THE SCHOOL OF PUBLIC POLICY
SPP Research Papers
UNIVERSITY OF CALGARY
Volume 3 • Issue 5 • October 2010

SECURITIES REGULATION IN CANADA AT A CROSSROADS

by Pierre Lortie

Senior Business Advisor
Fraser Milner Casgrain LLP

SUMMARY

On May 26, 2010, Canada's Minister of Finance tabled in the House of Commons a draft *Securities Act*. The purpose of the Act is to establish Federal government jurisdiction over securities legislation and create a Federal Securities Regulatory Authority.

With this initiative, the Federal government proposes to centralize the regulatory apparatus to ensure uniformity of policies and regulations across Canada and meet international standards of quality and comprehensiveness.

But this initiative also raises significant constitutional and economic policy issues. In a comprehensive paper examining the main arguments supporting a centralized securities apparatus, Pierre Lortie, Senior Business Advisor at Fraser Milner Casgrain LLP, argues that sound public policy should move ahead only if there is a strong body of empirical evidence demonstrating that the performance of the current regime is significantly inferior to that of other countries — particularly the United States — and that a centralization of the regulatory apparatus is necessary to correct the situation.

The paper demonstrates that Canada's decentralized securities regulatory regime has in fact shown flexibility, a great capacity to adapt to changing circumstances and an unrelenting ability to respond to particular industry or regional needs. It has also provided strong assurances against the hasty adoption of disruptive and costly regulations because it is less susceptible to the imposition of politically expedient or faddish requirements or the influence of a dominant industry or interest groups.

In contrast, a centralized system runs the risk of turning into a disruptive, costly and regrettable initiative that will not give Canadians what they expect, while erasing many of the benefits achieved so far.

SECURITIES REGULATION IN CANADA AT A CROSSROADS

On May 26, 2010, Canada's Minister of Finance tabled in the House of Commons a draft *Securities Act*. The purpose of the Act is to establish Federal government jurisdiction over securities legislation and create a Federal Securities Regulatory Authority. At the same time, the Minister took the unusual step of referring the proposed legislation to the Supreme Court of Canada for a ruling on whether the Federal government has the constitutional authority to take charge of the security regulation field. These steps follow the adoption in July, 2009, of the Canadian Securities Regulation Regime Transition Act, which created an organization to design the Federal regulatory apparatus and prepare the transition to a single national securities regulator.

Federal government authorities are not alone in holding the view that the case for the takeover of jurisdiction over securities regulation from the provinces has been made and that it's time to proceed as soon as possible. Large segments of the financial industry support the transfer of jurisdiction for securities regulation to the Federal government on the grounds that it would considerably improve its efficacy, enhance the efficiency and competitiveness of Canadian capital markets, reduce regulatory costs, strengthen enforcement, reduce systemic risks and improve Canada's image and influence internationally. This sentiment is buttressed by numerous reports sponsored mainly by organizations backing such a change.[1]

Meanwhile, proponents of maintaining the current regulatory regime argue that the close collaboration between Canadian Securities Administrators has produced a high degree of harmonization in securities legislation/regulations across Canada, and that any differences appropriately reflect local circumstances. They say that with the application of information technologies, these efforts have led to the establishment of systems and practices that are truly national in scope, as well as to the elimination of duplicative functions that were performed by each securities commission in the past. In short, while there may not be a Federal agency similar to the U.S. Securities and Exchange Commission, they argue that Canada has in practice a 'national' securities regulatory regime that regulates its capital markets and that it compares very favourably to other jurisdictions, including the United States.

Admittedly, proponents of the current securities regime have not marshalled to great effect the substantial body of empirical evidence that bears directly on the performance of the Canadian regime, while the proponents of a centralized regime have been parsimonious in their use of independent empirical analyses.

[1] The Wise Persons' Committee to Review the Structure of Securities Regulation in Canada, *It's Time*, (December 2003); Crawford Panel on a Single Canadian Securities Regulator, *Blueprint for a Canadian Securities Commission*, final paper, (June 2006); Expert Panel on Securities Regulation, *Creating an Advantage in Global Capital Markets – Final Report and Recommendations*, (January 2009).

The actions of the Federal government give an impression of déjà vu. A similar initiative was undertaken in the mid-70s, culminating with the publication of a draft Act in 1979.[2] Much like today's efforts, it reflected the view that the extension of the jurisdiction of the Federal government in securities regulation was necessary. However, little evidence was provided to justify the Federal government initiative. The comments written afterwards by the architect of the proposal and a strong proponent of the current initiative are revealing: "[T]emporal and budgetary constraints precluded a detailed empirical study of all aspects of the Canadian securities market, or a cost-benefit analysis of all, or even the major, provisions in existing securities legislation."[3]

This is a serious shortcoming. The proposed *Securities Act* is a comprehensive piece of legislation which, in most respects, duplicates existing provincial laws. By challenging the exclusive jurisdiction of the provinces in matters of securities regulation which has historically been grounded in the Property and Civil Rights clause, the Federal initiative puts into question the constitutional balance of federal and provincial powers.

Aside from the constitutional issues arising from the Federal initiative, sound public policy should move ahead with the transformation of the Canadian securities regulatory regime only if there is a strong body of empirical evidence demonstrating that the performance of the current regime with regard to the main object and purpose of securities legislation and the functioning of the Canadian capital markets is significantly inferior to what is observed in other countries, and that a centralization of the regulatory apparatus is necessary to correct the situation.

The purpose of this paper is to review the main arguments supporting a centralized securities regulatory apparatus in light of objective and factual evidence concerning the Canadian capital markets and its performance on key dimensions compared to that of other developed capital markets, principally the U.S. market, which is regarded as the benchmark in international studies and the most relevant for Canada.

Before embarking on this analytical journey, a couple of points are worth highlighting. First, in assessing the Canadian securities regime, this paper takes into account what it is today, not the features of a distant past. Moreover, it takes into account how it functions in practice, since it is the *de facto* functioning of the regime that matters, not the *de jure* aspects.

The Canadian securities regulatory regime is highly harmonized across the country and truly national in scope. Examples of such national systems include the System for Electronic Document Analysis and Retrieval (SEDAR), the System for Electronic Disclosure by Insider (SEDI), the National Registration System (NRS), and the National Registration Database (NRD). These national systems are equivalent to similar U.S. systems established by the SEC.

The Mutual Reliance Review System (MRRS) and the development and implementation of 44 national instruments and 44 national policies governing key areas such as prospectus requirements, mutual fund regulation, rights of offering, takeover bids, prospectus and registration exemptions, continuous disclosure contents, and marketplace operations have produced a high level of harmonization across the country.

---

[2] Minister of Supply and Services Canada, *Proposals for a Securities Market Law for Canada: Draft Act*, (1979), vol. 1; ibid., *Commentary*, vol. 2; ibid., *Background Papers*, vol. 3.

[3] Anisman, P., *The Proposals for a Securities Market Law for Canada: Purpose and Process* (1981), Osgoode Hall L.J. 329, 19.

The implementation of the Principal Regulator System (MI11-101) on Sept. 19, 2005, extended exemptions to participants when they deal with different securities jurisdictions. Since the implementation of the arrangement known as the passport system on March 17, 2008, in all provinces and territories, except Ontario, participants can access capital markets across Canada by dealing only with the regulator in one jurisdiction. On Sept. 28, 2009, the passport system was extended to the registration of dealers, advisors and investment fund managers. This single-window concept of securities regulation gives participants the ability to clear a prospectus, register as a dealer or adviser, or obtain a discretionary exemption from the regulator in their home province or territory and have it be applicable in all other jurisdictions. It also ensures that public companies are subject to only one set of harmonized continuous disclosure requirements. The benefits accruing from the implementation of the first phases of the passport system are recognized by industry participants across the country.

Second, lofty vision statements do not a high performance organization make. Comparisons on the performance of the Canadian securities regulatory regime versus an idealized error-free system are irrelevant. The appropriate standards are the actual performance, over time, of centralized regimes in jurisdictions with well-developed capital markets. Nor should claims of the inability of the current securities regulatory regime to address specific matters be accepted at face value. For example, the draft Act of 1979 provided for the establishment of a national clearing system for securities.[4] This was presented as another justification for the necessary involvement of the Federal government in securities matters because, as it was said at the time, it would be impractical for the provinces to establish a national clearing system. In reality, the Canadian Depository for Securities (CDS), which began clearing trades executed on the Montreal Stock Exchange in 1976, has since grown into the national clearing, depository and settlement organization for the vast majority of equity, bonds and money market instruments across Canada. CDS is recognized as one of the most reliable clearing and settlement systems worldwide.

This paper covers many of the salient aspects of the debate: The main purpose of securities regulation and how the Canadian regime compares on these dimensions to that of other well-developed jurisdictions; the financial costs of securities regulation in Canada, both in absolute terms and relative to the costs of regulation in other jurisdictions; the record on enforcement and how it compares to that in the United States, the explicit or implicit benchmark used in the current debate. We look at the ease of access to capital markets and the cost of capital for issuers, which is the critical criteria in assessing the quality of capital markets.

We do not live in a static world and, therefore, the fundamental characteristic of a sound regulatory system is its dynamic efficiency. Experience demonstrates that certain structures are inherently better at this than others. This is the object of section five. The final sections address Canada's standing in international forums and the competitiveness of Canadian capital markets, as well as the argument that concerns about systemic risk justify the take-over of the securities regulation domain by the Federal government.

[4] Section 10.1 of the Draft Act provided as follows: "The purpose of [Part 10] is to facilitate the development and implementation in Canada of one or more book-entry systems for the transfer and pledge of securities whether or not they are evidenced by security certificates."

The analysis compares the current securities regulatory regime to one that would be under the full authority of the Federal government. Many leaders in the financial industry and other segments of Canadian society hope that a compromise can be reached between the Provinces and the Federal government. That is not how the die has been cast. The question put before the Supreme Court of Canada is whether or not the Federal government possesses the constitutional authority to adopt a comprehensive securities act and, consequently to impose its paramountcy over the securities domain. If the answer is negative, the current regime remains in place with, hopefully, full involvement of Ontario. On the alternative, the Federal government will assert its new powers which will, over time, empty of any economic significance the opting-in option provided in the draft Securities Act. As the Australian experience makes clear, such a compromise approach is unsatisfactory for all parties and leads inevitably toward centralization under the authority of the Federal Government.

FAIRNESS AND EFFICIENCY OF CANADIAN CAPITAL MARKETS

The international norms and standards pertaining to the regulation of securities markets are guided by the International Organization of Securities Commissions (IOSCO). They establish that the main object and purpose of securities legislation is to provide protection to investors from unfair, improper or fraudulent practices and to foster fair and efficient capital markets and confidence in capital markets.[5]

A recent assessment of the Canadian financial sector by the International Monetary Fund (IMF) confirmed that securities regulation in Canada conformed to the IOSCO Principles.[6] Since the same will hold true for a centralized regime, no gains should be expected on this front.

Nevertheless, it is suggested that a centralized regime would improve the fairness and efficiency of Canadian capital markets, based on the view that current performance is impaired by deficiencies in the Canadian securities regulatory regime, resulting in capital markets of a lower quality than in other developed markets.

With the main purpose of securities regulation being the promotion of fair and efficient capital markets, it is critical that the performance of Canadian capital markets on this key dimension be assessed in a rigorous methodological manner based on solid empirical evidence. And since in this world nothing is perfect, the assessment of the performance of the Canadian regime needs to be made against the performance of other countries.

---

5 See, for instance, Ontario Securities Act, R.S.O. 1990, i.S5

6 IMF, Canada: *Financial System Stability Assessment – Update*, (February 2008).

Comparisons made by the OECD and the World Bank consistently rank Canada among the best with respect to the quality of securities regulations and investor protection, ahead of the United States, the United Kingdom and Australia, all of which have a national regulator. These assessments are confirmed by a substantial body of empirical studies concerning the performance of our securities regulatory system. The conclusions of these independent academic studies are uniformly consistent: the fairness and efficiency of Canadian capital markets is deemed equivalent to that of the United States and superior to that of other markets on all dimensions.

For instance, based on the results of the largest and most comprehensive study of the efficiency of securities regulation and the strength of private and public enforcement of investor protection, Canada ranks 2nd out of 49 countries on the effectiveness of securities regulations. The comparative results are interesting: The United States obtained a score of 97%; Canada, 91%; Australia, 77% and the United Kingdom, 73%.[7] In another independent study, the authors developed a capital market governance index that captures three key dimensions of securities law: the degree of earnings opacity, the enforcement of insider laws and the effect of short-selling restrictions. In terms of quality of capital market governance, Canada ranked 3rd, behind the United States (1st) but ahead of the United Kingdom (5th) and Australia (16th).[8]

The central objective of securities regulation is to correct the imbalance between the issuers of securities (and their related parties) and the investors, arising from the dominant position of the former or the asymmetry in information between the two parties. The efficiency of capital markets — and hence the quality of investor protection — is highly dependent on the efficacy of regulation in achieving that balance and protecting minority shareholders from expropriation by the controlling shareholders or managers. Empirically, strong investor protection is associated with valuable and broad financial markets, dispersed ownership of shares, efficient allocation of capital across firms and effective corporate governance.

