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Mercredi 18 août 2004

Standing committee on finance and economic affairs

Ontario Securities
Commission Review

Comité permanent des finances et des affaires économiques

Étude de la Commission des
valeurs mobilières de l'Ontario

Chair: Pat Hoy
Clerk: Trevor Day

Président : Pat Hoy
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LEGISLATIVE ASSEMBLY OF ONTARIO

STANDING COMMITTEE ON FINANCE AND ECONOMIC AFFAIRS

Wednesday 18 August 2004

ASSEMBLÉE LÉGISLATIVE DE L'ONTARIO

COMITÉ PERMANENT DES FINANCES ET DES AFFAIRES ÉCONOMIQUES

Mercredi 18 août 2004

The committee met at 0901 in room 151.

SUBCOMMITTEE REPORT

The Chair (Mr Pat Hoy): The standing committee on finance and economic affairs will please come to order. Good morning, everyone. I would like to begin with the reading of the report of the subcommittee. Mr O'Toole, if you would, please.

Mr John O'Toole (Durham): With your indulgence, the standing committee on finance and economic affairs subcommittee report:

Your subcommittee met on Wednesday, July 21, 2004, to consider the method of proceeding in order to fulfill the review, consultation and reporting obligations as set out in subsection 143.12(5) of the Securities Act and specifically the priority recommendations as set out in the Five-Year Review Committee Final Report: Reviewing the Securities Act (Ontario) including:

—securities regulation in Canada and a single regulator system; and

—the appropriate structure for the adjudicative tribunal role of the Ontario Securities Commission (OSC);

and recommends the following:

(1) That the committee meet in Toronto on August 18, 19, 23 and 24, 2004 as required, for the purpose of holding public hearings.

(2) That the committee clerk, with the authorization of the Chair, post information regarding the hearings on the Ontario Parliamentary Channel, the committee's Web site and in the National Post and the Globe and Mail newspapers on Tuesday, August 3, 2004.

(3) That interested parties who wish to be considered to make an oral presentation contact the committee clerk by 5 pm on Wednesday, August 11, 2004.

(4) That, in the event all witnesses cannot be scheduled, the committee clerk provide the members of the subcommittee with a list of requests to appear by 12 noon on Thursday, August 12, 2004.

(5) That the members of the subcommittee prioritize the list of requests to appear and return it to the committee clerk by 5 pm on Friday, August 13, 2004.

(6) That groups be offered 20 minutes and individuals 10 minutes for their presentation. This time is to include questions from the committee.

(7) That the Chair of Management Board of Cabinet be invited to speak to the committee for an hour the morning of August 18, 2004.

(8) That the committee request a two-hour technical briefing from the Ministry of Finance the morning of August 18, 2004.

(9) That the opposition critics be allotted 10 minutes each to make statements the afternoon of August 18, 2004.

(10) That the committee invite David Brown, chairman of the Ontario Securities Commission, to speak to the committee for an hour the afternoon of August 18, 2004.

(11) That the committee invite Purdy Crawford, chair of the five-year review committee, to speak to the committee for an hour the morning of August 19, 2004.

(12) That the deadline for written submissions be Tuesday, August 24, 2004, at 5 pm.

(13) That the research officer prepare a draft report for the committee's review by Monday, September 20, 2004.

(14) That the committee meet to review the draft report on Tuesday, September 28, 2004, at which time any dissenting opinions shall be filed with the clerk of the committee.

(15) That the clerk of the committee, in consultation with the Chair, be authorized, prior to the passage of the report of the subcommittee, to commence making any preliminary arrangements necessary to facilitate the committee's proceedings.

The Chair: Any discussion? Hearing none, all in favour? Carried. Thank you very much.

ONTARIO SECURITIES COMMISSION REVIEW

The Chair: Now we'll move to our first presentation of the morning. The committee is pleased to welcome the Chair of the Management Board of Cabinet, Minister Gerry Phillips. Good morning, sir. You have an hour for your presentation. If you wish, you may leave time for questions within that hour.

Hon Gerry Phillips (Chair of the Management Board of Cabinet): Thank you very much, Chair. I appreciate the chance to be here and to address you on the five-year review committee final report. I've also asked Phil Howell, the assistant deputy minister in this area and our senior civil servant in the area, to join me in

case there are any technical questions. Again, I appreciate the chance to be with you, to give some opening remarks and to leave some time for questions as well, Mr Chair. I think my presentation will run perhaps half an hour, and so I hope we'll have a good chance to discuss the report.

The report and the referral of the report to a legislative committee are part of a periodic review process that's required, as you know, by the Securities Act. This is the first five-year review, and it's timely at this juncture, when there are a wide range of capital markets reform initiatives under discussion. Your committee's review of the report will assist in maintaining up-to-date securities laws and ensuring that regulation remains relevant in the current environment.

Today, I plan to discuss the role of capital markets in Ontario and the overall context for securities regulation here; to provide some background on the five-year review committee and the process it went through in reviewing Ontario's securities laws; and to give a brief overview of the five-year review committee report. I'll focus on two of the report's priority recommendations: The first is to move to a single securities regulator in Canada, and the second is to study whether a separate tribunal should be created to carry out the adjudicative role of the Ontario Securities Commission. I'll also comment on other securities regulation reform initiatives currently underway and how they relate to the five-year review committee's recommendations.

After I've concluded, the Ministry of Finance staff will provide a technical briefing. Phil Howell, who is the assistant deputy minister of the office of economic policy and chief economist, and Colin Nickerson, senior manager, securities policy unit, a branch of the economic office, will handle that presentation.

I think we all appreciate that well-functioning securities markets are essential to economic prosperity in Ontario and across Canada. Vibrant capital markets attract investment. They provide funds for new industries and the expansion of established industries. They provide Canadians with opportunities to invest to help them save for retirement, fund their children's education or purchase a home. As we all know, capital markets connect people and institutions that have funds to invest with those wanting to put their funds to productive use.

As you look around this city, this province and this country, the essential role of our capital markets is readily apparent. Historically, they have supplied funds that have fuelled the development and growth of all sectors of the economy. Most significantly—and I think we all appreciate this—most Canadians now have a stake in Canada's capital markets, whether directly by owning shares and bonds or indirectly through any pension plan or retirement savings plan.

The securities sector has become an important industry in its own right, but beyond that, our capital markets play a key enabling role in facilitating the growth of other industries. We cannot take for granted the critical function that capital markets play. We must recognize where change is needed and take the appropriate steps to ensure that our capital markets remain healthy and vibrant.

0910

One of the keys to a vibrant and competitive capital market is effective regulations. Governments regulate securities markets to protect investors from unfair practices and fraud, as well as making sure that businesses have efficient access to the capital they need to grow and expand. As capital markets evolve, we must ensure that regulation also adapts to serve these twin objectives: raising the money and making sure the investors are well protected.

The regulatory framework must be both effective and efficient. Governments must balance protections for investors with the need for fair and efficient markets. Regulators must have the capacity to enforce securities laws while not imposing an unfair or undue burden on business.

I'll talk a little bit now about the importance of capital markets. Canadian capital market activity is largely, as I think we all know, concentrated in Ontario. Ontario accounts for more than one half of the jobs and the real output of the Canadian securities industry. Ontario companies account for about half of the number and value of Canadian companies listed on the Toronto Stock Exchange.

The TSX itself accounts for virtually all equity issuance and trading in Canada. It's one of the key organizations at the centre of capital market activity in Ontario's financial sector, which, by the way, currently employs about 325,000 people—hugely important to us. Toronto, as I think you probably appreciate, is North America's third-largest financial centre, after New York and Chicago.

Canada's capital markets are a large part of Canada's economy and Ontario's economy, but we must not lose sight of the fact that our capital market is a relatively small proportion—less than 3%—of global markets. I'll discuss that later, as this is a key consideration in determining whether Canada can afford to have 13 securities regulators.

A little bit of background on the five-year review committee: On March 2, 2000, the first five-year review committee was established to review Ontario's securities laws and the legislative needs of the Ontario Securities Commission. The committee was chaired by Purdy Crawford, whom I think you will hear from tomorrow, and also included Carol Hansell, William Riedl, Helen Sinclair, David Wilson and Susan Wolburgh Jenah. The committee spent three years developing and consulting on their report. Members gave generously of their time and expertise, and I am confident you will agree that this demonstrates the best spirit of public service. We're very grateful for their contribution. I would like to take this opportunity to acknowledge their efforts and to thank the five-year review committee and their staff for all their hard work.

Process: In developing their report, the committee published for comment an illustrative set of issues it

proposed to consider. That was the first step they did, to publish these issues. The committee then released a draft report of its review of Ontario's securities laws for public comment in May 2002. In response, the committee received 45 submissions from investors, public companies and securities intermediaries. The committee reviewed these comments and revised their report as they considered appropriate. Their final report was delivered to the Minister of Finance in March 2003, and the report was tabled in the Legislature and then referred to this committee.

The report is an in-depth review of a wide range of securities law issues. As you know, this document contains 95 recommendations covering most aspects of securities regulation. As noted earlier, two of the report's priority recommendations are, first, moving to establish a single securities regulator across Canada and, second, the need to study the appropriate structure for the Ontario Securities Commission's adjudicative tribunal role. I will discuss these in more detail later.

However, the report also contains recommendations for significant change in a number of other areas, including:

Implementing civil liability for secondary market disclosure. This would give investors broader rights to sue for company misrepresentations when they buy shares that are already traded in the market. It would put them on a similar footing to investors who buy shares through transactions such as initial public offerings, or IPOs;

Secondly, giving the Ontario Securities Commission more rule-making authority in relation to the corporate governance standards of public companies;

Another area they recommend is requiring the establishment of new independent governance bodies for mutual funds;

They also recommend stronger powers for the Ontario Securities Commission and the courts to enforce compliance with securities laws, and so-called whistleblower protections for those who report violations; and

New OSC powers to oversee self-regulatory organizations—SROs, as they're called—and new enforcement powers for SROs.

In terms of the status of the five-year review committee's recommendations, I would note that 20 of the 95 recommendations in the report have been addressed already. For instance, the government has approved new rules developed by the OSC or approved regulation changes to implement nine of the five-year review committee's recommendations. The OSC has already acted to address four recommendations, such as performing OSC cost-benefit analyses to assess the costs and benefits of regulation proposals. SROs and other bodies have taken action on two others. Some other recommendations do not require action. For example, the five-year review committee endorsed existing provisions and felt no change was needed in relation to five of its recommendations.

In addition, there are a number of recommendations directed to parties who can implement them without government action. For example, there are important recommendations that the OSC limit the number of projects it takes on and that it strive for "practical if not perfect" solutions, to use the definition of the report, so that regulatory changes are more timely. These are significant recommendations that the OSC can implement on its own. In total, 35 recommendations could be implemented by the OSC or the SROs with actions developed by OSC rules.

I would like to now return to what the five-year review committee said was its major recommendation, and that is the issue of a single securities regulator. Canada's current securities regulatory framework consists of 13 sets of securities laws and 13 securities regulators, like a bit of a patchwork quilt. There are enough differences from province to province that the current system is expensive and complicated. It is an obstacle to investing in Canada and doing business across Canada.

For example, there was a press report citing a study by the Prospectors and Developers Association of Canada indicating that it would cost a junior mining company $300,000 if it were to raise $600,000 and do so across all 13 jurisdictions. This is not an effective and efficient way for companies to raise capital. It discourages them from approaching investors in all jurisdictions, with the result that investors in some provinces are denied investment opportunities.

It is not just in relation to raising capital that the current system creates unnecessary burdens. Public companies and securities market participants, such as securities firms, advisers and portfolio managers, among others, face similar obstacles on an ongoing basis in understanding, monitoring and complying with the different laws and dealing with the different regulators in each province and territory where they operate.

The enforcement of securities laws could suffer. There are inconsistent protections for investors. Resources now devoted to coordinating with other regulators or needlessly duplicating other regulators' activities could be better spent on regulating.

Despite the best efforts of all of our regulators, the current structure does not maximize confidence in Canada's capital markets. As a result, it is not as attractive as it could be for companies to invest or do business in Canada. We are the only industrialized country without a single securities regulator. As noted by one observer, it simply makes no sense for Canada to maintain 13 independent regulatory agencies in an economy about the size of Texas.

Many of the problems associated with Canada's current securities regulatory framework can be alleviated by one of the five-year review committee's central recommendations, and that was their first recommendation: the implementation of a single securities regulator. The committee has called this nation's lack of a single regulator "the most pressing securities regulation issue in Ontario and across Canada."

There are three different proposals to reform the securities regulatory framework now under discussion

that I will address: first, Ontario's proposal for a new provincial-territorial securities regulator; second, the Federal Wise Persons' Committee recommendation for federal, provincial and territorial governments to create a single federal regulator with federal securities laws, even if all provinces do not co-operate; and the third proposal is an interprovincial securities initiative called a passport proposal that I will explain in some detail later on.

0920

On June 24 this year, the government released Ontario's discussion paper, Modernizing Securities Regulation in Canada. I hope the committee has been given a copy of that. It proposes a new provincial-territorial securities regulator with a common body of laws and a single fee structure. Its mandate would reflect the needs of capital markets across Canada, while providing strong protection for investors.

In pursuing this goal, we recognize the need for flexibility to address the concerns of all provinces and territories and to ensure a strong local and regional regulatory presence. We are willing to explore creative solutions to achieve a successful outcome.

Ontario's approach has been, and continues to be, that the fundamental solution consists of three key elements, and you can see that in our proposal: We believe that in Canada we need one new regulator, one common body of securities law and one set of fees.

In developing our proposal, we have worked with ministers in other provinces through a group called the interprovincial securities initiative steering committee. I've travelled to western Canada and will actually leave tonight for another meeting with some other ministers there to discuss our proposal. We've consulted with stakeholders in Ontario.

I've noted some of the fundamental problems in the current system when companies and intermediaries have to deal with multiple regulators and multiple laws. We are addressing that problem directly. Instead of 13 different systems, we say to ourselves and to the other provinces, "Let's work to create one integrated system." It makes sense.

In my view, there are many benefits offered by our proposal. For instance, one set of clear, consistent requirements would be easier for companies and investors to understand. As a result, it would be easier and cheaper for companies to raise capital and for securities businesses to operate across Canada. This would provide more choice for investors and companies, which can only be beneficial to our economies.

There would be fewer lost financing and investment opportunities from the delays and complexities of dealing with multiple regulators and multiple laws. There would be a lower compliance burden and, therefore, a more cost-effective system in place. Resources would be freed up for companies, and lower costs would be passed on to investors. There would be improved capacity to deliver a rapid and coordinated regulatory policy response to market changes.

A single regulator could build on the existing solid base of local investigation and enforcement. A strong local enforcement presence could deal effectively with local violations and respond locally to investor complaints. At the same time, common enforcement priorities would assist in pursuing offenders whose violations span provincial borders. A single agency would enable more effective coordination with other law enforcement bodies, regulators and prosecutors and would facilitate more comprehensive and integrated responses to securities offences.

A single regulator would also provide the consistent voice needed to positively influence regulators in other countries in the development of international securities policy initiatives.

Our proposal would treat market participants more fairly through a more cost-effective administration and fees that reflect the cost of regulation.

We believe that our model would better address concerns around attracting investment and reducing regulatory burden, while improving investor protection. However, we understand that other provinces are concerned because their businesses do not want to lose the benefit of regulatory expertise in specific sectors and they do not want to lose the responsiveness of a local regulator. We think that our proposal can accommodate those concerns and offer significant improvements; for example, by drawing on existing expertise in staffing the new agency, by giving local staff real decision-making authority and by having their decisions under the common body of law apply across Canada.

Another example of concern is that some of the smaller provinces are concerned about their revenue loss in moving to a single fee structure. We recognize that this is an issue, and we are prepared to look at a number of ways of dealing with that.

In contrast to Ontario's proposal, some other provinces support a proposal that is an arrangement to coordinate the work and decision-making of all provincial and territorial securities regulators that now exist. Each province would still have its own regulator and enact its own laws.

The proposed passport covers two aspects of securities regulation: Individuals and firms could do securities business in all provinces by registering with a primary regulator and complying with the laws of that regulator's province; and companies could obtain approval to issue shares in all jurisdictions by complying with the primary regulator's disclosure laws.

All substantive elements of the passport proposal are already included in existing harmonization initiatives of securities regulators. For public companies, some of these elements have been implemented already and the others are well underway. For securities firms that must register to do business with regulators, a new national registration system is at an advanced stage of development.

Securities regulators are already in the process of developing and implementing these initiatives. Indeed, some have already been implemented. Many of their benefits will be achieved regardless of whether the provinces and territories enter into a passport system.

The passport includes a willingness to consider further reforms, including steps toward a joint provincial securities agency, but no commitment to move in that direction, and that is our fundamental concern, I might say. We fundamentally believe that we in this country need to move to a single securities regulator. To date, those who advocate the passport have not indicated they are firmly committed to ultimately moving to that single regulator.

The passport proposal was consulted on by provinces in June and July 2003. Some provinces are now proposing that a memorandum of understanding—MOU—be signed to implement the passport system. I would like to table with the members of this committee today a copy of the current version of the proposed MOU for your consideration.

In our judgement, the passport approach is not the answer. It does not go far enough. The passport includes a weak commitment to harmonized law relative to Ontario's proposal. Under the passport, there would be wider scope for different regulatory approaches.

Over time, as the scope of the passport is expanded and more differences emerge, the passport does not compare favourably to a single regulator, and it risks undermining core strengths of the current system. The passport is not as seamless as a single-regulator system, because market participants still need to worry about different laws in different jurisdictions.

There are other drawbacks to the passport proposal:

It does not address the high cost of maintaining 13 separate securities regulatory authorities;

It does not adequately address the need for competitive capital markets and high standards of investor protection. Forcing investors and companies to understand and deal with differences in 13 jurisdictions does not make it attractive to invest and do business in a market the size of Canada's;

Maintaining 13 regulators and 13 sets of securities laws and adding a complex set of regulatory responsibilities perpetuates a fragmented Canadian regulatory system;

It does not improve governance and accountability. The addition of a minister's council under a passport holds promise, but the absence of a voting mechanism would limit its effectiveness; and

It does not address the need to pay fees to up to 13 regulators, even though one regulator would do most of the work under the passport.

Importantly, many Ontario-based stakeholders view the passport as forestalling needed change. It diverts resources from the real solution; that is, moving to a single regulator.

The other specific recommendation I'd like to comment on today is the issue of the appropriate structure for the OSC's adjudicative tribunal.

The five-year review committee recommends that this issue be studied by the government and by the OSC. I understand that OSC Chair David Brown plans to table a report to this committee on this issue when he appears later today.

We approach this issue with an open mind, and the government is prepared to study it as recommended by the five-year review committee. I expect that other parts of government, other agencies and stakeholders from the securities field and beyond will take a keen interest in looking at this recommendation.

In studying this issue, we believe that separating the adjudicative function from the regulator's other roles is especially relevant in looking at possible structures for a single regulator.

Another reform initiative I want to address is the uniform securities law, or USL, as it's referred to in most reports. The USL is a project of the Canadian Securities Administrators—or CSA, which you'll see in a lot of reports—which is a forum for the 13 securities regulators of Canada's provinces and territories that coordinates and harmonizes regulation of the Canadian capital markets. The objective of the USL project is to develop more uniform securities laws across Canada.

0930

Uniform securities laws across jurisdictions are a necessary component of both the passport and single-regulator models. Uniform laws across jurisdictions could work as a common base of securities laws across provinces under either the Ontario or Wise Persons' Committee single-regulator proposals. Regulators plan to release the next draft of the USL proposal in November. To date, no government has approved the proposal.

The USL project is a significant undertaking that could contribute significant improvements to the current system. We applaud the efforts of securities regulators to move in this direction.

At the same time, we believe the governments must go further. Its name notwithstanding, the USL project would not result in uniform securities legislation across Canada. As presently contemplated, the USL project would not result in one set of securities laws; what is being proposed is 13 sets of more uniform, but not identical, laws. Each province would enact its own legislation, both a uniform securities act with regulatory requirements and a more loosely harmonized act for administrative matters.

The initial draft of the proposed Uniform Securities Act was not comprehensive and included significant differences across provinces. Examples of these differences include matters that would be regulated differently across provinces. An example of that was derivatives. Important investor rights could also vary. As a result, USL differs markedly from the Ontario proposal for a single, comprehensive act that would apply across all provinces.

Many of the five-year review committee's recommendations are included in the USL draft legislation and could be considered in that context.

Apart from the USL, there is a large number of more specific initiatives underway to harmonize securities laws across provinces. Again, many of these cover issues that are also covered in the five-year review committee's recommendations. For example, there are CSA initiatives to develop national rules in specific areas.

The significance of these proposals is that many five-year review committee recommendations are already being considered by regulators across Canada; the response to the five-year review committee's report needs to be considered in a national context; and a single regulator administering a common body of law is the best way to achieve a common national approach. But until we get there, regulators should be given the opportunity to develop national rules.

In closing—on time, I think, too—I would like to reiterate that well-functioning securities markets will help drive economic prosperity and growth. Effective regulation is a key element underpinning efficient, vibrant and competitive capital markets. Regulatory reform will benefit investors, companies and intermediaries across Canada, and in Ontario particularly.

As I've outlined, there are numerous initiatives under discussion to move toward more national regulation. I believe they provide an important context for your review, as will the perspectives of the five-year committee, the OSC and other interested parties.

I particularly look forward to hearing your views on the following priority five-year review committee recommendations, the two that I've just talked about: Ontario's efforts to move to a single securities regulator and the need for the government to study whether to transfer OSC adjudicative responsibilities to a separate tribunal.

The government also would welcome your views on all your areas, obviously, but particularly those that relate to the introduction of new enforcement powers; the need for stronger mutual fund governance; the proposal to introduce civil liability for secondary market disclosure; improving the disclosure of information to investors; adding flexibility for businesses in raising capital; enhancing shareholder rights; and supplementing the remedies available to wronged investors.

The global marketplace will continue to grow and expand. Our government wants to ensure that Ontario's capital markets remain vibrant and attractive in this competitive marketplace to help our economy grow and expand.

That concludes my opening remarks. I'd be happy to entertain any questions.

The Chair: Thank you very much for your presentation. We have about 30 minutes for questions; that would be 10 minutes for each party. We'll begin with the official opposition.

Mr O'Toole: Thank you very much, Minister, for making us aware of your position on a number of important issues. I just want to put on the record that I have the greatest respect for, and confidence in, your past record as finance critic when you were in opposition. My only wish is that you were still doing it. That being said—

Hon Mr Phillips: I heard the "opposition" word in there.

Mr O'Toole: Exactly.

I don't want to be too critical; I just want to be straightforward. I know that many of the things you're talking about are the privilege of listening to and being a very small part of when I was the parliamentary assistant to the then Minister of Finance. I understand how important it is to have trust and confidence in the capital market, certainly post-Enron or Nortel or Royal Group Technologies. These are questions that leave the small investors, who are the people I represent, uncertain and with a lack of confidence.

The two questions you put to us, both the single regulator as well as the tribunal function of the OSC, are very pertinent and have been raised by many experts besides Purdy Crawford—the issue there being who is watching whom and who is setting the rules in the marketplace.

I want to pose a couple of little questions and have a couple of questions beyond those two initials that you raised. My understanding is that in the single regulator debate, they're going to try—whether it's under the passport system—to find some way around Quebec. Technically, they won't join. It's my understanding that they are basically the problem—not that they're a problem; it's just that they see themselves as a little bit more independent, I suppose. What is the alternative to the Quebec problem or challenge in moving forward with the single regulator? What can we do? How can we move that? I'm basically in favour of simplifying the 13 jurisdictional issues, the fees, but to ever get one set of rules, I think we're still—we've been talking about it for almost a decade and we're still probably another decade away from its actually happening. You can look at the adjudicative role then. Until you get a single set of rules, you can't have any separation of the adjudication outside a provincial jurisdiction.

Hon Mr Phillips: There are couple of questions there, or maybe three questions. One is, are we 10 years away from a single regulator? I think there's a fair bit of momentum across the country on the idea of moving to a single regulator. I thought this report was a very helpful first step in that, saying, "This is our number one recommendation." There was the federal Wise Persons' Committee recommendation. Even in provinces that may be a bit reluctant to move to it now—I think there's a general recognition in most provinces that this is inevitable, that this country must move ultimately to one single regulator. So it's a question of when that happens. I think there's a fair bit of belief right across the country.

My focus in working with the other provinces has been to say to them, "What would inhibit you from saying: 'We can move to a single regulator now,' and how can we tackle those problems now? If they're going to be the same problems you will raise with me in two or three years, we haven't advanced it at all." That actually has been the discussion I've been having with other provinces.

