominating Committee will recommend Board nominees to the Council of Ministers, taking into consideration:

- the national and/or international experience in the public and/or private sector, in the capital markets or in the securities and/or financial services sectors of the proposed nominees
- the skill sets required on the Board at the time of the election[15]
- the integrity, reliability and reputation of the proposed nominees, and
- geographic representation.

We expect the Board to be comprised of ten to fifteen directors from across Canada.[16] Because the experience and integrity of prospective Board nominees, as well as the skill sets needed on the Board at the time of the election, are of equal or greater importance to the effectiveness of the Board than a director's home province or territory, we reject the notion that the Board must include one director from each Participating Jurisdiction. The Nominating Committee should seek out the most qualified nominees available from across Canada with a view to maintaining geographic diversity.

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[15] The Board should include directors who represent the matrix of experience and backgrounds desired on corporate boards (i.e., financial, human resources, operations, communications) with members who have expertise in various regulatory areas for which the CSC will be responsible (i.e., equity markets, fixed income markets, institutional investors, compliance, SMEs, investment funds, specific industry sectors, investor rights).

[16] We feel this many directors are needed, regardless of the number of Participating Jurisdictions at any time, to ensure the requisite mix of experiences needed to oversee a complicated entity such as the CSC and to ensure there are sufficient directors to properly populate the committees of the Board that we contemplate.

The Council of Ministers will elect directors only from the list submitted by the Nominating Committee and will not substitute candidates. This approach will ensure the integrity of the process, insulate it from partisanship and prevent any one Participating Jurisdiction from exercising undue influence. Each director will be elected for a three-year term, or until his or her successor is elected, except that the terms of some initial directors will be four or five years to create a staggered Board. Each director may serve a maximum of three terms although a director may become the non-executive Chair at any time during these terms or subsequently thereto without being bound by this restriction.[17]

The Chair of the Board will be a non-executive Chair. At the outset, and before the selection of the initial Board of Directors, the Chair will be appointed by the Council of Ministers based upon the recommendation of the Nominating Committee. For the CSC to achieve success, it is essential for the initial Chair to be and to be perceived by the Participating Jurisdictions and their constituents as being a strong and independent leader of the utmost integrity.

The Board will be responsible for supervising (but not managing) the operations of the CSC. The Board will be responsible for all aspects of the governance of the CSC, other than those items that have been reserved for the Council of Ministers (see "the Model – Structure – Council of Ministers"). The responsibilities of the Board will include, without limitation:

1. appointing the Chief Commissioner, reviewing his or her performance, compensation and terms of employment and terminating the Chief Commissioner, if appropriate

2. determining the location of the head office and the locations of the regional offices

3. reviewing and approving recommendations from the Chief Commissioner or otherwise regarding the appointment of vice-commissioners, their regional office locations and the policy functions of the regional offices

4. appointing from among its members various committees of directors, including an audit committee,[18] a governance committee, a compensation and human resources committee and a regulatory committee

5. setting, on an ongoing basis, the remuneration for the non-executive Chair, the Board of Directors, and the members of the various Board committees

6. approving draft Rules before they are published for comment (see "The Model – Legislation – Rulemaking")

7. approving the annual Statement of Priorities and budget of the CSC and submitting it to the Council of Ministers

8. appointing the auditor to conduct the annual audit of the CSC

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[17] The non-executive Chair will be subject to reasonable term limits which will be set out in the Act.

[18] The audit committee should include one director with financial expertise and all members should be financially literate.

9. approving the annual report of the CSC, submitting it to the Council of Ministers and releasing it to the public within 90 days of the CSC's year end

10. reporting annually to the Council of Ministers concerning the exercise of its responsibilities, and

11. ensuring that management of the CSC has appropriate policies, procedures and systems for managing and reporting on its responsibilities and activities.

The Chief Commissioner and the Chair of the Board will make themselves available to address the legislature or standing or special committee of the legislature of any Participating Jurisdiction, if required.

(v) Executive Management

The Chief Commissioner will be the chief executive officer of the CSC. The Chief Commissioner will be appointed by, and will be directly accountable to, the Board. The Chief Commissioner will also be a member of the Board, but will not be permitted to act as the Chair of the Board. Other than the Chief Commissioner, all members of the Board will be independent of management. As noted under "The Model – Structure – Nominating Committee", the experience, qualifications and reputation of the first Chief Commissioner will be crucial to the success of the CSC.