There are numerous studies in the academic literature that specifically address key features of efficient markets and that compare the performance of the Canadian equity markets to that of other countries. The following are examples of such independent and analytically rigorous studies:

---

[7] La Porta, R., F. Lopez-De-Silanes, A. Shleifer, *What Works in Securities Laws*, Journal of Finance, (2006).

[8] Daouk, H., Lee, M.C.C., Ng, D., *Capital market governance: How do security laws affect market performance*, Journal of Corporate Finance, (2006).

Extent and Timeliness of Financial Disclosure and Material Events

There has been rigorous analysis on the consequences of increased disclosure affecting non-U.S.-based firms when they cross list their shares in the United States. The conclusion is that the U.S. requirements for increased disclosure result in absolute abnormal returns and abnormal trading volume around earnings announcements. However, the analysis shows that Canadian interlisted companies are the least affected, indicating that the disclosure requirements in Canada are similar to, or have the same effect as, those in the U.S. According to the authors: "We find no significant post-listing change for Canadian firms … Canada is a particularly interesting case for study as its disclosure environment is very similar to that in the U.S., which implies that the factors involved in the cross-listing decisions of Canadians firms differ from those of firms in other countries."[9]

Protection of Minority Shareholders in Equity or Voting Power in the Advent of Takeover Bids

Securities regulation in Canada and TSX rules have required since 1987 that any company issuing a class of shares with superior voting rights must include a provision that no offer to acquire the class of controlling shares is valid without the would-be acquirer making a concurrent offer at the same terms and conditions to the other class of shareholders. This coattail regulation has eliminated a key source of potential abuse and 'saved' Canada from the disruptive impact of 'greenmail' which was, at the time, prevalent in the United States.[10]

The empirical evidence demonstrates that these securities regulatory requirements are very effective, since very small additional private benefits accrue to controlling shareholders.[11] In particular, takeovers of dual-class Canadian companies produce virtually no control benefits for the holders of the supra-voting shares as compared to the holders of the other classes of common shares.[12] Other empirical studies estimate the value investors place on control by measuring the premium paid in block transactions. The results demonstrate that Canadian capital markets do not yield entrenchment benefits to controlling shareholders.[13]

---

[9] Bailey, W., G. A. Carolyi and C. Salva, *The Economic Consequences of Increased Disclosure: Evidence from International Cross-Listing*, Journal of Financial Economics, Vol. 81, (2006).

[10] The regulation did grandfather existing situations at the time it came into effect (1987) as long as no new shares were issued. Ten years later, only 13 companies listed on the TSX had not adopted a coattail provision. (See Y. Allaire, 2006).; Magna International Inc. was one of them.

[11] Nenova, T., *The value of corporate voting rights and control: a cross country analysis*, Journal of Financial Economics 68, (2003), 325-351.

[12] Smith, B. and B. Amoako-Adu, *Relative Prices of Dual Class Shares*, Journal of Financial and Quantitative Analysis, vol. 30, No 2, (June 1995); Clark, Robert C., *Corporate Governance Changes in the Wake of the Sarbanes-Oxley Act: A Morality Tale for Policymakers Too*, Harvard Law and Economics, Discussion Paper No 525, (December 2005); Morck, R., D. Wolfenzon and B. Yeung, *Corporate Governance, Economic Entrenchment and Growth*, Journal of Economics Literature, vol. 43, No 3, (September 2005).

[13] Dyck, A., L. Zingales, *Private Benefits of Control: An International Comparison,* Journal of Finance (2004).

The following table presents a graphic summary of the superiority of the Canadian securities regulatory regime.

TABLE 1: Estimated private Benefits of Control in Different Countries

Country	Block Premium* (%)	Voting Premium** (%)
Australia	2	23
France	2	28
Germany	10	10
Switzerland	6	5
United Kingdom	2	10
United States	2	2
Canada	**1**	**3**

* Based on transactions between 1990 and 2000 (See Dyck, A., L. Zingales, op.cit (2004).
** Based on 1997 data (See Nenova, T., op. cit. (2003).

Morck, R., Wolfenzon, D. and Yeung, B., Corporate Governance, Economic Entrenchment and Growth*, Journal of Economic Literature Vol. 43 (2005).*

THE FINANCIAL COST OF SECURITIES REGULATION IN CANADA

The multi-jurisdictional characteristic of the Canadian securities regulatory regime has fuelled arguments that there is too much duplication. According to this view, a centralized apparatus under the authority of the Federal government would avoid duplication and result in lower costs.

Regulations are adopted to avoid or correct market distortions or, at the very least, to mitigate their adverse consequences. Regulation is not free. A regulatory apparatus costs money, compliance with regulations imposes a financial burden and regulations inevitably create some distortions of their own in the economy. This remains the case whether the regime is centralized or not. The policy challenge is to design a regulatory regime where the benefits are greater than the costs. The operative questions are:

a) How does the direct cost of the securities regulatory apparatus in Canada compare with that of other countries?

b) How do securities issuance costs induced by securities regulations compare to those incurred in U.S. markets?

c) What are the incremental costs of compliance — that is the costs to financial firms of activities required by the securities regulators that would not have been undertaken in the absence of regulation — and how do they compare with those in other jurisdictions?

The Direct Costs of the Regulatory Apparatus

The Financial Services Authority (UK) regularly publishes a survey of the costs of regulatory authorities in several jurisdictions. The data shows that common law countries have substantially higher direct costs compared to countries with other legal traditions. For instance, the ratio of direct securities regulatory costs between the United Kingdom and Germany, the second and third largest capital markets in terms of IPO activity, is approximately 4.5 to 1.

So, how does the direct cost of the Canadian securities regulatory apparatus compare? The survey shows that the regulatory apparatus is generally less expensive in Canada than in other common law countries, which all have a centralized securities regulator. As a percentage of total capitalization, Canada's total direct cost of the securities regulatory apparatus is similar to that of the United States, but significantly lower than that of Australia. When compared on the basis of the number of listed issuers, the cost of the Canadian securities regulatory apparatus is by far the lowest amongst common law jurisdictions.[14]

Interestingly, a study commissioned by the Task Force to Modernize Securities Legislation in Canada reaches a similar conclusion: "In terms of budgets and staffing levels, the Canadian regulatory system is comparable to the overall regulatory system in the United States."[15] The conclusions of Professor Jackson's study would have been even more favourable to Canada had it included, as it should have, the direct costs of the Commodity Futures Trading Commission (CFTC) in the United States since, in Canada, this regulatory function is carried out by the securities commissions and not by a separate regulatory agency.

The comparative data does not support the claim that the total cost of the current securities regulatory apparatus is larger than that of jurisdictions with a centralized regulator. However, there are strong indications that the direct costs of a centralized regulator would be more expensive than those of the current system. That was the outcome in Australia as a result of its move to a national regulator. The direct costs of the Australian Securities & Investments Commission (ASIC) nearly doubled between 2003 and 2009 (from A$173M to A$337M). The same result should be expected in Canada, where the federal government has pledged to offer jobs at the Federal Securities Regulatory Authority to all the current staff in provincial securities commissions. It has also made official statements such as: "We expect that staffing levels will remain largely unchanged in the new organization."[16]

Regulatory Induced Securities Issuance Costs

The regulatory costs for the issuance of securities and the associated costs incurred by financial intermediaries and professional 'gatekeepers' will be passed along and borne by the issuers. These include the underwriting/brokerage fees and the cost to meet regulatory or market requirements such as legal and accounting fees and other fees or incidental costs (i.e. registration, printing, marketing roadshow, etc.). According to the Canadian Bankers Association (CBA): "Regulatory costs for SMEs are the crux of the matter."

---

[14] Suret, J.M., Carpentier, C., *Réglementation des valeurs mobilières au Canada : un réexamen des arguments avancés pour justifier la commission unique*, report prepared for l'Autorité des marchés financiers du Québec, (June 20, 2010), 53-60.

[15] Jackson, H.E., *Regulatory Intensity in the Regulation of Capital Markets: A Preliminary Comparison of Canadian and U.S. Approaches*, Research Study, Task Force to Modernize Securities Legislation in Canada, (July 30, 2006).

[16] The Canadian Securities Transition Office, *Transition Plan for the Canadian Securities Regulatory Authority*, (July 12, 2010), 33.

A widely quoted paper by the CBA that estimates the regulation-related expenses of an IPO in Canada concludes that if a firm seeks "to raise capital in all 13 jurisdictions rather than just one … regulation related costs would double to 16% of capital in the case of a firm seeking to raise $1 million and to 4% of capital in the case of a firm seeking to raise $10 million."[17]

The CBA study is wanting in several important respects. First, the cost increase function implicit in their model is not grounded in Canadian reality. Based on the geographical distribution of issuers and IPO activity, it is fair to conclude that the increase in costs between two and three jurisdictions reported by the CBA is associated with the higher cost of registering in Ontario and that the significant increase in costs between 3, 4 or 5 jurisdictions is related to the translation costs of registering in Quebec. Hence, the data presented by the CBA suggests that the increased regulation-related expenses vary as a step function tied to the higher cost for accessing the Ontario market and the additional requirements of bilingualism in the Quebec market, which cannot be extrapolated to all other provinces and territories.

Second, the data used for the study excludes income trusts and junior capital pool entities, two means of accessing the public markets used extensively by SMEs during the period considered. In particular, the Capital Pool Company programs allow very small IPOs relative to international norms. Third, the data pertains to a regulatory environment that has been streamlined by the implementation of the passport system, except for Canadian issuers not domiciled in Ontario accessing that market.

Fourth, the study offers no comparison with similar regulation-related expenses in other jurisdictions, nor against the centralized regulatory apparatus it advocates. The draft legislation provides that the proposed Canadian Securities Regulatory Authority would be self-financing; there exists no credible indications that the total cost issuers would have to bear would be less than under the current regime. The opposite is most likely to be the case. The fee structure may well be simplified, but in the end, it is the quantum that counts.

Fortunately, there are methodologically rigorous and independent studies that have analysed the cost of an IPO in Canada in comparison with those incurred in the United States. The results are presented in Table 2.

TABLE 2: IPO Costs in Canada and the United States (1997-1999)**

Size of issue ($M)	Brokerage fees (%)	Other expenses (%)	Total direct costs (%)
Canada			
1.0-9.9	8.12	7.86	15.98
All issues*	5.35	1.84	7.19
United States			
1.0-9.9	9.29	8.7	17.99
All issues*	5.79	1.43	7.22

* weighted average

** Koolie, M and J.M. Suret, *How Cost-Effective are Canadian IPO markets*, Canadian Investment Review 61 (1), (2003).

---

[17] Canadian Bankers Association, *The impact of multiple regulators on the cost of raising capital for small- and medium-sized businesses*, (February 2007).

These results show conclusively that Canadian securities regulation does not impose on Canadian issuers, including junior issuers, a cost burden higher than that in the U.S. Indeed, for junior issuers the opposite appears to be the case. Hence, contrary to accepted wisdom, the Canadian multi-jurisdictional regime does not impose a heavier burden on issuers than what is observed in the U.S. market. The Canadian burden has been further lightened since the study's release with the adoption of the passport system.

Despite its shortcomings, the CBA Paper draws attention, albeit inadvertently, to the costs of translating into French offering and continuous disclosure documents, an issue which would irremediably take a different dimension under a Federal securities regime. The creation of a federal securities commission will not change the obligation to translate offering documents to access the Quebec market. These costs will not change and it would be ludicrous to imply otherwise. The Transition Office admits this much in its Transition Plan.

What may change, however, is that under the jurisdiction of a Canadian government agency, the obligation to publish offering and continuous disclosure documents in both English and French could become mandatory for all issuers, resulting in an increase in regulatory-related costs for all non-Quebec issuers.

This is not an issue that should be dismissed. It has been observed that: "At this time, even among the 253 largest listed companies in Canada, the companies making up the S&P/TSX Composite Index, only 81 (37%) publish their annual report in French as well as in English. Only 60% actually provide a French version of the all-important Management Information Circular, the proxy document that provides information on executive compensation, on board members proposed for election as well as on any special resolution submitted to a vote by the general assembly of shareholders."[18]

The Transition Office states that "no translation requirements on reporting issuers will be imposed beyond the requirements that exist today."[19] This may be the intention, but it pays short shrift to the fact that the responsibilities of the Canadian government with regard to the promotion of the official languages differ markedly from those of the provinces. Would the status quo survive a court challenge?

The Wise Persons' Committee states that a major justification for a centralized regulatory regime is to "provide equal access to investment opportunities to all Canadians, regardless of the province or territory in which they live."[20] At the national level, this fundamental principle cannot be put into practice without addressing the matter of the language of disclosure documents. It would be a challenge for a Canadian Government that is bound by its own legislation to "…generally advance the equality of status and use of the English and French languages within Canadian society"[21] to explain why it is mandatory that all the information presented on a box of cereal needs to be bilingual, but that information it deems essential to the efficiency of Canadian capital markets and the protection of individual investors would not.

