



EXPERT PANEL ON
SECURITIES REGULATION

Creating an Advantage in Global Capital Markets

STAKEHOLDER REPORT

FACE-TO-FACE MEETINGS APRIL 21-JULY 15, 2008

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I. INTRODUCTION AND OVERVIEW

The Expert Panel on Securities Regulation in Canada, established by the federal Minister of Finance on February 21, 2008, is mandated to provide advice and recommendations to the Minister of Finance and the provincial and territorial ministers responsible for securities regulation on the best way forward to improve securities regulation in Canada.¹ The Expert Panel's final report, including a model common securities act and a transition path, is scheduled to be delivered by the end of 2008.

An important part of the work of the Expert Panel is hearing from a broad range of stakeholders. These include individual Canadian investors as well as institutions; the large and small companies in Canada and around the world raising capital in Canadian markets; professional market participants and advisors; regulators; and policy advisors. In addition to inviting submissions through our website (www.expertpanel.ca), the Expert Panel met with stakeholders across Canada supplemented with meetings in New York City, Washington, D.C. and London, England.² A list of those met with is provided in Appendix 3. Submissions are posted on the website.

This report summarizes the wide-ranging views presented to the Expert Panel during its face-to-face consultation meetings. Whether expressed as “we hope you are the last panel” or “just get on with it,” many stakeholders expressed frustration that decades of debate and study have failed to result in a single securities regulator. Other stakeholders staunchly defended the passport system.

Why do stakeholders continue to invest in the debate over how to improve the regulation of Canada's capital markets? A few are motivated by opposition to some of the options under consideration. Far more see scope for further improvements to the current regime. Many of those stakeholders indicated during the consultations that they were particularly encouraged by some elements of the Expert Panel's Terms of Reference, notably:

- Preparation of a model common securities act will allow discussion of concrete issues, addressing the reservations many stakeholders expressed about endorsing change without knowing the details of any proposed new regime;
- Providing a transition path is a further measure to address a major stakeholder concern—avoiding uncertainty and disruption as changes are implemented; and,
- Proportionate regulation can address the concerns of smaller issuers and those in specialized industries—junior mining, and junior oil and gas companies—that they should not be subject to a “one size fits all” approach.

¹ See Appendices 1 and 2 for the Terms of Reference and membership of the Expert Panel.

² The Consultation Paper issued by the Expert Panel on April 21, 2008 is available at <http://www.expertpanel.ca/eng/documents/public-consultation-paper.php> together with a call for written submissions (due by July 15), and information for stakeholders interested in meeting with the Expert Panel.

Stakeholder views on three “top-of-mind” issues—the international context, enforcement, and the passport model—appear to have evolved significantly over the last few years. Input to the Expert Panel on many other topics appears largely unchanged from the opinions expressed to the Crawford Panel and Wise Persons Committee.³

The international context has surged to a much higher profile. The recent global credit crisis, and in Canada the ongoing fall-out from asset-backed commercial paper (ABCP), as well as the international dimension of virtually all high-profile Canadian enforcement cases, have contributed to this increased focus. Many stakeholders are concerned that Canada’s international voice is diminished by the lack of national representation in capital markets forums.

The Expert Panel was asked by several stakeholders: “How do we negotiate internationally when no one is in charge?” Many stakeholders suggested that a single regulator would help Canadian issuers and registrants operate in other countries by facilitating mutual recognition. Some stakeholders believe Canadian access to investment opportunities and financial innovation is curtailed because international firms are dissuaded from offering products in Canada by the complexity and costs. Accounting for just over three percent of the global public equity market,⁴ the Expert Panel heard that Canada is not big enough or growing so fast that international firms “must pay attention to Canada” or “have to be here” as they do in China, India, Europe or the United States.

Stakeholders are deeply concerned about the shortcomings of enforcement in Canada. Stakeholders noted that concerns about enforcement are now more acute as a result of the lack of tangible successes arising from the Integrated Market Enforcement Teams (IMETs) initiative.⁵ They expressed the urgent need to act quickly to put further reforms in place to improve enforcement.

Stakeholder views on the passport system now reflect some issuer experience, although national prospectus requirements have only recently been introduced and the national registration rule remains to be adopted.

II. CONSULTATION THEMES

The Expert Panel particularly invited input on issues and questions raised in the consultation document. Some stakeholders systematically addressed these issues, while many others provided input on selected topics and introduced additional issues of concern. The wide-ranging opinions, evidence and analysis provided to the Expert Panel is organized thematically in this report without attribution. Inferences about the strength of opinion and breadth of support for particular issues are derived from the input of stakeholders meeting in person with the Expert Panel.

³ Submissions and publications are available at <http://www.crawfordpanel.ca/> and http://www.wise-averties.ca/main_en.html.

⁴ World Federation of Exchanges, Domestic Market Capitalization, 2007.

⁵ Stakeholder comments were largely made prior to the June 18 and 19 announcements of charges in the Norbourg, Royal Group Technologies, and Nortel cases.