In terms of Quebec, that perhaps is the most challenging one, partially because of a different legal code. But even there, I think there's a recognition that that could be overcome if the goodwill were there. So I guess the solution in the short term is to find whatever

other provinces are prepared to move now to work jointly on a regulator, find a model that other provinces then can feel comfortable with and move one at a time on it. Quebec may be our largest challenge, but I think all of us accept that we are very much a global trading society now and we'd better be competitive globally on this.

Mr O'Toole: I appreciate your candidness, and I sense the same thing. If the other provinces and territories could come together and operate without being in confrontation with Quebec, there may be some willingness to move forward. Is that the discussion at the second level, under the Wise Persons' Committee: Just move forward and they can either opt in or opt out and let them deal with it? Is there any will to do that? That's the shortest route to get to the single regulator. And what are the barriers? Are the barriers the fees, who has the appointments and how many appointments from each jurisdiction? What's the hang-up there?

0940

Hon Mr Phillips: A key part of our recommendation is, we're not talking about simply expanding the Ontario Securities Commission; this is the new regulator. I think it is perhaps an apprehension of this simply being the Ontario Securities Commission taking over. That's a natural feeling, I guess.

Also, in other provinces, we have to answer the question, "Would they lose influence on policy-making?" For Alberta, obviously their oil and gas sector is hugely important, and there's a concern that, "Would a single regulator appreciate the unique needs of regional industries? Second, would we have local responsiveness? Third, would it become bureaucratic?"

We've tried to answer all those questions in our proposal. I think that's the thing that's causing a little bit of inertia right now: the concern that their local needs would not be reflected in a single securities regulator.

Mr O'Toole: I just have a couple of questions that aren't directly related in the most obvious way, but they are to me. I have to qualify that I'm not near up to appropriate speed on this file. It's very complicated and very technical.

I was aware of the attempt to merge all financial regulation—and that included pension funds and co-ops and credit unions—under FSCO. FSCO kind of looks after the regulation of that. The merger of OSC and FSCO: What's the status of that?

It was my sense that the smaller capital players, like credit unions and certainly, to some extent, co-ops and then the uniqueness themselves of the pension fund managers, being the large pool of capital—are they all going to be lumped in under the one? I became less and less comfortable with the one big window to the capital market including the small and then the extensively large, like the pension fund groups, which are basically huge. They're the whole capital market, technically, in terms of moving funds. What's the status of the OSC-FSCO merger, and what do you see as the role for the small and then the very large players in that?

Hon Mr Phillips: I may get Phil to comment in a second. Our focus, our priority right now, is finding a way to move to a single, national securities regulator. That's where our focus has been and will be over the next period of time. I do think, Phil, that Quebec has moved to this model, if I'm not mistaken, and we are watching that. They've moved to it, and so obviously we're watching that.

In answer to your question, our priority is going to be seeing if over the next little while we can't find a way to move to a form of single securities regulator.

Mr O'Toole: Again, qualifying that I'm not trained in this area, everything I read and sense when I look at the distribution of some pension assets and distribution of surpluses—pension funds are a huge black hole, in my view, and need a lot of public policy attention. They aren't something I want to throw straight into the marketplace. I think the government has a role to protect the public. As we've seen in some of the recent restructuring issues, whether it's Stelco or Air Canada, the pensions are really the issue. It's Ontario law that created many of those problems within the distribution rules of surpluses or an actuarial forecast on surplus and what the current market conditions are.

Can you give me some sense—perhaps Phil could—I still see a huge problem on the horizon in all pension plans? Whether it's General Motors—I see huge liabilities going forward on pension funds. Then if you put pension funds into the whole pool of equity capital with a bit more risk to it—I don't want my pension there.

Then you have the whole issue on pensions, in my view, of moving toward defined benefit or defined contribution plans. If that gets mixed into this whole capital market, equity, that we're talking about under this OSC review—

Hon Mr Phillips: I think my recommendation to the committee would be that we're not proposing that here. What we're proposing is the response to the Five Year Review Committee Final Report. I think my answer would be that at least as I can see, our focus is going to be on the securities side of it. The pension issue is probably almost a separate issue, with all due respect to ourselves here.

The Chair: We'll move to the NDP and Mr Prue.

Mr Michael Prue (Beaches-East York): It's good to see you here. We'll see what you do with this one.

The first question I have relates to the report that you say we're going to get this afternoon. Everybody has been waiting for it. It has never been publicly disclosed. Is it going to be publicly disclosed, or is it for our eyes only this afternoon?

Hon Mr Phillips: I assume it will be publicly disclosed this afternoon by the chair of the securities commission.

Mr Prue: Have you seen it yourself?

Hon Mr Phillips: I have, yes.

Mr Prue: We don't know what's in it. It has been kind of secret, although we've been given to understand that perhaps it has been critical of the securities review and what's going on in the OSC.

Hon Mr Phillips: By the way, it was a report that was commissioned by the securities commission, not by the

government. It was looking at whether or not the adjudicative role should be separate from the securities commission. The OSC itself said, "We'd like to get some independent advice." That's why I got a copy of it last week. I really think they should release it. It's dealing with the issue of whether that should move forward or not and in what form.

Mr Prue: I'm curious, because that's where I'm going with my next question. You asked us to comment on whether we thought they should be separated. I'd like you to comment, since you have seen the report. We haven't seen it. I'd like you to comment on where you're heading with this. Do you think that they should be separated?

Hon Mr Phillips: That always gets into the "telling us what you want to do before you hear from us" sort of thing. In our proposal that you'll see for a single securities regulator, we are not silent on that issue. We say that that should be part of the consideration of the single securities regulator. I anticipated that we would have to consider that in conjunction with other provinces when we were trying to put together this single securities regulator, and that would be part of our discussions. I think it's an issue where I'll look to your advice. We'll want to have some public comment on what's called this fairness committee's report. I don't think we, the government, or I, the minister, have made up our minds finally on it.

I think it's fair to say that there are some fairly good arguments in favour of separating some of the adjudicative functions from the securities commission. You shouldn't take that as being exactly where we're heading; it's a decision that will be made in the months ahead. But there's a fair bit of argument that suggests there's some merit in separating some of the adjudicative functions.

Mr Prue: It seems to me that that's the American experience. Although there are many things I'm critical of in that country, it appears that their securities regulations have a good deal more teeth than our own. Would that be a fair comment?

Hon Mr Phillips: I'm not sure they have a fair bit more teeth. I don't think a legal analysis of our securities regulations versus theirs would suggest there are a lot more teeth in the US.

Mr Prue: There's one aspect of this bill that I find quite glaringly inadequate, and I'd like your comment on it. That's the whole idea of restitution. The province of Manitoba allows for restitution up to $100,000 without going through the courts. Britain has gone in that same direction. Other jurisdictions around the world have done that. This report says it only needs to be studied. Surely if it's working in other jurisdictions, we have a template. Why has this been left out of this report?

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Hon Mr Phillips: You could ask Mr Crawford that. In his report, he provides the rationale for why he didn't reach a final decision on that. By the way, as I recall the report, I think part of it said that we should study the Manitoba experience because, as you point out, they've moved to—that's something that if the committee wants to give us some advice on it, I'd welcome it.

Mr Prue: We'll wait for this afternoon. We'll see what he says.

Hon Mr Phillips: Technically, Mr Crawford is on tomorrow morning.

Mr Prue: Tomorrow morning; all right. I'm going to a third—I've still got time?

The Chair: A little less than five minutes.

Mr Prue: I've got lots of time, my goodness. I just zoomed through these.

The former government refused to proclaim the regulations to extend civil liability provisions for continuous disclosure—I hope I got that right. How it appeared to the outside observer, or even to the inside observer like me the last time around, was that the corporate lobbying got pretty hot and intense. Is that continuing? Are you still getting lobbied on this? Because the recommendations are back again.

Hon Mr Phillips: Strangely enough, no, but let me answer your question. I think your real question is, what should happen on that? I think I mentioned it my remarks. The issue is helping investors' access to—I hope I get this right—civil remedies on what's called secondary market. In other words, shares have been issued for five years and there is a claim that the company is not disclosing to the investor adequately what recourse they have. I think the reason it wasn't proclaimed is because it does require some technical amendments. I think most people would agree that it couldn't be proclaimed because it wasn't workable.

I must say that, based on what I've seen to date—and again I would welcome advice from the committee—that is something we should look seriously at pursuing and moving on. I think it does represent some enhanced investor protection and in a way that can't be seen as unfair to the business community.

Mr Prue: OK. Stockbrokers in Ontario: In my view, we have been a little lax in the past in monitoring and ensuring that they are at all times dealing in the public good. We know they're dealing in their own good. Would you comment on that? Is what we're looking at today going to be able to rein in any of those people who perhaps stray a little bit too far or who have in the past? Are there going to be more constraints on them?

Hon Mr Phillips: Well, yes. For example, the mutual fund area has been one area of some comment. There are proposals in the five-year review for enhancing investor protection in mutual funds. I think the Ontario Securities Commission, as well as other regulators across the country, are looking at proposing what are called rules on enhancing investor protection in mutual funds.

What happens on rules, by the way, is that the securities commission proposes rules, publishes them and the industry has a chance to respond to them. The securities commission then can either revise them in line with the comments or not and then submit them to the government for its approval. You either deal with them in four weeks and reject them or they're deemed to be approved.

I think the answer to your question is that there are some proposals in here on the mutual fund industry that would enhance consumer protection. The issue I talked about earlier, which you raised—that is, civil liability on secondary market issues—I think that enhances consumer protection.

I think that one of the reasons a single securities regulator would be helpful is that one set of securities law across the country would enhance investor protection as well.

The Chair: We'll move to the government.

Mr Bruce Crozier (Essex): Good morning, Minister. Just one question: A lot has been said about a single securities regulator in Canada, and I happen to be one who agrees wholeheartedly with that. In installing that, there was a comment in your presentation that said there was a need to balance protection and enforcement without imposing "undue burden on business." Could you elaborate a bit on that and how that might be accomplished? I'm sure business is going to be on one side, saying, "Minimize the regulations," and small investors and large investors alike will be on the other side, saying, "Give us all the protection you can."

Hon Mr Phillips: I think I said in my opening remarks that it's this balance of how you make Ontario an attractive place to have a business but how do you protect corporate and individual investors? When I talk about undue burdens I go back to some of the comments on one regulator. Maybe "undue" is too strong a word, but certainly it is an additional burden that does not have to exist, to have 13 regulators, and not only regulators and securities acts but 13 sets of regulations. For business, it's difficult to understand those differences.

I regard that as an unnecessary burden. I think we could relieve the burden. I think we could relieve the burden on business by substantially simplifying that. With 13 securities laws, it's difficult. It's that kind of unnecessary burden that I think we could handle.

Mr John Milloy (Kitchener Centre): Thank you for your presentation, Minister. I probably share a lot of the surprise that many people have when you look at this issue from an international context and realize that Canada—which, as I think you point out in the presentation, has 2% or 3% of the market—is one of the few countries, if not the only country, in the western world without a single regulator.

We're obviously a committee that's here on behalf of the Ontario Legislature, representing the people of Ontario. You pointed out in your presentation that you've done a fair amount of work with stakeholders from Ontario, the business community. The five-year committee makes the single-regulator issue one of its primary concerns. I just wondered, what are you hearing from stakeholders? What is Bay Street's view on the single regulator and how important it is to them?

Hon Mr Phillips: I think virtually everybody I've talked to in the Ontario business community is pretty strongly supportive of the single regulator. I think it's as a result of, first, that we are so intertwined now with the US. I always say that there is no jurisdiction in the world that has a higher percentage of its gross domestic product in international exports than Ontario does. I think 93% goes to the US. I think virtually all of our financial community has a close working relationship with particularly New York and, to a lesser extent, Washington. They rely very much on a kind of seamless relationship with the markets. They find it difficult to explain to their competitors or their business partners around the world why Canada would have 13 regulators. They're looking ahead, I think, and saying that for efficient markets, so we don't lose any more of our markets to the US, we need to move efficiently. Efficiency can be had by fewer regulators rather than more, for the cost of regulating.

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From our stakeholders, as they say in the financial community, I get strong—I think almost universal—support for a single regulator. That's why we have so much concern about the passport model, which we're really worried will simply delay a focus on this for a considerable period of time.

Mr Milloy: Some people have said the USL project and other efforts at harmonization may be enough, but what you're hearing is that's not enough in terms of moving forward?

Hon Mr Phillips: I think everybody would say, "Let's keep moving forward on harmonizing, moving as close as we can to one securities law." But ultimately the solution has to rest with a single securities regulator. That wasn't just Mr Crawford's report; the committee has probably seen at least excerpts of what's called the Wise Persons' Committee, of which that was their first strong recommendation. Whatever we do, we've got to keep looking to harmonize and make it easier. But virtually every person I've talked to in the business community in Ontario would say a single regulator is where we've got to go.

Mr Milloy: Can I just ask you a bit about the Ontario proposal? You pointed out in your answer to Mr O'Toole some of the concerns about local expertise, about, if I can put it this way, not having the OSC just expand around the whole country—what you're hearing from your provincial counterparts. You said a lot of the proposal tries to deal with these fears and anxieties. It might be worth it if we had a minute or two just to walk us through how the proposal will meet some of those.

Hon Mr Phillips: Let's take a business in Alberta. They would be very concerned, in dealing with important matters, about having to get decisions out of Toronto. So we'd need strong local offices in communities. Virtually every province has a unique industry. I think Alberta would be very worried if they thought that all oil and gas securities policy was going to be determined in Toronto. We have to assure people that key policy would be developed as close as possible to the source of the major industry. I think they worry very much that this is simply going to be the OSC expanding. That's why we've taken as much care as we can to say we're talking about a new regulatory agency.

I gave a talk to the economic club, and after that, someone asked me, "Where would the head office be?" I said, "That's not one of our three principles." The three principles we have are a single securities regulator, a single set of securities laws and a single set of fees. Everything after that, I think, we should be prepared to discuss.

Mr Milloy: And right now, you're going off on another trip. I know you've been doing some speaking engagements out west. Is the reaction in the business community—obviously there's an appetite in some pockets for this.

Hon Mr Phillips: As I said earlier, there's almost a recognition across the country that it is inevitable that we will move to a single regulator, that it's time. I think some other provinces might say, "Well, let's just keep working toward it." Ontario's position has been that if it is our number one priority from this report and the Wise Persons' Committee's number one recommendation, let's see if we can figure out what inhibits us from moving now and let's tackle that. So everywhere I go, I say to people, "What do you need to see in a proposal for you to feel comfortable that you could accept a commitment to move to a single regulator?" The challenge in the end is going to be a fine enough common trust across the country to say, "We're now prepared to do that."

The Chair: On behalf of the committee, I want to thank you for your appearance here this morning, Minister.

Hon Mr Phillips: Thank you very much.

MINISTRY OF FINANCE

The Chair: Now I call on the Ministry of Finance for the technical briefing. Please come forward.

You have time this morning for two hours of technical briefing. You may leave time for questions within those two hours if you so desire. I would ask you to identify yourselves for the purposes of Hansard.

Mr Phil Howell: Thank you, Mr Chair. My name is Phil Howell. I'm the assistant deputy minister and chief economist, office of economic policy, Ministry of Finance. I'm joined today by Colin Nickerson, a senior manager in the securities policy unit in my division.

We're pleased to have the opportunity to address you this morning. I should note that we also have other ministry staff in attendance today on whom, with the Chair's approval, we may call to answer questions, should the need arise later in the morning.

This presentation has been described as a technical briefing on the five-year committee final report. We'll take you through the committee's recommendations after providing a brief context in which to consider the report. After that, we'll be pleased to answer questions. In the spirit of this presentation, we invite questions not just on the presentation but on any aspect of the five-year review committee report that you feel will assist you in your deliberations. I should also add that we and other Ministry of Finance staff are available to answer any questions that may arise over the coming weeks, as you compile your report.

This slide outlines our presentation. I plan to discuss the importance of Canada's capital markets, their significance for Ontario, the objectives of securities regulation, the OSC role within Ontario and in Canada, the five-year review committee recommendations, and securities regulatory reform proposals.

As Minister Phillips said earlier, well-functioning securities markets are essential to economic prosperity in Ontario and across Canada. Vibrant capital markets attract investment. They provide funds for new industries and the expansion of established industries by linking savings and investments. Countries with financial systems that efficiently channel savings into productive investments tend to experience higher economic growth rates.

As you know, governments regulate securities markets to protect investors and ensure they function in a fair and efficient manner, without imposing undue burdens on businesses. Well-regulated capital markets that achieve these objectives entice both domestic and international investors and underpin economic growth.

As the minister mentioned earlier, almost all Canadians have a stake in Canada's capital markets. Some own stocks, bonds and mutual funds directly. Many others participate in pension plans that invest in securities to earn returns to fund the payment of pension incomes to their members.

Canadian capital market activity is largely concentrated in Ontario. There is a variety of ways to measure capital market activity and where it occurs; for example, by jobs, by value of output or by the value of trading in the shares of companies based in each province. No one measure is best, but what is clear is that by any measure, Ontario's interest in a strong and vibrant capital market extends beyond our interest in the role that capital markets play in underpinning economic growth.

In Ontario, the securities industry is a vital industrial sector in its own right, and that is what makes the securities regulatory framework and its role in fostering a healthy capital market so important.

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The financial sector currently employs over 325,000 people in Ontario. As is shown on this slide, there are 62,000 people in Ontario employed in the securities industry part of that: 44,000 Ontarians work in wealth management—that is, employed in mutual fund, pension fund and financial planning activities—and about 18,000 work in the dealer/broker industry.

Within the financial sector, the securities industry has also led job creation over the past decade. It's been a significant contributor to the employment growth in the sector.

The minister mentioned that Toronto is also North America's third-largest financial centre. Significantly, financial sector job creation in Toronto has led other North American cities with large financial sectors over the past decade. Large US cities, including Boston, New York

and Chicago, lag behind Toronto over this period, which again underscores the importance of this sector as a contributor to Ontario's growth and economic prosperity.

As I mentioned earlier, Canadian securities market activity is concentrated in Ontario. About 53% of all Canadian securities sector jobs are here, while over 55% of the industry's output is generated in Ontario.

The chart on the slide shows that the Toronto Stock Exchange accounts for most new equity issuance in the country, and also most trading. The TSX is Canada's national exchange for senior equities. Bond and derivative markets are also key components of Canada's securities markets. Activity there tends to be dominated by the large banks, dealers and other institutions largely concentrated in Ontario.

Ontario-based companies account for 53% of the market capitalization of Canadian companies on the Toronto Stock Exchange. Alberta, closely followed by Quebec, and then BC, are well behind Ontario.

As you can see on the next slide, Canada, with the dark bar representing the Toronto Stock Exchange—the red bar on your slides—lags behind other major competitor nations, including Germany and the US, in attracting foreign listings. Foreign listings are less than 6% of Toronto Stock Exchange listings. However, over 200 Canadian TSX companies are interlisted on US exchanges, with over half their trading now occurring in the US. This southward migration of trading activity is not solely attributable to Canada's securities regulatory framework. Equally, however, it is clear that our regulatory framework is not a competitive advantage in attracting foreign listings and trading.

I'm now going to move on and provide you with an overview of how securities markets, firms and their employees are regulated in Ontario. Here, the government regulates securities markets to protect investors from unfair practices and fraud, foster fair and efficient capital markets, and instill confidence in the integrity of those markets. These goals are explicitly reflected in the objectives of the Ontario Securities Act and in the Ontario Securities Commission's mandate.

In designing securities regulation, the government is faced with the challenge of achieving all three objectives. This requires balancing protections for investors with the benefits for overall economic performance from efficient capital markets. Regulators must have the capacity to enforce securities laws, but in a way that does not impose an undue burden on businesses.

The OSC is a multi-function, not-for-profit crown agency. In Ontario, the OSC administers and enforces the Securities Act, the Commodity Futures Act and other securities-related legislation.

The OSC currently has a chair, two vice-chairs and eight part-time commissioners who are appointed by the Lieutenant Governor in Council. The act allows for up to 14 commissioners. Their responsibilities as commissioners include sitting on panels that hear OSC administrative enforcement proceedings, and serving as the OSC board of directors and making decisions on policy proposals developed by staff, such as proposed rules, concept papers, policies and staff notices. As of year-end 2003, the OSC had over 350 permanent employees.

As you know, in Canada, each province and territory has its own securities regulator. The precise form varies across jurisdictions, but most have a commission model. This slide lists the 12 other securities regulators in Canada, apart from the OSC.

In Ontario and across Canada, securities regulatory authorities play a pivotal role in the regulation of securities exchanges and other securities marketplaces. For instance, in Ontario the OSC can recognize stock exchanges. Recognition allows the exchange to operate and sets the terms for doing so. In order to be recognized, an exchange must go through an extensive review process to demonstrate to the OSC's satisfaction that it has appropriate corporate governance; its fees are fair and reasonable; it will provide fair access; it will be financially viable; its systems are capable; it has proper rules in place; it is able to regulate participating securities firms and listed companies; it will discipline them if rules are broken; its enforcement proceedings will be fair; and it is able to share information with other regulators.

Securities regulators across the country have made some arrangements to streamline the regulation of exchanges. The Toronto Stock Exchange is the national exchange for senior equities, as I mentioned earlier. Its primary regulator is the OSC. The TSX Venture Exchange is the national exchange for junior equities. The Alberta and BC commissions share responsibilities for their regulation. The Montreal Exchange is the national exchange for derivatives, including stocks, bond options and futures. It is overseen by Quebec's regulatory authority.

There are smaller exchanges. The Winnipeg Commodity Exchange is a national exchange for agricultural futures and options. Finally, a newly recognized exchange, the Canadian Trading and Quotation System, is the electronic exchange for new, emerging companies' securities.

Aside from the regulators, Canada also has self-regulatory organizations, SROs, that regulate the operations and business conduct of member firms and their representatives. They include the Investment Dealers Association of Canada, IDA, which regulates investment dealers and their salespeople; Market Regulation Services Inc, an independent regulation services provider for the Toronto Stock Exchange, Canadian equity markets such as the TSX Venture Exchange and several electronic marketplaces; and the Mutual Fund Dealers Association of Canada, which regulates the sales activities of mutual fund dealers. Securities commissions regulate the actual mutual funds; for example, what they are allowed to invest in. The OSC has the power to recognize SROs. Like the OSC recognition of exchanges, the recognition of SROs sets the terms under which they are allowed to operate.

There are also other entities the OSC has the power to recognize or approve. These are clearing and settlement systems for trades in securities and investor protection

funds. Examples of these include the Canadian Depository for Securities, or CDS, which is recognized by the OSC as a clearing agency. Its responsibilities include the safe custody and movement of securities and the processing of trade transactions.

Another is the Canadian Investor Protection Fund, approved by the OSC as an investor protection fund. It provides limited coverage to investors against the bankruptcy of securities dealers.

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The OSC also has a role in regulating the Canadian Derivatives Clearing Corp, or CDCC. The CDCC is overseen by both the Ontario and Quebec securities regulators. It functions as a clearinghouse for derivatives traded on the Montreal Exchange and provides clearing and settlement services for the Winnipeg Commodity Exchange.

The federal government also plays a role in supporting the operation of capital markets and regulating markets. For example, the federal office of superintendent of financial institutions, OSFI, provides solvency regulation of federally regulated financial institutions. Provinces perform this role in respect of provincially regulated institutions. The Bank of Canada provides supervision and service to national clearing systems. It plays a pivotal role in the operation and oversight of Canadian debt markets.

The Canadian Payments Association is a national clearing and settlement system that facilitates the flow of funds between institutions. It also helps mitigate the risk to the financial system of the failure of major institutions.

I'm now going to provide you with a brief overview of the key organizations the OSC participates in that play an important role in harmonizing and coordinating regulation across jurisdictions.

One of these organizations is the Canadian Securities Administrators, or CSA, a council of Canada's 13 securities regulators that coordinates and harmonizes securities regulation. It recently established a policy coordination committee of the chairs of Canada's regulators from six of the provinces, those being BC, Alberta, Manitoba, Ontario, Quebec and Nova Scotia. The CSA has also established a small secretariat to assist in the coordination and management of regulatory projects that span jurisdictions. However, the CSA is only an ad hoc organization.

Another organization that the OSC participates actively with is the Joint Forum of Financial Market Regulators. The joint forum was formed by the CSA, the Canadian Council of Insurance Regulators and the Canadian Association of Pension Supervisory Authorities. It facilitates and coordinates the development of harmonized cross-sectoral and cross-jurisdictional solutions to financial services regulatory issues.

Other relevant international organizations include IOSCO, the International Organization of Securities Commissions, of which Ontario and Quebec are full members and Alberta and BC are associate members; the Council of Securities Regulators of the Americas; and the North American Securities Administrators Association. All of those are referenced in various parts of the five-year committee's report.