---

[18] Allaire, Y., *The Fine Print on a National Securities Commission*, The Montreal Gazette, (February 17, 2009).

[19] Canadian Securities Transition Office, op. cit., 29.

[20] The Wise Persons' Committee, op. cit.

[21] Official Languages Act, R.S., 1985, c.31, art.2(b).

The Incremental Costs of Compliance for Financial Firms

A careful study of the cost of securities regulation found that the direct cost of securities regulation in the United Kingdom amounted to 0.3% of a financial firm's net operating expenses, while incremental compliance cost represents 1.3% of net operating expenses.[22] This is in line with the 4 to 1 ratio generally regarded as the rule. In a more recent study of the incremental compliance cost of Financial Services Authority (FSA) regulation in the United Kingdom, the median cost was evaluated at 1.6% of the firm's non-regulatory operating cost,[23] a result relatively close to that of the prior study. Moreover, as in U.S. studies, the cost of securities regulation were estimated to be significantly higher for smaller financial firms than for larger firms and higher for firms engaged in retail sales and advice than for firms engaged in capital markets operations.

Given that the direct cost of securities regulation is somewhat lower in Canada than in the United States, and that the regulatory philosophies and requirements are quite similar, there is no reason to suggest that the incremental cost of securities regulation for financial firms are more burdensome in Canada. The contrary is most likely the case.

Large Canadian banks and other large financial institutions will argue, with some reason, that they invest considerable sums in compliance with their internal policies since they have a significant interest in protecting their brand. Therefore, a centralized securities regulator should impose a smaller burden since it would recognize the strength and value of their internal mechanisms. The argument is seductive but fallacious.

First, a significant portion the cost of regulation for the securities industry stems from capital adequacy rules. As discussed later in this paper, this aspect has been delegated by Securities Administrators to the Office of the Superintendent of Financial Institutions (OSFI) and, therefore, the duplications, conflicts and lack of coordination between prudential regulators that have plagued the U.S. regulatory system have been successfully eliminated in Canada. In short, the benefits of centralization on this aspect, with respect to the large financial institutions regulated by the Canadian government, have already been recognized and reaped.

Second, with respect to business conduct, it is not uncommon for employees or units of large public or private organizations to engage in egregious behaviour, particularly when incentivized by dysfunctional remuneration programs. Canadian geography commands that, in order to be effective, the regulation and supervision of conduct vis-à-vis consumers and individual investors in securities matters be carried out at the regional level. This conclusion is aligned with the 2007 decision of the Supreme Court of Canada with respect to the promotion of certain insurance products to the effect that Canadian chartered banks were subject to the Alberta Insurance Act when carrying on such activities in the province.[24]

---

[22] Franks, J., Schaefer, S. and Stanton, M., *The direct and compliance cost of financial regulation*, Journal of Banking and Finance, 21, 1998, 1547-1572.

[23] Financial Services Authority, *Cost of Compliance. A Report by Europe Economics*, (June 2003).

[24] Supreme Court of Canada, "Canadian Western Bank v. Alberta", 2007, S.C.R.3, 2007SCC22.

However, this is not the whole story. A comparison with the United States must take into account their widespread prevalence of private actions. Litigation (class actions) and arbitration initiated by private parties account for 45% of total securities enforcement actions in the United States, whereas this phenomenon is almost non-existent in Canada. This imposes a substantial compliance and legal burden on U.S. financial firms, which have been until now generally avoided in Canada. Professor Jackson writes, as do many U.S. authors, that private enforcement actions in the United States constitute "a substantial multiplier to public enforcement in the field of securities regulation."[25] It is doubtful that many who cricitize the performance of the Canadian securities regulatory regime in terms of enforcement would regard the importation of the 'bounty approach' to enforcement as progress.

Some will argue that this costly feature of the American legal system should not be considered in the debate since the draft Securities Act does not contemplate expanding the scope of private actions. This is a static view. It fails to recognize that in a Federal state, economic or political pressures create dynamic situations where the constituent jurisdictions will enact measures to achieve their objectives. The choice of instrument will depend on those available, not on whether or not it is a first best solution.

THE ENFORCEMENT SHIBBOLETH

The ultimate argument by proponents of a centralized regulatory system is that the Canadian regime is deficient in matters of enforcement.[26] It is a seductive argument. In any society, the social and economic impact of fraud is costly. Even when prosecuted in justice, the prevention of fraud is a far superior outcome. Regrettably, no society is immune to asocial behaviour and the idea that each and every fraudulent behaviour can be uncovered beforehand is an illusion. Therefore, the performance of the Canadian securities regulatory regime must be compared to that of other systems considered to have a superior track record and not against an ideal of perfection that has no relevance whatsoever to human behaviour and proclivities.

Comparisons with the United States are frequent. The Crawford Report captures the impetus for this widespread fixation: "Securities law enforcement in the United States has been highly visible on both sides of the border due to press coverage, due to the size and impact of the market abuses in question, and due perhaps to the search for profile by some involved. … The high visibility of securities law enforcement action in the United States has led many Canadian investors (justifiably or not) to conclude that Canadian regulators are failing in this area."[27] Many point to the SEC and the United States as examples to emulate.

[25] Jackson, H.E., op. cit., 123.

[26] For instance, the press release issued on May 26, 2010, by the Department of Finance to announce the publication of the proposed *Federal Securities Act* was entitled *Government of Canada Moves to Protect Canadian Investors*.

[27] Crawford Panel on a Single Canadian Securities Regulator, *Blueprint for a Canadian Securities Commission, Final Paper*, (June 2006).

In fact, criticism on the quality of enforcement is common to all jurisdictions. The scathing observations and disturbing findings reported by the Government Accountability Office (GAO) on the effectiveness of the SEC in enforcement matters impart a sobering perspective on whether a centralized apparatus is the answer. The investigation of the SEC and the FINRA Special Committee concerning the failure to uncover Bernard Madoff's Ponzi scheme highlights the structural deficiencies of centralized bureaucracies distant from the market, including their reduced capacity to identify and prevent fraud.[28]

The data concerning public enforcement actions in Canada and the United States reveals a more nuanced situation. A thorough analysis of the legal rules governing criminal proceedings in both countries debunks the assertion that the observed results stem from the architecture of Canadian securities regulatory regime.

PUBLIC ENFORCEMENT ACTIONS: THE RECORD

Enforcement actions span a large continuum, from regulatory enforcement to criminal enforcement. Canadian securities commissions are civil enforcement agencies and, therefore, their only recourse is to impose administrative, civil and penal sanctions. The police and Attorney Generals have responsibility for the investigation and prosecution of criminal activity in capital markets.

The incidence of public enforcement actions in Canada and the United States is presented in Table 3.

TABLE 3: Summary of Public Enforcement Actions in Securities Regulation (2002-2004, average)

Agency	# of Enforcement Actions (annualized)	Proportion (%)	# of Enforcement Actions (annualized)	Proportion (%)
Government Agencies				
Securities and Exchange Commissions*	-	-	639	17.6
Department of Justice	-	-	112	3.1
State and Provincial Agencies	124	59	1482	40.8
SUB-TOTAL	124	59	2233	61.5
Self-Regulatory				
IDA	56	26.7	-	-
MFDA	12	5.7	-	-
NASD	-	-	1170	32.2
SUB-TOTAL	68	32.4	1170	32.2
RS/NYSE	18	8.6	227	6.3
Total	**210**	**100**	**3630**	**100**

* SEC only in the United States

SOURCE: Jackson, H.E., op. cit.

[28] SEC, Report of Investigation Case No. OIG-509 and Report of the 2009 Special Review Committee on FINRA's Examination Program in light of the Stanford and Madoff schemes.

Several observations arise from the data. Clearly, the incidence of public enforcement actions in Canada is significantly lower than that observed in the United States. The ratio of public enforcement actions between both countries is 18.0 compared to a U.S./Canada ratio of 10.9 for population and 11.4 for total domestic market capitalization (2008). Such a ratio is often presented as proof that the Canadian securities regulatory regime is not fulfilling its enforcement role, a shortcoming that according to advocates of a centralized model can only be corrected by the takeover of securities regulation by the Federal Government. The argument is powerful but flawed.

First, the academics who have engaged in international comparisons of enforcement intensity hold the view that the results of such comparisons are problematic in several ways. Lawfulness of populations may vary. For instance, there are about 1.6 million adults incarcerated in the United States compared to 33,100 adults in Canada (a ratio of 48.3 to 1).[29] Despite this huge discrepancy, no one can pretend that Canada is a less law-abiding society or that our cities are more dangerous places to live. Countries may structure their regulatory oversight differently, one emphasizing ex-ante supervision while the other relies on ex-post sanctioning and litigation. Abundant academic literature argues that the U.S. securities regulation is excessively tilted toward enforcement actions while a better balance in oversight activities would be much more efficient.[30] Why should Canada blindly follow the same road?

Second, the argument that centralizing the Canadian regulatory regime would improve the enforcement record is a faulty assumption, at best. Table 3 clearly shows that, in the United States, the SEC accounts for only 17.6% of public enforcement actions compared to the State securities regulatory agencies, which account for 40.8% of total public enforcement actions. Recognizing that State agencies are more attuned than the national regulator to the activities that occur in their jurisdiction, the U.S. National Securities Markets Improvement Act of 1996 (NSMIA) provided that enforcement remains subject to concurrent federal and state regulations. The jurisdiction of state securities commissions to investigate and bring enforcement actions with respect to fraud, deceit or unlawful conduct in connection with securities transactions is explicitly preserved under the NSMIA. It is noteworthy that the recent Dodd-Frank *Wall Street Reform and Consumer Protection Act* (the Dodd-Frank Act) not only confirmed the jurisdiction of the States under NSMIA but expanded the investor protection and enforcement roles of State securities regulators.

Third, the most strident criticism about the quality of enforcement of securities regulation comes from the Canadian banking industry and several elements of the financial community in Toronto. Since they dominate the securities industry, these same banking institutions and financial industry leaders have a large influence on the performance of the self regulatory organizations (SROs). If the lower level of regulatory enforcement intensity in Canada compared to the United States is an outcome of the current structure of the Canadian regulatory regime, why is it that the relative proportion of enforcement actions by the Canadian self-regulatory organizations they control is no different than that of the Canadian Securities Commissions?

---

[29] The high propensity to incarcerate in the United States is a well documented phenomenon. As a proportion of total population, the number of persons incarcerated in the United States is five times higher than in the United Kingdom, nine times higher than in Germany and 12 times higher than in Japan.

[30] The high propensity to incarcerate in the United States is a well documented phenomenon. As a proportion of total population, the number of persons incarcerated in the United States is five times higher than in the United Kingdom, nine times higher than in Germany and 12 times higher than in Japan.

The plot thickens considerably when similar comparisons are made on the basis of the size of monetary sanctions. In the United States, the monetary sanctions imposed by self-regulatory organizations amount to 31% of those imposed by government agencies.[31] In Canada, this same ratio is only 12%. How does the Canadian securities industry justify this apparent leniency on the part of its own organizations?

Consistency in Regulatory Enforcement Decisions

Critics of the Canadian securities regulatory regime contend that its structure does not possess the mechanisms and safeguards that would promote consistency in regulatory decision making across all jurisdictions.

Once again, the record as it stands is quite satisfactory and a far cry from the dismal situation some like to depict. In her research study commissioned by the Wise Persons' Committee, Mary Condon, Osgoode Hall Law School professor, noted that as far as public interest enforcement orders by provincial securities were concerned, "there was a notable consistency across the provinces in the articulation of the public interest that was the basis for making orders."[32] In short, enforcement rulings by provincial securities regulators have shown a remarkable convergence over time to assert "the goals of maintaining public confidence in, and integrity of capital markets"[33] rather than explode in myriad directions.

The Federal Government Record With Respect to Securities Crime

In matters of enforcement, the Canadian Government is not an innocent bystander. The Federal Parliament has exclusive jurisdiction to bring securities crimes under the ambit of the Criminal Code. The Canadian government bears a major responsibility for the enforcement of the Criminal Code provisions concerning securities fraud and the prosecution of serious offences. Amendments to the Criminal Code made in 2004 provide that the Attorney General of Canada exercise concurrent jurisdiction to prosecute fraud-related cases, including insider trading offences.

It's unclear from an examination of the record of the actions of the Canadian government in securities matters that there is a good understanding of the intricacies of securities markets and the challenges of effective oversight and enforcement on the ground or that there prevails a sustained determination to implement in an effective way the enforcement responsibilities that stand legitimately under its ambit.

---

[31] The underlying data is drawn from Jackson, H.E., op. cit.

[32] Condon, Mary, *The Use of Public Interest Enforcement Orders by Securities Regulators in Canada*, Research prepared for the Wise Persons' Committee, (October 24, 2003), 415.

[33] Condon, Mary, op. cit., p 415.

For instance, when recent amendments to the Criminal Code were enacted, making illegal insider trading and tipping criminal offences, several experts in securities law indicated that they would not provide additional deterrence. The Insider Trading Task Force warned the Canadian Government that the experience with other insider trading enactments was to the effect that the "knowing use" of inside information "results in an insurmountable evidentiary obstacle."[34] In his testimony before the Senate Committee on Banking, Trade and Commerce, Mr. Michael Watson, Director, Enforcement, Ontario Securities Commission, made a convincing case that the requirement to meet the mens rea standard embodied in the proposed legislation was likely to make it impossible to overcome the hurdle of proving that a criminal act has been committed. Unfortunately, to date, Mr. Watson has been proven correct.