A. Objectives, Outcomes and Performance Measures

The Expert Panel heard broad support for a common set of objectives for securities regulation in Canada. One stakeholder noted that “clear objectives help compliance.” A number of stakeholders suggested that the objectives could be drawn from the existing provincial legislation and mandates. While there are differences in wording, in principle the mandates of all the provincial securities authorities focus on investor protection and fair, efficient capital markets.⁶

Stakeholders expressed mixed views about objectives for securities regulations extending beyond the three core objectives established by the International Organization of Securities Commissions (IOSCO):⁷

- The protection of investors;
- Ensuring that markets are fair, efficient and transparent; and
- The reduction of systemic risk.⁸

The first two IOSCO objectives were unanimously supported. Few stakeholders specifically addressed issues of systemic risk or expressed opinions about the role of securities regulation in reducing systematic risk. Some believe systemic risk is adequately addressed by the current regimes.

Some stakeholders were of the view that enhancing the competitiveness of Canada’s capital markets was an appropriate objective in addition to the IOSCO principles. Others viewed the issue of competitiveness of Canada’s markets as a second order issue, with enhanced competitiveness following naturally from appropriate policies, regulation and supervision. Some noted the potential conflict arising from assigning a competitiveness or economic development mandate to a regulatory or self-regulatory organization (SRO).

There is widespread support for the concept of a performance measurement framework for securities regulation in Canada. Some stakeholders noted that elements of such a framework already exist, citing the reporting by securities regulators and SROs on efficiency measures such as timeliness of review or response, resolution of complaints, and prosecutions or referrals to other authorities. Others questioned the relevance of these numerical indicators as measures of performance.

A significant number of stakeholders focused on the difficulties of establishing precise and measurable indicators. Several noted that the Financial Services Authority (FSA), the United Kingdom’s integrated financial services regulator, is often cited as a leader in this

⁶ See Table B in the Expert Panel Consultation Paper for a summary of the mandates of selected provincial securities regulators.

⁷ IOSCO is the international cooperative forum for securities regulatory agencies, which has established international standards through the promulgation of the IOSCO Principles and Objectives of Securities Regulation.

⁸ Systemic risk as defined here arises from the possibility that a market or institutional failure could trigger the failure of other market participants, potentially destabilizing the financial system and significantly disrupting both the financial and non-financial sectors.

area, yet has very general performance indicators and metrics only tenuously linked to outcomes. One basis for evaluating the performance of the FSA is the extent to which “the costs and benefits of regulation are proportionate,” however several stakeholders noted that regulatory costs and benefits are neither clearly defined nor precisely measured.

B. Principles-Based Securities Regulation

The concept of principles-based regulation—establishing relatively high level principles or objectives rather than relying on detailed and comprehensive rules to govern activity—is broadly endorsed. Many stakeholders noted that rules either lagged behind market developments or stifled innovation. Principles were viewed as important because one size does not fit all. However, important reservations and caveats were expressed to the Expert Panel.

Several stakeholders stressed that a principles-based approach would be desirable only with a single securities regulator. Some suggested that a principles-based approach in the current “balkanized” system of 13 regulators would be the worst of all possible worlds, due to the potential for 13 different interpretations of the principles.

Some stakeholders suggested that compliance with principles would be simpler and less costly than compliance with numerous detailed rules. Others, however, expressed the opposite view. A particular concern for some is the potential lack of “bright line” tests in a principles-based system. One of the perceived strengths of a rules-based approach is the relative ease of determining compliance. Compliance with a principle is seen as more judgmental and open to interpretation.

The Expert Panel heard specific examples of a principles-based approach in the existing regime such as the “public interest” jurisdiction of provincial securities laws. This enables regulators to take action in the public interest, even if there has been no specific rule violation.

Many stakeholders suggested to the Expert Panel that a distinction between principles-based and rules-based approaches is a false dichotomy. Even the FSA, often held out as an example of a principles-based regime, has an extensive rule-book. Stakeholders observed that over time, case-law, regulatory guidance and exemptions evolve into rules.

Most stakeholders supported “platform” legislation which would delegate broad powers to the securities regulator. This is widely seen as necessary to deal with swiftly changing markets, as stakeholders noted that the process for amending legislation is slow given that capital markets issues are frequently a low legislative priority. Stakeholders noted that an important corollary to delegated powers is the accountability of the regulator.

Some stakeholders questioned whether there was enough political support for principles-based legislation with a high degree of delegated authority. These stakeholders drew the Expert Panel’s attention to takeover rules, which in Ontario are contained in the legislation while in the other jurisdictions is largely dealt with in rules. Other

stakeholders referred to the 2004 British Columbia principles-based legislation which was not proclaimed.⁹

C. Proportionate Securities Regulation

Stakeholders broadly supported proportionate regulation, and the related but not identical concept of risk-based regulation. It is clear, however, that different stakeholders have divergent views of the appropriate approach. Some focus on regulation proportionate to size, while others focus on risk. Another aspect is the differing perspectives of the two key constituencies—investors and issuers. It was suggested that the appropriate balance is relief from regulatory burden for issuers to the extent such relief is not incompatible with investor protection. Numerous stakeholders expressed concern that many current prescriptive rules contribute little to investor protection.