The Chief Commissioner will have all the authorities and responsibilities normally assigned to a chief executive officer, including without limitation:

1. recommending to the Board the appointment of vice-commissioners as members of the executive team. Each vice-commissioner will be responsible for one or more policy areas, including one vice-commissioner specifically responsible for enforcement, and each regional office will be headed by a vice-commissioner

2. structuring the CSC and allocating its resources, including designating the policy functions of regional offices, subject to approval by the Board

3. in consultation with the Board and where appropriate, rotating vice-commissioners among regional offices to ensure that they gain experience in different policy areas with a view to succession planning

4. recommending amendments to the Canadian Securities Act and changes to regulatory policies and rules

5. presenting the annual Statement of Priorities and budget of the CSC to the Board for approval

6. presenting the annual report of the CSC to the Board for approval

7. reporting to the Board at least quarterly on the operating performance and financial position of the CSC, and

8. ensuring that Canada is properly represented at international forums on securities regulation.

The appropriate number of vice-commissioners will depend on which jurisdictions participate in the CSC. If all jurisdictions participate at the outset, we recommend that at least five vice-commissioners be appointed as heads of regional offices located in British Columbia, Alberta, Ontario, Québec and one Atlantic province, unless one of these jurisdictions is the location of the head office, in which case one or more vice-commissioners may work out of the head office with the Chief Commissioner.[19] Decisions regarding the appropriate number of vice-commissioners and the location of the head office and regional offices will be made by the Board of Directors.

As discussed in Section 4, "Location of Offices and Role of Regional and Local Offices", the regional offices will each be headed by a vice-commissioner and will become "centers of excellence" for specific policy areas.[20] Each vice-commissioner will be responsible for making policy determinations in his or her office's area of expertise and will be supported by staff that have the requisite regulatory experience. Vice-commissioners will report to the Chief Commissioner and communicate regularly with each other to ensure that each center of excellence develops policy that is consistent with the overall, national policy approach adopted by the CSC. Vice-commissioners should have sufficient functional power to enable them to serve as effective liaisons for local and regional capital markets participants. In this way, each regional office and vice-commissioner can offer a meaningful window of access to influence at the Canadian Securities Commission.

3. Legislation

(i) A Single Act

Canada needs a common body of securities law that applies across the country. Uniform regulation and interpretation will ensure that securities laws are consistently applied and enforced across the country. It will encourage capital investment in Canada, which will drive economic expansion and increase productivity. Uniform regulation fosters responsible corporate behaviour and investment practices by removing uncertainties about how legislation and policy may be interpreted in different domestic jurisdictions at different times under different political regimes.

The CSC will administer the Canadian Securities Act, which will be in force in all Participating Jurisdictions. One Participating Jurisdiction will enact the Act and the other jurisdictions will enact the Act by incorporating it by reference or by enacting it directly. The Act will set out the powers, responsibilities and duties of the CSC, the Council of Ministers, the Board of Directors, the Nominating Committee and the Canadian Securities Tribunal as well as basic principles of securities law. In addition, the Act will set out the securities regulatory

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[19] The location of offices is further discussed in Section 4, "Location of Offices and Role of Regional and Local Offices".

[20] For example, regional offices may develop into centers of excellence for the regulation of SMEs, oil and gas, mining and/or investment funds. Responsibility for all inter-provincial enforcement matters will be assigned to a regional office.

offences triable in court, such as insider trading, and the penalties for such offences, as well as administrative matters, such as the interaction of the Act with provincial *Interpretation Acts*, for example. (See Appendix 1 – Outline of the Canadian Securities Act, for a more complete list of matters to be addressed in the Act.)

The Act will grant authority to the CSC to make Rules that will provide the details of Canadian capital markets regulation. This grant of rulemaking authority should be established in the broadest possible terms so as to avoid the necessity of amending the Act frequently to add new areas of rulemaking authority. (See "The Model – Legislation – Rulemaking".) The CSC will also be empowered to grant orders exempting issuers, registrants and others from specific provisions of the Rules.