Constitutional protections and investigative procedures differ between Canada and the United States. For example, the restrictions placed by the Courts on the use for criminal investigations of evidence gathered during the course of regulatory investigations render it much more difficult to pursue effectively securities crime in Canada.

To investigate successfully and secure convictions in Canada's Criminal Court, there must be proof beyond reasonable doubt of criminal action and criminal intent by those charged. Canadian criminal law does not allow police to compel testimony during an investigation from persons, including corporations, who are not charged with an offence but who may possess information that would assist and expedite the investigation. The U.S. Grand Jury process and the powers of the U.K. Serious Fraud Office permit compelled testimony of non-accused parties.

The legal requirements related to disclosure of the Crown case to the accused renders impractical the adoption in Canada of the U.S. practice of laying criminal charges first against some individuals and, in a second round, against additional accused. This staging of cases not only accelerates the laying of charges but facilitates the uncovering of additional evidence.

In the United States, the grand jury process enables prosecutors to compel and introduce sufficient evidence to obtain an indictment and then continue to investigate and prepare the case. In Canada, the grand jury process was formally abolished in 1985. In their report on the critical issues in enforcement, retired Justice of the Supreme Court of Canada, the Honourable Peter Cory, and Professor Marilyn Pilkington conclude that "in light of different procedural traditions and constitutional protections in Canada and the United States, it would be inappropriate even to suggest that the grand jury process be introduced for the investigation of capital market offences."[35]

And if all this was not enough, the United States adopted in 2003 the practice of charging the corporations (as distinct from officers and employees) in fraud cases when their non-cooperation was deemed important. This and other enforcement/sanction instruments such as deferred prosecution and cooperation agreements have had a significant impact on the behaviour of U.S. corporations and the incidence of successful criminal investigations.

---

[34] Insider Trading Task Force, *Illegal Insider Trading in Canada: Recommendations on Prevention, Detection and Deterrence*, (November 2003).

[35] The Hon. Peter de C. Cory, Pilkington, M.L., *Research Study: Critical Issues in Enforcement*, Task Force to Modernize Securities Legislation in Canada, (September 2006).

Despite its substantially greater latitude in pursuing criminal cases, the prosecutors extended the use of the honest-services fraud law to gain convictions in the highly publicized Enron and Hollinger cases. The U.S. Supreme Court has since eviscerated this extension of the law by prosecutors, causing these convictions to lay in abeyance.[36]

The Federal Government Record with Respect to Prosecution of Securities Crime

Efficiency in criminal enforcement requires a close, constructive and sustained cooperation between regulatory bodies and police forces. Recognizing this imperative, the United Kingdom created the Serious Fraud Office (SFO) in 1987. In the United States, the Corporate Fraud Task Force was created in 2002 as a dedicated unit that assembles, under the direction of the U.S. Department of Justice, representatives of several federal agencies and seven U.S. Attorneys.

In Canada, the Canadian government waited until 2003 to announce the creation of the Integrated Market Enforcement Teams (IMET) and their deployment in Calgary, Montreal, Toronto and Vancouver. It indicated that by March 31, 2004, these teams would incorporate a quick-start capability, allowing them to respond swiftly to major corporate frauds and market irregularities anywhere in Canada and that effective management and accountability mechanisms would be a key feature of the initiative. The IMET teams are jointly managed by the RCMP and Justice Canada. They are meant to work closely with securities regulators and other federal and provincial authorities. There are now nine IMET teams across Canada.

To date, the IMET program has not produced the anticipated results. It may well be that the expectations were unrealistic, but this only shows that the vitriolic criticisms levied by Federal government authorities did not reflect a thorough understanding of the intricacies and complexities involved in investigating and prosecuting securities crime and their interrelation with the rule of law in Canada. The implementation of the IMET program had its shortcomings. An assessment of the RCMP program concluded that its management lacked the leadership, coordination, cohesion, flexibility and communication necessary to meet the task.[37] Testimonies at hearings before the Senatorial Committee on Banking Trade and Finance (June 13, 2007) revealed that the funding for this crucial Canadian enforcement initiative was not adequate and that the teams were hampered in their activities by high personnel turnover.

According to the assessment, management of the program was saddled with significant organizational issues related to the chain of command. "The HQ Director of the IMET program had limited authority to actually direct or coordinate the Program, which was essentially run as four semi-independent units under the guidance of four criminal operations managers."[38] So much for the touted virtues of unity and speed of decision in Federal agencies! However, the tendency to blame the RCMP for the implementation hiccups and for the gradual decentralization of authority over IMET activities contrary to the pre-ordained structure imposed at inception may well miss the fundamental lesson to be drawn from the experience: securities regulation and law are better enforced at the local/regional level.

---

[36] Supreme Court of the United States, "Skilling v. United States" and "Black et al v. United States", (June 24, 2010).

[37] Le Pan, N., *Enhancing Integrated Market Enforcement Teams, Achieving Results in Fighting Capital Market Crime*, (2007).

[38] Le Pan, N., op. cit.

The bottom line is that centralized authority at the Federal level provides no guarantee of speed of action or results. The solution to effective enforcement does not rest in attempts to emulate the United States. Even on a market-adjusted basis, the United States is an outlier in terms of actual enforcement actions and sanctions levied. Contrary to other jurisdictions, it systematically prosecutes securities offences criminally. Since the legal framework governing criminal investigations and prosecutions in Canada is a fundamental reason for the low incidence of criminal prosecutions of fraud, deceit and unlawful conduct related to financial transactions, centralization of the securities regulatory apparatus will not change one iota to the limitations and constraints that govern enforcement activities in criminal matters.

A more thorough examination of what works in securities law suggests that, overall, Canada may well have achieved a more optimal approach in the regulation of our securities markets than what is often suggested in the public debate.[39] This conclusion may be counterintuitive for many. It does not mean that more vigorous action or greater sanctions would not have been justified in certain cases, nor that there is no room for improvement in the enforcement machinery across the spectrum. The above results suggest that what is required is a commitment to continuous improvements of our system and practices, not a structural overhaul. Notwithstanding the warnings of the tougher enforcement proponents, improvements in the enforcement of securities laws in Canada will not be achieved by attempting to copy the U.S. approach, which is not compatible with our constitutional and other values. The answer is in decriminalizing most securities offences; strengthening efforts at the provincial and federal levels to investigate, prosecute and adjudicate securities offences; and giving securities commissions (or tribunal) and Courts greater authority to order restitution or compensation in appropriate circumstances.

ACCESS TO CAPITAL MARKETS AND COST OF EQUITY

From a Canadian economic perspective, market access by new issuers and the cost of equity in Canada compared to that in the United States are two critical dimensions. The proponents of the centralized regime argue that the current Canadian securities regulatory environment is more costly and more burdensome for issuers and industry participants than a centralized apparatus would be. At a recent Ministerial Conference, one expert claimed that Canada was saddled with a significantly higher cost of capital relative to the United States, in part because of poorer corporate governance in this country stemming from shortcomings in securities regulation.[40]

[39] See, for instance, LaPorta, R., Lopez-de-Silanes, F., and Shleifer, A., *What Works in Securities Laws*, The Journal of Finance, (February 2006); Djankov, S., LaPorta, R., Lopez-de-Silanes, F., Shleifer, A., *The Law and Economics of Self-Dealing*, Journal of Financial Economics, (2008).

[40] Coffee, J.C., *Canada's Position in a Globalizing World of Securities Markets: an Outsider's Perspective*, Presentation, Meech Lake, (June 19, 2007).

A large body of empirical studies indicates that on all dimensions of market efficiency that depend on securities regulation, the Canadian market ranks with the best. Worth noting is that the market capitalization of Canadian issuers relative to GDP is greater than that in most developed economies, a measure of a well-developed and efficient capital market.[41] Yet, the question remains: How do these desirable characteristics of the Canadian capital markets translate at the issuer level? To answer this question, it's important to assess the performance of the Canadian equity markets with respect to the ease of access for new issuers, the absence of regulatory barriers that may unduly restrict that access, and the cost of issuance. It's also important to compare the cost of equity in Canada relative to that in the United States.

The Performance of the Canadian Equity Markets with Respect to New Issues

Canada's strong performance in raising equity is highlighted in Table 4, which compares the aggregate value of equity raised in Canada through initial public offerings (IPOs) with that of several common law countries during the 1990-2006 period. The data shows that ratio of the value of IPO issued in Canada compared to the United States has grown from 6% in the 1990-1995 period, to 20% in the 2001-2006 period.

TABLE 4: Aggregate IPO Activity by Country of Issuance*

Country	1990-1995	1996-2000	2001-2006
United States	180.2	360.6	230.3
United Kingdom	55.0	87.9	89.6
Australia	13.3	28.2	29.2
Canada	11.4	24.1	45.1
Canada/USA	6%	7%	20%

* Adapted from N. Cetorelli and S. Peristriani, *Prestigious Stock Exchanges: A Network Analysis of International Financial Centers*, Staff Report no. 384, Federal Reserve Bank of New York, (August 2009).

Clearly, many factors outside the realm of securities regulation influence IPO activity. For instance, the substantial increase in the value of IPO proceeds in the United States during the 1996-2000 was driven by feverish activity in technology companies, particularly the dot.coms. Yet, relative to GDP, the total value of IPOs over that same period was 8.57% in Canada compared to 5.47% in the United States.[42]

Access to Public Markets by Junior Issuers

A vibrant Canadian economy is highly dependent on the growth of small-cap companies and on the resource sector. The Canadian equity market for new issuers has unique characteristics adapted to this economic need.

[41] Hendry, S., M.R. King, *The Efficiency of Canadian Capital Markets: Some Bank of Canada Research*, Bank of Canada Review, (Summer 2004).

[42] Securities Data Corporation, World Bank (2001).

Carpentier and Suret have undertaken comprehensive studies of these matters and the results are compelling.[43] Securities regulation in Canada does not impose undue barriers to access to the public market for junior issuers. On the contrary:

- 71% of new exchange registrant do not earn any income
- On average, in Canada, 214 Canadian companies access the public securities market every year, compared to 313 initial offerings in the United States
- Between 1995 and 2000, 1295 initial public offerings were completed in Canada compared to 457 in Australia.
- Between 2003 and 2007, more than $36.1 billion in equity was raised by junior issuers on the TSX(V).[44]
- In 2008, 6449 companies were listed on U.S. exchanges compared to 3841 in Canada; 64% of these Canadian listed companies (2443) were listed on TSX-Venture.

Interestingly, even though access to public markets is less constrained in Canada, Canadian junior issuers have a higher survival rate and longer life expectancy than equivalent-size companies in the United States. The table below summarizes the empirical results.

TABLE 5: Comparison of Survival Rates of Junior Issuers*

Author	Country	Offering Period	Duration (years)	Survival Rate (%)
Carpentier & Suret (2007)	Canada	1986-2002	5	88.4
Demers-Joss (2006)	United States	1985-2000	5	83.3
Bradley et al (2006)	United States	1990-1998	3	68.5

* Adapted from Carpentier and Suret (2009), op. cit.

The comprehensive studies that have examined the ease of access to public markets and the costs associated with public issues demonstrate the superiority of the Canadian regime in terms of responsiveness to the diversity and heterogeneous needs of the Canadian economy. The IMF confirmed this: “Arguably, the current system has responded to the specific characteristics of its capital market, such as allowing for a large presence of small issuers, and the concentration of certain industries in specific provinces.”[45]

[43] Carpentier, C. and J. M. Suret, *Reglementation des valeurs mobilières au Canada*, (July 2003); *Proposal for a Single Securities Commission: Comments and Discussion*, CIRANO, (September 2009).

[44] TSX Group, (April 2008).

[45] IMF, *Canada: Financial System Stability Assessment – Update*, (February 2008).

The Cost of Equity for Canadian and U.S. Firms

Ultimately, the net effect of the securities regulatory regime will materialize in one critical economic factor: the cost of equity.

As is to be expected, the cost of capital is higher in markets with poor regulation, since shareholders demand a higher risk premium. This conclusion is supported by extensive empirical analysis. We have shown that a substantial body of empirical evidence demonstrates that the present regime of securities regulation in Canada produces an outcome — a level of market efficiency — that is at par with the United States, the world's most efficient market, and significantly better than the United Kingdom, Australia and other industrialized countries with a centralized securities regulatory apparatus. How does this situation translate in terms of the relative cost of equity for Canadian companies?