Proportionate regulation is widely viewed as a key element in the success of the Venture Exchange of the Toronto Stock Exchange (TSX), providing a lesser regulatory burden for smaller issuers. A number of stakeholders suggested to the Expert Panel ways in which the current approach could be improved, including more streamlined financial reporting and disclosure requirements, and relaxed prospectus requirements for business acquisitions. Australian requirements for exploration companies were cited as a useful example of simplified yet effective reporting.

Some stakeholders explicitly linked proportionate and principles-based regulation. They suggested that a more rules-based approach was appropriate for smaller issuers lacking the resources to adapt principles into policies and procedures. Compliance with principles was seen as imposing a disproportionate regulatory burden on smaller issuers, which might amount to a barrier to accessing public markets.

Risk-based approaches to oversight of registrants were broadly supported. A number of stakeholders noted that these were already incorporated into determining the scope and frequency of SRO compliance reviews. Some stakeholders cited selective review of prospectuses by securities commissions as a practical example of risk-based oversight of issuers.

The Expert Panel heard different opinions on the appropriate implementation of proportionate regulation. Some stakeholders supported linking the regulatory approach to size or to other economic indicators of the issuer. Others noted that size might not reflect the risk involved. The different reporting and disclosure requirements for TSX Venture issuers, and use of a minimum investment amount in order to determine sophisticated investors for exemptions from registration and prospectus requirements, were cited as practical examples of a size-based approach. Other stakeholders noted that fraud in a small issuer poses a reputational risk for a market that may be disproportionate to its size.

⁹ The British Columbia Securities Act, Bill 38, introduced May 5, 2004.

D. Enforcement

The Expert Panel's Terms of Reference focus particularly on two aspects of the enforcement of securities law in Canada: whether a more principles-based approach could improve enforcement; and whether the adjudicative function should be independent of the regulator. Stakeholders generally did not link enhancing enforcement to a more principles-based approach to securities regulation. However, many stakeholders shared with the Expert Panel much more wide-ranging recommendations, often based on negative views of the current status of the enforcement of securities law in Canada.

A minority of stakeholders meeting with the Expert Panel challenged the view that Canadian enforcement compares unfavourably with other jurisdictions. These stakeholders suggested this widespread view is based on anecdotes and sensational reporting rather than evidence. Some regulators and lawyers meeting with the Expert Panel cautioned against expecting American-style outcomes given the significantly different legal environment in Canada.

Consumer Redress

The Expert Panel heard complaints about the costs of litigation and the time required to seek redress. Some stakeholders cited the need for a one-stop service—a gatekeeper—for investors seeking redress. The Ombudsman for Banking Services and Investments was supported by some stakeholders, but others expressed concerns about its lack of independence from industry, and others questioned whether it could be truly effective without a legislative mandate to enforce settlements.

Individual investors and consumer advocates expressed concern about the role and track records of SROs and securities commissions. There is a perception that SROs are reluctant to act or lack the capacity for effective enforcement, and that securities commissions are insufficiently responsive to investor complaints. Some stakeholders suggested there was an inherent conflict, or at least a perception of bias, when the agency responsible for policymaking, investigating and prosecuting is also responsible for adjudication. Many investors and consumer advocates cited a need for increased accountability for investor protection.

Criminal Convictions and Credibility

Many stakeholders rhetorically asked why Canadian prosecutions of white collar crime do not have the same record of convictions and relatively speedy outcomes seen in the United States. High-profile convictions in the United States, particularly cases involving Canadian companies and causing significant losses to Canadian investors, were cited as contributing to Canada's reputation for weak enforcement.

Most stakeholders suggested that the state of enforcement in Canada is the direct result of a lack of resources dedicated to investigation and prosecution and a lack of coordination among jurisdictions. Among the specific concerns highlighted for the Expert Panel were:

- Difficulties in undertaking investigations across jurisdictions;

- Rapid turnover in Royal Canadian Mounted Police (RCMP) personnel assigned to IMETs;
- Insufficient (or lack of) specialized knowledge among investigators, prosecutors and judges;
- Lower priority and less willingness to prosecute white collar crime ;
- Lack of coordination among the RCMP, provincial police and major city and regional police services;
- Inadequate integration of the Public Prosecution Service of Canada and the Provincial Crown agencies into the enforcement continuum; and
- Blurring of the lines and potential contamination of evidence between administrative and quasi-criminal investigations by securities regulators and criminal investigations by the police.

Most stakeholders endorsed the thrust of the recommendations to improve IMETs contained in the Le Pan Report.¹⁰ However, others wondered whether there is a need for an entirely new approach.

Administrative Enforcement

A number of stakeholders were less critical of administrative enforcement by the SROs and securities commissions. Nonetheless, the Expert Panel heard concerns in this area as well, particularly from investors and consumer advocates. These included the inability to enforce an order from one province in another jurisdiction, the inability to collect fines or enforce meaningful penalties on individuals leaving the industry, and concern that “bad actors” disciplined in one jurisdiction return in another.