As I said earlier, the OSC has the power to make binding rules that have the same force as regulations made by cabinet. OSC rules must first be published for comment. Once approved by the commission, they must be delivered to the minister. The minister may approve, reject or return the proposed rules to the OSC for further consideration within 60 days of delivery.

I also mentioned earlier that the OSC can make policies, which are essentially non-binding guidelines. They cannot be prohibitive or mandatory in nature and do not require the minister's approval. The OSC can also enter into agreements and memoranda of understanding with regulators or other jurisdictions.

Rules may be local, national or multilateral in nature. There are local rules that apply only in one province, national rules that apply in all provinces and territories and multilateral instruments that apply in some, but not all, jurisdictions. National rules contribute to more harmonized regulation. They take longer to implement because of the need to obtain approval from all Canadian jurisdictions outside Ontario. National rules and CSA cooperation make for harmonized securities regulation, but many consider this approach second-best to a single securities regulator. Recently, there has been a tendency toward more multilateral rules rather than national rules.

Let's now turn to the five-year review committee's recommendations. To summarize: Twenty recommendations have already been implemented or do not require further action; 40 require legislation, structural change—an example being changing the structure of the OSC in the adjudicative tribunal area—or government action; and 35 can be addressed by the OSC or various self-regulatory organizations.

I have attached three lists of the recommendations corresponding to these categories as appendices to the slide show accompanying this presentation. Hard copies of this presentation, if they haven't already been made available, will be made available this morning. We plan to review all the recommendations with you, specifically those that have been implemented and those that require structural change.

At this point, I want to repeat my earlier offer that we would be pleased to meet with the committee members at any time during your deliberations or answer written questions. I recognize that in the time allotted today, we cannot go into detail on many of the recommendations.

Twenty of the committee's 95 recommendations have already been addressed. These include recommendations where the OSC and government have put in place recommended new rules. They include recommendations where the OSC has taken action to address the recommended changes, and they include recommendations where the five-year review committee endorsed existing provisions; ie, there was no change needed. Appendix 1 in the slide show reviews the full list of these recommendations.

Of the 20, there were nine where the government approved new rules developed by the OSC or approved

regulation changes. These changes cover recommendations that relate to better continuous disclosure of relevant information, financial statement requirements for companies and recommendations relating to corporate governance of public companies. On these recommendations there was widespread agreement among stakeholders and by government on the need for timely action.

The next slide sets out the six recommendations already addressed by the OSC, SROs and the Canadian Institute of Chartered Accountants, CICA. They relate to rule-making, financial statement requirements and enforcement.

For five recommendations, the five-year review committee endorsed existing provisions and felt that no change was needed.

Next are the recommendations that call for legislation, structural change or government action. There are 40 recommendations in this category. Legislation or structural change account for 37 of those recommendations, and the other three can be addressed by government action without the need for legislation.

This group includes recommendations on the need for a single regulator, the structure and governance of the OSC, new OSC powers on oversight and enforcement, and significant new remedies for investors. Appendix 2 to the slide show provides a full list of these recommendations.

Before speaking on the recommendations that require legislative change, I would like to address another reform initiative that Minister Phillips commented on: the USL project. As the minister noted, this project is an initiative of the Canadian Securities Administrators, the CSA, to develop more uniform legislation across Canada. The relevance of the USL project to these recommendations is that a number of the five-year review committee's recommendations have been incorporated into the draft USL as part of the USL proposal. They've been incorporated into the draft act. The USL project provides one context for the consideration of these items.

Alternatively, their inclusion in the USL indicates at least some consensus that regulators across Canada plan to recommend them to governments. Implementing these five-year review committee recommendations would be consistent with the direction proposed by regulators in their USL proposal.

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Later, I'll be speaking about two reform proposals: Ontario's single reform proposal and the passport proposal. I should note at this point that the USL proposal, as currently conceived, is not comprehensive, and legislation would still differ across jurisdictions. Accordingly, the USL does not create a common body of securities legislation to the same extent as Ontario's proposal for regulatory reform under which all jurisdictions would adopt one law. However, the USL could serve as a starting point to develop that one comprehensive body of securities law that would apply across Canada.

Of the 37 recommendations that require legislation or structural change, four relate to moving to a single securities regulator or changing the OSC's structure.

The next slide's recommendations for legislative change include three that would change the structure and objectives of the Securities Act and three that involve changes to non-securities legislation—for example, changes to commercial property transfer, business incorporation and other legislation.

On the next slide, the recommendations for legislation include four that relate to changes to the Securities Act rule-making provisions, one that relates to registration requirements and four that deal with OSC oversight of self-regulatory organizations.

Continuing on, the next recommendations for legislation include three aimed at encouraging better disclosure of information to investors, including new liabilities for misleading disclosure, discussed earlier, and three that focus on improving corporate and mutual fund governance.

The next slide—I'll speak slowly and allow a few minutes for people to absorb—sets out nine recommended legislative changes to give new enforcement powers to the OSC or to the courts.

The final recommendations for legislation include three that relate to enforcement, and would give new remedies to investors.

The remaining three of the 40 recommendations in this category can be addressed by government action without the need for legislation or changes to the OSC's structure.

I would now like to briefly speak to the recommendations that can be addressed by OSC or SRO actions or by the development of new rules. While we will give you an overview of these items, I understand that the OSC will be providing materials that address these recommendations in somewhat greater detail.

There are 35 recommendations in this category, and they address matters such as improving the information disclosed to investors, enhancing the rights of investors, and stronger enforcement. Appendix 3 of the slide show has a full list of these recommendations.

Of the 35 recommendations that can be addressed by OSC or SRO actions or OSC rules, three could be addressed by the development of OSC rules to harmonize with emerging global standards and five relate to operational changes to the OSC rule-making process.

In the next group of recommendations that can be addressed by the OSC or SROs, two relate to electronic delivery of or access to information and four cover changes to registration requirements. There are two recommendations in this category that relate to SROs.

Of the recommendations on the next slide, four deal with more flexible capital-raising requirements and three are directed at improving or accelerating disclosure to investors.

Of the recommendations on the next slide, two relate to the OSC's role of regulating takeover bids and four deal with the development of rules in relation to mutual fund governance.

Concluding this category are six enforcement-related recommendations that can be addressed by OSC or SRO actions or new OSC rules.

As the minister explained during his remarks, some other provinces support a proposal that is an arrangement to coordinate the work and decision-making of all provincial and territorial securities regulators that now exist. Each province would still have its own regulator and enact its own laws. This model, often called the passport, covers two aspects of current securities regulation: First, individuals and firms could do securities business in all provinces by registering with a primary regulator and complying with the laws of that regulator's province; and second, companies could obtain approval to issue shares in all jurisdictions by complying with the primary regulator's disclosure laws.

All substantive elements of the passport proposal are included in existing harmonization initiatives of the securities regulators, primarily through the CSA. These elements include, for public companies, prospectus requirements and clearance, prospectus and registration exemptions, and continuous disclosure requirements. For securities firms, they include routine discretionary exemptions for securities firms and their representatives, categories of registration and registration requirements, and registration and routine discretionary exemptions.

For public companies, some of these elements have been implemented already and others are well underway. For securities firms that must register to do business with regulators, a new national registration system is at an advanced stage of development.

Minister Phillips commented earlier on the passport model and the significant drawbacks associated with it. Rather than recite those drawbacks again, let me reiterate the conclusions we have heard from many Ontario-based stakeholders: The passport proposal does not go far enough, it risks making the current system less effective, and it forestalls needed change—it is not seen as a credible alternative to a single regulator.

Ontario's discussion paper proposes a new provincial-territorial securities regulator with a common body of laws and a single fee structure. Its mandate would reflect the needs of capital markets across Canada, while providing strong protections for investors.

A single regulator could build on the existing solid base of local investigation and enforcement. A strong local enforcement presence could deal effectively with local violations and respond locally to investor complaints. At the same time, common enforcement priorities would assist in pursuing offenders whose violations span provincial borders. A single regulatory agency would enable more effective coordination with other law enforcement bodies, regulators and prosecutors, and would facilitate more comprehensive and integrated responses to securities offences. A single regulator also could provide the consistent voice needed to positively influence regulators in other countries in the development of international securities policy initiatives.

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The Ontario proposal addresses head-on the fundamental problem of multiple regulators and multiple sets of securities laws. The Ontario proposal presents a new platform to deliver significant benefits over the current system, including:

Stronger, easier-to-understand protections for investors;

Lower compliance burdens and a more cost-effective system—lower costs for companies and lower costs that would therefore be passed on to investors;

It is easier for companies to raise capital across Canada and for securities firms to operate in more provinces, which provides more choice for investors and companies and more competitive markets;

Rapid, coordinated regulatory policy response to market changes;

A stronger capacity to enforce securities laws—more effective enforcement inspires confidence in our markets; and, finally,

A consistent Canadian voice internationally.

In conclusion to these opening remarks, I certainly recognize that you face a challenging task. Our overview of the recommendations has been comprehensive in terms of touching on them all, but necessarily brief. However, as the minister's remarks indicated this morning, and as I suspect other appearances before you will confirm, much of the interest in the five-year committee's report will be on a subset of the recommendations we have covered this morning.

Thank you for your time. Colin and I, as well as other staff as necessary, will now be pleased to answer questions.

The Chair: Thank you very much for your presentation this morning. First of all, I would say that members should have the memorandum of understanding. The clerk did get that out. That was something the minister mentioned in his comments.

We have about 28 minutes per caucus, and we'll begin with Mr Prue.

Mr Prue: I don't have 28 minutes' worth of questions, but maybe you've got 28 minutes' worth of answers.

Let's go back to where I was asking some questions of Minister Phillips. I would take it that you two, as well as he, have seen a copy of the OSC report that we're going to see later today or tomorrow.

Mr Howell: Yes. Last week we got a copy.

Mr Prue: Is what is contained in that copy reflected in the recommendations and your discussion today, or are we going to go off on a new tangent?

Mr Howell: First of all, the report was commissioned by the OSC in response to one of the recommendations in the Crawford report, which recommended that both the OSC and the government look at this issue. The OSC, in response to that recommendation, had the fairness committee struck basically to follow that recommendation, to get someone to take a look at the issue for them. It was a report that they commissioned in response to the Crawford report; they weren't directed to do it by the government.

Similarly, we on the government side have been looking at this issue and will continue to look at the issue. As

the minister indicated, I think he'll be interested in feedback from the committee on the issue.

As I understand it, Mr Brown will spend a fair bit of his statement today discussing this issue and what the report found, and I think it would be appropriate, since it's his report, that he do so. I also understand he will be tabling the report so that members can see for themselves what it says. It's not a lengthy report, and I think it very fairly lays out the issues on both sides of the question.

The five-year review report also noted that certainly there was a question of perception around the efficacy of having the commission be the policeman, prosecutor, judge and jury. The fairness committee report looked at both sides, the pros and cons, of having it split or having it as a single body, as is currently the case.

Mr Prue: I think that takes me to my next question, in terms of the separation. Minister Phillips said no decision has been made. I glean the same sort of reaction from you. But what options are we looking at? What are the options that the committee or the government has to separate these functions? Many jurisdictions around the world have them separated. Are we looking at the American examples? Are we looking at European examples? Are we looking at a made-in-Canada solution? I just need to know what options are being looked at.

Mr Howell: I think there are essentially two options: You separate it or you don't. Within those fundamental two options, there is of course a very wide array of different institutional structures.

I think it will be important, and certainly from the government perspective we'll be looking at in a broader context than just as it applies to the securities commission, because it has significant implications for any kind of adjudicative tribunal that exists. While I do not profess to be any kind of an expert in this area, it is certainly true that every country, every jurisdiction is going to develop an approach to these types of tribunals that's going to inevitably reflect local history and tradition.

It's very useful to look at other jurisdictions' experience and to take that experience into consideration when developing our own policy, but it isn't always going to be the case that circumstances are identical in other countries. So simply transplanting another model may not always be the best solution.

In respect of the US model, you may want to inquire of Mr Brown later today and get his perspective on how it works, and we'd certainly be willing to provide further written evidence. But the separation isn't as distinct as is often portrayed, in the sense that while they do have the separate tribunal function in the US, the SEC decides which cases go to the tribunal, and then the course of appeal for the judges' rulings is back to the SEC. So it's not as entirely an independent function as is often portrayed.

In response to your question, we certainly are looking at other jurisdictions' experiences. We will also take into account the whole issue in the context of what courts have determined is critical in these areas, and that's the expertness of tribunals. That's another very important element which is discussed in the fairness committee report, led by Justice Osborne. That is going to be an important consideration for government in addressing this issue.

Implementing that kind of change is something that would take quite some time. It wouldn't happen overnight, and of course, it's important that the integrity of the adjudication system be maintained through the transition period. That's another issue addressed in the fairness committee report. I think the committee will be interested in their remarks on that score.

I hope that's answered some of the question.

Mr Prue: The water remains murky, but let's go on.

Most of what is contained in your comments, the minister's comments and the report revolves the issue of a single regulator. That seems to be the big nub of all this. We've just been given this. It says, "Draft, strictly confidential advice to ministers," which I haven't had a chance to read. What immediate steps can Ontario take to do this? We can't go it on our own. Is it sitting down with the federal government and asking them to take over an item of provincial jurisdiction? I can see the hoots and hollers across the country if we do that. I can see it breaking down like medicare or whatever else is now federally regulated but is a provincial responsibility. What immediate steps can we take to do this? Is this pie-in-the-sky stuff?

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Mr Howell: It's interesting to me, having been involved in this over the past couple of years, to just reflect on how much attitudes have changed across the country in respect of the possibility of achieving a single regulator.

A little over a year ago, the interprovincial ministers' committee released a discussion paper and hearings were held across the country in Vancouver, Calgary, Winnipeg, Toronto, Montreal and Halifax to let stakeholders in different communities and other interested parties express their view.

At that point in time—and I was part of the hearing panel—my interpretation of what I was hearing was that a vast majority conceptually approved a single regulator in the sense that they saw the advantages of it. At that time, a year and a half ago, outside of Ontario—and even within Ontario, to some extent—there was very little belief on the part of market participants that a single regulator could overcome the hurdles represented by the differing interests at play in respect of the local regulators, and a view that, in that kind of environment, maybe a passport would be the best kind of solution.

In fairness, in parts of the country—and there were parts of the stakeholder group who did also say there shouldn't be a national regulator—they were often much smaller issuers or companies or entities, or on the sell side, advisers and so on, who didn't have a national presence and didn't have a bigger perspective or didn't take into account some of the other objectives or impacts of securities regulation in the context of economic performance.

What has changed over the past year and a half through a number of events, partly the publication of the Wise Persons' Committee report, partly just a lot more discussion and an elevation of this issue higher up the ladder of governments across the country in terms of issues they were considering—I think it has led to a realization that there is not only the need to move there but much more a sense that maybe there is a chance to go a little bit further.

I think, in terms of what Ontario can do, it's important that at this point we continue pushing for the single regulator, even though there are some other provinces right now that are saying maybe the passport is the best we can get. In my view—and of course ultimately this is a decision for governments to make and for political leaders to decide how much energy and effort to provide to this file in the face of a lot of other competing challenges—it makes sense to keep pushing, because there is a chance to see that evolution of opinion continue a bit further and more willingness to address some of the problems and obstacles that would have to be overcome to actually implement it, because there are a lot. There are a lot under the passport system. I mean, it's not just going to be waving a magic wand—"Oh, we've got a passport"—and it's implemented and we move forward.

So, from Ontario's perspective, we have to continue building the case and making the case for the single regulator, in large part, frankly, because it's so much in our interest just in the context of the size and role of this whole sector in our economy to keep doing so. At the staff level, obviously we have discussions with federal bureaucrats on possibilities. I talk to my colleagues across the country on this issue. It's not Ontario versus the other 12 at all in terms of the single regulator versus passport. A large number of provinces, many of them smaller provinces, see a lot of merit in having a single regulator. I think it's important to keep involving them in discussion and to build consensus.

What could Ontario do on its own? If the intent of that question is, do we sign a passport model or do we not, or what would happen if some others signed a passport and we didn't, I think the reality of the situation is that signing the passport model wouldn't really do anything for Ontario. The question would be, would signing the passport take away some of the impetus for pursuing this file, especially at the political leadership level, and, if it did, would that represent a lost opportunity? In my view, it would definitely represent a lost opportunity, just because the direction of interest in this file has evolved fairly strongly over the last year and a half toward more consideration of the single regulator. I think it's important we not lose that momentum.

Mr Prue: OK. A new line of questioning: The single biggest complaint we have received so far from small investors is that they're very disappointed we are not adopting the Manitoba model, in terms of a securities regulator having the power to order restitution. Can you tell me why this has been left out? It seems to be working in Manitoba. All we're saying is that we're going to study it some more. Governments seem to study and study and hope things go away. The reality is that many small investors have been ripped off and probably will continue to get ripped off. The court system is cumbersome and takes years. A regulator like they have in Manitoba or in Great Britain or in other jurisdictions around the world is certainly much faster than a cumbersome court. Why are we studying some more?

Mr Howell: I think, and as the report notes, the Manitoba experience in Canada is unique. It's not just in respect of securities tribunals but other tribunal activity. It definitely differs from the tradition of areas in which regulators have moved in Canada historically. That said, I think the report points out that it is certainly worth taking a look at. While it is a move away from the tradition—and tradition obviously isn't a reason for maintaining something indefinitely—it is worth looking at, because it does break from the roles that tribunals have played in Canada to date. I think there is a body of legal precedent and so on that surrounds that. I'm certainly not a lawyer; I don't know. Colin, who is, might have another perspective on that.

Mr Colin Nickerson: I think one of the issues you have to consider in these sorts of things is that the structure of the commission is not presently set up to resolve civil disputes among private parties. So it is an important recommendation. It is one, as Mr Howell said, that there is some experience with in other jurisdictions, and it's important to look at that. But there are a number of factors that you would have to look at and study before putting that in place.

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Mr Prue: I suppose, but there are many people out there, particularly small investors, who feel they get burned by the system. They feel that the self-regulation of the system by insiders, by people who control the levers, works against them on many occasions. They feel that the Investment Dealers Association, the Mutual Fund Dealers Association—it doesn't work.

How can we change that attitude so that people who are putting their life savings into an investment feel that they're going to be treated fairly if things start to go wrong, that they're going to be able to seek redress and that the big guys aren't going to be able to control everything? That's really why I'm sitting here today. I'm trying to figure out how to do that, not to perpetuate a system that works for the big guys, the big multinationals, the big banks, the big investors, but for the little guys who are putting their life savings in and who deserve some protection and don't need to go for five or 10 years through the courts to get redress when things go wrong. That's what I want to hear from you. How do we do that?

Mr Nickerson: There are certainly some important recommendations throughout the committee's report on the areas of enforcement, in terms of proposed new powers for the commission, in terms of proposed new powers for the courts and how those could be accessed.

One of the recommendations, just as an example—and I won't try to go through all of them—is for the OSC to

look at using its existing powers under the act to apply to courts for restitution or compensation orders. I don't know that there have been any cases to date, but I believe it's something that's now built into the commission's considerations in terms of the options they consider when they're looking at possible enforcement cases and how they might proceed. Again, as Mr Howell has noted, Mr Brown is appearing later today and I'm sure he could speak in more detail on those or other recommendations.

There are other recommendations throughout the report that also speak to broader rights for investors. Both the minister and Mr Howell commented on the civil liability provisions. There are others throughout the report, such as measures that would broaden the ability of investors to sue insiders when there are insider trading violations, those sorts of things. So we've categorized the recommendations under a number of areas. One of those is enforcement. In terms of both actions that the OSC could pursue and actions that would require legislation to implement, there are a number of measures that I think speak to that concern and where the views of this committee would certainly be welcomed.

Mr Lorenzo Berardinetti (Scarborough Southwest): I have a question, and I don't know whether the people who are doing the technical briefing can provide an answer to this. As I've been sitting here watching the presentation today, first from the minister and then from yourselves, I've been wondering what the Americans do—the United States—in terms of regulating their system. I take it it's probably a national regulatory system. Is it run out of New York, or is it something that you've looked at?

Mr Howell: Yes, the US, the national regulators, the Securities and Exchange Commission, which is actually headquartered in Washington and has regional offices around the country, New York being the most notable and significant in many respects. There are also, in some states in the US, state-level regulators, but in the US the evolution has been the other way. It did start out as purely state-regulated in the US.

Think of this as thematic, rather than legally exactly right. But over time, I think initially during the Great Depression period, there was, after the market crashed in 1929, a sense that maybe the regulatory arrangements weren't appropriate. Over time, in the US, there has been a consolidation of the substantive regulatory power of securities into the national regulator under federal law through the Securities and Exchange Commission.

I don't believe that every state currently has a regulator left. They do exist and they are involved in dealing with some local matters there, but the substantive direction around issuing securities, the disclosure requirements, all that sort of stuff, the guts of securities regulation in the United States, is regulated by the SEC at the federal level.

Colin?

Mr Nickerson: It's also interesting, I think, and important to note that it has been evolving more in that direction. In the last number of years there have been important new measures put in place to facilitate the access to markets across the United States for issuers or public companies that raise money nationally.

Mr Berardinetti: I go back to the example that the minister started off with, regarding the mining company that is trying to raise $600,000. If it had to apply to all 13 jurisdictions across Canada, it would cost approximately $300,000 to do that. In the United States, that would not be the case. I take it that there'd be one fee that would be paid, perhaps to this Securities and Exchange Commission, that they would organize that kind of set-up in terms of costs that would be expended by a company that wanted a business in maybe six or 12 or all 50 states.

Mr Howell: Yes. A lot of the costs in the Canadian case aren't necessarily just the fees that are paid to the regulators, but it's the fact that the lawyers are required to prepare prospectuses and ensure compliance. They have to look at 13 if a company is going to issue in all 13.

In fact, one of the practical consequences of our regulatory structure is that a lot of companies often decide it's just not worth the cost. So their securities aren't going to be available to investors in a number of provinces. But a lot of the cost comes from, essentially, lawyers' fees and so on, ensuring compliance with all of the jurisdictions' requirements that they're going to issue securities in. So that $300,000 isn't just in fees that go to securities commissions.

Mr Berardinetti: The lawyers make most of the money, then.

Mr Howell: Yes, absolutely.

Mr Berardinetti: As usual. No offence to lawyers.

Mr Howell: Unless they're employed with the Ontario government.

Mr Berardinetti: I'm usually the butt of lawyer jokes, but it's great to give one out for a change.

Mr Nickerson: One of the other factors that is important to note is that all the securities regulators in Canada, through the CSA and other bodies—there are various mechanisms in place to make that process easier, both for companies that are issuing securities and for securities firms that operate across jurisdictions. But despite all that, it doesn't replicate a single regulator. It doesn't match up for either the public companies or the firms and other businesses in the industry.

Mr Berardinetti: You're saying here in Canada.

Mr Nickerson: In Canada, yes.

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Mr Berardinetti: I have one final question. Besides the United States, you have the European Community obviously coming together with the currency. Are they moving at all toward something similar that would go from one country to another? If an investor in France wanted to invest in Germany, Great Britain or Spain, would they—I take it that they're subject to separate commissions or bodies at this point.

Mr Howell: Yes. I'll ask Colin to comment on that specifically, but in Europe there has been a recognition over the past number of years that their regulatory structure needs rationalization. The fact that their econ-

omies have become more integrated speaks to moving in that direction. They have looked at a variety of ways of dealing with the fact—they all have national regulators—of harmonizing regulation across countries. In some ways, it's not unlike the challenge that we face in Canada of dealing across provinces. Of interest is that they have pursued and gone down the passport route as a way of dealing with that. In the Wise Persons' Committee background paper, there's some discussion of that experience, which hasn't been an altogether happy one. Colin, would you like to add to that?

Mr Nickerson: I think there's an interesting distinction between the system in Europe now, where you have the power of a central body—I'm not sure if it's the European Parliament or exactly how their system works—to impose some discipline in terms of ensuring that there's greater harmonization. I think the experience of trying to rely on harmonization across different jurisdictions has not proven successful. I think the recent literature would support that.

The Chair: We'll move to Mrs Jeffrey.

Mrs Linda Jeffrey (Brampton Centre): My original questions were exactly those. That was really interesting.

I had some other questions. It has been a very interesting presentation this morning. You didn't go into too much depth about the federal government's role, and that was my question. In the capital market regulation, how do you foresee the federal government's role changing if there's a single securities regulator across Canada in the future? Do you see their role changing?