A comprehensive comparative study has analyzed the relationship between international differences in the cost of equity in 40 countries and their performance with respect to level of disclosure, the effectiveness of securities regulation and the overall quality of the legal system. The main conclusion is that "firms in countries with extensive disclosure rules, strong securities regulation, and to a lesser extent, firms in countries with high quality legal systems, display lower levels of cost of capital, even after controlling for traditional risk and country factors."[46] The study also demonstrates that the cost of equity in Canada is one of the lowest in the world, a result consistent with the very favorable assessments of the quality of securities regulation in Canada. The estimates for the main common law countries for the 1992-2001 period were United States, 10.24%; Canada, 10.52%; United Kingdom, 10.64%; Australia, 10.72%; New Zealand, 11.14%. Witmer, using data for the 1991-2006 period and different criteria for the quality of securities regulation, obtains similar results.[47] To be sure, cross-country variations are driven not only by corporate governance factors but also by growth opportunities which depend on R&D and the degree of capital market openness that may contribute to the differences observed.[48]

Studies squarely addressing the question of the cost of equity in Canada and the United States have recently been published by the Bank of Canada.[49] The introduction to one of these studies is worthy of note since it highlights the faulty assumptions driving recent official reports promoting the Federal government takeover of the whole domain of securities regulation.

---

[46] Hail, L. and C. Leuz, *International Differences in the Cost of Equity Capital: Do Legal Institutions and Securities Regulation Matter?*, Journal of Accounting Research, (2006).

[47] Witmer, J., *The Cost of Equity in Canada: An International Comparison*, Document de travail 2008-2021, Banque du Canada.

[48] Chua, T.C., Ern, C.S., Lai, S., *Corporate valuation around the world: the effects of governance, growth and openness*, Journal of Banking and Finance, (2007).

[49] Witmer, J. and L. Zorn, *Estimating and Comparing the Implied Cost of Equity for Canadian and U.S. Firms*, Bank of Canada Working Paper, No. 2007-48; Zorn, L., *Estimating the Cost of Equity for Canadian and U.S. Firms*, Bank of Canada Review, (Autumn 2007).

> "There has been a concern among policy-makers that financing costs may be persistently higher in Canada than in the United States. The Capital Markets Leadership Task Force begins its 2006 report, for example, with the premise that the cost of capital in this country needs to be reduced for Canadian firms to compete effectively with those in the United States. Similarly, the report of the Task Force to Modernize Securities Legislation in Canada (2006) reinforces the notion of a "made-in-Canada" risk premium that increases the cost of equity capital in Canada and discounts the trading price of Canadian shares. The empirical evidence supporting this view is mixed. Multi-country studies indicate that the costs of equity for Canada and for the United States are comparatively close on a worldwide scale."[50]

The conclusion of the study is that "after taking firm-level and aggregate-level factors into account, the cost of equity was approximately 30 to 50 basis points higher in Canada than in the United States over the 1988-2006 period." However, this differential is related to the difference in bond yields between both countries during the period, reflecting differences in monetary and fiscal policy regimes, including their effects on inflation uncertainty. When longer-term sovereign bond yields are taken into account "our tests are unable to conclude definitely that there is a difference between the Canadian and U.S. cost of equity."[51]

DYNAMIC EFFICIENCY: THE ACID TEST OF A GOOD REGULATORY REGIME

True to its federalist structure, the Canadian securities regulatory regime requires Securities Administrators from all parts of Canada to reach a consensus in order to preserve the national scope of our securities markets. This characteristic of the current regime is often presented as a fatal short-coming said to be making it slow to adapt and to respond in a timely manner to important market developments. Since dynamic efficiency is a critical aspect of the design of an efficient regulatory structure, it is not evident that centralization is the appropriate solution for an heterogeneous environment. Moreover, it's important to consider the structure of the industry it is tasked to regulate. The concentrated structure of the Canadian banking industry, which also dominates the securities industry, has led to its activities being closely intertwined with the regulatory and economic policy instruments of the Canadian Government. This raises the likelihood that the influence of the banking industry on the formulation of securities regulation to suit its own interests would be significantly enhanced under a single Federal regulator scenario. Indeed, it is well established that a regulatory process is more prone to and vulnerable to capture where concentration is high.[52]

---

[50] Zorn, L., (2007) op. cit. (our emphasis).

[51] Zorn, L., (2007) op. cit.

[52] Becker, G., *A Theory of Competition among Pressure Groups for Political Influence*, Quarterly Journal of Economics, (1983).

There is no evidence whatsoever that a monopoly in securities regulation is a superior structure for a diversified economy. On the contrary, the systemic risk associated with flawed regulations is magnified since they impact on the whole economy. For instance, it is well accepted that the decision to preclude the CFTC and SEC from regulating the OTC financial derivatives market, and the adoption in 2004 and failed implementation of the SEC's Consolidated Supervised Entity Program afterwards, have had major roles in the recent debacle.

A decentralized regime encourages innovation and experimentation. The cost of faulty regulations is lower since it's limited to a province. The benefits, if any, and the lessons from implementation, can be appreciated by the other regulators. The end result is that inappropriate or unworkable regulations are discarded more quickly in a decentralized system than under a single regulator, while sound innovations are adopted across the country. This has certainly been the case in Canada. For example, the Quebec experience with an independent adjudicatory body is generally viewed favourably and constitutes one of the main structural features of the draft *Securities Act*. In contrast, a centralized regulator will stifle innovation or prevent adaptations to specific regional circumstances since, even if proposed by a regional office, rejection of the proposal at the national level will prevent adoption at the local level. The crucial difference between a decentralized but harmonized regulatory regime and a single regulator is that while in the former the participating jurisdictions have opting-in and opting-out options, there is no opting-out opportunity under the proposed Federal *Securities Act*.

To a large extent, the case for maintaining the current Canadian securities regulatory regime rests on the proposition that, over the years, it has demonstrated flexibility, a great capacity to adapt to changing circumstances, an unrelenting ability to respond to particular industry or regional needs. It also provides strong assurances against the hasty adoption of disruptive and costly regulations because it is less susceptible to the imposition of politically expedient or faddish requirements or the influence of a dominant industry or interest groups.

The high degree of legislative and regulatory harmonization that prevails across Canada, the establishment of truly national systems, the acceptance of mutual recognition as an organizational principle inherent, for instance, in the passport system, are remarkable achievements. Notwithstanding critics of certain details in the functioning of the current regime, the fact remains that the absence of the Federal government in the field of securities regulation has not led to a race to the bottom. On the contrary, the regime has evolved to become one of the best worldwide.

Numerous examples illustrate the strengths of the Canadian regime in terms of dynamic efficiency. The following examples span the whole range of issues.

Responsiveness to the Characteristics and Regional Needs of the Canadian Economy

The Canadian market is characterized by a much larger proportion of small-cap issuers than is the case in the United States and other industrialized countries. This is reflected in a high level of concentration in terms of capitalization: at the end of 2003, the 100 largest Canadian listed stocks accounted for 79% of total capitalization. As reported above, a substantial number of junior companies have never shown a profit prior to their accessing the public market and listing their shares on an exchange. The majority of these companies are resource exploration companies.

This critical financing avenue was facilitated by the focus of the Vancouver and Alberta stock exchanges and the responsiveness of the British Columbia and Alberta Securities Commissions to the characteristics and specific needs of small-cap equity markets, and particularly that of resources exploration companies.

To ensure against the traditional tendency of the senior market to regulate-out small-cap markets, the acquisition of the Vancouver and Alberta Stock Exchanges by the TSX Group (TSE Venture) was accompanied by strong contractual undertakings and guarantees to the Alberta Securities Commission aimed at ensuring that the development of this market would continue.

It is naïve to think that a centralized regulator would have a strong and continuous interest in ensuring that the regulatory requirements are designed to maintain the proper balance between the specific characteristics and needs of junior issuers and the protection of the integrity of the market. The prevalent tendency of stock exchanges and securities commissions dealing mainly with seasoned issuers is that small issuers should be discouraged from going public until they become larger. This tendency would be further nurtured and exacerbated by the long-standing position of the dominant securities firms to 'officially' shun the junior issuers market.

For example, studies on the factors behind the failure of European junior stock markets stress that since the senior and junior exchanges were under the same management, the second-tier markets did not received adequate attention, as "stock market managements were inevitably predominantly interested in the main market, which accounts for most of their income and prestige."[53] A similar phenomenon occurred in Quebec following the withdrawal of stock trading activities at The Montreal Exchange in 2000.

There are other examples underscoring the responsiveness to the characteristics and needs of regional economies in other provinces. For instance, the Quebec Securities Act provides specific exceptions on the issuance of participation rights in local credit unions that are part of the Mouvement Desjardins, since these financial institutions are already subject to specific and comprehensive regulations by the AMF.

A Continuous Ability to Adapt Its Regulation to International Norms

Canadian Securities Administrators have demonstrated a good grasp of the major forces shaping the industry worldwide and have, over the years, adapted the regulatory approach accordingly. The demutualization of exchanges and the adoption of a comprehensive self-regulation framework illustrates this point.

Following the lead of the Stockholm Stock Exchange in the early 1990s, most of the world's major financial exchanges have converted from mutual, not-for-profit organizations to publicly-traded, for-profit firms. The Toronto Stock Exchange, The Montreal Exchange and the Alberta Stock Exchange were no exception and have all adopted the for-profit model.

In most cases, mutual exchanges had substantial self-regulatory authority, including legal authority to establish and enforce a variety of rules governing the qualifications and behaviour of listed companies and securities industry participants. As the pace of demutualization accelerated, there have been growing concerns that for-profit exchanges might neglect their

---

[53] Bannock, G., *European Second-Tier Markets for WTBFs*, Commission of the European Communities, (1994).

self-regulatory responsibilities. In particular, agencies such as the SEC, the CFIC, the IMF and IOSCO have argued that because enforcement activities are costly, self-enforcement could become too-little enforcement if demutualized exchanges committed insufficient resources to regulatory operations in order to improve profitability.

The Canadian securities regulatory regime has evolved in tandem with these developments and now relies largely on self-regulatory organizations for supervision of the market and its participants. The SROs are subject to an authorization regime based on eligibility criteria that addresses issues of integrity, financial viability, capacity, governance and fair access. They are subject to oversight through periodic reporting, on-site inspections and regular meetings. Moreover, the Securities Administrators have developed a coordinated approach aimed at avoiding duplication and steamlining the regulatory supervision process. This takes the form of a 'lead regulator' for exchanges and the 'principal regulator' approach for SROs, whereby one regulator is the single point of contact for an SRO. This regulatory regime conforms to the IOSCO Principles and, therefore, is in line with international standards.

A Healthy Concern for the Impact of New Regulations

The harmonization of Canadian securities regulations with the U.S. Sarbanes-Oxley legislation, adopted by the U.S. Congress in July, 2002, is a case study in the strength of the current architecture to properly weigh the appropriateness of proposed regulation, including their impact on small and medium companies.

The proposal, promoted particularly by the OSC, to adopt and impose the original Sarbanes-Oxley regulation (SOX) on all Canadian public companies met with strong resistance from some securities commissions. The pressure to be aligned with the new rules was understandable for two major reasons. First, SOX has an extraterritorial application since it applies to all cross-listed foreign issuers. Given the number and importance of Canadian issuers listed on both the TSX and a U.S. exchange, the matter needed to be addressed. Second, concerns existed that the Multi-Jurisdiction Disclosure System that allows Canadian issuers to access the U.S. market on the basis of disclosure documents prepared in accordance with Canadian requirements could be jeopardized if Canada did not follow in lock-step with the SOX regulations.

Notwithstanding these concerns, it was fair to question whether the incremental compliance costs were worth the beneficial results the U.S. Congress assumed would flow from implementation of the SOX rules and whether circumstances in Canada warranted the same heavy regulatory regimen.[54] The President of the Toronto Stock Exchange made the point: "It is not obvious … that the best way to restore investor confidence in Canadian capital markets that are working is making them more like American markets that are not. Nor is it obvious to me that the U.S. has found the answer in Sarbanes-Oxley to its corporate governance troubles."[55]

---

[54] The high-profile cases of Enron, WorldCom, Globe Crossing and Tyco involved criminal fraud activities that existing accounting rules and corporate fiduciary law clearly prohibited. More recently, the collapse of Lehmann Brothers in September 2008 and the demise of AIG which visited untold damages on the U.S. and other economies occurred even though these firms were SOX compliant.

[55] Letter from Barbara Stymiest, President, Toronto Stock Exchange, to David A. Brown, Chairman, OSC, (September 17, 2002).

The cost of implementing the original SOX rules — notably Section 404, which requires CEOs and CFOs to certify that internal accounting and control procedures comply with the rules and external auditors to attest to these procedures — are considerable by any standard. Indeed, studies have estimated that 40% to 70% of the cost of compliance with SOX were related to the external auditor attestation of the control systems. The Alberta and British Columbia Securities Commissions were particularly concerned with the heavy cost burden and disproportional negative impact of SOX on smaller firms since, to a large extent, the cost of compliance is fixed.