Pan-Canadian Adjudicative Tribunal

The potential to enhance administrative enforcement of securities law is widely seen as one of the strengths of a pan-Canadian regulator. There is broad support for a national approach to enforcement as a means of dealing with the inter-provincial nature of most securities offences, bringing the same expertise and resources to all jurisdictions, and addressing problems of enforcing sanctions across jurisdictions.

Stakeholders expressed divergent views on whether adjudication should be independent of the regulatory authority. While most supported independence as a means to avoid the possibility of bias inherent in a model with the adjudicative function under the direct authority of the regulator, there were significant reservations. Some stakeholders are concerned about the separation of adjudication from policy development, particularly as adjudicative decisions effectively create policy. Stakeholders cited various examples of

¹⁰ *Enhancing Integrated Market Enforcement Teams, Achieving Results in Fighting Capital Markets Crime*, report by the Special Advisor to the Commissioner of the RCMP (October 2007). Key recommendations to improve IMETs included enhanced leadership, accountability, oversight and management of the program, enhanced operational support to address bottlenecks and human resource issues and better coordination among all stakeholders involved in capital markets fraud enforcement.

effective regimes involving independent adjudication, as well as effective commissions with integrated prosecution and adjudication functions.

Quebec's Bureau de décision et de révision en valeurs mobilières was cited by a considerable number of stakeholders as an example of an effective external tribunal. The UK's FSA was cited as an example of adjudication being effectively integrated into the regulatory authority, although it operates and reports independently to the board. There is also a separate appeal mechanism external to the FSA. Many stakeholders, particularly industry participants, supported the FSA approach of employing active industry participants to serve as part-time adjudicators. Some investors indicated they could support this approach so long as industry participants comprised a minority of the panel. Others would support inclusion of only retired industry participants, and some object completely on the grounds that industry participants may give inadequate weight to investor protection.

E. Securities Regulatory Structure

Most stakeholders support some form of pan-Canadian regulatory structure. They suggested to the Expert Panel that the strengths of the current system such as a regional distribution of authority could be preserved in an appropriately designed common regulatory structure.

A few stakeholders view the passport system as their desired end-point, regarding consideration of alternatives as a distraction at best, and at worst as detrimental to effective implementation. Some stakeholders view passport as a practical means of achieving many of the objectives of a single regulator, and advocate operating under passport for several years prior to revisiting the idea of a single regulator. The majority of stakeholders, however, expressed to the Expert Panel a preference for a single regulator over passport, even if passport were to become fully implemented.

Strengths and Weaknesses of the Passport System

The most frequently cited strength of the current system, and passport when fully implemented, is the model of regionally distributed authority. This is widely viewed as having facilitated the development of specific expertise, for example venture markets in Vancouver, and oil and gas enterprises in Calgary, and derivatives in Montreal. Local representation was also cited by many stakeholders as being important for enforcement, giving investors an easy avenue to make complaints.

More than one stakeholder commented that “passport may be just enough to prevent the needed real reform.” Many cited persistent concerns despite the progress towards a single set of national rules:

- Ontario, with the largest number of registrants and majority of large market capitalization issuers, is not part of passport although issuers can still obtain many of the benefits through protocols with passport provinces;
- National registration remains to be implemented;
- Issuers still have to file in 13 jurisdictions even though approval is only required in their home jurisdiction—13 legal opinions can still be required;

- Rules, although converging in many respects, are not identical and may not remain harmonized over time;
- Even harmonized rules can be subject to different interpretation by different regulators;
- 13 decisions or approvals can still be required—one market participant cited the example of a missed acquisition opportunity because one small jurisdiction was unable to respond on a timely basis; and
- Foreign investors' incomprehension of such a balkanized system of regulation.

Some stakeholders cited a tension between one of the perceived strengths of passport—regulatory innovation and competition among the 13 jurisdictions—with the stated goal of harmonized rules. They noted that if rules are indeed harmonized, then securities regulation should not significantly vary across jurisdictions; however, if the goal is not identical regimes, then even when passport is fully implemented, there will be differences that increase compliance costs for issuers and registrants—which are ultimately borne by investors—and result in differing treatment for Canadian investors and companies depending on their province of residence.

The Expert Panel heard opposing views on the decision-making process of the Canadian Securities Administrators (CSA). While most stakeholders criticized it as slow and unwieldy, some were strong supporters because of the consensus decision-making model and the ability to opt out of any decision. They noted that this gives a province far more influence than it might have in a national structure. Conversely, this perceived strength was criticized by some stakeholders, who questioned the ability to achieve harmonized rules with individual jurisdictions opting to pursue different approaches in selected instances.

The ability of the passport structure to deal with change and innovation was seen by many stakeholders as fatal in the long run because of the lack of a single act with a single power to amend. Some stakeholders noted that every market innovation requires a new harmonization effort, with extended time periods required for consensus decision-making.