Mr Howell: That's a simple question, but an awful lot of complexity lurks within it. In Canada, the jurisdictional responsibility for regulating securities is a provincial one. In his remarks earlier today, the minister made some references about fears and perceptions in other parts of the country that a single regulator would just be a super-sized OSC. I think in Canada there's a similar concern with respect to federal government involvement. There's not a compelling groundswell of opinion yet that this jurisdiction should be ceded to the federal government and have them regulate it.

I think the challenge for the provinces and the interprovincial ministerial committee, though, is to come up with an effective provincially based single regulator system that will be enough to forestall the federal government from intervening in this jurisdiction. As part of the Wise Persons' Committee, there were legal opinions which I believe were included in the background papers—if not, they do exist and they're public—that say that the federal government does have authority to regulate securities markets.

I think what would motivate the federal government to do so, in the absence of the provinces coming up with a workable regulatory model, would be taking into consideration some of these economic development considerations we were talking about earlier. You really do need good, sound, effective capital markets to finance economic growth and prosperity, to allow new companies to raise capital, to come to the market, grow and expand, and to allow large companies to both sustain and expand their operations. The minister talked a bit about that, and I did as well, in terms of this balance issue. There is that balance with the capital markets, for sure. It's a huge responsibility to protect investors, but at the same time we cannot lose sight of the importance of effective capital markets in promoting economic growth. I think it's that last aspect that is primarily the federal government's interest.

The reason that the Wise Persons' Committee was struck and the reason that the federal government has been getting involved is, I think, precisely because they see that the current regulatory structure is an impediment to the Canadian economy and the provincial sub-national economies performing as well as they could.

It's not the only answer. We're not going to suddenly go to 6% a year real GDP growth if we have a single regulator. But it's one of those things where it's not clear that the cost to economic potential is really offset by any benefits of having the 13 regulators.

I don't know where the federal government is going to go with this issue. They were certainly very interested in it prior to the election. It's the same finance minister now. At the officials' level, there has been no diminution in their interest in seeing something.

I think at the moment it's probably also fair to say that in some way the federal government is ambivalent on the exact design of the solution. The sense that I get, at least from dealing with officials, is that what they really want is to get rid of this regulatory overlap and the costs and so on that are affecting the efficiency of our capital markets. If there's a workable solution that the provinces could work out, I think they'd be satisfied. I don't get any sense that they want to be the national regulator.

The Chair: Mr Milloy?

Mr Milloy: If I can just ask a few questions in the spirit of the technical briefing side, not to put you on the spot for policy opinions or political opinions but just some of the background and, I guess, anticipating some of the witnesses the committee will be hearing this afternoon and tomorrow—one of them is Mr Crawford himself and the whole five-year review committee.

I wanted to ask you, in a neutral way, the process that has led to the formation of the five-year committee. This is their first report. I know there has been some criticism in the press that it has taken a long time for it to come up. When you read the report, some of the things, as you pointed out in your presentation, have been dealt with. Can you give us a bit of background as to the way in which the legislation mandates this report? I know Mr Crawford had some specific recommendations about how we could change this process. I think it's very important that we're constantly reviewing it.

Again, not wanting to put you on the spot, but are there options? I think this is one of the things the committee has to look at in terms of recommendations to the government on how we can have this continual overview of this, and is there a more efficient way?

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Mr Howell: The starting point is the act and the legislation that requires the five-year review. As we men-

tioned earlier, the committee was struck in accordance with that act, and they began their deliberations, which did take them a considerable period. I guess the timing of their final report last year, in 2003, did coincide with the end of a mandate for a government. The legislative requirement, which is also in the act, that the report be tabled with a committee of the House did not come to pass last spring, and then of course there was the election and so on, and we end up here today.

That said, the draft report and the final report had been widely circulated and, as noted earlier, action was indeed taken on a number of the recommendations, because they really did require a timely response.

One issue that arises and that the Crawford report mentioned—and I think it's something that hopefully the committee will consider—would be around the timing of the next five-year review. The committee will report this fall. The next five-year review has to be struck roughly within six months or so, I believe. It doesn't seem to make a lot of sense to have a new committee out there when the full range of recommendations and so on from this committee's report haven't yet been implemented. In that context, the Crawford report—and I'm sure Mr Crawford will have something to say on this tomorrow when he appears—is recommending that the five-year clock should start ticking with the submission of the previous five-year report. That probably makes a lot more sense in terms of effective review, and I don't think it would impair the scope of the review in doing it that way. That is one of the recommendations, and that's an issue that the committee should look at closely.

I think, though, you've raised another very good point, and that is that it is a very complex area. The Canadian and international capital markets evolve very rapidly these days. There are always new instruments appearing, there are new structures developing and so on. It's certainly important that the act is reviewed regularly and effectively, because it is critically important that the regulatory environment keep up with the evolution. I might just add in passing that the ability to do that is probably a little easier in terms of responding to market developments in the context of a single regulator rather than our current multiplicity of regulators.

Mr Nickerson: Since this was the first five-year review, I think it's probably fair to say that it's more comprehensive than some subsequent reviews may be. So in looking at how to do that, that could be a consideration to take into account.

The other point I'd note is that under another piece of legislation that the commission administers, the Commodity Futures Act, there's also a requirement to appoint a committee to conduct a five-year review of that act and that, too, is something that's on the horizon over the next few months.

Mr Milloy: We'll be back here again, then.

Do I have more time?

The Chair: Yes.

Mr Milloy: Just getting a bit of background on some of these really complex issues—we're obviously hearing from Mr Brown of the OSC this afternoon, and there's been some interesting discussion with Mr Prue about the adjudicative side of things but, beyond that, in reading the committee report, the five-year review, there is this sense of finding a balance between the OSC and the government. We went really quickly through some of the recommendations.

Can you just take a minute to outline what the five-year committee envisions their final recommendations to be in terms of what the OSC would be responsible for, versus the government? I realize that ultimately I will see reports of the government, but just to give an overview or, I guess, get our minds around the next presentation.

Mr Howell: OK. I'm going to ask Colin to go through that. I think, though, just as a general comment on it, the recommendations have been structured by the Crawford report. The role of implementing recommendations arising out of the Crawford report don't necessarily, in many cases, reflect their decision on who should be doing something. What it reflects is the existing way that the act is written and the assignment of responsibilities under the act.

There are a lot of areas where the government of the day consciously decided in formulating the act that certain powers would be given to the OSC. Rule-making would probably be the most prominent and important example of that, but equally important are its roles in respect of oversight of various self-regulatory organizations, ensuring that their performance is up to snuff and so on in the context of recognition orders.

It's in light of that and in reflection of that that we've organized these recommendations in the way we have in the appendices, to recognize that there are many where the OSC can actually implement the recommendation. It's not in any way reducing the government oversight role or the very important and ultimate responsibility and accountability that the government has in terms of responsibility for regulating the markets.

There is a second set of recommendations where they are talking about changing powers and expanding and addressing elements of the act, and they're also covered here separately. I'll let Colin address some of those, but I just wanted to provide that kind of a perspective.

Mr Nickerson: Of course, under the current rule-making procedures that are set out under the act, there is a requirement for rules that, once finalized by the commission, are sent to the minister, and the minister has the ability within a set time period afterwards to make a decision on those. So I'm just emphasizing that there is also a government role in relation to rules.

I think the split between what the commission can do and what the government can do is an interesting question. What we've tried to do in the slides is convey to this committee the things that would require legislation or government action in order to proceed with those recommendations. Likewise, there are other items, as Mr Howell said, where the commission could proceed with them by rule. There are some categories of items that require both and an example of one of those might be mutual fund governance. So there's certainly a role for both in there.

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I think the split reflects the existing subjects on which the commission has the ability to make rules. So it would cover items such as the disclosure to investors, how securities firms and their representatives are registered under the act, all those sorts of things. It wasn't, I don't think, intended to suggest that one party restrict its focus or that this committee restrict its focus, but just for your information on what would be required to implement the recommendations.

Mr Howell: I think it might be useful if all members have a copy of the appendices now. Colin, relevant to that question, looking at appendix 3, maybe just run through some of the examples here. For example, under "Rule-making" you can see that there are five OSC actions and use that as an example of how it's appropriate for the OSC to do that. It doesn't necessarily require direct government involvement.

Mr Nickerson: Right. Again, underlying the rule-making process is that the commission has the ability to make rules that have the same force as regulations. Part of the process for doing that is that they are required to publish those proposals for comment first and get feedback from the industry; likewise, if there are any changes. Proposed policies are also published, and that's an important process in keeping securities laws in the province and across the country up to date.

There are a number of—

The Chair: I hate to interrupt, but maybe we could take a look at that particular section we're discussing now. I want to give the official opposition their opportunity to ask questions.

Mr Toby Barrett (Haldimand-Norfolk-Brant): Thank you, Mr Howell. The Chair of Management Board this morning presented three options to restructure the regulatory framework. I say "Chair of Management Board;" he's essentially standing in for the Minister of Finance because of the conflict of interest of our Minister of Finance. The Chair of Management Board listed Ontario's proposal, the federal proposal—the Wise Persons' proposal—and the passport proposal.

Given what you have indicated—I think you used the phrase the "southward migration of trading activity," and certainly from what I've been reading here, the trend is global and cross-border. In your brief, you made mention that the recent tendency is toward multilateral rather than national rules. I assume "multilateral" refers to the more international nature of—

Mr Howell: No. Actually, in that context we were talking about the fact that the existing arrangements with the CSA—which, as I noted, is just an ad hoc entity. The regulators across the country come together on sort of a voluntary basis to look for areas of harmonization. There have been some rules that have been introduced that were only going to apply in, say, three or four provinces, as opposed to the national rules, which would apply across the country.

Mr Nickerson: I think the point there is that there are national rules in place for many important areas. An example of that would be the information mutual funds are required to disclose to investors. The point is that in a number of recent cases—and this has been well noted in the market—there is a tendency for some provinces not to join up to those rules, or to join up to some parts of them but not others. So it makes it less than one national rule book, if I could it put it that way.

Mr Barrett: I guess the question I'm asking is, is there a fourth option? With the trend to global security trading 24 hours a day across many, many borders, our people are subject to decisions and lying on prospectuses from companies like Enron that, as I understand it, are not based in Canada—Internet trading. I think my question would be, are we trying to leap this canyon in two jumps by going from our territorial system, a provincial system, to now a national system—we've been a nation for well over 100 years—when we seem to be operating in an ever-increasing global system? Is there a fourth option? We certainly had a fourth option with respect to international trade; I think of NAFTA and the WTO. Or do we do this 10 years from now?

Mr Howell: Yes. There's no question that the regulatory environment often responds rather than leads developments in whatever area it regulates, not just in securities. And it's certainly the case that there is more and more international activity with the globalization of capital markets. There are a whole bunch of issues that arise, and it's becoming increasingly clear among those players in the market that the existing national regulatory structures don't always meet the needs of dealing with the regulatory requirements in this kind of market.

It's that recognition that has led international securities regulatory associations to form, like IOSCO and so on. They're a little more organized than the CSA, in terms of having a more defined mandate and rules of operation. That's the forum in which some of those concerns are being addressed, and it may well turn out, over the course of the evolution of capital markets, that somewhere down the road the solution is going to be some kind of single regulator, or at least fewer international regulators of securities markets. A lot of the issues that would have to be addressed and overcome in that kind of historical evolution are precisely the things we're grappling with in the case of Canada right now, in terms of the interprovincial situation moving to a single regulator. There's definitely a parallel.

That said, the parts of the market that are operating internationally and the types of players in those markets don't represent the full spectrum of capital market participants. While it is becoming increasingly easy for some smaller companies to raise capital abroad, there's a whole range of both regulatory objectives on the part of the government and practical capital-raising activities on the part of smaller companies that are just going to preclude them from being in those markets. That area of activity still has to be regulated. In the context of the Canadian market, the question we've been asking and that the minister has been asking is, "Does it make sense for us to be regulating some of those smaller market and

smaller participant requirements in the context of 13 regulators, or would it make more sense to do it in the context of one?" recognizing that in a fundamental sense, the issues of cost of raising capital and so on, the issues of protecting investors and so on, are not all that different across the jurisdictions, and yet the existence of the 13 regulators does apply here, both additional costs and regulatory effectiveness.

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Mr Barrett: What is Quebec's position on this?

Mr Howell: Again, it's interesting. Quebec's position has evolved a lot over the past year. We made reference earlier to a national registration database. When that initiative was originally proposed, Quebec wanted no part of it. They have now decided—they've come to that game late and are now actively engaged in trying to catch up and get up to speed to form this so-called national registration database, which would be an electronic way of tracking registrations of securities salespeople, advisers and so on.

I think they're coming to the party this year—the minister mentioned there's sort of an overall reform of their regulatory sector. That and a new awareness of the fact that there is just a compelling economic interest that focused them getting more engaged with the rest of the Canadian capital market have led them, I think, to change their view.

They are certainly not there, for two reasons, on the single regulator. One is a purely technical one that has to do with the distinction between the common law base of the legal systems in nine provinces and the—what's the correct term, Colin?

Mr Nickerson: The civil code.

Mr Howell: —the civil code basis of the Quebec legal system. That means that, technically speaking, there will never be an identical law in the other nine provinces and Quebec. However, that's a technical distinction. The spirit: Everything could be harmonized in terms of practices and so on to effectively have a single law underlying a national regulator. That said, Quebec is clearly not at the moment at the point where they would sign on to even dealing with the technical, legal underpinnings to a single regulator.

They are, however, in favour of signing on to the passport proposal, largely because one of the main things that the passport proposal is focused on is registration, and since they are now coming as participants to the national registration database, harmonizing the aspects of their law that apply to that issue is necessary. They've already made the decision, so their support of the passport on a political basis, their support of the passport, isn't really substantive to them. They've already made that decision.

Mr Barrett: I see the Bourse de Montréal is in a trading alliance with Chicago, Singapore and Paris. Are we seeing other alliances like this that have relevance for any thought of going a national route with the Toronto Stock Exchange, assuming it's working on alliances?

Mr Howell: Well, the Montreal Exchange is the national exchange now for derivatives trading, and so their alliance with Chicago is along the same lines as the TSX looking for alliances with London and other European exchanges.

Mr Nickerson: I think you're correct that the TSX is pursuing those sorts of things. We could certainly provide some further information on that if that were a topic of interest.

Mr Barrett: If, for example, the single federal framework were adopted, to what extent would Ontario have need for the Commodity Futures Act? At present, our Minister of Finance has been removed from his responsibility for that act and several other acts. Would these acts essentially be redundant and come under the federal Ministry of Finance?

Mr Howell: It would depend on what the federal government did, but presumably, if there was going to be a federal securities regulator, there'd be a federal securities act that would be passed, and then, in that respect, that would override other acts. They'd also have to deal with futures exchanges and derivatives, regulations and so on as well in their act.

Mr Nickerson: Contrary to Mr Howell's earlier assertion, I'm not a practising lawyer, so I wanted to dispel that; I'm here in a policy role.

There are different ways that the different provinces regulate derivatives. There are separate acts in a couple of the provinces. In some of the other provinces they regulate them under their securities act. So there are a couple of ways to do it that one would assume if the federal government proceeded with putting in place a single regulator, it would be a comprehensive approach.

The Chair: We'll move to Mr O'Toole.

Mr O'Toole: I have just a couple of questions. How much time have I got?

Interjection.

Mr Barrett: Just one last question: Come what may, we would still have a Toronto Stock Exchange. We would continue to have a Toronto Stock Exchange Act, the Toronto Futures Exchange Act—

Mr Nickerson: I guess that's a question that would have to be looked at. The Toronto Stock Exchange Act, as I understand it, was put in place to set up the Toronto Stock Exchange some years ago. The exchange, of course, has demutualized and converted essentially to a private, for-profit corporation. So the act is a sort of vestige of that and a number of provisions that were repealed there. I don't know what would be necessary to keep in place. Likewise, the Toronto Futures Exchange is no longer active and has not been since sometime after the exchanges realigned and Montreal assumed responsibility as the national exchange for derivatives.

Mr O'Toole: I'd just like to put on the record that in most of the submissions and stuff I've read, hardly anyone disputes the fact of a national regulator. It's been talked about probably for 10 years, roughly; certainly in the last five, I'm quite well aware of.

Mr Howell: It seems to go in cycles.

Mr O'Toole: Well, it will never go away. In fact, I think Mr Barrett has established that the response to that

will be a sort of international regulator, and eventually, kind of under the United Nations or whoever will run the world, a single-currency world sort of thing. So he has pretty much anticipated that.

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I want to move to a slightly different aspect: the perceived role conflict of the Ontario Securities Commission. I think you or one of the submissions here this morning said the role is to foster the capital market, to make sure that there's good liquidity and access to capital to foster economic growth. It makes very good sense to have a streamlined, seamless series of rules to enter the marketplace. The competing force here is investor protection. If you want quick access to capital to grow the economy, and you're going to get that capital ultimately from some little person who's saving through their pension or trying to use something different than a savings plan—they're going to go into a mutual fund or go to some other financial planner or someone to give them some advice on how to make wealth. There are several thousand books published daily on how we can all get rich by buying real estate or whatever, so that conflict is where I'm coming from.

I read a couple of things, and I've had lots of calls from interested people involved—just individuals. SIPA is a group I've met with over the years. They've been brought to my attention by small investors. It's in that role of conflict where—I looked at other jurisdictions, like the SEC. They do have a separation. Other jurisdictions are looking at it. In a further outreach of that, some of them are looking for some restitution process as well to strengthen the rule-making, adjudicative functions.

Without trying to tell politicians what to do, what's your own view? That's really the cut and thrust of Purdy Crawford and the Wise Persons' Committee: separating it. It's this bifurcation that they all mention in technical legal terms. Bifurcation is that division; that's really essential. What's your sense of that, given the context of the little person today—not you; me, because I don't make big money—putting all their trust not in a savings account but in a mutual fund or some other investment instrument and having such a mirage? You and your lawyer friend would have difficulty explaining much of what Purdy Crawford's rules are. The simple investor reading a prospectus is completely buzzed. He's going by some financial planner who has community college or something. I'm not trying to belittle them. Then on top of that, the lawyers who write it don't write it in layman's terms. I've tried to read it, and I took the securities courses. The little person today who's investing on-line doesn't stand much of a chance in this marketplace.

I go back to simple things that I've learned: no pain, no gain; no risk, no gain; all those terms. So the person who's acting on the instinct of selling for a commission generally is—there are all kinds of cases here cited by SIPA about people who have taken it right through to the courts, have had decisions in their favour and then lost at the court of appeal.

What's your sense of separation? That's the fundamental issue here. As far as the national regulator, I have no problem. It's the separation of the functions and the perceived conflict.

Mr Howell: First of all, I suspect this is an issue that you're going to have the opportunity to hear from a number of people on, beginning with Mr Brown. You'll hear from Mr Crawford on it tomorrow. I suspect that it will come up in a number of the other submissions; at least, I know it's on the agendas of a number of other groups which I know are going to be appearing before the committee.

As I was saying earlier—and it's clearly laid out in the Crawford report and in other areas. When you've had a chance later today to look through the fairness committee's report, it's very well articulated there—the government has to address the issue from the context of having these multiple and perhaps conflicting objectives in terms of regulating the markets. Because of the role that capital markets play in supporting economic development and growth and ultimately, therefore, helping people become better off and making living standards higher, government can't ignore the functioning of capital markets in its approach to regulation.

At the same time, governments clearly have a responsibility in terms of ensuring that adequate protections are in place and that within the whole panoply of regulators and the regulatory structure that's created there is effective oversight of the participants and that individuals' and investors' interests are adequately protected. There are a wide variety of ways in which that can happen. It can be the regulator itself directly overseeing the activities and registration of individuals who can participate in the market. It can be devolved to self-regulatory organizations with oversight from the regulator and ultimate oversight from the government. The question of how it gets set up has to be looked at and addressed in the context of effectiveness in terms of protecting investors and the cost of doing it.

At the same time, government doesn't have the luxury of just deciding, "All we're going to do is protect investors," or "All we're going to do is just let capital markets run wild and not care about what the impact is on people." The trick in devising the regulatory structure is to balance those.

With specific reference to the adjudicative rule of the tribunal, I guess there are two issues. One is: Is there any sort of legal reason why people's rights are somehow being violated by having that kind of process in place? Then I guess the second question is: If it's legally sound, how do you deal with the fact that there is still likely to be a perception that somehow there's a conflict there?

I think what Justice Osborne's report focused on—as I read it, anyway—is recognizing that there's nothing legally wrong with the way it's set up. The Supreme Court has brought down rulings that support that interpretation. But there is clearly a perception out there—it's the same thing that Mr Crawford says in his report.

The question for governments, then, is going to be in deciding where we go. Is overcoming that perception

worth the cost of setting up the separate adjudicative tribunal; will there be enough work for that tribunal to do for them to retain what the courts refer to as a level of expertise or expertness that allows their judgments to be rendered and accepted? There's a whole range of issues like that that will have to be confronted in terms of making that decision.

As the minister mentioned earlier—and we certainly at the officials' level had this discussion a lot with our colleagues across the country—we're open to addressing that issue, not just because it's in the five-year report and recommended, but also, in the context of a single regulator, it might be very relevant to use that opportunity in establishing that to come to grips with this whole question. The reason it's significant at a national level is that in Canada there would probably be enough work to enable a separate tribunal to exist on a full-time basis.

Mr O'Toole: That's kind of where I was going. I think the two go together in terms of—

The Chair: We have less that a minute.

Mr O'Toole:—having the two functions, and they have the investor protection plan, which is, I believe, a federal plan, if I'm not mistaken. Isn't there an investor protection plan?

Mr Howell: CIPF.

Mr O'Toole: I need the short answer. Is there or is there not?

Mr Nickerson: It's an industry-sponsored fund to protect against dealer bankruptcies.

Mr O'Toole: Are the rules set up federally or provincially or by the industry?

Mr Howell: By the industry.

Mr O'Toole: But when you do separate, it'll become much more complicated if you have a national and then you have the judicial function, which is difficult if not impossible to operate.

The Chair: Thank you for your presentation this morning and appearing before the committee. We appreciate it very much.

Just for the committee's knowledge, if you care to leave your materials in the room, it will be secured over the lunch hour. We will recess for lunch and reconvene at 1 o'clock.

The committee recessed from 1200 to 1301.

The Chair: The standing committee on finance and economic affairs will please come to order. I would ask before we start that persons turn off their electronic devices as we begin this afternoon.

We had very good compliance from our presenters this morning, they tell me; they used their microphones very well. But they said that some of the committee members were not speaking into their mikes, so if you would speak into your microphones, that would be appreciated.

Our first order of business is to allow the opposition critics to have 10 minutes to comment. We'll begin with the official opposition.

Mr O'Toole: Mr Barrett and I will be sharing the 10 minutes. Thank you very much, Chair.

I found this morning both educational and interesting in a general sense. It's understandable that there's much interest in these public hearings with respect to the issue of making sure we have a response to the discussion about the rights of the regulator and the rights of the consumer. In that respect, I was pleased that the ministry briefing notes did take some time to go through the Crawford report and break down the three sections that would take legislative initiatives.

But ultimately, at a constituency level, as a person who is elected by constituents, not by corporations—essentially, we're there to represent the interests of our constituents, many of whom are consumers in this particular marketplace—I'm most interested this afternoon to hear from David Brown, the chair of the Ontario Securities Commission, and his response to the input to this date, some of which has been from other jurisdictions. Also, more recently, I'm even more interested in Justice Coulter Osborne's report, which none of us committee members, I hope, have seen. I wish we had seen it, but we haven't seen it, to my understanding. But ministry officials have seen it, and it appears at this time—because I have not seen the report—that there would be some recognition of the importance of separating the adjudicative tribunal functions.

All of this, in my view, goes back to trying to precipitate confidence in the marketplace for the small and medium-sized investor, and that would afford them some sort of protection, as in the case that has been cited with the United Kingdom, as well as Manitoba, where there is some attempt at protection of the investor and looking at restitution issues, which again would be very complicated. I suppose that expense would ultimately be borne by the investor.

But the conflicting roles that I see built into the mandate of the OSC as it has evolved under the Securities Act since the early 1990s, and more recently in 1994, when the courts decided—I think it was Justice Daniels's report in 1994 that gave them rule-making authority. In 1997, it became a self-funding crown agency. It has become a much more complex marketplace for the investor in many forums, both electronically and also with emerging corporations trying to find capital and finding innovative ways to approach the marketplace.

So I would also like to be on the record as being in favour of a system, a single regulatory agency, if that's possible, federally. As Mr Barrett mentioned in one of his questions this morning, it's moving toward a kind of North American marketplace, if not a world marketplace.

I think the first step that drew some support from me—without having fully read the memorandum of understanding for the passport system, it might be a first good step if you can find some harmony amongst rule-making and, potentially, judicial reviews.