(ii) Amending the Act

Because the detailed rules governing Canadian capital markets will be contained in Rules (see "The Model – Legislation – Rulemaking"), we expect that the Act will seldom require amendment. Amendments to the Act will be necessary to change the powers of the CSC, the oversight mechanisms of the Participating Jurisdictions (such as the role of the Board, Council of Ministers or Nominating Committee), the securities regulatory offences set out in the Act and other matters set out in Appendix 1 – Outline of the Canadian Securities Act.

The Canadian Securities Act will provide that amendments to the Act must be approved by the legislatures of two-thirds of the Participating Jurisdictions.[21] The Act will further provide that, once an amendment is approved by this extraordinary majority, the legislatures of all Participating Jurisdictions will be required to enact the amendment (directly or through incorporation by reference) within a specified time period. If a Participating Jurisdiction does not enact an approved amendment, the Act will provide that, with the approval of a majority of the Council of Ministers, that jurisdiction will cease to be a Participating Jurisdiction.[22,23]

Currently, in most provinces, amendments to the local *Securities Act* may be suggested by either the securities regulator or the government. We understand that it is common for a

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[21] In our view, this voting formula is optimal to ensure that the CSC is not susceptible to domination by one or more Participating Jurisdictions. However, we expect that the provinces, territories and federal government may have different views as to the appropriate voting formula, including, for example, allocating votes based on percentage of population, gross domestic product or some other factor. This issue should be open for discussion and may be subject to revision as additional Participating Jurisdictions opt into the CSC.

[22] It may be that the amendment that is not enacted is not considered material enough to conclude that such jurisdiction can no longer effectively participate in the CSC.

[23] Alternatively, when the Act is first incorporated by reference by the Participating Jurisdictions, it could be incorporated "as amended from time to time." In this way, each legislative body would not be required to enact subsequent amendments, avoiding the complications and delay which accompany trying to get legislative time in each separate jurisdiction. Under this model, the Council of Ministers would have to approve, by a two-thirds majority, any proposed amendment before it was enacted by the original jurisdiction. Once the amendment was enacted by the original jurisdiction it would be effective immediately in all Participating Jurisdictions. Any Participating Jurisdiction which did not wish to have the amendment in force would have to pass its own legislation repealing the amendment – at which point the Council of Ministers would need to determine whether the Participating Jurisdiction could continue as a participant in the CSC (as discussed above).

securities regulator to propose to the responsible minister amendments to the offence provisions while the governments also may initiate amendments, for example relating to oversight of the regulator or to expand rulemaking authority of the regulator. Our model contemplates that amendments to the Act may be initiated either by the CSC or by the government of one or more Participating Jurisdictions through the Council of Ministers. The Council of Ministers would be a logical venue in which a minister could raise a proposal with his or her colleagues to determine whether there would be sufficient support for the amendment in the legislatures of the Participating Jurisdictions. Amendments proposed by a government through the Council of Ministers should not require endorsement by the Board of the CSC or be subject to public consultation because legislation enacted by the legislatures of the Participating Jurisdictions is approved by the elected representatives of the public.

(iii) Rulemaking

The substance of Canadian capital markets regulation will be provided in Rules made by the CSC pursuant to rulemaking authority granted under the Canadian Securities Act. Rules will address subjects such as prospectus and registration requirements and exemptions, continuous disclosure obligations for public issuers, take-over bids and investment funds.[24] This structure should be an improvement over current practice under which an increasing number of provisions in provincial and territorial statutes are inconsistent with, or have been superseded by, corresponding provisions in multilateral or national instruments. Relocating substantive regulation from the Act into Rules will provide the CSC with maximum flexibility to develop timely policy responses to evolving market conditions.

The CSA has produced national and multilateral instruments in a number of important securities law areas and we expect that the CSC would adopt most, if not all, of these instruments as its own.

The establishment of the CSC provides an opportunity for the Participating Jurisdictions to consider their fundamental approaches to rulemaking going forward. We would encourage the CSC, in the future, to consider adopting, where possible and appropriate, a regulatory approach that is less prescriptive than the regimes set out in certain CSA instruments and instead articulates clear, basic principles with which capital markets participants must comply, supported by rules where necessary to minimize issuer and investor uncertainties about interpretation. In addition, plain language should replace bureaucratic legalese. However, while we support the future movement to a more principles-based approach to regulation, we are not proposing that the CSA's existing national and multilateral instruments be redrafted before they are adopted by the CSC. To the contrary, this existing body of harmonized regulation forms the foundation for a smooth and efficient transition to the Canadian Securities Commission.