A few stakeholders noted with frustration that the CSA does not appear to have a mechanism for resolving internal differences before interfacing with market participants. This was said to have resulted in mutually exclusive or contradictory comments being provided in the same CSA response.

The variation in level of resources and expertise across jurisdictions was noted by a number of stakeholders as a flaw that will persist under any version of the passport system. Some stakeholders were less concerned, believing that resources and expertise were generally adequate among the four larger jurisdictions which, in their view, perform most securities regulation in Canada.

The Expert Panel heard concerns from a number of stakeholders that the passport system lacks a single voice to represent the capital markets regulators in dealing with threats to

financial stability domestically or internationally. This was cited specifically in the context of recent events, especially the turmoil arising from the freezing of the ABCP market.

The International Dimension

Many domestic and foreign stakeholders expressed increasing concern about the adverse impact of our fragmented and complex regulatory system on Canadian investors and issuers. The Expert Panel heard that individual investors may not have an opportunity to purchase foreign securities because some international issuers choose to avoid the expense of registering in all provinces. Canadian institutional investors maintain offices in the United States, in part to obtain access to these securities.

International stakeholders view Canada's fragmented structure as an impediment to participating in the global trend toward mutual recognition between national regulators. Canadian issuers raising capital in international markets believe that the lack of a single regulator complicates dealing with foreign authorities and makes it more difficult to achieve mutual recognition. One stakeholder stated: "A common regulator providing a common entry point for mutual recognition in the U.S. would be very big. Mutual recognition would largely eliminate the need to list in the U.S."

Some stakeholders suggest that concern over the perceived uneven quality of regulation and enforcement among Canadian jurisdictions would threaten continuing American commitment to the Multi-Jurisdictional Disclosure System (MJDS).¹¹ This was dismissed by other stakeholders as fear-mongering.

Some stakeholders suggested that larger Canadian issuers increasingly cross-list to obtain the "halo effect" from the perception of stronger U.S. regulation and enforcement. Others noted that some large Canadian institutional investors choose U.S. markets to buy and sell issues cross-listed on U.S. markets specifically to have recourse to U.S. enforcement.

Several investment dealers noted that Canada's complex regulatory structure, even with the advent of passport, is a disincentive for foreign companies to list on Canadian exchanges. As one remarked, "you don't dare tell them in the first meeting what they have to do to list in Canada." This is a particular concern for Canadian exchanges and Canadian market participants competing for business internationally.

Some international stakeholders suggested that Canada's status as the sole Financial Stability Forum (FSF) member country without a national securities regulator will come under increasing international scrutiny as jurisdictions around the world implement the April 2008 FSF recommendations to establish more robust and cross-cutting

¹¹ MJDS is a reciprocal initiative adopted by the Securities and Exchange Commission and the CSA, allowing issuers to meet their disclosure obligations in both Canada and the United States by complying with the issuer's home country disclosure standards and permitting the review of that disclosure solely by the securities regulator in the issuer's home country.

arrangements for dealing with stress in financial markets.¹² Specific concerns include the lack of a single national voice and the potential inability of 13 regulators to coordinate in a timely manner for the rapid policy response required to deal with global crises.

Costs and Efficiency

Many stakeholders, in discussing securities regulatory models, expressed the need to strike a balance between achieving greater cost savings and efficiencies on the one hand and regional representation and a cooperative approach on the other. They indicated that a centralized, single securities regulator would lower the cost of regulated activity and enhance efficiency, but it would come at the expense of the significant benefits associated with a regionally-distributed, cooperative model.

Stakeholders representing issuers indicated concerns about the costs of operating in the current system. They cited the need to pay filing fees, often in all 13 jurisdictions, coupled with the cost of having to obtain multiple legal opinions to comply with differing securities laws. They also felt that the level of service was not commensurate with the fee level. Stakeholders representing registrants expressed similar concern about the fees and compliance costs of operating in multiple jurisdictions.

Structural Models

Most stakeholders want a practical approach to pan-Canadian regulation. While some have strong opinions about particular regulatory structures, it is clear most could support a range of options that would improve on the passport system, provided that some of the key issues noted below are adequately addressed.

Some stakeholders expressed concerns about models involving oversight by a Council of Ministers as in the current passport approach, and as contemplated in the Crawford Model. A number of stakeholders suggested that without a single minister ultimately responsible, in practice there is little accountability to Parliament and the public. A number of stakeholders suggested addressing this concern through a structure combining provincial participation with accountability to the federal Minister of Finance.

Any effective regulatory authority requires adequate funding and control over its budget, yet it needs to be accountable and subject to oversight. Several stakeholders suggested that a single regulatory authority should have an independent Board of Directors which would be responsible for setting the budget. This strong independent board—a number of stakeholders drew a parallel to the Canada Pension Plan Investment Board (CPPIB)—is seen as especially important by stakeholders supporting principles-based legislation with a high degree of delegated authority to the agency. A structure more akin to a public

¹² The Financial Stability Forum was established in 1999 to bring together national authorities responsible for financial stability, international financial institutions, sector-specific international groupings of regulators and supervisors, and committees of central bank experts. The April 2008 recommendations to the G7 Finance Ministers are available at http://www.fsforum.org/publications/FSF_Report_to_G7_11_April.pdf

company board was also suggested to separate the roles of the board and management to enable effective corporate governance and oversight.