As the opposition, much of this is similar to the initiatives we have taken. In fact, if you look at the changes to securities law, it was to build confidence in the capital markets. The Purdy Crawford review was certainly an important part of that five-year review, and I would hope

that review is ongoing, that it never ceases. Because once we do get a national regulator, we could potentially be talking, as we are today, about having a North American marketplace. New York, Chicago and other large trading—we see that the Ontario marketplace is, I believe, sixth in the world, if I have my notes correct, after Tokyo and other places.

In a general sense, it's a very technical area; it's a very complex area. It's leveraged on one side with well-informed marketplace participants, be they lawyers, brokers or mutual fund dealers, and on the other hand is the consumer—unless it's an institutional investor like a pension fund, the Ontario teachers' pension fund or some of the other large or public sector funds. The due diligence occurs on those pension fund managers to pick the appropriate portfolio that fits their degree of risk tolerance. In that context, it's a very complex topic. I hope we're able to make substantive non-political contributions in the interest of protecting our constituents.

I'll let Mr Barrett continue.

Mr Barrett: In this review of the Ontario Securities Act, again, we all chat with constituents. People are concerned about where to park their money—those who haven't maxed out their credit. We're in a time of relatively low interest rates—that may change—but there is a reluctance or an anxiety for many people to get involved, or get involved again, in the stock market or in this business.

It's my impression that 99% of the people we represent don't know what fees they're paying to the salesmen or the managers of these various funds. It's something I find difficult to track down, if you have a fairly balanced portfolio. It's not like driving by a gas station and in most cases you can find out what the price of gas is. Most of us have a fair idea of what a real estate dealer gets in commission.

Enron is certainly something that comes up. I was chatting with a fellow yesterday, my banker. He spent six months researching Enron and invested a considerable amount of money. He had no idea that they were lying on that prospectus, and he has paid a price for that. In fact, his employer, that particular bank, is paying a price, and we will all pay a price as lawsuits continue and as we find that banks either have to accrue for us less interest or charge higher fees.

Insider trading: This has been going on for many, many years. The Ontario government has addressed the issue of insider trading in the past and has to continue, and it goes far beyond the Martha Stewart issues. I think it's very important that this government remain vigilant with respect to some of the fraudulent practices.

Conflict of interest is another very important issue. To that end, the presentation this morning was from the Chair of Management Board, not from the Minister of Finance, and I think we know that story.

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The annual report of the Ontario Securities Commission—I just wish to quote in part. There has been some very positive action in recent times: "Ontario continues to lead the way in promoting investor confidence. Legislation introduced by the provincial government has increased sanctions for wrongdoing and given us the authority to introduce measures that will ensure corporate financial statements mean what they appear to mean and auditors are responsible to shareholders."

I know the financial penalties have been increased. I think you can get a jail term of five years less a day. I fully support that approach.

I find the Crawford report is well done and very comprehensive.

I do have questions about the federal Wise Persons' Committee report. We all have a copy of this. They've pretty well made up their minds; there's no question about that. I find it is less than balanced in the promotion of a single federal regulator. It is actually a fairly good sales document promoting change. That is fine. This particular government was elected on the mantra of "Choose change." The government I was part of was actually elected in 1995 on a slogan of "Common sense for a change."

I would just draw your attention to the table of contents. On one page we have a number of subtitles under the various chapters. The words "change", "changed" and "changing" come up 12 different times in those titles. I suggest that in this report, given the complexity of this issue, in one sense there's a bit more sizzle here than steak. Obviously I feel that this committee needs much more information before we get stampeded into handing everything over to the federal government.

The Chair: We'll move to the NDP. Mr Prue, you have 10 minutes.

Mr Prue: This is a five-year review. I have to tell some of the people that I looked forward to this with some trepidation. This is a huge, daunting task. The reams of paper and the trees that were cut down so each one of us could have hundreds and thousands of pages of paper, some of which makes very little sense to a lay-person—but it's a five-year review we have to go through. We have to go through it because the world is getting more complex.

There are people out there whom we read about in the papers almost every day, certainly in the United States, if not in Canada, who take this system and are able to mould it, use it, make fortunes off it and cheat people and do all kinds of stuff. The system itself allows for it. We need to protect, if anyone, the small investor. We've already heard some of the examples: Enron, Arthur Andersen, Martha Stewart. These are American examples; I know they're not Canadian or Ontario ones. Every day, I'm sure there are people out there who are using insider information and not getting caught. Every day there are problems with the securities system.

I do not believe the regulations in the United States, Canada, Europe or other places fully protect the small investor. They cannot possibly know all of the rules and regulations. They cannot possibly know all the information that's being traded or closely guarded. They are there with faith, but they oftentimes get burned.

I looked down the list of deputations for this particular committee, and it's instructive to me. Of all the committees I've been on in the past three years, almost all the deputants belong to an organization; if you look down the list, they all get 20 minutes because they belong to an organization. That's the norm. You get the odd individual here and there who comes and makes a deputation. In this particular grouping there are 16 individuals—16 individuals—which is the most I have ever seen, who are coming forward of their own volition to tell their story about the Ontario Securities Commission and what they think needs to be done.

Without having heard any of them, and I don't know any of the names, quite frankly—or I think I know one or two of the names—I think you're going to hear a lot about them having been being burned; you're going to hear about them being dissatisfied with the current system and how it did not work for them. I might be wrong, but I think that's what I'm going to hear over the next two days. We need to listen to them. We need to protect them. We need to change the laws so these small investors don't get burned, that if they're taking their entire life savings, they're going to be protected by a government or a government agency or a government-regulated agency.

I don't think we're going to hear from the big corporations—I'd be surprised if we do—or the banks or all of those people, who have legions of lawyers and accountants and other people who can look after their own interests very well, thank you very much. I don't think they need our help, and I don't think we ought to be offering any more than they already have. What we have here and what we continue to have and that, I'm sure, no matter what we do, will continue to exist, will be a very closed shop, people who go from brokerage houses to the Ontario Securities Commission, and from the Ontario Securities Commission back to the brokerage houses, back to the law offices, back to all of those places, because there are probably a couple of thousand people who circulate in between all of those jobs, going from place to place to place, and the system works for them. I would be less than honest with you if I thought that they will be coming forward to us, asking for changes that are in any way going to impede their ability to make money. That's what they're in the game for, that's what they do, and the system works fine for them. We need to look to make sure that the system works for every investor, particularly those who are not part of those inner workings.

I looked at what is being proposed. The key recommendation is that we go to a national securities regulator. I want to tell you, I think that's a great idea, but I also think we are very naive if we think this committee is going to have anything to do with actually getting a national securities regulator. This will be taken over, I suppose, by the federal government, if and when it ever happens. If we had not gotten medicare all those years ago through the federal government, then today, if somebody were to start out and try to do it, I would doubt very much that it would actually happen, because the provinces, including our own, have become very conscious of their jurisdiction and are very reluctant to give it up, either our own province or any of the others. So although it's a good idea, I don't think we should be wasting too much time except to say that we support it.

We need to look at some of the other things that are important. The first one is the investigative versus the adjudicative role. We need to make sure the adjudication is separate and apart from the investigations body. I do not believe that anyone seeking redress or justice can go to an investigator and ask the investigator to make the same decision. If the investigator investigates or looks at it—it's just like going to a court. You want an independent body; you want an independent judge. You don't want the policeman who arrested you to be the judge as well. It just doesn't work. So we have to look at ways of strengthening the adjudicative branch, of separating it, looking at the other jurisdictions, the American ones, the European ones, the British ones, and making sure we develop the best possible system.

Last but not least, I'm very disappointed to see that the whole experience in Manitoba and in England about having restitution available in a very simple way that ordinary investors can get their hands on without going to the extraordinary lengths of lawyers and courts and years of delay, as they have now, has been put on the shelf—recommendation 75—to study further. It really, really does not need study, in my view. The system appears to be working in another province. We could change it to make sure it is more adapted to the Ontario experience, which is larger, which has more investors, which has a greater capacity. We could change it, but I think the experience is a good one, because ordinary people who have been wronged by the system can get their money and can get it back fast. They can have someone who will listen to them. They don't have to be mired down for months and years in the court system with the expense of judges and accountants and everything else that goes with it. I would hope the committee will look at this and see that recommendation 75 is extremely weak. If we did one thing in this committee, I would suggest that we should change recommendation 75 and say, "We've had enough study. We need action. We need an opportunity for ordinary people to be protected." The best example we have at this stage is the British one, followed closely by the Manitoba one. We should be doing that.

So two things: the investigative versus the adjudicative role—we need to have strong adjudication—and second, that we have to have an opportunity for ordinary people to get restitution without having to go through the courts. If we only do two things on this committee, those should be the two, and we should not be wasting a lot of time looking at a national securities regulator, which we may not see—I hope we do—in our lifetime. Those would be my comments.

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ONTARIO SECURITIES COMMISSION

The Chair: The committee is slightly ahead of schedule. Are representatives of the Ontario Securities Com-

mission in the room, and if so, would you mind coming forward at this time?

Good afternoon. You have an hour for your presentation. You may leave time within that hour for questions from committee members. I would ask you to identify yourselves for the purposes of our recording Hansard. You may begin.

Mr David Brown: Thank you, Chair. I am David Brown.

Ms Susan Wolburgh Jenah: I am Susan Wolburgh Jenah, vice-chair.

Mr Brown: Chair, thank you for this opportunity to speak to you and respond to your questions relating to the five-year review committee. As you have heard, I am joined today by Susan Wolburgh Jenah, one of the two vice-chairs of the Ontario Securities Commission. I am David Brown, the chair of the Ontario Securities Commission. In her previous role as general counsel to the commission, Ms Jenah served as a member of the five-year review committee, whose report is under review today.

The OSC is pleased to participate in the five-year review process and the opportunity to take a periodic look at the laws, rules, structures and operational policies that characterize securities regulation in this province. The review process, which was mandated under the Securities Act in 1994, provides something very valuable: a recurring, proactive opportunity to take a close look at a system that is functioning well, to determine ways in which it could be made to function even better.

No public institution can hope to rest on its laurels. Emerging issues and needs often prompt new ways of doing things. Our response is to pursue a fundamental principle: The OSC is always prepared to embrace change in order to meet change.

We're committed to seeking the widest participation in the regulatory process. Our priorities include accountability and transparency. We proactively seek critical review. That includes maintaining 16 standing advisory committees with broad stakeholder representation, and commissioning ad hoc task forces that include a wide range of market participants.

Before discussing some of the issues raised by the five-year review committee, let me start by providing some background on the commission itself.

We're proud of the organization we have in place and of the way it advances the commission's statutory mandate, which, as you know, is to provide protection to investors from unfair, improper and fraudulent practices, plus to foster fair and efficient capital markets and, most important, confidence in those markets.

We've also made it a priority to raise the level of investor education and fraud awareness. We've worked with government organizations and community groups to broaden our audience and increase our direct contact with Ontario investors.

A particular focus has been communicating an anti-fraud message to Ontario seniors. We were one of the first securities regulators in North America to launch an investor education fund, which has provided groundbreaking research and education tools.

To carry out its mandate, the OSC is organized into 10 core branches. We seek to recruit and retain staff who have the skills and expertise to carry out individual responsibilities as well as to work together as a team in areas of common concern.

I'm happy to remind you that in Ontario, securities regulation places no demands on the public purse. The commission receives its funding from market participants based on their participation in the market and their use of our services.

The expertise and quality of our regulatory regime has been recognized internationally. The OSC is often called upon to play lead roles in international bodies such as the International Organization of Securities Commissions, or IOSCO, and spearhead projects by regulators around the world. We work closely with our counterparts in other provinces and with the US SEC, the Financial Services Authority in the UK and regulatory bodies in other countries, in order to bring best practices to Ontario and Canada while exporting our own knowledge and expertise.

At the same time, we've been successful in improving our enforcement capabilities here at home. As business grows in complexity, so does the scope for fraud and other market manipulation.

In the past five years, the OSC has poured considerably more resources into enforcement while cooperating closely with law enforcement agencies such as the RCMP, the OPP and the crown. In the last fiscal year, for example, we opened 216 new enforcement cases. In recent years, about half of the cases investigated have resulted in regulatory action or were directed to other regulators or law enforcement agencies.

The three most frequent types of securities violations investigated over the past few years have been misconduct by market registrants; illegal insider trading, or tipping; and trading of securities without registration.

Recent investments in enforcement have also made the OSC more efficient and more effective, cutting our average length of an investigation by one third, from 20 months to 13 months, while reducing the average time involved in bringing a case to trial from 15 months to 11 months.

These statistics are encouraging, but they don't fully reflect the impact of our enforcement activities. They don't show the number of times our enforcement branch has been able to prevent harmful conduct by identifying dubious operations in their early stages. Our enforcement branch is one of the first in North America to establish an intelligence team, and it has already registered successes in stopping activities that could have harmed investors.

In all of our activities, we recognize that laurels are not something to rest on; they're something to build on. Many of the challenges the commission faces are in a constant state of flux. We are committed to change; to be proactive, not just reactive; and to welcome innovative ideas and approaches.

That leads me back to the report of the five-year review committee.

First, I want to express my appreciation to the members of the review committee. The OSC was pleased to support their work and we were impressed by the breadth of their recommendations and the depth of the thinking behind them.

The review committee's recommendations covered legislation, rules, and structural and operational issues. I'd like to discuss a few which are priorities for the commission and for the integrity of capital markets in Ontario.

It makes sense to begin with the recommendation that the committee identified as the "most pressing securities regulation issue in Ontario and across Canada"—what is called the "urgent need for a single Canadian securities regulator."

I don't have to dwell on this issue, as the Premier and Minister Phillips have both done an excellent job of articulating the reasons why Canada needs a single securities regulator. I will emphasize just one point: the competitive disadvantage of being out of step with the world.

Ours is the only advanced national economy in the world that does not have a national securities regulator and one of only two countries among more than 100 who are members of IOSCO. Can we really afford this competitive disadvantage?

Canada's current system of 13 regulators with 13 sets of rules and regulations is costly, cumbersome and carries the risk of marginalizing Canadian interests in an increasingly global marketplace where capital flows across national borders with few restrictions.

We estimate that approximately 10% of our operating budget is consumed trying to make this fragmented system work. We do it because we have to, but issuers, registrants and investors have options: They can go elsewhere. They don't need to be here.

In an effort to address this fragmentation problem, the OSC has worked closely with our fellow provincial and territorial securities regulators on the uniform securities legislation (USL) project. We have contributed considerable resources to this significant initiative which the CSA launched more than two years ago with the objective of developing uniform securities legislation. But it's important to keep in mind that, while USL is a positive step forward, it is no permanent substitute for a single regulator. Canada simply cannot afford the duplication and overlap of 13 separate regulators when every country Canada competes with has only one.

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About two thirds of the report's 95 recommendations are directed to the OSC and the Canadian administrators. About one third call for legislative or structural reform, study or other action by the Legislature or the government. Recommendations in both categories have been implemented or are in progress. I'm tabling a document today that outlines the status of review committee recommendations.

Of those requiring legislative action, we would urge that this committee consider on a priority basis endorsing recommendations in four critical areas.

First, we urgently need the proclamation of amendments to the Securities Act, which were enacted in December 2002. The amendments would create a regime for statutory civil liability for secondary market disclosure. This is recommendation number 40 at page 133 of the commission report. It would also make it an offence under the statute to commit fraud and market manipulation and misrepresentation. This is referred to on pages 242 to 246 of the report.

Unlike investors in the United States, Ontario investors face significant hurdles in suing corporations and their insiders for false or misleading disclosure. The proposed civil remedies will provide investors with a means to seek redress, plus encourage compliance by corporations and others with their obligations of transparency. The prohibitions against fraud, market manipulation and misrepresentation will enable us as regulators to seek quasi-criminal sanctions against those who would undertake that activity in our markets. We'll get the tools we need to help protect investors in this province. These measures will give us means to fulfill an important element of our statutory mandate, and that is protecting investors.

Second, we need better tools and flexibility to achieve more effective co-operation with other Canadian securities regulators. The ultimate goal of a single regulator for Canada will obviously take some time. In the meantime, market participants are demanding that we work together with our CSA counterparts to achieve greater harmonization of regulatory requirements. To do that, we need some legislative steps, including statutory amendments to facilitate interjurisdictional delegation of decision-making where a common approach to issues has been agreed upon. That's contained in recommendation number 2 at page 41.

Third, we need the ability to reduce the regulatory burden. In particular, I'm referring to the review committee's recommendation to facilitate quick responses to new situations that have not been expressly provided for in existing rules. Too often, market participants are caught in a regulatory time warp. They want to do something that the rule makers never intended to prevent, or even anticipated. But it takes nine to 18 months to change a rule. In the meantime, market participants need to come back to us each and every time for an exemption. Other Canadian jurisdictions are able to issue blanket exemptions. The review committee's recommendation to introduce similar authority in Ontario would eliminate a regulatory burden and enhance our ability to take a common CSA approach to issues as they arise. That's recommendation 21 at page 85.

Fourth, there is a clear need to modernize Ontario's commercial law dealing with the transfer and pledging of securities. Canadian law in this area has fallen behind the US and the European Union, and we need to catch up. All of the Canadian securities regulators endorse the

Uniform Securities Transfer Act, as it's called, and we urge the committee to recommend that Ontario play a leadership role with respect to this important legislation to better serve Ontario investors. That's recommendation 5 at page 50.

There's one other issue that the review committee identified that I would like to comment on, and that is the recommendation that the structure of the commission as a multifunctional agency be given further consideration. Unlike most of the other areas covered by the report, the review committee made no recommendation on this one. However, it did call for further thought and study.

I fully support this reassessment. It is essential that the structure of the commission be periodically reconsidered to ensure that it is the most suitable and effective for the commission to discharge its mandate. Our current structure and any alternatives under consideration should be measured against the benchmark of our mandate, and that is to provide protection to investors and to foster fair and efficient capital markets and confidence in our capital markets.

Under the commission's current integrated structure, which is codified in our governing legislation, the commission performs multiple functions such as developing policy, conducting investigations, prosecuting cases and adjudicating cases that come before it. Contrast this with a bifurcated model in which the adjudicative function of the commission would be hived off to a separate, independent tribunal that has no involvement in policy-making, investigations or prosecutions.

In this context, I am tabling materials that we commissioned to help inform the debate around this issue. These materials include a report by a committee chaired by the Honourable Coulter A. Osborne and legal opinions by the law firms of Torys LLP and McCarthy Tétrault. I'd like to walk through the advantages and disadvantages of each model. Let me start with the two principal disadvantages of our current integrated model.

First, it allows for a greater risk of perception of bias on the part of the commissioners exercising their adjudicative function as a result of the commission's involvement in policy-making and oversight of our enforcement branch. This issue is extensively discussed in the report the OSC commissioned from the committee chaired by Coulter Osborne. In particular, it's noteworthy that the report focuses on the perception of bias as opposed to actual bias, reporting that, "Critics of the existing structure contend that the perception of bias works to erode the credibility of the commission."

The commission is concerned about the issues raised because we take perceptions very seriously, even if they are only held in some quarters. This perception problem is inherent in the integrated model for administrative agencies. Candidly, no one has figured out a way to eliminate it entirely. But we have many safeguards in place, and we're always looking for ways to enhance them.

The second disadvantage results from one of these safeguards: the separation of the commissioners from the day-to-day decision-making of the enforcement branch. Currently the commission fulfills its responsibility to oversee enforcement activities without becoming involved in case- or fact-specific decisions about investigations and prosecutions of individual cases. This practice is in effect for obvious reasons, as some of the commissioners may end up sitting on the panel that adjudicates the matter. As chair, I get involved in investigations and prosecution decisions and therefore do not sit on any hearing panels. These are tough decisions, and I'd welcome the input of my fellow commissioners. A bifurcated model would allow this input because the matter would end up being heard by a different set of people.

Knowing that these are disadvantages in the current model, why then did the Legislature nonetheless decide that this model is best for Ontario? Indeed, why is this the chosen model for so many regulatory and administrative agencies across Canada, even beyond the realm of securities regulation? I think the answer is because its main benefit is the enhanced expertise that is inherent in it. By hearing and deciding real cases, the commissioners gain a hands-on experience that informs their development of policy and, by developing policy, commissioners gain an insight and understanding of the public interest underlying that policy that informs their decisions when adjudicating cases. At the same time, by offering potential commission members the prospect of a broader, more challenging range of functions, the pool of candidates from which the government must draw expands, as does the range of expertise, skills and knowledge.

It's important to keep in mind that when commissioners adjudicate cases, they're not just deciding whether someone broke a rule. The Securities Act requires that the commission exercise its sanctioning powers in the public interest. For example, when suspending a dealer or when restricting a person from acting as a director of a public company or when imposing a fine or when ordering a person to hand over the profit they earned from their misdeeds, the commission must make a determination that such orders are necessary in the broader public interest. The policy development process gives commissioners insight into the public interest, insight that is invaluable in the adjudication process.

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As well, the integrated model reflects the roles and responsibilities of an administrative agency or regulator as distinct from a court. Administrative agencies were developed to fulfill roles that were very different from and not appropriate to the courts, often resolving issues in accordance with a statutory mandate to pursue or protect the public interest. In connection with such a mandate, they may be empowered to formulate policy or make rules that have the force of law.

The Supreme Court of Canada has not only endorsed the legality of the integrated model of regulation in Canada, but our highest court has also recognized, in the words of Chief Justice McLachlin, "the overlapping of investigative, prosecutorial and adjudicative functions in

a single agency is frequently necessary for [an administrative agency] to effectively perform its intended role."

That leads me to the other side of the balance sheet: the disadvantages of moving to a bifurcated model. What will have been lost? First and foremost, the expertise that the commission gains precisely from performing those multiple functions. The Supreme Court of Canada recently commented on the impact that hiving off the adjudicative function may have on the expertise of a tribunal. In the recent Monsanto decision, in reviewing a decision of the Ontario financial services tribunal, the court said, "Involvement in policy development will be an important consideration in evaluating a tribunal's expertise."

The challenge for our elected officials in reassessing the commission's structure is to balance the advantages and disadvantages of different models and to determine whether the current structure continues to best serve Ontario investors and participants in Ontario's capital markets.

One of the reasons the issue is being revisited now is that the commission recently acquired new powers to assess administrative penalties of up to $1 million and to order people to disgorge profits earned from their misdeeds. The Osborne report raised the question of whether these new powers changed the legal environment for an integrated commission. We thought that this was an important question, so we asked the law firm of Torys LLP to examine the issue. The Torys opinion addressed the issue of apprehension of bias and concluded that the commission's new powers do not detract from the legality of the integrated model and do not compromise the right to a hearing before an impartial tribunal.

The Osborne report also raised the issue of whether the structure of the OSC properly allows the commission to exercise its statutory oversight responsibilities, particularly with regard to enforcement. As I mentioned, the commissioners do not get involved in day-to-day decisions on investigations and prosecutions. Does this still pass the test in today's corporate governance environment, and does it satisfy our statutory oversight responsibilities as a board under the legislation?

We asked the law firm of McCarthy Tétrault for their legal opinion on this key issue. Their conclusion? The OSC's structure and internal processes do not in any way conflict with the commission's responsibility to oversee enforcement matters.

Clearly, the best structure for the commission is complex. It requires consideration of the broader Canadian context, under which the integrated structure is the predominant model, not only for securities regulatory agencies but in other areas as well. In that regard, it's worth noting that in 1987, Alberta tried restructuring its securities commission into two entities. It found that it didn't work, and it ultimately reverted to a structure which is identical to ours.

I should note that I believe a stronger case could be made for a separate tribunal if we were to establish a single securities regulator for Canada. Such a tribunal would likely have a significant caseload with national reach, enabling it to attract and build a base of qualified experts. The tribunal would also have the flexibility to conduct their hearings wherever in Canada it is appropriate.

As I said at the outset of my remarks, the OSC is always prepared to embrace change in order to meet change. As a regulator of financial markets in a period of rapid transformation, we can do no less. We are presented here with a unique opportunity that is unavailable to most securities regulators around the world. Here, on a periodic basis, opinion leaders from our markets and our investor community are asked to review our practices and procedures and our legislative underpinning and to make recommendations for improvement. These are important initiatives for Ontario's capital markets and for the whole of Canada. Indeed, the world is watching.

I have provided to the clerk of the committee the documents I referred to in my remarks. I look forward to members' questions. Indeed, should the committee find it useful, I would be happy to return at the end of your hearings to answer further questions, as other issues relevant to securities regulation in this province may emerge during your deliberations. Thank you.

The Chair: Thank you very much. Did you have any comment to make?

Ms Wolburgh Jenah: Not at this time.

The Chair: OK. Thank you very much.

I appreciate your coming to the microphone a bit ahead of schedule, and I thank you on behalf of the committee. We have about 11 minutes per party, and we'll begin with the official opposition and Mr O'Toole.