In the end, the Canadian Securities Administration achieved a consensus on a harmonized body of regulations that embody the main governance features of SOX, but generally avoid SOX's overly elaborate and costly impositions. The Canadian regulations contain specific carve-outs of certain requirements for venture issuers and for issuers with controlling shareholders, while eliminating the burdensome requirements of Section 404 of SOX. It took some time and much wrangling among provincial securities commissions to achieve this consensus. But no one can deny that a process that forces so much disciplined attentiveness to the distinctive features of Canada's markets has produced a regulatory regime that has saved the great majority of Canadian issuers substantial compliance costs.[56]

With the passage of time, it is now possible to assess the net effect of SOX, and whether or not it has achieved its proclaimed objectives. The empirical studies conclude that "capital markets generally perceived SOX as imposing higher costs than benefits to foreign issuers from countries, like Canada, which already boasts strict governance, accounting, and securities regulation regimes."[57] Interestingly, the SEC Advisory Committee established to assess the regulatory system for smaller companies under U.S. securities laws concluded that "the costs imposed on smaller public corporations by a number of SOX provisions significantly exceeded any benefit the provisions provided to investors."[58] The Dodd-Frank Act includes an exemption from SOX for all publicly traded companies with a market capitalization of less than $75 million.[59] SOX offers a good example of 'haste makes waste' and of the merits of the current Canadian regulatory regime.

The SOX episode does not imply that the Canadian securities regulatory regime can't deal with urgent situations when they arise. The following example is a case in point.

---

[56] The Canadian response to SOX is embedded in the following regulatory instruments: Multilateral Instruments 52-109 (CEO and CFO certifications) and 52-110 (Audit Committees) and National Instruments 52-108 (Auditor Oversight), 58-101 (Disclosure of Corporate Governance Practices) and 58-201 (Corporate Governance Guidelines).

[57] Ben-Ishai, S., *Sarbanes-Oxley Five Years Later: A Canadian Perspective*, (June 2008).

[58] Advisory Committee on Smaller Companies, *Final Report to the United States Securities Exchange Commission*, (2006).

[59] Dodd-Frank Wall Street Reform and Consumer Protection Act, Section 989, H.R. 4173, 111th U.S. Congress.

The massive short selling of the shares of financial and industrial companies by hedge funds and other speculators that began in the fall of 2007 was seen as posing a serious threat to the very foundations of the U.S. financial system.[60] On Sept. 19, 2008, the SEC issued an order imposing a comprehensive short selling ban on 799 financial stocks for a ten-day period. The list of companies was later expanded to include major companies such as GE.[61]

The response of securities regulators in major jurisdictions to this SEC decision is presented in Table 6. Contrary to the assertion of the Expert Panel, Canada's response was swift.[62]

TABLE 6: Adoption of Emergency Short Selling Restrictions

Country	From	Until
United States	09/19/2008	10/08/2008
Canada	09/19/2008	10/08/2008
United Kingdom	09/19/2008	01/16/2009
Australia	09/22/2008	11/18/2008

The Regulation of Takeover Bids and Going Private Transactions

The development of the regulatory framework for takeover bids in Canada and the United States is a case study in the efficient working of the Canadian securities regulatory regime.

The matter came to the fore in the early 80s with the emergence of the junk bond market, which enabled hostile takeover bids for large public firms and the exacting of 'greenmail' from target firms by raiders. The economic dislocation caused by these financial ventures, coupled with serious misgivings with respect to the fairness of this market behaviour towards shareholders, spurred efforts to design an appropriate regulatory framework.

In Canada, the securities industry promoted a regulatory framework that firmly established as its cornerstone that all shareholders be treated fairly, as exemplified by the mandatory coat-tail provision. The Securities Administrators adopted regulations to implement the regulatory framework and the main features where gradually incorporated in securities legislation. As a result, Canada was spared from the scourge of greenmail and, as shown in Table 1, Canada benefits from an enviable position with respect to shareholders protection.

---

[60] In his account of the period, Henry M. Paulson, Jr., insists on several occasions on the very destabilizing effect of short selling during the financial crisis. "I called Chris Cox to discuss market manipulation. The investment bank's falling stock price and widening CDS appeared to be driven by hedge funds and speculators. I wanted the SEC to investigate what looked to me to be predatory, collusive behavior as our banks were being attacked one by one" … "I alerted Tim Geithner and then called Chris Cox to urge him again to do something to end abusive short selling." Paulson, Jr., H. M., *On the Brink, Inside the Race to Stop the Collapse of the Global Financial System*, Business Plus, (2010).

[61] On October 17th, 2008, the SEC adopted the Naked Short Selling Antifraud Rule (Rule 10b-21). The stated purpose was to supplement the antifraud provisions of the U.S. federal securities laws by giving an example of illegal short selling activity.

[62] Lamenting the alleged difficulty of "Canadian securities regulators to react quickly and decisively to capital market events," it offers as an illustration that in these circumstances "the Canadian response lagged behind the coordinated efforts of the United States and United Kingdom." Expert Panel on Securities Regulation, Final Reports and Recommendations, (January 2009), 40.

In contrast, in the United States, the U.S. Congress and the SEC failed to agree on a securities regulatory framework that would have given primacy to the promotion of fairness for all shareholders. The consequence has been the adoption at the State level of anti-takeover provisions in their company laws, giving firms further defenses against hostile bids, including authorizing the board of directors to 'just say no.'[63] [64]

In its prior quest to centralize securities regulation under its authority, the Federal Government incorporated into the Canada Business Corporation Act provisions concerning going private transactions, takeover bids and insider reporting which duplicated the measures already adopted by the Canadian Securities Administrators. Those provisions were eliminated in 2001 to avoid "the futility of maintaining a regulatory overlap"[65] with Canadian securities regulations pertaining to these same matters.

The final outcome is that the Canadian Securities regulatory regime has produced in a timely manner one truly national regulatory regime for going private and takeover transactions,[66] even though the Canadian government does not regulate these matters, whereas the United States is saddled with a plethora of different requirements which depend on the state of incorporation.

Recently, serious questions were raised about the appropriateness of National Policy 62-2002 and the traditional position of securities regulators that shareholder rights plans (poison pills) could be maintained only for the limited time needed to obtain a better bid.[67] In simple terms, in Canada, once a company is put in play, the final outcome is a take-over transaction. It is difficult to envisage that such a policy would have been different under a Federal regime, since the takeovers which have raised the most questions — Alcan, Falconbridge, Inco — have all been authorized under the Canada Investment Act.

As befits a dynamic system, some securities commission have recently leaned toward the U.S. position that as long as the board of directors fulfilled its fiduciary duties, its decision to issue a 'poison pill' and 'just say no' to a takeover bid should not be overruled. This was certainly the case in the ASC decision concerning Pulse Data Inc. and the OSC decision regarding Neo Material Technologies Inc. In contrast, the BCSC stuck with the traditional view in the Lions Gate Entertainment Corp. case.[68] Clearly, the underpinnings of National Policy 62-2002 will need to be revisited. The Supreme Court of Canada ruling in the BCE Inc. case of 2008, that the board needed to act in the long-term interests of a corporation, will influence the debate, but it does not specifically address the limits to the constraints that can be imposed on shareholders' property rights. The rationales underlying the decisions of the securities commissions in actual cases and varying circumstances will provide precious material to inform the content of a revised national policy which, otherwise, would be non-existent under a centralized regulator.

---

[63] Gompers, P.A., J.L. Ishii, A. Metrick, *Corporate Governance and Equity Prices*, Quarterly Journal of Economics, (February 2003).

[64] Allaire, Y., and M. Firsirotu, op. cit. (November 2003).

[65] Industry Canada, *Analysis of the Changes of the Canada Business Corporation Act*.

[66] Canadian Securities Administrators, National Policy 62-202.

[67] Allaire, Y., *Potash and Couche-Tard: 'Laissez-Faire' Canada vs 'protectionist' America*, The Institute for Governance of Private and Public Organization, (September 2010).

[68] At the date of this writing, the Saskatchewan Securities Commission had not yet rendered its decision in the case of Potash Corp.

THE INTERNATIONAL DIMENSION

Canada's standing in international forums and markets are legitimate concerns for the Canadian Government. These run the gamut from representations, the ability to enter into critical international agreements and, most importantly, the competitiveness of Canadian capital markets.

An argument often made to justify the takeover of the securities regulation domain by the Federal government is that Canada's position in international forum is diminished because securities regulation is under the jurisdiction of the Provinces and that international issuers shun Canadian capital markets for the same reason. Here again, the allegations are not supported by the evidence.

Institutional Representation and Influence

Canada's capital markets represent about 3% of the global capital markets. Whatever we may think of ourselves, we are not a dominant force. Nevertheless, Canada, through the Securities Administrators, has enjoyed and continues to enjoy at the international level significantly more influence and leadership than warranted by the relative size of our capital markets. This position reflects in no small proportion the credibility and high international rankings of the quality of securities regulation in Canada.

IOSCO was founded in Canada in 1983 at an annual meeting of the Inter-American committee of securities commissions, which at the time was chaired by a Canadian, the chairperson of the Quebec Securities Commission. The head office of IOSCO was located in Montreal until it was transferred to Madrid several years later at the instigation of the European members. IOSCO's main activities are centered around the promotion of common approaches to securities regulation. It aims to facilitate cooperation and information sharing among securities regulators as well as to establish strong standards and an effective surveillance of securities transactions. IOSCO standards are deliberately broad and not legally binding on its member states. In this, IOSCO differs fundamentally from the Bank for International Settlement (BIS) and the Basel Committee on Banking Supervision (BCBS).

Canada has always exerted a great deal of influence within IOSCO. The Ontario and Quebec securities commissions have voting status while Alberta and British Columbia have observer status. Since its founding, both the OSC and the AMF (or QSC) have been represented on IOSCO's Executive Committee and Technical Committee. The latter was chaired for a good length of time by the chairman of the OSC. Moreover, the President of the AMF now chairs the IOSCO's Inter-American Committee and the Council of Securities Regulators of the Americas (COSRA). The Alberta and British Columbia securities commissions are also members. Canada is alone with China and the United States to have two IOSCO memberships. With a centralized regulator, Canada would lose one seat. Given the leadership roles exerted over the years by the two Canadian representatives, the shrinking of our representation can hardly be viewed as progress.

Because of the geographic proximity and size of the U.S. capital markets and the substantial integration of the Canadian and American capital markets, the most important and relevant international relationship needs to be with the United States. This is achieved through the membership and active participation of Canadian Securities Administrators in the North American Securities Administrators Association (NASAA).

The June, 1991, agreement between the SEC and Canadian Securities Commissions concerning the Canada/USA Multijurisdictional Disclosure System (MJDS) is a case in point. It permits eligible Canadian issuers to offer securities in the United States based on disclosure documents prepared in accordance with Canadian requirements, use Canadian continuous disclosure documentation and file Canadian-style insider reports in satisfaction of U.S. requirements. The MJDS extends to specific transactions such as cross-border rights offerings, takeover bids, and business combinations. U.S. issuers benefit from a similar treatment in Canada. No other country benefits from such a mutual recognition and harmonization agreement with the SEC. That it has stood the test of time and remained in force for close to 20 years is a measure of the high regard for the consistent quality of securities regulation in Canada.

Canadian securities regulators and the SEC have had formal mechanisms since 1998 to assist each other in enforcement activities. On June 10, 2010, the SEC, the OSC and the AMF signed Regulatory Cooperation Agreement that provides for “a clear mechanism for consultation, cooperation and exchange of information in the context of supervision.”

The Competitiveness of Canadian Capital Markets

Noting recent trends in global financial markets, the Wise Person’s Committee asserted that “[t]hese sweeping changes have resulted in vigorous global competition for capital. The rules of engagement are simple. Capital flows to destinations that engender investor confidence and offer the most attractive risk-adjusted returns.”[69] Well said, but it does not follow that such admonitions form a sound basis for detailed policy formulation in matters of securities regulations. For example, in the last two decades, a substantial part of global financial flows went to China, a jurisdiction that is not generally perceived as the best example to emulate in terms of securities regulation. In 2006, Germany ranked 1st on the value of foreign IPOs taking place in a jurisdiction. Yet, according to the 2009 World Bank assessment of the quality of securities regulation and investor protection, Germany ranked 83, whereas Canada held the 5th position. Clearly, factors other than securities regulation are determining the attractiveness and competitiveness of capital markets at the international level.

The factors at play are varied and need to be considered and weighted in the proper context, not as generalizations. Nevertheless, the relative importance and competitiveness of Canadian capital markets in global markets is a legitimate concern, since their effective performance create great economic advantages, notably for the Canadian financial industry and the leading urban areas where it conducts its business.

[69] The Wise Persons’ Committee, op. cit., p.2.

The competitiveness of the Canadian capital market for equities needs to be measured on two levels: its ability to attract IPOs and foreign listings, and secondary market trading. Measured on the basis of the aggregate value of new listings and traded volume, it is obvious that other financial centers around the world have grown in importance. For instance, the Eurobond market has become the largest bond market in recent years. It is not to belittle our situation to recognize that Canada has never exerted global financial leadership as New York, London or Hong Kong. Why would a leading Chinese bank or German industrial company list their shares on the TSX, when they can be on the NYSE? This decision has nothing to do with the securities regulatory regime, except for the fact that Canadian investors can acquire and sell shares on the NYSE as easily as on the TSX.