Additional mechanisms for accountability to both industry and the public were also recommended in the consultation process. Some stakeholders referred to the public accountability process used in the United States, achieved in part through Senate Banking Committee hearings on securities issues and regulator performance.

Meaningful consumer input into securities regulation was identified as an important issue by many stakeholders. It was frequently suggested to the Expert Panel that the Financial Services Consumer Panel in the United Kingdom is a worthy model. Key features include a legislative foundation with a mandate to advise and monitor the FSA on all its policies and activities from an independent consumer point of view, appointment to the panel through a public recruitment process, and a research budget and support staff financed by the FSA.

Regional sensitivities to capital markets, investors, issuers and registrants are important. One reason raised for opposition to a single regulator is the concern that it would end up “simply changing the sign over the door of the Ontario Securities Commission.” The Expert Panel heard several specific reasons for this concern:

- Regional issues and priorities would receive insufficient attention in a centralized organization;
- The risk of application of one-size-fits-all rules that would disadvantage specific industry sectors;
- The loss of local resources to nurture and support small issuers; and
- The loss of innovation that is currently fostered by the regulatory competition among jurisdictions.

The Expert Panel heard from many stakeholders that these concerns could be addressed through a distributed model of strong regional centres. A few stakeholders suggested locating the head office outside Ontario to emphasize decentralization. Others emphasized the need to establish regional offices that have palpable delegated authority, be identified as “centres of excellence” and have adequate staffing to deal independently with smaller and specialized issuers within the region. Regional offices, they noted, would be particularly important as a point of contact for smaller regional firms, in support of achieving regulatory requirements, and as a complaint intake-mechanism for retail investors.

Despite the general support for a distributed model, a small number of stakeholders questioned the need for a regional or decentralized approach. Some cited the example of the U.S. Securities and Exchange Commission as a headquarters-dominated structure operating effectively from a base outside the major financial centres.

The amalgamation of Canadian stock exchanges was cited by a number of stakeholders as a positive example. The TSX Venture Exchange is seen as operating with strong regional representation, and is seen as a concrete example of a proportional approach

which has preserved the features especially important to junior mining and junior oil and gas companies.

Governance Models

The Expert Panel heard a number of suggestions for models of federal-provincial cooperation and/or regionally distributed operations. Two of the most commonly cited examples were the Canada Revenue Agency—a single agency which administers federal and provincial taxes, and the CPPIB. The CPPIB is a corporation governed by directors appointed by the Governor in Council on the recommendation of the federal Minister of Finance, following a legislated consultation process with provincial ministers.¹³

These and the other examples cited were not held out as precise templates, but rather as indicators that a number of different approaches could work in practice. Some stakeholders noted RRSPs as an example of using clear federal jurisdiction to provide a common framework benefiting all Canadians investing to provide for their retirement, even though in many cases RRSPs are sold by provincially licensed intermediaries.

Legislative or policy development paralysis was identified by some stakeholders as a possible consequence of complex models of federal-provincial cooperation. Some specifically advocated against “one-province, one-vote” or a requirement for consensus decision making, noting this was a shortcoming of the passport system. Other stakeholders specifically cautioned against a model requiring each jurisdiction to enact legislative amendments—a single law with a single authority to amend was viewed by many stakeholders as a requirement to keep the regulatory framework up to date.

Integrated Financial Sector Regulation

Given global developments, a few stakeholders questioned whether the establishment of a common securities regulator was too modest an objective. The Expert Panel heard that continued convergence in financial products and markets increasingly results in firms operating in fields subject to both prudential and market-conduct regulation.¹⁴ The response in Saskatchewan and Quebec has been to more closely align the regulatory structure with market developments by adopting a single regulatory body for all financial services. Most stakeholders discussing this option with the Expert Panel concluded that an agency overseeing all financial markets and institutions would be too big a leap for Canada, at least in the near to medium term.

Transitional Issues

The Expert Panel was directed by many stakeholders to the FSA and the Australia Securities and Investment Commission as practical examples of migrating multiple predecessor agencies into a single regulatory body. Stakeholders also referred to previous

¹³ A description of the CPPIB is available at <http://www.crawfordpanel.ca/BackgroundPaperC.pdf>

¹⁴ Prudential regulation applies to intermediaries such as banks and insurance companies, requiring prudent behaviour such as maintaining adequate capital. Market conduct regulation focuses on ensuring full plain and true disclosure by market participants.

experience in Canada with reallocation of responsibilities among jurisdictions, for example the Labour Market Development Agreements, as practical illustrations of how transitional issues can be smoothly resolved.