All proposed new Rules will be approved by the Board for publication for comment. They will be published for public comment in the same way that securities regulators currently publish their own proposed rules and CSA instruments for comment. We expect vice-commissioners to take the lead on developing Rules that are relevant to the policy areas assigned to them by the Board. Final Rules will be approved by the Board and the Board will then notify

[24] See Appendix 1 – Outline of the Canadian Securities Act, for further examples of subjects to be addressed in Rules.

the Council of Ministers of its decision. Rules will become effective on a date determined by the Board unless a majority of the Council of Ministers vetoes or returns the Rule to the CSC for reconsideration within 45 days of it having been referred to the Council of Ministers.

We expect that, as a matter of good practice, the Chief Commissioner will keep the Council of Ministers informed regarding policy direction and the progress of proposed Rules throughout the drafting and public comment process.

Given the importance of the capital markets to the prosperity of individual Canadians and to the Canadian economy, we are aware that there may be certain limited circumstances when Ministers will feel it is important they be able to instruct the securities regulator to respond to an issue of significant importance to the capital markets. In these circumstances we believe that a Minister should be able to provide instructions to the CSC to respond with a proposed Rule on the topic, or modify an existing Rule, provided a majority of the Council of Ministers approves of the Minister providing such instruction.

4. Location of Offices and Role of Regional and Local Offices

The Chief Commissioner will be located in the head office of the CSC. The Chief Commissioner and senior staff at the head office will play the lead role in setting policy priorities, overseeing policy development and allocating CSC resources. The head office will also ensure that Canada is properly represented internationally and will coordinate with other financial sector regulators in Canada.

The location of the head office of the CSC has been described as a "hot potato". It is essential that the CSC not be susceptible to domination by the government of any Participating Jurisdiction. We believe that, by vesting primary responsibility for supervision of the CSC in an independent Board elected by the Council of Ministers on the recommendation of the geographically representative Nominating Committee, we have adequately safeguarded the CSC from domination by one Participating Jurisdiction, such that the location of the head office should not be a matter of paramount concern. At this time, we make no specific recommendation as to the location of the head office. However, we assume that the head office will be located in one of four largest provinces, namely, British Columbia, Alberta, Ontario or Québec, assuming that each is a Participating Jurisdiction at the outset.

We are aware that many provinces and territories desire a continued regulatory presence in their jurisdiction under a common Canadian securities regulator model. These jurisdictions seek to preserve local expertise and remain responsive to local registrants, issuers and investors. To address these concerns, we recommend the establishment of regional offices headed by vice-commissioners, as described in "The Model – Structure – Executive Management". These regional offices may build upon existing areas of expertise and become centers of excellence in certain policy areas. However, we believe that most policy matters will affect all regions of the country. For example, SMEs thrive across the country, the mining industry is present in numerous jurisdictions and the mutual fund industry services the entire Canadian population. The virtue of our model is that the CSC will set policy priorities nationally and ensure that policy is consistently applied across the country, while drawing upon the centers of excellence housed in regional offices which will serve the national interest from a regional base. One regional office will be responsible for all inter-provincial enforcement matters.

Thanks to cooperative technological efforts of the CSA, many administrative functions of the CSC can be discharged from the head office or any regional office. With the System for Electronic Document Analysis and Retrieval ("SEDAR") and the National Registration Database ("NRD"), functions that were historically performed by local offices are currently performed electronically and accessed by all 13 Canadian securities regulators. We believe that technology can bridge geographic boundaries between Participating Jurisdictions and expect the CSC to build extensively on the technological efficiencies available today and in the future.[25] We envision that either the head office or a regional office will act as gatekeeper for all regulatory filings and/or applications, which will be assigned to CSC staff with the requisite policy expertise, regardless of their office location.