The crucial questions is: What has happened to the competitiveness and importance of the Canadian capital market in the face of the global integration of capital markets and why? The results of a recent study comparing 45 stock exchanges/markets for the 1990-2006 period sheds some light on these important questions.[70]

The competitiveness of primary markets is determined by the direction of IPO flows. This in turn is influenced by aggregate volumes, the aggregate volumes of foreign IPOs taking place in each jurisdiction, and the aggregate volumes of IPOs done in foreign markets by domestic firms. The difference between inflows and outflows of IPOs over time provides useful insights. The net aggregate value of IPOs is obtained by subtracting the value of foreign IPOs completed in a jurisdiction from the value of IPOs done abroad by domestic issuers. A positive value indicates that IPO inflows are greater than outflows. Results for certain markets are presented in Table 7.

TABLE 7: Net Aggregate Values of IPOs in Certain Jurisdictions $ millions U.S.

Country	1995	2006
United States	45,780	36,627
United Kingdom	(2,209)	20,741
Germany	15,574	56,244
Hong Kong	1,608	39,776
Canada	(2350)	(1909)
Australia	(536)	(4197)

* Adapted from Citorelli et al (2009)

Several observations are in order. First, the data supports the contention that the United States has attracted a smaller proportion of foreign IPOs in recent years than what had traditionally been the case. Second, the formidable growth in foreign IPO activity in Germany and Hong Kong can be explained by geopolitical events and developments occurring in their regions: in Europe, the dismantling of the former Soviet Union, the creation of a single market, the emergence of the Euro, the liberalization of the financial sector; in Asia, China's transformation into a market economy.

[70] Citorelli, N., Peristani, S., op. cit. (2009).

The end result is that European equity markets now have the capital depth to retain their home companies. In 1995, 60% of European companies listed domestically; in 2005, this proportion had increased to 90%. This helps explain why the number of cross-listings worldwide has declined from 4700 in 1997 to 2300 in 2002. It does not imply a deterioration of the quality of the U.S. or Canadian markets in an absolute sense, but a relative erosion of their attractiveness compared to the leading European and Asian centres. This becomes particularly evident when considering the degree to which a financial center is the exclusive location of destination for foreign IPOs. In 2006, this ratio stood at 37% for the United States, but only at 29% for the United Kingdom, 17.6% for Germany and 0.23% for Hong Kong.[71]

Third, Canada's situation remains stable. It was not a common destination for foreign IPOs and this has not changed: Canadian issuers continue to raise more IPO funds abroad than we finance foreign IPO issuers in Canada.

The Secondary Markets for Equity

The main function of exchanges is to provide liquidity which, in turn, translates in the level of execution costs. Over time, trading in a given security will gravitate toward the exchange that offers the lowest transaction costs. The competitiveness of the Canadian secondary markets needs first and foremost to be assessed relative to U.S. markets. Between 1990 and 2008, the aggregate value traded on Canadian stock exchanges relative to that on U.S. exchanges declined from 4.05% to 2.4%, albeit there were ups and downs during the intervening period.[72]

Almost 90% of Canadian companies that list their stock abroad cross-list with U.S. exchanges. During the 1990 to 2005 period, 399 Canadian companies cross-listed on a U.S. exchange. During that period, the proportion of the 100 largest Canadian stocks which were interlisted grew from 32 to 65.[73] Almost all actively traded Canadian stocks are interlisted. In terms of capitalization, Canadian companies cross-listed on U.S. exchanges account for close to 60% of the total capitalization of Canadian listed companies. The main impetus for cross-listing on a U.S. exchange is the belief of Canadian executives that it will give them access to a broader base and increase the marketability of their company's securities, factors which, as we have seen above, are critical to the success of the financing strategies of Canadian corporations.

In terms of competitiveness, the telling statistic is that for more than half of the Canadian interlisted stocks, the value of trading is now larger in the United States. This gradual erosion of the competitiveness of the TSX relative to the U.S. exchanges has nothing to do with the architecture of the Canadian securities regulation regime. In fact, the OSC is the lead regulator for the TSX; it is doubtful that a centralized securities regulator would behave much differently.

---

[71] Karolyi, G.A., *The World of Cross Listings and Cross-Listings of the World: Challenging Conventional Wisdom*, Dice Center Working Paper, No. 2004-14.

[72] Fédération Internationale des Bourses de valeurs, Rapport annuel, (2009).

[73] Carpentier, C., L'Her, J.-F., Suret, J.-M., *Competition Among Securities Markets: Can the Canadian Market Survive?*, CIRANO, (November 2004).

According to several studies, the main reason for the deterioration of the relative performance of the main Canadian secondary market is the greater liquidity and the lower trading costs in the U.S. market. Estimates suggest that for an institutional trader, trading costs on the TSX are 161% higher that on the NYSE.[74] This stems, in part, from the concentrated structure and behaviour of Canadian securities industry, since a significant narrowing of spreads is observed as soon as the stocks are actively traded on the U.S. competing exchange.[75] [76] This improvement in the quality of the market is "interpreted as a response of domestic market-makers to competition from their foreign counterparts."[77]

The attractiveness of a foreign location for cross listing is heavily dependent on sustained trading volume activity subsequent to the listing. Factors that have been identified as key to sustained trading activity in the host market are: increased analyst and media coverage, the number of institutional investors holding the stock in their portfolio and the relative importance of their holdings, familiarity with the company and cultural homogeneity between the host and home markets.

In 1995, in Canada, there were 62 foreign listings on the TSX, accounting for 4.93% of total listings; in 2008, there were 86 foreign listings, but they accounted for only 2.26%. In Canada, the cross listings of foreign companies are generally ornamental, attracting very little trading interest. Their lack of economic substance is demonstrated by the proportion of total trading they account for: between 1995 and 2008, this ratio fell from 0.28% to 0.06%.

This result is not a function of securities regulation but of the fundamental characteristics of the Canadian financial industry and our very close and unique integration with the U.S. market.

SECURITIES REGULATION AND SYSTEMIC RISK

The well-balanced regulatory apparatus for the financial sector must have three major components. The first component, prudential regulation, pertains to the safety and soundness of financial firms, particularly deposit taking institutions and financial firms operating at the retail level. The second component is the regulation of business conduct whose focus must be on consumer and investor protection. This is the primary purpose of securities regulation. The third component usually entails broad powers and authority to deal with situations that present a threat to financial-system stability, or what is generally referred to as systemic risk.

---

[74] Elkins/McSherry Co. Inc., *Transactions Costs in Canadian and U.S. Equity Markets : A Study of Institutional Trading in Cross-Listing Stocks*, report published by the TSE, (1998).

[75] Foerster, S.R., and Karyoli, G.A., *Multimarket Trading and Liquidity: A Transaction Data Analysis of Canada U.S. Interlisting*, Journal of International Financial Markets, Institutions and Money, (1998).

[76] The author observed a similar effect on spreads of actively traded dual-listed stocks between the Montreal and Toronto Stock Exchanges.

[77] Chouinard, E., D'Souza, C., *The Rationale for Cross-Border Listings*, Bank of Canada Review, (Winter 2003-2004).

Proponents of a centralized securities regulator argue that concerns with respect to systemic risk provide a clear justification for the Federal Government initiative. Securities regulation must remain focused at the transaction and market participant level and strive to rigorously fulfill its traditional mandate of the protection of investors and the integrity, efficiency and transparency of the capital markets. In doing so, it complements prudential regulation and, indirectly, reduce systemic risk. The idea that the former needs to be subsumed into the latter to be efficient is contradicted by the experience in the United Kingdom and the United States. One does not need to assess systemic risk for the economy to determine the appropriate levels of disclosure in offering documents. We agree, however, that prudential regulation is intimately related to systemic risk.

Canadian securities commissions have traditionally exercised prudential regulation responsibilities in their oversight of the financial strength of securities brokers and investment dealers and clearing and settlement organizations. Today, in Canada, the prudential regulation role of securities commissions has been substantially curtailed as a consequence of the fundamental changes in the ownership and structure of the securities industry that occurred in the last 20 years.

In 1987, the Bank Act was amended to allow banks to acquire or establish securities firms as subsidiaries. In short order, the Canadian securities industry was dominated by commercial banks. Recognizing the futility of attempting to regulate the capital adequacy of a sub-part of a large and complex financial institution without considering the whole, the complexities involved in assessing risks in such institutions and the desirability of avoiding duplications and to have an integrated regulatory regime, the OSC and QSC accepted OSFI's prudential regulatory responsibility to oversee and regulate the securities-related activities of Canadian banks.[78] The securities related activities conducted by federal financial institutions, which fall under the direct and explicit domain of securities regulation, remain subject to the requirements of the Canadian securities regulatory regime. They include: all activities relating to the primary distribution of equity securities, including acting as a selling agent in connection with the distribution of mutual funds; all activities relating to the primary distribution of corporate debt securities; secondary market trading in equity securities; and, portfolio management and investment counselling.

These arrangements have stood the test of time, particularly in periods of substantial turmoil and stress in financial markets. Asked why Canadian banks performed better through the global financial crisis, Mr. Ted Price, Assistant Superintendent, Supervision Sector, OSFI, said: "Things that come to mind include tough regulatory rules in the areas of capital and leverage; a system where all banks, and all of their subsidiaries (including investment banking), are under the scrutiny of a single regulator."[79]

---

[78] In Ontario, the Memorandum of Understanding – Office of the Superintendent of Financial Institutions and Ontario Securities Commission (March 1988) completed the Ontario-Canada Hockin-Kwinter Agreement of April 1987. Quebec also concluded a policy coordination agreement with the Canadian government in March 1988.

[79] Ted Price, *Defining the New Agenda for Governance at Financial Institutions,* OSFI, Remarks to the Riskminds USA 2010 Risk Regulation Summit, (Cambridge Mass. May 10, 2010).

Even though some Canadian securities regulators continue to exercise a prudential regulation role over securities firms that are not bank affiliates, these securities industry participants are not of a size that warrants the involvement of the Federal government or that could endanger the stability of the financial system. Moreover, the retail clientele of securities firms is protected by the Canadian Investor Protection Fund (CIPF). Its record, in terms of retail investor protection against the financial debacle of a securities brokerage firm, is enviable and compares favourably with any domestic or international investor or depositor insurance program.

Admittedly, the Canadian Depository for Securities Limited (CDS) and its operating arm, CDSX, are systemically important parts of the Canadian financial system. This is well recognized by all parties. Indeed, CDS and CDSX were brought under the oversight of the Bank of Canada in accordance with the Payment Clearing and Settlement Act (PCSA), even though these organizations remain regulated by securities commissions. In addition, CDS reports to the Canadian Securities Administrators. This arrangement, which is akin to the respective roles of OSFI and the Bank of Canada with respect to Canadian banks, has been put in place without upheavals or need to restructure the existing securities regulatory regime.

A fair assessment of the situation is that, contrary to the serious failures of coordination between U.S. federal agencies that have been extensively documented, in Canada, the overlapping of crucial financial monitoring activities has been efficiently resolved through administrative agreements between provincial and federal agencies.

The Financial Derivatives Market

In recent years, systemic risk has expanded from the banking institutions to capital markets, in tandem with the growth of hedge funds, private equity funds and the development of complex capital market instruments. This phenomenon relates essentially to the very rapid growth of the over-the-counter (OTC) derivatives and of the securitization markets. The main components of the derivatives market are foreign exchange contracts, interest rate contracts, equity linked contracts, commodity contracts, and credit default swaps (CDS) contracts. The latter is essentially an insurance contract against a default on a loan, debenture or bond.

Derivatives improve economic efficiency by facilitating the reallocation of risk. For instance, it is prudent financial management for a manufacturer to hedge its future foreign currency exposure to stabilize its revenues and protect its profitability from variations in the relative value of currencies. Similarly, it may be a sound practice to convert a long-term floating rate debt into a fixed rate, or for an insurer to insure debt in its portfolio against default. Derivatives thus serve a useful economic purpose.

At the same time, derivatives facilitate leverage and the concentration of risks in certain sectors and institutions. This brings to the fore the issue of counterparty risk, since the benefits of hedging can only be realized if the counterparty has the financial wherewithal to meet its obligations when they arise. Moreover, since the diversification of risks inherent in hedging transactions increases linkages among market participants, the process, coupled with the counterparty risks and the opacity and lack of transparency of the OTC markets, raises serious systemic risk concerns.

Although the legitimate purpose of derivatives is to transfer risks, the very rapid growth of the CDS market suggests that the instruments were used by several market participants for other purposes.[80] A short example will illustrate the point.

An owner that insures its home against a fire incident with an insurance company is transferring a real and legitimate risk. For its part, the insurance company has a precise knowledge of what it insures. There exists a one-to-one correspondence between the asset insured and the contingent liability assumed by the insurer.

Now assume that a non-related party decides to sell investment contracts related to the probabilities that the home may or may not be destroyed by fire. The party may sell hundreds of such naked contracts, since there is no real insurance purpose to the contracts except as a gambling medium.

In the huge CDS market, this creation process increases significantly the potential for manipulation, since the debt markets use the pricing prevailing in the CDS market to determine interest rates or the price of the underlying security. Coupled with the limited transparency and disclosure of CDS market activity and the considerable speculative activity that appears to prevail in this market, at least relative to the outstanding value of the underlying securities, it is believed that the current structure and functioning of the CDS market may lead to an overestimation of risk in the market and significantly increase counterparty risk. This in turn raises serious questions about the stability of the financial sector and the best means to regulate these activities.