The Expert Panel received many specific suggestions on transitional issues, including:

- Guarantee all employees of existing agencies a position in the new structure;
- One to two years might be required to prepare for the transition;
- Allocate transitional tasks such as staff changing employers, labour agreements, and computer services to participating provinces to help ensure “buy-in”;
- Engage existing agencies in planning and implementing the new structure;
- A new agency would have to be functional on day one—there could be no gap or phase-in period; and
- Compensate the provinces for the loss of the excess of fees collected for securities regulation over the costs of their current regulatory authority.

Stakeholders suggested that providing market participants with certainty through a clearly defined structure and transition path would be crucial in garnering support from industry and the existing regulators. We heard that consultation and cooperation will be key, requiring working groups with representation from the existing agencies. Some stakeholders suggested that issuers and registrants should also be active participants in the design and implementation phases of establishing a new agency.

III. NEXT STEPS

This document summarizes input from the Expert Panel’s initial round of face-to-face consultation meetings. The Expert Panel’s deliberations will continue through the summer and fall with additional stakeholder meetings and review of the written submissions. These stakeholder views, together with the output from the research commissioned by the Expert Panel and work on a model common securities act, will shape and support the recommendations that the Expert Panel will provide in its report to the Minister of Finance and the provincial and territorial ministers responsible for securities regulation.

APPENDIX 1: EXPERT PANEL TERMS OF REFERENCE

Terms of Reference of Third-Party Expert Panel on Securities Regulation

With Budget 2007, the Government of Canada set out a plan for Canada's capital markets entitled *Creating a Canadian Advantage in Global Capital Markets*. This advantage requires a shared commitment to enhance the content, structure and enforcement of capital markets regulation.

At their meeting on June 19, the Minister of Finance of Canada and the provincial and territorial ministers responsible for securities regulation discussed various approaches to improve securities regulation. At the conclusion of the meeting, the Minister of Finance of Canada announced that, in parallel to existing efforts of provinces and territories to streamline and harmonize securities regulation, the Government of Canada would form a third-party expert panel to advise ministers on the best way forward.

The expert panel will draw on global best practices and build on the strengths of Canada's capital markets. It will also review efforts to date to harmonize and simplify Canada's regulatory system.

The panel's proposals will be respectful of the jurisdictional framework for securities regulation in Canada and will allow willing participation of provinces and territories.

The expert panel will review and advise on the following:

1. The objectives, outcomes and performance measures that will best anchor securities regulation and the pursuit of a Canadian advantage in global capital markets. For example,

- Efficient and competitive capital markets that contribute to economic growth and prosperity.
- Market integrity and the protection of investors.
- The reduction of systemic risk.

2. How Canada could best promote and advance proportionate, more principles-based regulation, starting from existing harmonized legislation and national and multilateral regulatory instruments, with a view to creating a Canadian advantage in global capital markets.

The regulatory framework will set out principles for regulation. For example, regulation will:

- be based on clear and sound principles;
- be applied only where there is a clear net benefit;
- be proportionate to reflect the unique make-up of Canadian capital markets and the needs and capacities of small and mid-sized businesses;
- foster integrity and investor confidence through markets that are fair and transparent;
- be supported by enforcement that is timely, proportionate, effective and consistent;

- foster open markets and competition that will drive innovation and choice for issuers and investors;
 - meet or exceed global best practices and standards and minimize impediments to cross-border capital flows;
 - draw on international regulatory cooperation; and
 - be complemented by efforts to enhance the financial literacy of Canadians so that they may exercise choice and seek advice in an informed manner.
- The regulatory framework may also set out principles for business, such as those established by the U.K. Financial Services Authority, e.g.:
 - integrity – a firm must conduct its business with integrity;
 - skill, care and diligence – a firm must conduct its business with due skill, care and diligence;
 - management and control – a firm must take reasonable care to organize and control its affairs responsibly and effectively, with adequate risk management systems;
 - financial prudence – a firm must maintain adequate financial resources;
 - market conduct – a firm must observe proper standards of market conduct;
 - customers' interests – a firm must pay due regard to the interests of its customers and treat them fairly;
 - communications with clients – a firm must pay due regard to the information needs of its clients and communicate information to them in a way which is clear, fair and not misleading;
 - conflicts of interest – a firm must manage conflicts of interest fairly, both between itself and its customers and between a customer and another client;
 - customers: relationships of trust – a firm must take reasonable care to ensure the suitability of its advice and discretionary decisions for any customer who is entitled to rely upon its judgment;
 - clients' assets – a firm must arrange adequate protection for clients' assets when it is responsible for them; and
 - relations with regulators – a firm must deal with its regulators in an open and co-operative way and must disclose anything relating to the firm of which the regulator would reasonably expect notice.

3. How proportionate, more principles-based regulation could facilitate and be reinforced by better, more coordinated enforcement that could include a separate securities tribunal.

4. How this approach to regulation could be implemented under a passport or under a common securities regulator; and,

5. A model common securities act and a transition path, including key steps and timelines, that participating provinces and territories could adopt to effect proposed changes to the content, structure and enforcement of regulation, including:

- Implementation of legislation.
- Implementation of changes to the structure of the regulatory system, as required.
- Interaction with non-participating jurisdictions, and enabling non-participating jurisdictions to opt-in at a later date.