Mr O'Toole: Thank you for your brief presentation on a very complex topic. You've given us some context here.

As I said in my opening comments, it's the perception sometimes that is the reality. It's that perception in the public that we're trying to deal with, technically; that is, the perception that justice must not only be done, but must be seen to be done. It's in that role of the combined functions of providing a strong, effective, transparent, accountable capital market environment with regulations and oversight, and the conflicting role of the adjudicative function.

During your remarks, I had the chance to look at some of the recommendations in the Coulter Osborne report and, in the conclusion there, the recommendations, they clearly make the case that they should be separated. That's my understanding. It's the same function, basically, and the Wise Persons' Committee said the same thing, as you say.

I guess it's easy to say, when I look at the overall development and growing complexity of that capital market—which you admirably do the job of, and have gained considerable respect, I might say, just from the press etc and your own presentation—it's growing more and more complex: the rules, the regulatory authority, larger national and international implications. It seems to me that you've made a conclusion to yourself that you

see, with Justice McLachlin's observation, that there are strengths to retaining the current relationships. It would appear that you perhaps use that as your justification for leaving the current model as it is, with some enhanced separation under the same organization. Is that a fair assumption?

Mr Brown: As I tried to indicate in my opening remarks, Mr O'Toole, I'm of two minds. As the chief executive officer of the commission, perception is very important to me, and I agree with you that perception can, if it's not addressed, undermine the credibility of the organization. But I also understand what Chief Justice McLachlin is saying—and, as you say, moving into a world that is becoming more and more complex. The integrated model seems to be serving those complexities quite well, because it allows the people who are being called upon to regulate the markets, and the regulatory process includes not only setting policies but investigating breaches of the laws and then bringing people to account. I think what Chief Justice McLachlin is saying is that here's a way of making sure we get all of the expertise where we need it.

Having said that, I guess my position comes down to, if we can conceive of a different model that would serve the investing public and our markets better than the one we have, I think we should go for it. But until we can find that model, until we've had a chance to test the various aspects of that model, we are better to leave the current structure as it is

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Mr O'Toole: If I may follow up on that, I've read somewhere—I was trying to find out where I read it. But if cases go to civil action or go beyond your own judicial process, the commercial list courts deal with them. These are people who are highly involved and familiar with this, as opposed to us, the great unwashed, who know nothing about it. We trust these self-regulatory organizations. Would they not be a competent, independent group where they're not dealing with rule-making and responding to market conditions, although they'd be reading other court decisions in other jurisdictions and precedent decisions?

I look at the Bre-X case and your own legal team's response to Felderhof, where you felt the court wasn't able to deal with it. Could you respond?

Mr Brown: Yes. There are a variety of concepts there. Let me see if I can take them one at a time.

Under our statute, we can bring cases to court and we can seek quasi-criminal penalties, and we do that quite often. The Bre-X/Felderhof case is a good case in point. That goes to the provincial court. That does not go to the part of the courts where the commercial list is located.

Every decision by our commission is subject to an automatic right of appeal. So anyone who comes to our commission and is concerned either that there has been bias or that they haven't received a fair hearing has an automatic right of appeal. Again, that doesn't go to the commercial list; that goes to the Divisional Court. So in our current system, you don't get into the commercial list automatically.

Mr O'Toole: That's really the point I was trying to make.

Mr Brown: But certainly I think that is an alternative that could be considered. I think the Legislature, in looking at whether all of these cases should just go to the court system, should examine or bear in mind the reasons an integrated administrative tribunal was set up in the first place and why there are so many of them across the country with specific expertise. I think it's a recognition that the investors, the investing public and others who come before the system have a better chance of having a proper result if they're dealing with an expert tribunal. But it's an alternative that I think should be considered.

Mr Barrett: I thank you, Mr Brown and Ms Wolburgh Jenah.

Clearly, the collapse of Enron has shaken the little guy and institutional investors. As a result of the lying and misrepresentation that went on there, the US government enacted, and I don't know whether this is the right pronunciation, the Sarbanes-Oxley Act of 2002—sweeping changes. They've certainly given a lot of work to the New York Stock Exchange and NASDAQ and their SEC.

Our response to that, I understand, is a work in progress. The required amendments for us to raise the bar or to get up to speed on this have not been inculcated into the Securities Act. For example, for a breach of the act—and I may have misspoken earlier—would someone get five years less a day, maximum penalty, or is that not implemented yet?

Mr Brown: That's implemented. If I could, the Sarbanes-Oxley statute, as you say, was a very broad-reaching, comprehensive statute. It was passed by the federal government in the United States and it dealt with securities law, with employment law, with corporate law, with tax law. It was a very broad-ranging statute. We, in our constitutional system in Canada, don't have that.

What we've been able to do in Ontario, though, is implement many of the provisions that have been implemented in Sarbanes-Oxley. As you may know, some of the recommendations of the five-year review committee have already been implemented and statutory amendments made. That enabled us to implement here in Canada, in a way that is appropriate for Canada, three of the most important provisions of Sarbanes-Oxley. Those are already in place. We also, working with other agencies, including the accounting bodies, were able to implement here in Canada new conflict-of-interest rules for accountants that are now in place. We set up the Canadian Public Accountability Board, which was also a key feature of Sarbanes-Oxley. In the US they call it the Public Company Accounting Oversight Board, I think. PCAOB is the acronym that it goes by. We've set that up here in Canada, and I've been the chair of the governing committee that has set that up. So we've been able to bring into Canada many of the changes that have been instituted in the United States. There are still some to go, and a few of them are dependent on some of the recommendations that are made in this committee.

I've been down to New York. I've met with officials of the stock exchange. I deal with the officials of the SEC

on a regular basis. I think they're comfortable that we're on the right track to establishing investor protection regimes here in Canada that are as robust as in the United States.

Mr Barrett: When we say "here in Canada," does that also refer to Quebec or British Columbia or Winnipeg?

Mr Brown: Of the initiatives that I've talked about, they're virtually all completely across the country. There's one that British Columbia has done something different on. But, yes, it includes Quebec. It includes the entire country.

Mr Barrett: A federal body does that?

Mr Brown: No. We have been able to coordinate with the securities commissions in the other provinces to do national instruments. It takes a little more time, but we've been able in those circumstances to get national instruments that apply right across the country.

The Chair: We'll move to the NDP.

Mr Prue: First of all a comment: I noticed with some alarm—perhaps I shouldn't have—that there were 216 cases opened in the last fiscal year. That works out to just under one a day. So once a day you find somebody out there tweaking the system, cheating the system, taking advantage of the system, to the detriment of people who are investing.

Mr Brown: We probably have many more than those that are brought to our attention. We work our way through and investigate, take the investigations to various stages. I think what I said was that of those 216, typically we find that about half of those cases, when we get through our investigation, result in proceedings. So your point is still valid, but it's probably somewhere around 100 rather than 216.

Mr Prue: OK. So it's only about two a week.

Mr Brown: I should tell you that this isn't the context, though, of capital markets where billions of dollars are traded on a daily basis. We have a very large economy here in Ontario. The stakes are high, and there are very sophisticated players who are dealing not only with sophisticated players but with unsophisticated players. I don't find the statistics surprising.

Mr Prue: I've just had an opportunity here to read part of Coulter Osborne's report. The very last line of the report is dated 5 March 2004. Could you tell me, why has it been released today, five and a half months after its submission to you? Why the secrecy?

Mr Brown: There's been no secrecy at all. We made it clear that we would make the report public. We made it clear that we commissioned the report to assist us in responding to the recommendations of the five-year review committee, but also to assist this committee once it was formed and given its mandate to address those issues.

We also identified in the report the legal issues that I referred to in my prepared remarks that the Osborne committee did not address. We thought it would be important for us in understanding these issues, but ultimately, important for you if we were to get some legal answers to those. So we commissioned the legal opinions that have been tabled today, and those were just delivered in the last few days. We've delivered a complete package today, but always with the publicly announced intention of making it public.

Mr Prue: The Osborne report is diametrically opposed to the legal opinion of Torys LLP. I'm looking at pages 33 and 34 of the Osborne report, in which he quite clearly sets out the necessity of bifurcation of the functions and says in just a couple of sentences, talking about the bifurcation, "However, this cannot be accomplished where the commissioners are inhibited from doing so by the existence of their adjudicative functions." Then he goes on to state, "While the Supreme Court of Canada has affirmed that there can be no complaint at law about the apprehension of bias where legislation has mingled the adjudicative, enforcement and policy-making functions, the perception exists in fact. In our view, more 'tweaking' will do little to alleviate the problem."

And then, finally, he goes on to say: "Nor does the evidence support the need for the cross-pollination between the commissioners' adjudicative and non-adjudicative functions. The role of policy in sanction proceedings is limited. In any event, if it is to play any role, it should be identified in advance."

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He goes on to state on page 34 that there is no reason to believe adjudicators should not be separate and apart and distinct, and if you paid them enough money, you would get decent people to do it. That seems to be quite at odds. Although I do realize you played both sides and you did talk about both sides, the argument you're making on the one side is at complete variance to Coulter Osborne's recommendation.

Mr Brown: I don't think that's right at all. First of all, the Torys opinion addresses the legal questions. The Osborne report addresses the perception. They make it very clear they don't think there's a legal problem. We wanted to make it absolutely certain in our minds that there was no legal problem, and that's what the Torys opinion set out to do.

The Torys opinion, unfortunately, also had the advantage of two and maybe three Supreme Court of Canada decisions that were decided just in the last few months, after the Osborne report came out.

The Osborne report is a response to the perception issue. As I've said, the perception issue is an important one. The Osborne report makes a recommendation as to how to solve the perception issue, how to make it go away, and I think it's a fair response to the perception issue.

Having said that, I have said the perception issue has been around for many years. It involves virtually all of the integrated administrative agencies across the country that are set up similar to ours. I think legislatures have traditionally looked at that perception issue but have looked at the other advantages and have chosen the side of an integrated tribunal. I think there's the recognition that there are safeguards that can be put in place—and I think we have them in place—to manage the perception,

but it can't be made to go away completely, I don't think, without moving to the type of model Coulter Osborne is recommending.

Mr Prue: Do you disagree with his recommendation that we go to that type of model?

Mr Brown: I don't disagree with the recommendation that that is the model that will resolve the perception issue. What he was not asked to do, and what his committee did not attempt to explore is, what is the other side of the balance? What I'm saying is that it's fortunate, in a sense, that you, as legislators, have to look at all sides of it. I think examining the other side of it is very important before a decision is made.

Mr Prue: But the reason—and I go right back to the very first page of his report. He writes: "In fulfilling our mandate, we proceeded on the basis that, absent clear and convincing evidence, we would not recommend structural change."

So he was asked not to recommend structural change unless he thought it was absolutely necessary. And when he did, on the basis of perception, there is still some equivocating here of whether or not it's a good idea. That's what I'm hearing.

Mr Brown: He's recommending structural change as a way to dispel the perception. You're absolutely right.

The Chair: We'll move to the government and Ms Matthews.

Ms Deborah Matthews (London North Centre): I have to say I'm feeling a bit confused here, only because we just received this report from Coulter Osborne when you began your presentation. So I was paying attention to what you were saying, and then I happened to flip to Coulter Osborne's conclusion and thought that maybe I was reading something that had been put there by mistake, because it's so contrary to what you were saying.

For the benefit of people—the two or three people—who might be watching on television and the more in this room, I would just like to read the first couple of paragraphs of Coulter Osborne's conclusion.

Like Mr Prue, I just want to remind people that he does, in his introduction, state: "We proceeded on the basis that, absent clear and convincing evidence, we would not recommend structural change."

So he went in with a bias against making this recommendation. He doesn't mince any words: "We would strongly advise the commission to take steps to separate its adjudicative function from the commission. The arguments supported by the evidence in favour of this separation are persuasive, indeed overwhelming."

It's very strong language. They "received considerable expert opinion," and there's a list of the people they spoke to. "A substantial preponderance of that evidence supports our central recommendation—that the commission should do what is required to be done to establish" a separate tribunal.

To me, it looks like what happened is that he came back, you didn't like it and you went and found another opinion that was supportive of keeping it within the OSC. So I guess I would just like to ask you to maybe explain what the process was and why you are so opposed to this very clear recommendation from a highly regarded person?

Mr Brown: First of all, let me make a few things clear, and perhaps you were reading when I was responding to some of the questions. From my point of view, I'm attracted to both sides of this argument. As I've said, as the CEO, perception is very important to us. It's very important to our ability to effectively pursue our mandate. So I do think there are some attractive features to the recommendation in this report.

The opinions that were sought were not to counter the report of the Osborne committee. The two opinions were to clarify some legal questions that were left hanging in the balance in the Osborne committee. Our commissioners, in the course of all of this examination of their role, still have to sit on tribunals and still have to make decisions and judgments. So we wanted to be certain that the legal underpinning of the commission in its current form was solid.

That's what those two opinions were attempting to do. We were pretty certain in our own minds it was solid, but we thought it would be responsible for us to have outside parties tell us that. So the legal opinions are just that. They confirm that the legal foundation for what we're doing is solid.

The Osborne committee went around and talked to people, mostly market participants; I suspect, from the list of names, a fairly high percentage of people who either have been called before our tribunal in an enforcement matter or perhaps are in an industry where they might be called. So they were seeking their opinion evidence as to whether or not this perception is there and, if so, how could the perception go away. They concluded that the only really effective way to counter that perception would be to split the tribunal.

As I said in my prepared remarks, and as we've tried to analyze it ourselves, there are many, many integrated tribunals in Canada. With the exception of the province of Quebec, which doesn't have a commission so they needed a tribunal, all of the other securities regulators that have commissions have separate tribunals. All of the professional societies—there are many boards where the tribunal is part of the administrative agency. The suggestion here would go against that, and it may well be, as I've said, the proper way to go, but I think the advantages that were perceived when these other tribunals, including our own, were set up should be factored into the decision as to whether to separate the tribunal.

Ms Matthews: Did you mention in your comments that you thought we should have a national body before we split up the adjudicative function?

Mr Brown: I didn't say that, but I did say that I think there is a stronger argument for a separate tribunal for a national body. I should explain; I didn't explain it very well in my remarks. I asked our registrar, who is the registrar of the tribunal, just how many days our commissioner sat in hearings for the last 12 months, and it works out to only 39 days in total. That's actually a number of half days but in total days, it was 39 days.

One of my fears, given the load that we currently have before the tribunal—and again to explain, we don't bring all of our cases to the tribunal. We take a substantial number of them to the courts, so it's only the cases that come to the tribunal that are part of this determination. The Osborne report doesn't recommend that we split the tribunal for all of those cases, so it's only a portion of the ones that end up at the tribunal. In the past year, we have had only 39 hearing days. For someone to be a member of one of those tribunals, they have to give up all of their associations where they might have a conflict. So you need people who have expertise but who are willing to give up their affiliations.

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My fear is that with a hearing load of only 39 hearing days, you're not going to get the kinds of people whom theoretically you would want to get on the tribunal. I think for a national tribunal you'd have a much better chance, because it would be responsible for hearing cases across the entire country. It would be a much greater hearing load, and they'd be matters of national interest. I think you'd have a better chance of getting the expertise on such a tribunal for a national body.

Ms Matthews: I have tremendous confidence in the ability of Minister Phillips to pull together this national regulatory body. However, it might take him a little while.

The Chair: We'll move to Mr Milloy.

Mr Milloy: Do I have any time?

The Chair: Yes, you do. You have about four minutes.

Mr Milloy: Great. I'll be direct and talk about rule-making and some of the comments you made today and reading Mr Crawford's report. I'm just wondering if I can share very candidly with you—this isn't some trick question—the two sides that are going around in my head on rule-making.

On one hand, you very legitimately have government oversight of rule-making. You know much better than I do about the publication of rules, the chance for comment and the chance for ministerial oversight. At the same time I realize—and you went into this a little bit in your presentation—how quickly the markets are moving, everything from technology to some of the international pressures, and that you need to be able to respond to investors and those selling securities in a very quick and rapid way. I guess trying to find that balance is always the key.

When I look at Mr Crawford's report on rule-making, where he wants to give the OSC the so-called basket rule-making, which to my understanding is that a lot of the residual rule-making which now is with the government would then go to the OSC—the idea of publishing the names of those who comment to the minister during the minister's review period, giving the OSC more scope to determine when it republishes changes; I'm just going through the list. You talked about exemption. My natural reaction is, and maybe I'm on this side of the table, is that not in a sense broadening the OSC's powers and maybe tipping the balance a bit?

The question is, if a rule needs to be published, looked at, examined and discussed, with something like an exemption order, which in a sense you could argue has the same effect as a rule, it allows a company to operate in a new milieu. In a sense, you're getting around the government with that.

I'm not trying to be belligerent. I'm just saying, as someone looking at this and as a committee looking at this, I think we're both torn in both ways.

Mr Brown: Let me try to answer, and then I might ask Ms Wolburgh Jenah, who was on the committee, to respond as well.

From my perspective, the people the minister appointed to that committee were skeptics. They were as skeptical a group as I would want to confront as the chair of the OSC. They were market participants. There was an investor advocate on the group. That group took it upon itself to criss-cross the province and talk to as many people as they could to determine what we needed to do to make the system work more efficiently.

I accept their recommendations. I think that they thought long and hard about the recommendations you have just referred to. They know that when some of the rule-making authority was originally put in place, these were issues that were debated, and they know that some of them were close calls one way or the other. I accept their recommendations as being well thought out and tested very carefully among market participants who would have some very strong views.

Susan?

Ms Wolburgh Jenah: The questions you raise are really very good ones. Putting my five-year review committee member hat on, these were issues—as David said, we went into the process with questions about ourselves. When the commission first got rule-making authority there were many who were concerned about the way in which the commission would exercise that rule-making authority. There were many people who brought a great deal of balance to the actual amendments to the act to ensure that there was appropriate oversight from the government, to ensure that there was a proper public comment process that was enshrined. The process has worked very well.

I think what has happened in the intervening period is that those who were critics of giving the commission more flexibility in its rule-making in terms of—for example, the enumerated list of heads of authority versus an approach that would recognize that sometimes you just can't contemplate every permutation of where you might want to make a rule six months from now, and giving the commission some kind of basket clause consistent with its purposes and principles and mandate would not be such a bad thing. So the critics are coming back to the five-year review committee in response to our initial interim report—that is, the original critics of a broader approach—and saying, "We've had some experience with this. We're not that concerned about this issue anymore."

Having said that, and I now put my commission hat on, the truth is that this is not a priority recommendation.

We support all of the recommendations that the five-year review committee made. As you know from Mr Brown's remarks this afternoon, these aren't the areas that we would focus on as being key, with one exception. The reason I say that is because the government has been very responsive. When we've come back to the government to say, "We don't have the rule-making authority we need to get on with the job in the area of audit committees; here is what we need," the government has responded, "Here is the rule-making authority to allow you to do the job." That's the alternative approach. It is working. It's not quite as flexible or as quick a process as having a basket provision, which many of our CSA colleagues do have in their legislation, but we can live with it and we can work with it, and there are other sides to this issue.

The one area that you did raise where I think we do feel quite strongly, and it was a priority recommendation in Mr Brown's remarks this afternoon, is the area of blanket exemptions. There are some—and you will most likely be hearing from some people who hold this view—who view this as really a way of undermining the rule-making process because it involves, in effect, as you pointed out, Mr O'Toole, giving a group or class of participants an ability to rely on the exemption. That is not the intention. The intention of a blanket exemption approach is to be more flexible. It's to be able to respond quicker. I can tell you that what happens currently is that you can require 10 market participants to come in and make ad hoc individual applications for exemptive relief, which we can then grant, or you can give us the flexibility to be able to say, "If 10 of you all need this relief and it makes sense to give it to all of you, then let's do it without having to put market participants through the time, the cost and the administrative inconvenience of having to apply." That's what this exemption is about.

The Chair: Thank you for your presentation before the committee today. We appreciate it.

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INVESTMENT DEALERS ASSOCIATION OF CANADA

The Chair: I would call on the Investment Dealers Association of Canada. Good afternoon, and thank you for being here in the room slightly ahead of schedule. I would ask you to identify yourself for the purposes of Hansard. You have 20 minutes for your presentation and may allow time for questions, if you so desire, within that 20 minutes.

Mr Joseph Oliver: Thank you, Mr Chairman. I'll use about half of the time allotted for presentation and half for questions.

My name is Joe Oliver, and I'm the president and CEO of the Investment Dealers Association of Canada, the national self-regulatory organization and representative of the securities industry. We've made several presentations to the five-year review committee and appreciate the opportunity to discuss its final recommendations with you today.

The IDA mandate is to protect investors and enhance the efficiency and competitiveness of the Canadian capital markets, an objective shared with the Ontario Securities Commission. As a national self-regulatory organization, or SRO, we regulate the activities of 208 investment dealers and their nearly 25,000 registered employees in terms of capital adequacy and business conduct. One hundred and twenty-nine of our member firms are headquartered here in Ontario, with 2,100 branches and 16,000 registrants. From 2001 to June of this year, IDA staff conducted 567 on-site financial and sales compliance examinations.

This afternoon, I would like to discuss three issues that were raised by the committee: enforcement, regulatory reform and consumer redress.

Enforcement is at the core of sound regulation and goes to the heart of investor confidence. As the five-year committee stated, "The need for securities regulators to have meaningful and effective enforcement powers has never been greater."

At the IDA, we assess complaints from investors and regulatory agencies, undertake investigations, prosecute cases and hold hearings across Canada.

Our national platform allows us to work effectively on joint investigations with the provincial securities commissions, with domestic criminal law enforcement agencies like the RCMP's IMET, and with international SROs and regulators like the National Association of Securities Dealers and the SEC.

In the past three and a half years, we successfully completed 165 prosecutions, imposing fines on firms and individuals totalling over $12 million and terminating 25 individuals' and three firms' licences.

But we can do more and we need to do more. Unfortunately, Canadian SROs don't have the meaningful and effective enforcement powers that the committee has declared a necessity in today's capital markets.

We need the ability to compel clients and financial institutions to testify and produce documents at investigations and disciplinary hearings. Without that ability, good cases simply have to be abandoned.

We also need to be able to enforce the penalties imposed by our discipline committees against individuals no longer in the business, as if they were court orders. Without this power, our disciplinary process loses credibility when it imposes well-publicized and substantial monetary penalties but has no effective means to enforce the penalties.

We do what we can with the powers we have—we will not register individuals to work at member firms if they have not paid their fines—but that does not overcome justifiable skepticism about the process.

We were pleased that the committee recommended that the OSC study whether SROs should be given these statutory powers. Nevertheless, the CSA has not supported our request, even though they quite properly hold us to account for our enforcement performance. So we have asked the provincial ministers to include these powers in the proposed uniform securities act in each province.

The IDA also believes there is inadequate enforcement of criminal laws that deal with corporate and securities fraud. We simply cannot allow Canada to acquire a reputation as a haven for white-collar crime. That is why we identified the need for dedicated criminal courts for the prosecution of white-collar crimes. That is the case for youth, for domestic violence and for drug abuse. Capital market investigations require courts and prosecutors with the proper technical expertise. Specialized courts are one means of showing the public that these matters can and will be dealt with seriously. That's why I wrote the provincial attorneys general over a year ago urging them to consider creating criminal courts dedicated to securities and other white-collar crime.

Let me turn now to the committee's recommendation of the creation of a single securities regulator. Calls for reform come at a time when our regulatory structure is being simultaneously pushed and pulled. The centripetal and centrifugal forces at work across the country have created a paradox. On the one hand, more progress has been achieved in harmonizing the content and administration of rules than ever before, including the pivotal work on a uniform securities act and a passport model. On the other hand, there has never been as much divergence in philosophy, content and structure.

Every step that brings provincial and territorial rules more closely into harmony is matched by another pulling them further apart. We have to guard against the very real risk of going backwards, by creating unique approaches or introducing important new policies locally.

As a response, the government of Ontario recently proposed a national regulatory model under provincial jurisdiction. Other provinces favour a passport approach. We believe either initiative would represent substantive improvement to the present system, but each has significant weaknesses.

The passport system will not be comprehensive, since it cannot cope with the fundamental differences that exist between BC and Ontario—for example, the need for prospectuses or the registration of salespersons. The passport will not be harmonized, since it does nothing to narrow the different rules and regulations that prevail across the country. And the passport will not be stable, since it permits provinces to opt out.

On the other hand, a national commission governed by the provinces will require a uniform act, provincial delegation and common fees, but a comprehensive uniform act will be a huge challenge, given BC's distinct philosophical approach, Quebec's civil law tradition, Ontario's focus on international harmonization, and other provinces' concern about small-business financing. Also, delegation can be withdrawn. Several provinces rely on revenue from excess fees, and there is the palpable skepticism about Ontario's potentially dominating role.