The Expert Panel on Securities Regulations is quite laconic on the matter of derivatives. The absence of a meaningful discussion of the challenges associated with the regulation of derivatives is somewhat surprising, given that these instruments were understood to be a major factor in the debacle of financial firms and the Expert Panel's report was published in January, 2009.[81] The recommendation that a Federal securities commission wait for the United States and other major jurisdictions to determine the regulatory steps forward before it establish "the best path for the regulation of OTC derivatives in the future" is no doubt a pragmatic assessment of our relative importance in these global markets, but it is in sharp contrast to the assertion that Federal hegemony of the sector is required to exert leadership at the international level.

---

[80] Allaire, Y. and M. Firsirotu, *Black Markets and Business Blues*, FI Press, (2009).

[81] The takeover of Bear Stearns by J.P. Morgan with the substantial assistance from the U.S. Federal Reserve occurred on March 16, 2008; the bankruptcy of Lehman Brothers on Sept. 15, 2008; the AIG bail-out on Sept. 16, 2008.

A thorough discussion of the issues involved in the Canadian context would have made the following points:

- In Canada, five provinces have adopted legislation concerning derivatives.[82] Its administration has been assigned to the securities regulators, since there exists substantial overlap and complementarities between the regulation of securities and derivatives contracts. As a result, in Canada, the coordination issues and conflicts in regulatory approaches between the SEC and CFTC have been avoided. The Canadian commodities and financial derivatives are regulated by the securities regulator where the derivatives exchange is located. These exchange markets are functioning well and they attract substantial trading activity from abroad. In short, no issue has arisen in this part of the derivatives market, which is under the full jurisdiction of provincial securities regulators.
- In the United States, prior to the adoption of the Dodd-Frank Act, neither the SEC nor the CFTC had the legislative mandate to regulate OTC derivatives and hedge funds. No doubt, this void is a major explanatory factor for the financial debacle and the egregious excesses in the CDS market.
- In Canada, the only members of the securities industry involved in the OTC derivatives markets are affiliates of banks, or the banks themselves. There is no equivalent to the independent U.S. primary broker-dealer firms.
- Since 1987, OSFI regulates the securities-related activities that are carried on directly by federal financial institutions.
- A universal feature of securities laws excludes from the purview of the securities regulators private transactions taking place between sophisticated investors. The latter is generally defined in terms of the level of assets or wealth of the investor. Therefore, an OTC derivatives transaction taking place between an investment dealer and an insurance company or pension fund, for example, would not benefit from the protection of securities regulation, notably regulated information documents such as a prospectus.
- Similarly, issuers of commercial paper are exempted from the obligation to issue a prospectus when their issues are rated investment grade by a credit rating agency.[83] This exemption was used (and abused) for the issuance of non-bank sponsored asset-backed commercial paper which led to the costly ABCP debacle in Canada.[84]

Several international organizations and jurisdictions are actively engaged in devising approaches and tools to rein in the excesses in the derivatives and securitization markets that surfaced in the recent financial crisis and institute the proper infrastructure and regulatory framework.

---

[82] These provinces are Alberta, British Columbia, Manitoba, Ontario and Quebec.

[83] National Instrument 45-106 – Prospectus and Registration Exemptions, Section 2.35.

[84] Chant, J., *The ABCP Crisis in Canada: The Implications for the Regulation of Financial Market; Entente de Règlement*, AMF & Financière Banque Nationale, (December 2009).

In Canada, the Federal government has a major part to play, since the most thorny issues gravitate around the prudential regulation of banks and the containment of systemic risk.[85] We note that, in 2009, the Bank of Canada joined the international Over-the-Counter Derivatives Regulators Forum to influence the future oversight of infrastructure in this segment of the financial system, an initiative no one would contest. For their part, the Canadian Securities Administrators have initiated work aimed at developing and implementing an harmonized regime for the problems that legitimately fall under their purview. The priorities are the regulation of OTC derivative instruments and the distribution of securities in the exempt market, including the issue of adequate and pertinent disclosure and the regulation of credit rating agencies.

CONCLUSION

The substantial body of empirical evidence we have reviewed leads to the inescapable conclusion that the arguments made to justify the takeover of securities regulation by the Federal government lack a solid foundation and, too often, misrepresent the situation. In spite of the dearth of supporting evidence, the proposal is accepted as a fait accompli in many quarters, based on the conviction and belief that the Federal government is far better and more efficient than the Provinces. That is not the picture one can honestly draw of the Canadian securities regulation regime.

Moreover, in Canada, matters related to protection of investors and their property rights are within the constitutional domain of the provinces. No one can argue that securities regulation is an orphan area, since the provinces have been actively engaged in the field for eight or nine decades. They have enacted and implemented a regulatory regime that meets and conforms to internationals norms for the sector and ranks internationally as one of the best. There can be no doubt that the achievements of the Securities Administrators constitute an example of Canadian federalism at its best. Constitutional change cannot and should not be contemplated without a strong and compelling reason.

It is regrettable that the actions of the Canadian government, taken in the pursuit of narrow corporate and bureaucratic interests that are presented as Canada's interest, are putting in jeopardy a national effort that was achieving substantial success at relatively little cost. The annual report of the Council of Ministers of Securities Regulation, published on March 1, 2010, states unequivocally that it is "concerned about the potential impact that the focus and dedication of resources to the federal transition process may diminish the unprecedented levels of co-ordination and consensus among provincial and territorial governments and the CSA demonstrated over the past five years to ongoing reform."

[85] The finalization and implementation of the Basel III proposals is a case in point. Basel III proposals have an international focus, and are directed primarily on clarifying the specific details of securities that comprise Tier 1 and Tier 2 capital as well as harmonizing the calculation and minimum levels of capital required by banks. Additionally, they would also increase the capital requirements for trading books and securitization activities, as well as for counterparty exposure associated with repos, derivatives, and securities financing activities.

The practical consequences of the Federal government initiative are not trivial. In the short term, it undermines the substantial efforts required to sustain the highly harmonized regulatory framework and systems which now exist in Canada, diverts the available resources to ensure securities regulation are responsive to market developments, and disrupts the ongoing initiatives, including: the review of current derivatives regulation in Canada with a view to adopt a harmonized approach, the review of requirements relating to the trading of standardized over-the-counter derivatives on exchanges and electronic platforms, the development of new disclosure requirements at the point of sale for mutual funds and segregated funds, and the development of a proposal for hedge fund regulation. These are critical matters that were front and centre during the recent financial crisis. Does it really serve Canada to postpone any action on these fronts?

In the long term, in addition to the transitional uncertainties associated with a new body of law and regulations, a centralized regime would lack the dynamic efficiency and the responsiveness to the particular characteristics of regions, industries and categories of issuers. It would also fall short in providing safeguards against fads, political expediency and influence of the dominant industry participants, which constitute the strength and the main advantages of the current Canadian securities regulatory regime.

Proponents of the single regulator system claim that centralization is the best approach to securities regulation in Canada and that uniformity is necessary to achieve efficiency. This view fails to take into account the heterogeneity of the Canadian securities market, which is characterised by diversity on several important dimensions — regional industries, types and size of issuers, local market infrastructure. A solid body of economic literature refutes the notion that the dynamics inherent in a federal system must be suppressed in the securities field because it is inimical to Canada's best economic interests.[86] The litmus test of a sound regulatory regime is its dynamic efficiency and ability to innovate with less risk for the national economy. A monopoly in securities regulation with its inherent bias for uniformity does not meet these needs.

The short shrift given to the wealth of well-known economic analysis, which demonstrates the superior quality of the Canadian capital markets relative to markets worldwide, raises questions about the real objectives of the Pollyannas who see only gains and no cost to the centralization of the securities regulatory apparatus. Who really stands to benefit from the creation of a Federal securities commission? The review of independent empirical evidence demonstrates that it is certainly not Canadian investors, junior issuers, nor the fairness and efficiency of the Canadian capital markets.

The Canadian government could have chosen to build on the enviable record of our securities regulatory regime to enhance its position and influence in international forums. Instead, it chose to denigrate and undermine the reputation of Canadian capital markets and to commit substantial funding to duplicate what already exists, at a time when public finances are stressed everywhere.

[86] Breton, A., *Report, Royal Commission on the Economic Union and Development Prospects for Canada*, Volume Three, Minister of Supply and Services Canada, (1985); Breton, A., *Competitive Governments – An Economic Theory of Politics and Public Finance*, Cambridge University Press, (Cambridge, 1996); Courchene, T.J., *A Simple National Securities Regulator? Public Policy and Political Economy Perspectives*, (June 2010); Kenyon, A.D., *Theories of Interjurisdictional Competition*, New England Economic Review (1997).

In the end, the vainglorious attempt by the Federal government to assert its dominion over securities legislation will most likely turn into a disruptive, costly and regrettable initiative, with results contrary to what is purported to be sought.

About the Author

Pierre Lortie, BSc. Appl., P. Eng., Lic. Appl.écon., M.B.A., Senior Business Advisor

Pierre Lortie is a Senior Business Advisor at Fraser Milner Casgrain LLP, a major law firm recognized as a leader in business related legal matters across Canada. He is also a Director of Altair Nanotechnologies, Inc., Consolidated Thompson Iron Mines Ltd. and of Group Canam Inc.

He has held senior executive positions at Bombardier until December 2003 where he has served as President and COO of Bombardier Transportation; President and COO of Bombardier Capital; President and COO of Bombardier International; and President of Bombardier Aerospace, Regional Aircraft. He has been Chairman, President and CEO of Provigo Inc.; President and CEO of the Montréal Stock Exchange and a Senior Partner of Secor Inc.

Pierre is also President of the Canadian Ditchley Foundation and a Director of the Canadian Academy of Engineering.

Pierre has held several government appointments. He served as Chairman of Canada's Royal Commission on Electoral Reform and Party Financing. He was a representative of the Prime Minister of Canada on the APEC Business Advisory Council (ABAC) from 1999 to 2003. In the technology field, he served as Chairman of the Centre for Information Technology Innovation and as Vice Chairman of Canada's National Advisory Board on Science and Technology.

He served as Chairman of the Montréal Demerger Transition Committee from its inception on June 21, 2004 until the end of its mandate on December 31, 2005 and he acted as the Representative of the public authorities with regard to the McGill University Health Center (MUHC), the Centre hospitalier universitaire de l'Université de Montréal (CHUM) and the Centre hospitalier universitaire de Québec (CHUQ) modernization projects.

He received an M.B.A. with honors from the University of Chicago, a licence in applied economics from the Université Louvain, Belgium and a Bachelor's degree in applied sciences (engineering physics) from Université Laval, Canada. He was awarded a Doctorate Honoris Causa in civil law from Bishop's University. He received his certification from the Canadian Institute of Corporate Directors.

Pierre was appointed member of the Order of Canada in 2001.

ABOUT THIS PUBLICATION

The School of Public Policy Research Papers provide in-depth, evidence-based assessments and recommendations on a range of public policy issues. Research Papers are put through a stringent peer review process prior to being made available to academics, policy makers, the media and the public at large. Views expressed in The School of Public Policy Research Papers are the opinions of the author(s) and do not necessarily represent the view of *The School of Public Policy*.

OUR MANDATE

The University of Calgary is home to scholars in 16 faculties (offering more than 80 academic programs) and 36 Research Institutes and Centres including *The School of Public Policy*. Under the direction of Jack Mintz, Palmer Chair in Public Policy, and supported by more than 100 academics and researchers, the work of The School of Public Policy and its students contributes to a more meaningful and informed public debate on fiscal, social, energy, environmental and international issues to improve Canada's and Alberta's economic and social performance.

The School of Public Policy achieves its objectives through fostering ongoing partnerships with federal, provincial, state and municipal governments, industry associations, NGOs, and leading academic institutions internationally. Foreign Investment Advisory Committee of the World Bank, International Monetary Fund, Finance Canada, Department of Foreign Affairs and International Trade Canada, and Government of Alberta, are just some of the partners already engaged with the School's activities.

For those in government, *The School of Public Policy* helps to build capacity and assists in the training of public servants through degree and non-degree programs that are critical for an effective public service in Canada. For those outside of the public sector, its programs enhance the effectiveness of public policy, providing a better understanding of the objectives and limitations faced by governments in the application of legislation.

DISTRIBUTION

Our publications are available online at www.policyschool.ca.

ISSN

1919-112x SPP Research Papers (Print)
1919-1138 SPP Research Papers (Online)

DATE OF ISSUE

October 2010

MEDIA INQUIRIES AND INFORMATION

For media inquiries, please contact Morten Paulsen at 403-453-0062.

Our web site, www.policyschool.ca, contains more information about The School's events, publications, and staff.

DEVELOPMENT

For information about contributing to The School of Public Policy, please contact Cheryl Hamelin, Director of Development, by telephone at 403-210-6622 or on e-mail at c.hamelin@ucalgary.ca.

EDITOR

Claudia Cattaneo