Process

The third-party expert panel will be supported by a small secretariat and will draw as required on researchers and advisors.

The group will consult with governments and regulators. It will also engage self-regulatory organizations and market participants and encourage input through a web site and written submissions.

It will deliver to the Minister of Finance of Canada and provincial and territorial ministers responsible for securities regulation a final report by the end of 2008.

Funding

The federal government will fund the third-party expert panel.

APPENDIX 2: EXPERT PANEL MEMBERS

Panel Chair

Hon. Tom Hockin, P.C.
Former Minister of State (Finance) and former President, Investment Funds Institute of Canada (IFIC)

Panel Members

Ian D. Bruce, FCA
Chief Executive Officer, Peters & Co Limited

Denis Desautels, OC, FCA
Executive-in-Residence, University of Ottawa

Hal Kvisle
President and CEO, TransCanada Corporation

Dawn Russell, QC
Associate Professor, former Dean of Law, Dalhousie University

Terry Salman
Chairman, President and CEO, Salman Partners Inc.

Heather Zordel
Partner, Cassels Brock & Blackwell LLP

APPENDIX 3: CONSULTATION MEETINGS PARTICIPANT LIST

(alphabetical)

Canada

Calgary

Alberta Securities Commission
Birchcliff Energy Ltd.
Bissett Investment Management
Canada West Foundation
Canadian Association of Petroleum Producers
Canadian Oil Sands Trust Limited
Dr. Jack M. Mintz, University of Calgary
Mawer Investment Management
PetroCanada
Tristone Capital

Halifax

Acadian Securities
Beacon Securities
Bell Alliant
Clark Inc.
Cox and Palmer LLP
Honourable Michael Baker, Minister of Finance for Nova Scotia
McInnes Cooper
Nova Scotia Power
Nova Scotia Securities Commission
Stewart McKelvy

Montreal

Addenda Capital
André Fok Kam
BMO Nesbit Burns
Bourse de Montreal
Desjardins fédérations des caisses du Québec
Fasken Martineau DuMoulin LLP
Fédérations des chambre de commerce du Québec
IFL Investment Foundation
Jarislowsky Fraser
Secor Conseil
Toronto Stock Exchange

Regina

Greystone Managed Investments Inc.
Harold H. MacKay
Saskatchewan Financial Services Commission
Victoria Park Capital Inc

Toronto

Accountability Research Corporation
Alex Clark
Andrews Teasdale
BMO Nesbitt Burns
Canadian Bankers Association
Canadian Capital Markets Association
Canadian Public Accountability Board
Certified General Accountants of Canada
CIBC World Markets
Common Front for Retirement Security
Consumers Council of Canada
Diane Urquhart
Gary Logan
Goldman Sachs Canada
Investment Industry Regulatory Organization of Canada
Investment Counsel Association of Canada
Investment Funds Institute of Canada
Investment Industry Association of Canada
Jim MacDonald
Laureen Snider
Lehman Brothers Canada
Manulife Financial Ltd.
Market Regulation Services Inc.
Mutual Fund Dealers Association of Canada
Ontario Securities Commission
Pamela Reeve
Patricia Cosgrove
Phillip Anisman
Prospectors and Developers Association of Canada
RBC Capital Markets
Robert Kyle
Scotia Capital Markets
Small Investor Protection Association

Vancouver

British Columbia Investment Management Corporation
Canaccord Capital Corporation
Canfor Corporation
Vancouver Board of Trade
Elizabeth Harrison
Exeter Resource Corporation
Jinshan Gold Mines Ltd.
First Majestic Silver Corporation
Leith Wheeler Investment Counsel Ltd.
Lions Capital Corp.
Michael E .J. Phelps
Michael F. Rhodes
Association for Mineral Exploration British Columbia
PenderFund Capital Management
PI Financial Corp.
Rogers Group Financial
Canadian Listed Company Association
TSX Venture Exchange
Vector Corporate Finance Lawyers
Ventures West Capital Ltd.

Winnipeg

Honourable Greg Selinger, Minister of Finance for Manitoba
David Walker

International

New York City

JPMorgan Chase & Co.
Merrill Lynch & Co. Inc.
Cleary Gottlieb Steen & Hamilton LLP
Securities Industry & Financial Markets Association
Heyman Center on Corporate Governance, Benjamin N. Cardozo School of Law
NYSE Regulation Inc.

Washington

Committee on Banking, Housing and Urban Affairs, United States Senate
Committee on Financial Services, U.S. House of Representatives
Department of the Treasury
International Monetary Fund
North American Securities Administrators Association Inc.
United States Securities & Exchange Commission

London, United Kingdom

British Bankers' Association

Euroclear plc & Euroclear SA/NV

Financial Reporting Council

Financial Services Authority

HM Treasury

London Investment Banking Association

Morgan Stanley

Julia Black, London School of Economics

Terence Mowschenson, Q.C.