A possible provincial compromise may be for Ontario to agree to a passport, provided other provinces commit to a national model within a fairly short time period. But don't hold your breath, unless the federal government makes clear its continuing commitment to significant progress on the file.

The IDA is not committed to a particular model. We do, however, strongly believe there is an urgent need for decisive action and substantive improvement, or our capital markets will suffer, to the detriment of all Canadians.

Let me conclude with brief remarks on several other issues raised by the committee. The committee recommended that SROs require members to be bound by a national complaint handling system, as well as an industry-sponsored dispute resolution system, and advise customers of the availability of these programs. I should tell you that the IDA had already implemented both of these recommendations several years ago when we created an independent arbitration program and when we participated in the creation of the ombudsman for banking services and investments.

The committee also strongly encouraged transparency in connection with such programs. We post arbitration results on our Web site. We issue public notices of upcoming disciplinary hearings and the results of those hearings via media releases. We issue the complete reasons for decisions and settlement agreements. Our Web site also includes monthly reports on the number of complaints under review and investigations in progress.

The IDA is dedicated to making our markets fair and efficient for investors in Ontario and across Canada. I look forward to responding to any questions committee members may have.

The Chair: We'll begin this rotation with the NDP and Mr Prue. Each party will have approximately three minutes.

Mr Prue: I'd just like to zero in on the prosecutions, 165 prosecutions in the last three and a half years. That averages out, if my math is any good, to about one a week. Would that be pretty fair?

Mr Oliver: Yes.

Mr Prue: Is that separate and apart from the dealings? We just heard from Mr Brown. Are these separate from his?

Mr Oliver: Yes, they are.

Mr Prue: So he has two a week that he prosecutes on; you have one a week that you successfully prosecute on.

Mr Oliver: Right. Well—

Mr Prue: Are there other groups that are out there prosecuting? This sounds like the criminal court or the drug court. This sounds pretty bad to me. This is horrendous.

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Mr Oliver: Well, Mr Prue, as the chairman of the OSC pointed out, these numbers have to be put in perspective. There are some 42 million transactions. There are tens of millions of people engaged in the securities market. We're not happy with the number of prosecutions, but that's why we deal with them, to create a disincentive to behaviour which is inappropriate.

Mr Prue: I just want to follow on that. Your recommendation—and it seems to me to be a good one—is to set up a court or courts that have jurisdiction over this type of white-collar crime. It seems there are certainly a

number of individuals probably getting away with a lot more than they should. Is that a pretty fair comment?

Mr Oliver: We're concerned that the enforcement of white-collar crime has not been as robust as it could be. I haven't mentioned some of the initiatives at the federal level. We had recommended to the federal government the establishment of IMETs. I had written to the Minister of Justice to include illegal insider trading in the Criminal Code and to use wiretap evidence and so on. So there is no one magic bullet. This has to be handled at a lot of different levels, federal and provincial. We think that one of the important aspects of this is to make sure the prosecution and the adjudication of these cases is handled with the appropriate expertise and seriousness of purpose.

Mr Prue: And, I would take it also, in a very speedy and timely manner?

Mr Oliver: Absolutely.

Mr Prue: We notice a lot of these prosecutions because they make the news every day in the United States. I don't see them making the news so much in Canada. I don't remember seeing a report on anyone being prosecuted. That's why the numbers are startling to me. We certainly know about Enron and Arthur Andersen and Martha Stewart and all the other hundreds of them. Do they have a better prosecution system, or do they just publicize it more, or is it bigger? Or all of the above?

Mr Oliver: It relates to a number of the points you raise. The cases are bigger. The Enron, the Worldcom, the Delphi cases were bigger. The case involving Martha Stewart was not bigger, but there was a lot of notoriety associated with it. They have shown a purposefulness which sometimes may have been a little overwrought, but nevertheless, over all, was appropriate.

You deal with the cases you have; you don't manufacture them. I think what we're trying to do is focus policymakers on this issue. We don't believe that securities crime is victimless and so we think the penalties have to be tough. The parole system is another matter. We think the parole system is certainly much weaker than in the United States. So that's a reason some people are arbitraging the American and Canadian systems.

As I say, this has to be handled in a variety of ways, and the specialized courts are one element in that.

The Chair: We'll move to the government and Mr Milloy.

Mr Milloy: Thank you very much, Mr Oliver. Just to pick up on the five-year committee and the role of SROs, I take it the IDA is—I'm looking for the proper word—registered, I guess, with the OSC.

Mr Oliver: We're recognized by the OSC.

Mr Milloy: Recognized. And I take it that you would then favour the recommendation that other organizations that aren't recognized but perform the SRO function be recognized or be compelled to recognize.

Mr Oliver: I think everyone who is an SRO has to be recognized in order to operate in Ontario, if they have powers that would go to the securities industry; that is, if they relate to matters under the OSC jurisdiction. There are clearly self-regulatory bodies, like the law society, which are outside the direct jurisdiction of the commission.

Mr Milloy: I'm just picking up on this: "We recommend that the act be amended to authorize the commission to require SROs to apply for recognition where an SRO is taking on activities which are properly discharged by, or subject to the oversight of, the commission."

Mr Oliver: Yes, we would agree with that.

Mr Milloy: You would agree with that. Just following on with that, and perhaps it's not that related, you talk about having gone to the Canadian Securities Administrators to request the statutory powers for SROs. This is page 2 of your presentation, the second paragraph: "We were pleased the committee recommended that the OSC study whether SROs should be given these statutory powers," in regard to enforcement etc. Can you just explain a little bit more the background of that? Also, and I don't mean to put you on the spot to talk for the CSA, but what is the opposition to this? Because your presentation is quite compelling as to going forward.

Mr Oliver: We don't know precisely where the opposition is coming from, but we do know there isn't unanimity among the Canadian Securities Administrators. That is to say, some of the chairs of some of the commissions don't appear to be in agreement, but none of them has told us that they disagree; in fact, no one has raised a point of principle opposed to our getting these powers. After all, as I mentioned, they do hold us to account, and appropriately so, with respect to our enforcement responsibilities.

It is important that we have the ability to subpoena individuals and to subpoena evidence in order to know whether we should proceed with an investigation, and it is important—critical—that we also have that information when a case is brought before a panel. If we don't have that ability, then we simply can't go ahead on some cases where we should.

It also undermines the credibility of self-regulation and undermines investor confidence, which is a critical issue, if we have fined someone $1 million and they don't have to pay. We have had that power; we still actually have that power in Alberta. But under the new Uniform Securities Act, we may well lose it, because it's got to be uniform.

I think the issue was that they wanted to deal with as few matters which were different, when looking at the Uniform Securities Act, as they could. They wanted to get agreement on as much as they could get agreement on in order to push the process through. The result is that the Uniform Securities Act is not as comprehensive as it could or should be, and a lot will be left to individual administrative acts going forward. That's one of the weaknesses. We got caught up in that. The lack of unanimity across the country is one of the problems, and I don't have to tell this group that it's difficult to get unanimity across the country on a variety of issues. That

is, frankly, what we're confronting, and that's one of the arguments that's used by the other side for federal involvement.

The Chair: We'll move to the official opposition and Mr O'Toole.

Mr O'Toole: Thank you very much for your presentation. Just a quick question and then a couple of comments.

You talked about165 prosecutions in the past three and a half years. You are a national organization. Is that across Canada?

Mr Oliver: Yes, it is.

Mr O'Toole: Well, Mr Prue's conclusion is a little heavy, because the OSC was referring to Ontario—

Mr Oliver: Sorry. Which number did you mention?

Mr O'Toole: You said you had 165 prosecutions. This is on page 1.

Mr Oliver: Yes. That was national.

Mr O'Toole: That's a simple question. It looks to me, from your comment to Mr Milloy, that you really need more consistency and powers—subpoena—as well as the enforcement of court orders. Is that really—so I clearly understand. That's also on page 1, Mr Oliver.

Mr Oliver: Yes, that's correct.

Mr O'Toole: So you don't have that today.

Mr Oliver: That's correct.

Mr O'Toole: So you're toothless, really.

Mr Oliver: It's not that we are toothless—

Mr O'Toole: I'm not trying to be smart.

Mr Oliver: By the way, the number is 28 for Ontario. But it means there are some cases, where we need that particular evidence, where we're toothless. In many cases, of course, we don't need that evidence so we can proceed without it, or with a little bit of vulnerability.

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Mr O'Toole: When you look at a national regulator—this seems to be the overarching theme or drive here. Nobody wants to talk about the consumer protection part. They want to get the rule-making, uniformity and streamlining thing dealt with. I think if you look at it federally, it's going to take longer to get harmony in the rules, it will be harder to make rules, more complex and more expensive, more litigious, all the various factions. If you think it's bureaucratic today, wait till it's a national regulator. I'm kind of in favour of it, by the way, for all the reasons of accessing capital more expeditiously.

Then, if you look at the enforcement provisions, you'd almost have to go to the Supreme Court to get a definitive decision. With the lower courts and appeals, 4,000 processes, the poor penniless investor—the small-business person or whatever—can't touch it today, let alone the proposed national big giant. Is that a wrong assumption on my part?

Mr Oliver: Well, there are two issues here. One is structure and the whole disciplinary process, and the other is consumer redress. They're different issues, and they're both very important. But a national commission has to be responsive to legitimate regional interests. It cannot be bureaucratic. It has to operate efficiently and effectively.

The consumer redress, which you and Mr Prue have mentioned, is critical also, but you should understand that we have in Canada, without exaggeration, as comprehensive and robust a consumer redress system as anywhere in the world, and probably better than almost—

Mr O'Toole: Give me an example of that.

Mr Oliver: Well, we have two aspects of it. We have, first of all, an ombudsman for banking services and investments. That is free; it's independent; it's objective; it's relatively non-contentious; it's fast. So if an individual has a problem and they've tried unsuccessfully to settle the issue with their broker, they can go to the ombudsman and they will be heard. It will be costless and it will be objective, and it is totally independent.

In addition to that, we set up, without urging from the public or regulators, an arbitration system earlier. That arbitration system is faster, less contentious and less expensive than the courts. It's not perfect, because it does cost some money, but it costs less than going to court. It is obligatory for our members, but optional for the client. The ombudsman is also optional for the client, but obligatory for the member firms to participate. So for the individual investor, particularly the small investor who is more vulnerable than the large institution, there is a consumer redress system which is comprehensive and robust.

You had mentioned in your remarks earlier the Manitoba system. I think I should tell you that it's been in place for two and half years. We think it's totally redundant, and it has never been used. So it is no panacea, I should tell you.

The Chair: Thank you for your presentation before the committee this afternoon.

Mr Oliver: You're most welcome.

ANTHONY BAZOS

The Chair: I call on Anthony Bazos to come forward, please. Good afternoon.

Mr Anthony Bazos: My name is Anthony C. Bazos, and I was a practising lawyer for 41 years until I became ill and had to stop working in 1993.

The reason that I asked to appear is that, in the 1960s, I defended a case called the $100-million conspiracy. This situation involved charges of conspiracy to commit criminal offences which had extraterritorial effect. I argued that those charges were not valid at law and, to cut a long story short, the accused went to England, jumping bail. He was extradited, but not on those charges. He was subsequently convicted on charges of being in possession of property obtained by fraud, which is an offence under the Criminal Code.

The prosecution in the first instance was instituted by the Ontario Securities Commission. At that time, one of the co-accused wrote a book entitled A Hundred-Million Dollar Conspiracy and I wrote the foreword to it. In it at that time, which was in 1969, I advocated the formation

of a federal securities exchange commission, akin to the SEC in the United States, to cover the big gap that you have concerning extraterritorial offences. That means if somebody calls from outside Canada to solicit a sale of a stock certificate to somebody in Canada, as long as the transaction is committed outside of Canada he can never be prosecuted. But the federal government has the authority to make that a crime, and only the federal government has that authority.

I've seen a number of situations arise where the system cries out for a federal organization so that it can have the powers that are granted only under the provisions of the British North America Act, and they also have the right, regardless of the provincial securities commissions, to set up a federal securities commission. Canada is only one of two countries in the world that does not have a federal securities commission, and they should have.

On top of that, one of the things I would like to see happen is something to protect pension funds for workers in public corporations. To that extent, I would suggest an amendment to the law making those pension funds trust monies. Therefore, they would not be seizeable in a bankruptcy by the company. You've seen this in the United States, where corporations have been prosecuted by the securities commission but they go bankrupt and nothing winds up in the hands of the pensioner. He gets wiped out. You may have a similar situation here, up in Ottawa, that's now being canvassed in the newspapers. But you need, for sure, legislation covering pensions to be independent of general funds of a corporation; in other words, those funds would have to be trust funds and therefore non-seizeable in the case of bankruptcy, nor can they be pledged by the corporation for any other proposition or personal purposes.

The other thing I would like see for the protection of the investor is some limitation on the salaries and bonuses that chief executive officers get. Too much of this is going on and people again are losing.

The final thing I'd like to see is something to be done about these public corporations that are involved with pollution problems. There again, funds should be set aside by the corporation to be provided for in the case of bankruptcies—these funds should not be seizable—to take care of the problems with pollution. You've got pollution in streams; you've got pollution in the air; you have pollution of all types. We're talking about coal, we're talking about nuclear and we're also talking about other types of pollution.

Those are, in essence, the situations that brought me to speak to you about this matter today. I don't know that much about the IDA, but it strikes me that they are opposed, from the little I have heard, to a federal securities exchange commission. But your big problem is that outside countries don't like dealing with provincial officials. You've got a big problem in England as well with the European Union, which is having its birth pains about a federal securities commission. I think that just about covers all I've got to say.

The Chair: Thank you very much for your presentation. We only have time for one question, and in this rotation it will go to the government side. We have about three minutes.

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Mr Berardinetti: Your final comment was with regard to the situation in Europe. You mentioned that there's a federal union there. Are you saying that there's one for the European Community?

Mr Bazos: Each of those countries that belong to this union has its own securities commission. I'm not sure whether anything has been decided about whether the union is going to have one governing body, but I understand that that has been suggested.

Mr Berardinetti: And you're saying that would leave Great Britain out of it because of the fact that they're not part of the monetary system there?

Mr Bazos: I don't know. I don't purport to be an expert on the general union. I read roughly 16 different papers a week. Seven of them are American, four of them are British and the rest are Canadian. That's what I've been doing for the last four or five years. I've regained my health and I'm looking to get back into doing things, but that's irrelevant here.

My main problem is that I've seen the problems that arise where people were defrauded of the monies they'd earned and put into pension funds or whatever. These are serious problems. Something has to be done with them.

I don't know why the federal government hasn't put the powers. They do have the authority under the law to do that. That doesn't mean the provincial securities commissions will get wiped out. They will still exist. But you need a federal securities commission; there's no question about it. All you have to do is ask some of the various countries across the world whether they want to see a federal securities exchange commission in Canada. I'm positive the answer will be that they do.

The Chair: Thank you very much for your presentation this afternoon.

Mr Bazos: I'm only sorry I didn't have more detail to give you concerning the brief that was put together by you people, which is very comprehensive, to say the least.

DIANE URQUHART

The Chair: I would call on Diane Urquhart. Good afternoon to you. You have 10 minutes for your presentation. You may allow time for questions within that 10 minutes. I'd ask that you identify yourself for the purposes of our recording Hansard.

Ms Diane Urquhart: Good afternoon. My name is Diane Urquhart. I'm an investor advocate. I'm a volunteer, so I give my time, knowledge and experience for the purpose of improving investor protection in Canada.

I have substantial business experience from the past 25 years. I have been a top-ranked financial analyst. I've been a senior executive in the investment banking business of Canada working for two major Canadian invest-

ment banks. For a short stint, I was a senior portfolio manager registered with the Ontario Securities Commission. I've been a director of a public company. I worked for the Toronto Stock Exchange very early in my career. Throughout my entire life I have been an active investor.

I would like to officially request that I be allotted some more time, because I do understand we are ahead of schedule since prior speakers did not take their allotted time. I'll make that request again of you today, MPP Pat Hoy.

The Chair: Let me advise the committee that speakers did use their allotted time. The committee did not use all their time for questioning. A request from this presenter was sent to the clerk and to all members of the standing committee's subcommittee requesting extra time, and there was no response. The request has been made now. I would ask, first of all, how much extra time are you seeking?

Ms Urquhart: I would like an extra 10 minutes. I would like the opportunity to make a 10-minute presentation and then any amount of time within that subsequent 10 minutes for questions. If there are no questions, then I'll be finished in 10 minutes.

The Chair: Do we have unanimous consent? I heard a no. You have 10 minutes for your presentation.

Mr Prue: And I would like to move that she be granted seven minutes, which will take us back on to schedule. An extra seven minutes.

The Chair: We have a motion. All in favour of the motion?

Mr Crozier: Well, let me tell you at once that I'm saying no because one witness is asking for time that others haven't had the opportunity to have. I just think it's unfair.

Ms Urquhart: OK. Let me begin then. I believe that means not unanimous consent. I have submitted a 45-page—

The Chair: No, to be correct, we have a motion before the floor.

Ms Urquhart: Oh, I'm sorry.

Mr O'Toole: Recorded vote, please.

The Chair: A recorded vote has been requested.

Ayes

Barrett, O'Toole, Prue.

Nays

Berardinetti, Crozier, Jeffrey, Milloy.

The Chair: The motion is lost. You do have 10 minutes starting from this point.

Ms Urquhart: Thank you very much, Mr Chairman. My subject today is that the Canadian securities enforcement and justice system is not working for investor victims. I believe that fixing the enforcement and justice system is going to be good for the financial industry, good for public corporations in Canada and for the economy.

Certainly fixing the enforcement system is vital to investor confidence and investors placing their hard-earned savings into the capital markets. There's enough risk in equity markets, let alone to have concern about the honesty of the players who are working as insiders in this marketplace.

I do not believe you need to wait for a single securities regulator to fix the enforcement and restitution system of Canada. You can fix enforcement and restitution now. You can do this by fixing the OSC now and by enacting just a few new, key investor protection laws.

This slide—and you've got handouts before you as well—characterizes what you've already heard all morning. There are far too many agencies and authorities in Canada's enforcement and justice system.

The individual investor who has just lost tens of thousands, hundreds of thousands, perhaps millions of dollars—individual investors are not all mothers and grandmothers; there are entrepreneurs, such as myself and many others, who are investors in the Canadian capital markets. When you are an individual investor subject to the abuse by insiders of corporations or if you have been the victim of fraud by a financial adviser, you have to confront this system and figure out who to deal with. You don't know who to go to. You go to a lawyer and, quite frankly, the legal community of Canada often doesn't know the full breadth of the regulation and justice system that's available to individual investors. The bottom line is, this all costs money to the individual investor who has already lost hundreds of thousands of dollars.

These are the laws. Not only are there 13 securities laws, there are 13 different corporate laws; there is federal company law; there is the federal Criminal Code. All this costs money. You either do the research yourself or you go to a lawyer who's supposed to know all these laws. Notwithstanding that, they still have to research in which province the misconduct took place. Believe me, it's very complicated.

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I'm probably the only director in the country who has addressed multi-offence crime in a public corporation. The crimes I faced as a director had me performing a legal obligation to provide information on the misconduct that I observed and was unable to stop. That effected my going to the TSX Venture Exchange, which is a self-regulator. That was for stock trade manipulation unauthorized related party transactions. I had to work with the British Columbia Securities Commission on continuous disclosure misrepresentation; Ontario sent me there. I learned later that Ontario had exclusive jurisdiction for illegal issuer bids paid to a director, an executive officer and other members of the control group. There was fraud involved, and so I had dealings with the RCMP commercial crime unit.

The bottom line: The laws in Canada are useless unless they're enforced. If you're a director of a public

company attempting to be in the front line of stopping misconduct and represent the interests of small investors and shareholders generally, you have no authority to stop that misconduct. You need to have a regulatory or police authority to investigate and prosecute. That is not happening on a frequent enough basis in this country, and I believe that the Ontario Securities Commission, being the lead jurisdiction, is amongst the worst in not conducting a significant enough amount of investigations and prosecutions relative to the crime.

The OSC already has considerable powers to give restitution to small investors who suffer losses. In this table, I show that there are three routes of enforcement action that are available in Ontario to an aggrieved investor.

The OSC staff can prepare allegations and take them to an OSC commissioner panel. That's called an administrative procedure, and that's termed as a violation.

In the 2002 amendments, the Ontario Legislature gave the Ontario Securities Commission the power to make fines up to $1 million, to disgorge all ill-gotten gains and to put those proceeds into a trust fund. Under subsection 3.4(2), that trust fund can be paid to third parties or aggrieved investors, subject to the approval of the minister. The Ontario Securities Commission has not on a single occasion since 2002, when it was put in place, made any effort in any of its administrative proceedings to make use of the trust fund. I recommend that this committee ask them to do so. They have that power today.

It would also be extremely useful to have a new law that in the OSC itself there is direct power for restitution. That needs a new law. But effectively they get the same thing by putting it in a fund and getting the minister to approve its payment.

Ontario Securities Commission staff also have the power, under section 128 of the law, to take a matter directly to court and ask for restitution of aggrieved investors. I don't know how long this has been in existence, but the Ontario Securities Commission has never used that current power.

We heard this morning from Mr Nickerson that there's a tradition not to seek restitution. Well, we have a loss of investor confidence in this country, and so we cannot go by tradition.

There also was a Supreme Court decision that indicated the Ontario Securities Commission is not to take actions which involve the resolution of private interests. Let me say that if you're a small investor in a public company, you do not have private disputes with those insiders who decide to reallocate $6 billion of accumulated prior-year charges and then release them into future earnings. You don't have a private dispute with Mr Dunn, for example, as the chief financial officer of Nortel. It's a public company. If you suffer damages, you would like the Ontario Securities Commission, and the RCMP in necessary cases, to make allegations, to have it adjudicated in a separate court and then to have a restitution fund put together so that those who were found guilty of offences and crimes contribute to some partial, if not full, restitution to the investors that received damages.

The Ontario Securities Commission has a route in the law today, within section 122, to go to the Ontario Court of Justice to get a quasi-criminal offence and to put someone in jail. Today Mr Brown said he does that often. He does that rarely. In 2000 to 2002, there were no cases brought to the Ontario Court of Justice for a quasi-criminal offence charge. There was no one who went to jail during that period. Only recently, because of substantial public pressure, has he decided to take two cases back to the court. On the public record, the head of enforcement has indicated they don't like taking cases to the court because they feel the court does not have the expertise and does not mete out sufficient penalties. So when Mr Brown said this morning that he takes cases to the court for quasi-criminal charges, that has not been his record.

The Chair: I want to remind you that you have two minutes.

Ms Urquhart: OK. I urge everyone to read my report. This next slide simply says that restitution is common practice in the United States and that in the United States, on average, for every $10 billion of GDP there is $1,230,467 in restitution for investor victims. As you can see, no restitution has been accomplished in Canada, but it is prevalent in the United States.

I'd like to turn to the public opinion polls. We have a Canadian public that is not confident in the Ontario Securities Commission and securities regulators generally. The executive survey in June 2001 indicated that 79% feel that securities regulators do not do a good job of protecting the interests of small investors. The Globe and Mail earlier this year found that 55% of those surveyed had weak to no confidence in the enforcement operations of the regulators. I'm a member of the Association for Investment Management and Research: 49% of us said that the Ontario Securities Commission's enforcement was poor to very poor.

The media has had extensive coverage. We have had over 14,000 articles in the last three years. Look at the list of them. I chose 75 in my submission, but we get media headlines like, "The True North Strong and Fleeced: Little Protection for Canadian Investors." Media is a reflection of the public opinion.

Mutual funds sales: If you don't think there's a loss of confidence in Canada, in 23 of the past 26 months there have been, net, hundreds of millions of dollars in sales from mutual funds in the Canadian equity product line. That, I think, is evidence that Canadians have lost confidence in the integrity of Canadian equity markets and are walking with their feet. That does cause economic damage.

There was lots of discussion this morning about whether or not there are a lot of cases going before the commission. This next slide—and we don't have time to go through the details, but in 2003, there were 42 cases

settled or prosecuted. That compares to 745 complaints. So in the last five years, essentially one out of every 23 complaints that came into the Ontario Securities Commission, not including what went to the IDA, got addressed in the form of a case or a prosecution. No wonder investors are not happy with the Ontario Securities Commission's enforcement efforts.

There is one tenth the enforcement staff in the Ontario Securities Commission versus the SEC. They do substantially less than one tenth of the enforcement cases. The productivity per enforcement staff out of the Ontario Securities Commission is less than one half case per person per year.