We also envision a strong and important role for local offices. We recommend that local offices be established in those Participating Jurisdictions where there is no regional office. Local and regional offices will serve as a window of access to capital markets participants in each Participating Jurisdiction in at least three meaningful ways. First, they will receive investor complaints regarding potential breaches of securities laws and will also monitor the activities of local registrants with a view to detecting wrongdoing. Second, they will provide advice to local issuers and registrants regarding compliance with Canadian securities laws including, in the case of novel or specialized inquiries, referring issues to the regional office or head office with the requisite policy expertise. Third, these offices may provide advice to local SMEs regarding capital-raising and other business initiatives that are being proposed or undertaken in their jurisdiction.

5. Enforcement

A common theme that emerged at every roundtable is the urgent and compelling need for Canada to improve the enforcement of its securities laws. Roundtable participants expressed embarrassment regarding Canada's international reputation for being unable to successfully prosecute many egregious securities law violations and believe that this perception deters foreign investment into Canada and restricts Canadian investors' access to new investment opportunities and products. A number of roundtable participants informed us that international investors have expressed a reluctance to invest in Canadian issuers out of concern that our enforcement regime is not sufficiently stringent. This raises the cost of capital for Canadian companies that require funds to grow and to compensate their employees.

In addition, roundtable participants asserted that Canadian investors deserve the best system of investor protection in the world. We could not agree more. Canadian investors, directly and indirectly, are the largest shareholders of Canada's publicly traded companies, primarily through mutual funds and pension plans. Therefore Canadian investors have the most to lose by virtue of the delays and impediments to enforcement investigations and proceedings caused by our fragmented regulatory system.[26] Our model will dramatically strengthen the consistency and efficiency of securities law enforcement in Canada in a way that is not possible

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[25] See Background Paper A – *Various Models of Securities Regulation*, Section 1, "The Status Quo", for a brief overview of SEDAR and NRD.

[26] See Background Paper A – *Various Models of Securities Regulation,* Section 1(iv), "The Status Quo – Impediments to Effective Enforcement" for a discussion of enforcement challenges under the current system.

to achieve under a regime with multiple securities regulators and multiple bodies of securities law.

Under our model, a CSC vice-commissioner will be responsible for all enforcement matters across the Participating Jurisdictions, including appropriate allocation of resources. Enforcement staff in the regional and local offices will keep the vice-commissioner and his or her staff informed regarding investigations and proceedings. These communications will facilitate the coordination of enforcement efforts among all Participating Jurisdictions, reducing duplication and enabling local staff to apply the experience of their colleagues in other Participating Jurisdictions to their own enforcement activities.

The importance of a uniform Canadian Securities Act and Rules cannot be overstated when it comes to achieving consistent and efficient enforcement across the Participating Jurisdictions. Under the current system, and any system where there is more than one body of securities laws and more than one regulator, an offender that breaches securities laws in a particular jurisdiction can only be prosecuted and penalized in that jurisdiction.[27] CSC enforcement staff will be able to build on experience gained throughout the Participating Jurisdictions, unlike under the current system where differences between legislation in force in various Canadian jurisdictions sometimes impede the effective use of precedent between jurisdictions. This coordination will result in a more consistent approach to investigations and proceedings relating to breaches of securities legislation across Canada.

Federal government involvement in the CSC will overcome the jurisdictional challenges that have plagued some enforcement proceedings under Canada's current system. Enforcement orders will be effective across all Participating Jurisdictions without the necessity for holding multiple hearings and issuing multiple orders that slows down the current system. Federal government participation in the CSC may also permit better coordination between the CSC and the federal agencies and provincial Attorneys-General concerning the enforcement of *Criminal Code* securities fraud provisions and the prosecution of serious offences. All of these benefits will strengthen Canada's capital markets and enhance our reputation both at home and abroad.

6. A Separate Tribunal

Currently, most provincial and territorial securities regulators are responsible for making policy, conducting investigations and sitting as adjudicative tribunals. The Supreme Court of Canada has held that a multi-functional agency cannot be attacked on the grounds of reasonable apprehension of bias if its structure is statutorily authorized.[28] However, some participants in the capital markets sector, along with certain academics, are of the view that an agency that regulates, investigates, prosecutes and adjudicates could be seen to suffer from an inherent conflict of interest.

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[27] It is possible for securities regulators to coordinate multi-jurisdictional enforcement proceedings, however, these proceedings are cumbersome and uncommon due to the different bodies of securities law in force in each jurisdiction. A securities regulator may also elect to bring a proceeding against an offender that has been found guilty in another jurisdiction based on a public interest concern.

[28] See *Brosseau v. Alberta (Securities Commission)*, [1989] 1 S.C.R. 301 and *Ocean Port Hotel Ltd. v. British Columbia (General Manager, Liquor Control and Licensing Branch)*, [2001] 2 S.C.R. 781.

When Québec established the Autorité des marchés financiers ("AMF") in February 2004, it also established a separate adjudicative tribunal for certain matters (the *Bureau de décision et de révision en valeurs mobilières*), including the review of any decision of the AMF and of recognized self-regulatory organizations. This approach was also recommended for Ontario in the Osborne Report published in 2004. The Osborne Report concluded that, while the current multi-functional structure of the Ontario Securities Commission is constitutionally permissible and valid, there is a "perception of bias" when one regulator is the "architect of the laws, the enforcer and the judge".[29] The Osborne Report recommended that the Ontario Securities Commission separate its adjudicative role from its policy making and regulatory functions. The Standing Committee on Finance and Economic Affairs of the Ontario Legislative Assembly endorsed this recommendation.

We recommend that the Canadian Securities Act provide for the establishment of the Canadian Securities Tribunal as a separate agency from the CSC. The CST will be comprised of adjudicators that sit in panels of three. The CST will convene hearings to consider CSC staff allegations of violations of the Rules and the Act, although serious offences will be tried in provincial courts. The CST's role will not include responsibility for considering applications for exemptive relief from the Rules or conducting hearings relating to contested take-over bids. These matters are within the policy realm of the CSC and will be considered by the Chief Commissioner, vice-commissioners and in the case of routine exemptive relief applications, senior staff.

Adjudicators will travel across the Participating Jurisdictions to conduct hearings in the location that is most appropriate in the circumstances based on a "significant connection" or similar test. We expect the CST to conduct telephonic and/or video hearings in cases where not all adjudicators sitting on a particular panel are able to attend at the hearing location. Adjudicators will work out of separate offices from the head, regional and local offices of the CSC and will have a separate administrative staff. The appropriate number of adjudicators and panels will depend on the identities of the initial Participating Jurisdictions and should be dealt with in the MOU discussed in "Introduction – Section 4, Structure of the Regulator".

Adjudicators, including a Chief Adjudicator, will be appointed by the Council of Ministers based on recommendations of the Nominating Committee. Adjudicators should be experienced adjudicators, such as retired judges, ideally with experience relating to the securities or financial services industry, as well as current commissioners of the provincial securities regulators who have adjudicative experience. The Council of Ministers will also appoint a CST Administrator recommended by the Nominating Committee. The CST Administrator, together with staff, will coordinate hearing schedules and provide other administrative and support services to the CST. We expect the CST Administrator to take instructions from and communicate regularly with the Chief Adjudicator. The Chief Adjudicator will report periodically to the Council of Ministers regarding budget and other matters. The Chief Adjudicator and the CST will be independent of the CSC.

Decisions of the CST may be appealed to the superior or divisional court in the province or territory where the hearing was conducted.

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[29] The Honourable Coulter A. Osborne, Q.C., Professor David Mullan, and Bryan Finlay, Q.C., *Report of the Fairness Committee to the Ontario Securities Commission* (March 5, 2004).

The Rules of Procedure of the CST will be approved by the Council of Ministers in the same way that Rules are approved. The fees of the CSC will cover the costs of the CST as well.

7. Fee Structure

The CSC will be self-funding. Its fees will be set on a cost-recovery basis with an allowance for a reasonable reserve fund for unexpected expenses. Fees will not be set in excess of the cost of regulation, as that would tax market participants and undermine some of the economic efficiencies that the CSC is designed to achieve.

Currently, a number of Canadian jurisdictions derive revenue from the operations of their local securities regulatory authority and have expressed reluctance to forego this revenue by joining a single regulator. We propose that compensation to these jurisdictions for lost revenue should be settled in the MOU as described in "Introduction – Section 4, Structure of the Regulator", and not be provided from fees charged by the CSC.

8. Transition Matters

Participants at every roundtable commented that while the Passport System will not achieve all of the benefits of a single regulator, it is nevertheless an important initiative and should be permitted to reach its full potential while the Participating Jurisdictions work toward the establishment of the CSC. For the Passport System to reach its full potential, they said, Ontario's participation is mandatory. Most roundtable participants remarked that they do not view the Passport System and our proposed CSC as diametrically opposed alternatives. To the contrary, many suggested that the Passport System and certain CSA projects, by creating highly harmonized laws in a number of important areas, could contribute significantly toward to the success of the CSC initiative. A consistent view voiced at the roundtables was that the groundwork needed to establish the CSC should occur contemporaneously with Ontario joining the Passport System.

We believe that the next steps towards establishing the Canadian Securities Commission can be taken expeditiously by those jurisdictions that are prepared to participate or to seriously consider participating in a single securities regulator. Specifically, they should:

- establish a small task force to write the Canadian Securities Act and identify the current national and multilateral instruments which will be adopted as Rules

- establish a Nominating Committee that should immediately begin identifying candidates for the Board of Directors and the positions of non-Executive Chair of the Board, Chief Commissioner and Chief Adjudicator, and

- start negotiating the MOU, including reaching agreement about compensation for loss of revenue to some Participating Jurisdictions and developing a transition protocol.

As discussed in "Introduction – Section 4, Structure of the Regulator", the location of the head office, the location and role of regional offices and the appointment of the Chief Commissioner should be decided by the Board of Directors. As these are matters which must be settled before the CSC becomes operational, it is important that the work of the Nominating

Committee and the appointment of the non-executive Chair and of the members of the Board of Directors proceed in a timely manner.

We recommend that these matters be finalized prior to commencing the transition period during which issuers and registrants will migrate from their existing provincial regulators to the CSC. One commentator notes that although "issuers and investors react poorly to uncertainty … transitional uncertainty can only be minimized, not prevented."[30] With this in mind, we echo his recommendations:

> Thoroughly preparing the investment community is one way to minimize the destabilizing effects of this uncertainty. Therefore, the [governments of the Participating Jurisdictions] should set a realistic and achievable transition time-frame, clearly disclose that time-frame, and ensure that it 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 to expect will be less likely to abandon Canada's capital markets in the short term.[31]

Conclusion

In our view, implementing a common securities regime will benefit the Canadian capital markets and all those who invest in them in numerous ways.[32] This view was echoed by almost every participant in the roundtables. The transition to a common Canadian securities regulator should be assisted by recent regulatory initiatives. Through the forum of the Canadian Securities Administrators, the provinces and territories have developed highly harmonized laws in a number of areas and have streamlined the prospectus filing, application and registration processes for issuers and registrants that seek to do business in multiple Canadian jurisdictions. The recently launched Principal Regulator System has gone a step further by permitting capital market participants to deal and comply exclusively with the securities legislation of their head office jurisdiction in certain matters. The move to a common regulator can leverage off of these important CSA initiatives.

This next step – a single securities regulator – will further reduce the volume of securities regulation in Canada, encourage coherent, consistent and responsive policy development, speed up the time to market for issuers, lower the cost of capital and ensure a more robust system of enforcement across the country. Under our proposed CSC framework, the Act and Rules will apply and be interpreted consistently across all Participating Jurisdictions, creating certainty for capital market participants and ensuring that enforcement investigations and proceedings are conducted efficiently and predictably, with consistent outcomes that will apply across the country. As a result, Canada's competitive position in the global capital markets will improve. Entrepreneurship and innovation, especially by small and medium-sized enterprises, will be

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[30] David L. Johnston, *Canadian Securities Regulation*, 3rd ed. (Toronto: Butterworths, 2003), page 366.

[31] *Ibid.*

[32] See "Executive Summary – Benefits of a Single Canadian Securities Regulator" for a listing of the expected benefits.

enhanced and investors will be confident in investing their money in the Canadian capital markets. All of this will facilitate economic growth and increased prosperity for all Canadians.

APPENDIX 1:
OUTLINE OF THE CANADIAN SECURITIES ACT

The following is a list of some of the matters we believe should be addressed in the Canadian Securities Act:

1. Council of Ministers

- Composition – the Minister responsible for securities regulation in each Participating Jurisdiction and the appropriate federal minister
- Role – oversight of the Canadian Securities Commission and the Canadian Securities Tribunal

2. Nominating Committee

- Composition – one member selected by each Participating Jurisdiction
- Role – recommending Board nominees, non-executive Chair, adjudicators (including the Chief Adjudicator) and CST Administrator

3. Canadian Securities Commission

- Mandate – investor protection and fair and efficient capital markets
- Governing principles/vision
    - (i) To make Canada the best place in the world to invest and raise capital for both small and large businesses. To this end, to provide Canadian capital markets with a competitive advantage globally it is desirable to have as much principles-based regulation as is feasible, to replace bureaucratic legalese with plain language and to make the system more user friendly
    - (ii) To demonstrate leadership in securities regulation through innovative and cost effective responses to the needs of capital markets
    - (iii) To enforce investor rights on a consistent, tough and fair basis throughout the country
- Board of Directors
    - (i) Composition – including that the Chief Commissioner will be a director but may not be the Chair
    - (ii) Role – supervising management, appointing the Chief Commissioner and vice-commissioners, approving draft Rules, etc.

(iii) Terms – three year terms for directors, with four or five year terms for some initial directors and reasonable limits for the term of the non-executive Chair

- Executive management – Chief Commissioner and vice-commissioners
- By-laws – will govern the operations of the CSC and will be subject to the same approval procedure by the Council of Ministers as are Rules
- Financial reporting requirements – the annual report of the CSC, including audited financial statements, will be tabled in the legislature of each Participating Jurisdiction
- Funding – the CSC will be funded from fees collected pursuant to a Fee Schedule Rule – fees to be established on cost recovery basis

4. Rulemaking[1]

- Delegation by each Participating Jurisdiction to the CSC of subordinate legislative authority to regulate capital markets activity under the Act; CSC to exercise this authority by making Rules
- Exemption orders – CSC is authorized to grant exemption orders to capital markets participants that have applied for relief from specific provisions of the Rules
- Rulemaking procedure – approval of draft rules by the Board, public comment process, approval by Board, notice to Council of Ministers who have 45 days to disapprove or return a Rule
- The following is a non-exhaustive list of subjects to be addressed in Rules:

(i) prospectus requirements and exemptions

(ii) registration requirements and exemptions for advisers and dealers, including proficiency requirements and categories of registration

(iii) continuous disclosure obligations of public issuers (i.e., obligations to file financial reports, insider reports, material change reports and other disclosure)

(iv) governance requirements for public issuers

(v) take-over bids, issuer bids, insider bids and other significant transactions

[1] Delegation of rulemaking authority of the CSC should be very broad so as to overcome the current challenges in Ontario and other jurisdictions where the enumerated list of heads of rulemaking authority continually needs to be amended and/or updated to respond to new market developments.

(vi) investment funds

(vii) stock exchanges, clearing agencies and self regulatory organizations

(viii) fees

- MOUs – CSC is authorized to enter into MOUs with other regulators including securities regulators in other jurisdictions

5. Offences and penalties

6. Canadian Securities Tribunal

- Composition – adjudicators (including the Chief Adjudicator) appointed by the Council of Ministers
- Jurisdiction – adjudicating alleged breaches of the Act and the Rules
- Authority to adopt Rules of Procedure to govern the conduct of hearings – Rules of Procedure to be reviewed by the Council of Ministers
- Chief Adjudicator – accountability to the Council of Ministers
- CST Administrator and staff
- Funding – approved by the Council of Ministers

7. Immunity provisions – from prosecution while carrying out their duties

- Immunity rights of the CSC and its Board of Directors, Chief Commissioner, vice-commissioners, officers and employees
- Immunity rights of the CST and its adjudicators (including the Chief Adjudicator), and the CST Administrator and his or her staff

8. Voting formula for amending the Act

- Amendments must be approved by the legislatures of two-thirds of Participating Jurisdictions
- Any Participating Jurisdiction that does not enact an approved amendment (directly or through incorporation by reference) within a specified time period will, with the approval of the Council of Ministers, cease to be a Participating Jurisdiction

9. Administrative matters

- Application of the *Interpretation Act* of one Participating Jurisdiction to the Canadian Securities Act

- Interaction of the Canadian Securities Act with other relevant provincial and federal legislation

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