The hearing days: The implication that Mr Brown gave this morning was that we only have 39 days per commissioner, so we can't go to a separate adjudication function now. What would they do? I can assure you that there is a problem and that the commissioners' working only 39 days out of a 215-man-day year is a problem. We have to ask, why is it that they can only do one in 23 cases? I can assure you, with my experience, the answer is that there is inadequate public interest to use the limited enforcement resources of the Ontario Securities Commission. Yet the implication this morning is, "Let's not have a separate adjudicative panel, because what would they do?" Clearly, they're talking out of both sides of their mouth and it's unacceptable.

The Chair: Thank you. The time for your submission has expired.

Ms Urquhart: Fine. Please do read my submission. There are substantial additional facts along the same lines.

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SOCIAL INVESTMENT ORGANIZATION

The Chair: I would ask if the Social Investment Organization would come forward. Good afternoon, gentlemen. You have 20 minutes for your presentation. You may leave time within that 20 minutes for questions if you so desire.

Mr Eugene Ellmen: Thank you very much for giving us the opportunity to talk to the committee today on this important topic. My name is Eugene Ellmen. I'm executive director of the Social Investment Organization. With me is Rob Gross, a member of the board of directors of the SIO and the chair of our policy and advocacy committee. I would like to speak for about 10 minutes and leave some time for questions.

We're going to take probably a bit of a different path with you today than some of the speakers you've had earlier, who are more concerned about prosecutions and enforcement and the structure of the OSC and some of the issues around self-regulatory organizations. We're going to talk more about corporate disclosure and corporate governance and some of the issues that we think aren't receiving adequate attention, either in the corporate community or in the investment community.

Just by way of background, the Social Investment Organization is Canada's national association for socially responsible investment. We have about 400 members across Canada, which include staff and directors of some of the leading investment fund companies in this area: asset management firms, consulting firms and financial advisers. Our basic mission, if you will, is that our members believe, as financial advisers, as asset managers, that it's important to incorporate social responsibility and environmental sustainability assessments into the selection and management of stock portfolios. This is for two reasons. First, we think it makes prudent investment sense. There is a growing body of evidence that over the long term, social responsibility and sustainability criteria add to portfolio value. Also from a social responsibility point of view, we think that it's a tool to make corporations more socially responsible over the long term.

Our members serve about half a million Canadian depositors and investors. We estimate that the total value of socially responsible investment in Canada is over $51 billion. Those figures are from 2002. Certainly it's a small part of the investment industry but it's a growing part of it. We find that there is growing interest both by individuals and institutions in this investment approach.

So where do we come into this whole question of securities reform? Our view is that over the last couple of years the corporate scandals involving Enron and Worldcom, and plenty of Canadian examples as well, show a symptomatic disregard by many corporations for the interests of stakeholders. Certainly investors are included in that, but not just investors—employees, members of the community, the environment in which companies operate. These scandals show that management is preoccupied with short-term returns, to the sacrifice of long-term considerations such as sustainability and corporate responsibility.

In our brief, we go to some pains to show the weaknesses in the current continuous disclosure regime in Canada. There is plenty of evidence to show that Canadian corporations fail to disclose hidden balance sheet risks involving environmental liabilities, involving potential losses due to employee or community concerns. These corporations are failing to disclose these in the regular investor continuous disclosure documents that they file through current securities regulations.

So what we're going to propose here is a much strengthened continuous disclosure regime for corporations that would basically build the principle under the Ontario Securities Act that corporations need to disclose their socially responsible and sustainability policies, and disclose their risks. That should be a principle that's written into the act.

Certainly, we've spoken to the Canadian Securities Administrators about these issues in quite a bit of detail in the past in their various efforts to harmonize securities and continuous disclosure regulations across Canada. But we feel strongly that it's important that this principle of social responsibility and environmental disclosure should be a part of the act.

In addition, we also want to bring forward the basic point that, in terms of corporate governance, it's not

enough to be concerned about issues such as auditor independence, board independence, CEO and CFO certification of financial statements. It's important for companies to take into account social and environmental considerations when they're designing their codes of corporate conduct.

Our second recommendation in this brief is that the act should stipulate that publicly listed companies should be required to have mandatory codes of conduct, and there should be mandatory content in those codes, including social responsibility and environmental sustainability provisions. If companies fail to include that material in their codes of conduct, then they need to explain why. They need to disclose to investors why they're not doing this. We believe this would help to enhance the notion of corporate governance in Canada, to move it away from a strictly financial definition, which we have now, to incorporate these long-term social responsibility and environmental considerations.

In addition to this, we also address in our brief the issue of a national securities regulator. In order to achieve this enhanced disclosure and governance regime which we call for, it's our strong view that Canada needs a national securities commission. The reason for this is that, internationally, there are other jurisdictions that are much, much further ahead of Canada on this issue of social responsibility and environmental sustainability.

The UK has recently introduced a new law on an operating and financial review which stipulates very clearly that companies will be required to make their social responsibility and environmental policies known. Certainly, in other jurisdictions in Europe this is becoming the case. In South Africa, the King report on company law stipulates very detailed corporate disclosures along these lines.

If Canada is to keep pace with world developments in this regard, it needs a national securities regulator. The current system of trying to harmonize regulations through this Canadian Securities Administrators system is fraught with difficulty. It's a complicated request-for-comment system, and it means that 13 jurisdictions have to basically harmonize their regulations. This is keeping Canada behind on important matters, such as governance matters on prosecution and policy on governance-related matters, and it is also keeping Canada behind on social responsibility and environmental considerations.

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In addition, we also want to make the point that for relatively small fund companies or asset managers—and we have a lot of them in the socially responsible investment industry—with 13 jurisdictions to produce prospectuses for and to register securities in, for smaller players in this industry, it's a much, much higher cost proportionate to the assets under administration than for large mutual funds or the national banks. This puts many of the small players, many of the small fund companies, many of the small asset management firms, at a competitive disadvantage to the larger players. So we believe that both for matters of business and for matters of principle, it's important to have a national securities regulator.

With those comments—I don't know, Rob, if you want to add anything to that—I would be happy to answer questions for our remaining time.

The Chair: Thank you. Your prediction of using 10 minutes was impeccable. We have a little over three minutes for each caucus, and we begin with the official opposition.

Mr Barrett: I understand you're advocating a self-reporting of risk.

Mr Ellmen: Yes, that's correct.

Mr Barrett: In general terms: employees, customers, environment. Has this opened the door to getting more specific, and who decides? Are we talking tobacco, hamburgers, handguns?

Mr Ellmen: Ultimately, it will be up to the company to decide. In fact, many companies file very detailed sustainability reports. Rob could speak to this better than I could. Rob is the managing partner of Michael Jantzi Research Associates, which is the leading social research company on corporations in Canada. But we're basically leaving it up to the company to disclose what their board of directors feels are significant social and environmental policies or risks.

One of the points I want to say about that is that in our brief we do call for a civil liability regime in Canada. That was one of the recommendations of the Crawford report. Once that comes into place and when companies start making these more detailed disclosures, they will become subject to potential lawsuits in the future. That consideration will hold companies to a principled approach on this issue.

Mr Prue: I'm having a little bit of a problem with this because some companies think they're doing wonderful environmental things, as an example, when in fact they're probably not doing anything of the sort. I'm thinking about the nuclear industry, which says, "This is good, clean fuel," except they never say where the fuel's going to end up or that in 100,000 years from now, they're still going to be storing it. Who decides whether or not this is environmentally friendly? They're going to say it is, but is it, in reality, true, and if it isn't true, what does the regulator do with it?

Mr Ellmen: What will happen is, if our recommendations are enacted, there will be a burden on the company to disclose the risks that management already knows about. So if management knows about a risk and has identified it in its audit committee, it will be under an obligation to report that. And if investors find, somewhere down the road, that the stock was hurt by a failure to disclose, then that will give them some legal ammunition to take that company to court.

Mr Prue: But very often these things are disclosed after the fact, after the company has gone belly-up or sold out to some conglomerate or changed its name or ownership. That's usually when all this stuff surfaces. What do you see the investor having at that point?

Mr Ellmen: What we're arguing for here is a disclosure regime that will bring those risks up front. Before

the company really gets into deep difficulty, these disclosures will be put in their annual reports and their management discussion and analysis reports.

Mr Prue: And if these aren't included, they wouldn't be publicly traded?

Mr Ellmen: No, if they're not included and for some reason down the road the company does come into trouble, then this gives investors in that firm a strong case with the civil liability regime as well. The failure to disclose then gives investors a strong case to take that company to court. With that civil liability regime in place, companies' audit committees will be very, very careful about disclosing the risks that they're aware of.

Mr Prue: Part of the argument, though, that is being made around this issue is trying to get things out of the courts, not into them. They're huge, complex and expensive, and at the end of the day only the lawyers profit.

Mr Ellmen: I think, like it or not, because of the aftermath of Enron and Worldcom, investors are becoming more litigious. I think that's a reality of the world in which we live now.

Mr Prue: Thank you very much.

The Chair: We'll move to the government.

Mrs Jeffrey: Thank you for coming today. You make a strong assertion that social responsibility is a key business issue, or is becoming one as time goes on.

I read your brief. You make what I think is a provocative statement, so I'd like to challenge you on it. You indicate that "by requiring corporations to disclose their social and environmental risks and policies," it will help "shape an investment community that is increasingly sensitive to non-financial opportunities and risks. This can only help to enhance long-term shareholder returns." How do you support this assertion? Do you have any facts?

Mr Ellmen: We didn't include a lot of those data in the report, but if the committee members are interested, I could certainly direct you to numerous studies on this. There are numerous academic studies in Canada, the United States and Europe that support this. Most recently there was an academic study of the Canadian situation, using research from Michael Jantzi Research Associates—it was published in the spring issue of the Journal of Investing—showing that when socially responsible companies' share performance is compared with conventional companies' share performance, there's really no difference.

We have evidence, in the socially responsible investment movement, from various stock indexes that have outperformed conventional stock indexes. The one in Canada is the Jantzi Social Index. Since it went live in 2000, it has outperformed its comparable benchmark in Canada. The longest-standing one in the United States is the Domini 400 Social Index of 400 socially responsible stocks. When it's compared to the S&P 500, its conventional benchmark, it has consistently outperformed the S&P 500 since the Domini was started in 1990. The indexes in Europe—FTSE4Good and the Dow Jones Sustainability Indexes—have outperformed their conventional benchmarks as well.

Certainly the academic research either shows that there is outperformance or no impact on performance from social responsibility. Our experience in the socially responsible investment movement is that over time it only makes sense that companies that are responsive to their communities, keep themselves out of court on environmental liability and keep themselves out of controversies in developing countries have the best share performance over the long term.

The Chair: Thank you for your presentation this afternoon.

INVESTMENT FUNDS INSTITUTE OF CANADA

The Chair: I would call on the Investment Funds Institute of Canada to come forward, please. Good afternoon. You have 20 minutes for your presentation. You may allow for questions within that 20 minutes, if you so desire. I would ask you to identify yourself for the purposes of Hansard.

Mr Tom Hockin: Thank you, Mr Chair. My name is Tom Hockin. I'm president of the Investment Funds Institute of Canada, also known as IFIC. We represent the mutual fund industry in this country. We now are approaching $500 billion in assets in the mutual fund industry. It's about the same now as private pensions and deposits. So it's important to all of you and half of all Canadian households, probably in all of your ridings as well, who own mutual funds.

Our association includes fund managers, the retail distributors, and all the major affiliate firms: legal, accounting and other professions.

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I'd like to thank you for this opportunity to comment on the five-year review committee's final report reviewing the Ontario Securities Act. The five-year report recommends that the provinces, territories and federal government work toward the creation of a single securities regulator.

For many years, our institute has articulated a clear and consistent message: Our industry needs consistent rules, consistently applied across Canada, and we need it yesterday. Piecemeal reforms and incremental change are not enough. The reason we say this is that there is nothing about the mutual fund product that has to be tweaked to suit a region. It's a product that's suitable right across the country, and there shouldn't be different regulations about how it is put together in the country. Even the distribution of it requires very few regional tweakings.

Our industry, then, operates nationally, but it's regulated provincially and territorially. This fragmented model creates enormous duplication in compliance costs, and these costs are not borne by the companies. They are borne by your constituents, the unitholders. That's who pays for it. In fact, the fund industry is one of the major

suppliers of fees to the securities commissions in this country, somewhere between a third and a half.

Fund managers and fund dealers now must develop compliance and operational procedures that reflect the different rules that apply in each jurisdiction. This leads to significant implementation and training challenges. Information systems, for example, must be programmed and compliance personnel have to be trained to operate under 13 different sets of rules and regulations for this product which should be uniform across the country. There are a number of other domestic and international problems that flow from this patchwork, and I may be repeating some of the things you've heard earlier this afternoon.

Regulatory costs are exceptionally high, and it's a clear barrier to growth for a small market like ours. Regulatory costs are going up for mutual fund unitholders. What the fund industry—we're on the buy side—would like is lots of public companies that we can buy and choose among. That's what we want. But multiple costs make the Canadian market less attractive to international and large domestic issuers, because the cost of capital becomes too high, so we have less to buy. And multiple, poorly coordinated regulatory authorities make it confusing and difficult to know how to fulfill regulatory obligations across Canadian jurisdictions. For our product, some of them contradict each other.

So what are we to do? I'm not one who always likes to look to our neighbours to the south for an answer, but let's just look at what happened in the US. They have 50 states. The US Congress recognized that uncoordinated and overlapping federal and state securities regulation was a serious threat there to the efficient operations of their capital markets, and they have a much larger market than we do. The American efforts at fostering more coordinated administration of their legislative framework had to contend with reconciling the interests of 50 different state regulatory authorities, 50 different provinces or OSCs. The US, however, has made great progress in navigating these challenges with the implementation of the National Securities Markets Improvement Act of 1996 and the 2002 Uniform Securities Act. In light of the success of our biggest market competitor, IFIC believes there is no longer any continued justification for a regulatory model that fragments Canada's much smaller capital markets.

Let me speak to securities reform and the multiple reviews.

Financial associations from all industry sectors—you've heard from the IDA; you'll hear from the CBA; you're hearing from me now—are all noting the need for securities regulatory reform. Unfortunately, there are an unwieldy number of reform proposals underway. Many of them are positive and needed, but just as many have the potential to further impede the progress of an already overburdened industry. For example, the federal government convened a Wise Persons' Committee; provincial Ministers of Finance recommended the adoption of a passport system; the CSA embarked upon the uniform securities legislation project; the province of BC is currently implementing sweeping reforms, on a principled basis, for its securities legislation; and the province of Ontario released the five-year review committee final report. The volume and complexity of all these initiatives are now before all of us to consider, and they demand a lot of time from industry players and great effort from stakeholders if they are to be analyzed and commented on. All of us in the industry, I must tell you as legislators, have found it challenging to prioritize all of this: Which ones should we spend a lot of time with; which ones should we not?

To do this effectively, we all need to know how the various initiatives, including the one before you today, the five-year review report, interact and affect each other, and ultimately how regulators envisage our regulatory system as a whole when the various proposals are considered and completed.

Irrespective of who is leading which review, IFIC's message is always the same: The ultimate goal of any restructuring of the regulatory framework of our country and our industry must be to institute one set of rules that can be consistently interpreted and applied across Canada.

Let me speak to the adjudicative tribunal role of the OSC.

The review report noted that the OSC is a multi-functional administrative agency discharging a number of different and overlapping roles at the same time, including making policy, conducting investigations, and sitting as an administrative tribunal. The review questioned whether this structure gives rise to perceptions of potential for conflict or abuse, and recommended that the current OSC agency structure be given further thought on a priority basis.

I'm impressed by all the OSC does. It's easy to criticize them. But there is, I suppose, some potential for conflict, and the potential for perceptions of conflict is likely to increase as the OSC becomes more activist in its approach. When I say "activist," let's note that in the past few years, the OSC has increased its staff, introduced a new fee system, introduced a new revenue stream, undertaken more policy initiatives, and placed a new focus on consumer and investor complaints. There is also a perception within the industry that the OSC has been creeping somewhat toward an increasingly social-engineering bias to marketplace issues, beyond the scope, in the view of some, of its mandate. For example, a recent OSC survey on mutual fund dealer practices asked questions dealing with client service. It is IFIC's position that the OSC should focus its attention—it's got a lot on its plate—on its core mandate, compliance with rules, and leave nuances around client service matters to providers in the marketplace.

Another example of concern is the trend of the OSC commissioners to speak out publicly in support of an OSC policy initiative that has not yet progressed past the proposal stage. Endorsement by commissioners of draft OSC policy initiatives prior to having navigated the

public consultation process has the potential to inappropriately influence input on OSC initiatives from market participants. It also creates a reasonable perception of bias on the part of the commissioners in the eyes of some industry participants—we don't want that; I don't see too much of that, but I don't think they would want that either—who may subsequently appear before the commission either as defendants or to seek discretionary relief.

In considering this issue, it is worth noting the report's comments on a separate but related issue. The committee noted that trade associations advocate on behalf of their members' commercial interests, but as a regulator, each SRO sets requirements that govern the conduct of its members to protect the investing public. While the report does not recommend the separation of SRO trade association and regulatory functions, it does recommend that certain SROs consider whether improvements can be made to their structures to lessen perceptions of conflict of interest in regulation.

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A similar argument could be applied to the OSC and whether its policy, investigative, and adjudicative functions could be structured differently to help it in lessening perceptions of bias when an OSC commissioner has publicly expressed opinions on a proposed policy. Fortunately, this kind of behaviour has happened very seldom, but it has occurred with regard to the mutual fund product from time to time. So IFIC agrees with the need to examine the OSC's adjudicative tribunal role, and we look forward to reviewing and commenting on the OSC's study on its quasi-judicial structure, led by the Honourable Coulter Osborne.

This committee's review, the work of all of you here, will contribute greatly to the ongoing debate about streamlining Canada's cumbersome and fragmented securities regulatory structure. I'm very pleased that you've allowed me to appear before you. We applaud the work of the Legislature in regard to this. We appreciate your consideration of my comments today and would be pleased to discuss them further with you. I have a written submission as well.

The Chair: Thank you very much. I believe committee members have your written submission.

We have about three minutes per party, and we'll begin this rotation of questioning with the NDP and Mr Prue.

Mr Prue: I'd just like to go back to your comments about Coulter Osborne's report. Obviously you probably haven't seen it yet. OK. So anything you've heard, you heard in this room today.

Mr Hockin: And not very much.

Mr Prue: And not very much, no.

His report, in a nutshell, at least around the issue of the adjudication function, is that in the appearance of fairness and in an effort to make the Ontario Securities Commission work better, he recommends that it split off and be separate and apart. That is, I think, in a nutshell, pretty fairly what he said.

Do you support that kind of approach? I know you haven't read it, but I just want to hear where you're coming from as a major investor in the market. We heard the OSC equivocate, I think, try to walk on both sides and give arguments pro and con. I would like to hear what you think about having an independent quasi-judicial body, separate and apart from the OSC itself.

Mr Hockin: Well, I think the OSC's position up to now has been quite open on this. Factually, right now, they're handling this as best they can. I would side on the view that they would benefit from a separation, that they would find their work easier, and that the public would be more comfortable with the separation. But this is my private view. I haven't consulted with all my member companies on this.

Mr Prue: I can imagine.

You also talked about the development of a national policy and how that would affect—as an investor, you can invest literally anywhere you want. I'm not confined to investing in Canada. Even with my retirement funds, mutual funds, there's a certain percentage that can be outside. You know, you hire somebody; the markets are worldwide. Why do you need to have a single national—I'm just playing devil's advocate. I think it's a good idea, but why do you need to have that when I can invest in New York or Japan or London or on the DAX or anywhere I want by picking up a phone?

Mr Hockin: There are two reasons. First, this country needs to mobilize private investment to help companies grow and create jobs and to provide exports and so on. It can only be done either through private angel investors or by going public. We in the mutual fund industry—let's say you're running a Canadian mid-cap mutual fund. We would welcome more and more mid-cap companies to choose among so we could maybe sell the bad companies that aren't doing too well and have some good ones to buy. So we're an industry on the buy side that wants to have more choice, not only for the creation of jobs for the people who are going to be hired by these new companies, but also as a source of new issuers for us to buy and to allow our Canadian content, which is restricted, which is required in your retirement plan and mine, greater diversity.

The Chair: Thank you. We'll move to the government and Mr Milloy.

Mr Milloy: I want to thank you, Mr Hockin, for your presentation. I also appreciate the fact that you kept your presentation to one or two key issues. But at the same time, even though I only have a few minutes, I can't let this pass by without asking you—and I know you have some other material you submitted—where your institute has landed in terms of the very interesting recommendations on mutual fund governance. I realize you only have three minutes, but I thought I'd give you a chance to go on the record as to the different recommendations about an independent governance body for—

Mr Hockin: Of a mutual fund.

Mr Milloy: Yes.

Mr Hockin: Let me give you an example. Let's say you own the Royal Bank Canadian equity fund. It's now

prohibited by statute for that fund to own Royal Bank stock, even if it's a great stock to own, or to buy an initial public offering in the first 60 days from one of the subsidiaries of the Royal Bank. The OSC quite wisely thinks this is unfair to people in the Royal Bank Canadian equity mutual fund. They have been giving exemptive relief to fund companies that have put in place independent directors who would review those transactions and say, "We don't own those securities," because they couldn't find anybody else to buy them but because they're very good securities to own—we support that. We believe unit holders need not be punished by these prohibitions and limited by these prohibitions but to have independent directors who could make the call on this and say, "This is quite a suitable security. We totally support it."

Also, the independent directors could help the manager identify potential conflicts of interest out there and ask questions like, "Why are you always using this brokerage firm instead of another?" or, "How come you allocated all the expenses for the funds this way across these 90 funds instead of that way?"

So we've been very supportive of having an independent review committee as part of the board of a fund company. A number of our fund managers now have it. They've been smart to do it, because they've been able to get exemptive relief in some of these related party matters.

Mr O'Toole: Thank you very much. As you said in your opening remarks, most of us are probably involved directly or indirectly with the mutual fund issue. I think Mr Milloy has asked the right question in terms of governance. That seems to get a fair amount of media attention, and I'll be satisfied with that.

I'm reading from your report and, in a general sense, you say that you'd like to see the adjudicative function of the OSC examined. Coulter Osborne has been put on the record today as saying that in the absence of clear and convincing evidence, he would not recommend structural change, and yet if you read the conclusion on page 32, you see he's done that. So there must be clear and compelling evidence and all the rest of it. You'd be happy to see this committee make some strong recommendations on that separation.

You've said here that you're not speaking for the industry; you haven't had time to consult. But you work with this all the time and it's the perception issue, really. There are no accusations being made; it's perception and resources, technically. Maybe the government is going to have to step in and put some of that infrastructure in place, freeing up the current revenue from the OSC to do more due diligence in its cases. I'd like to think that I would be using that as a reference in the future, that you'll be consulting and advising this committee what your membership thinks?

Mr Hockin: Yes, I will. I don't think I want to add to anything I've said to Mr Prue. I think the present OSC commissioners honestly believe that they've separated the two, and I respect that, but I think they would get more comfort, as would the public, if there was a separation.

Mr O'Toole: Yes. I just wanted to put on the record too that it was mentioned before that there's probably an opportunity here to look at—it's such a technical and specialized area. A new court system has been mentioned before, and if you look at the commercial list courts, you would probably be very familiar with the disclosure and very technical regulatory framework, as opposed to a general law.

In most cases, in my understanding, most of these hearings go to the general court, as opposed to the commercial courts. Maybe that would be something the OSC could initiate on its own. Do you understand the difference?

Mr Hockin: Yes, it's a proposal that might be worth their following up.

1550

Mr O'Toole: Is there some signal the OSC could send that would ensure the clarity of the distinction between the regulatory role and the quasi-judicial role?

Mr Hockin: Beyond structural reform?

Mr O'Toole: I'm saying that commercial list courts could say, "We would recommend that the government allow us to send them to a specialized court." They would initiate that, giving them some appearance that they're trying to make sure there are specialists in this court setting, independent, that we could refer to, as opposed to the general court.

Mr Hockin: I'm not an administrative lawyer, but I must say they'd probably have to get comfort from the Legislature that they could do this kind of devolution.

Mr O'Toole: They're supposed to consult with the minister. It's very important.

Just one last thing: Public sector pensions technically are heavily invested in mutual funds. Some of them are moving their funds into real estate and other kinds of institutions. Most of us in mutual finds have no idea what the portfolio is, really. It's just a codified title of a whole series of balance of risk and reward.

Mr Prue: It goes down.

Mr O'Toole: Yes, it does down. I know that.

Mr Hockin: You can find out what's in your mutual fund. At the end of the month you can see what has been in it.

Mr O'Toole: But you can't tie it to—

Mr Hockin: You can't tie it to what's in it right today because the fund manager doesn't want to be copied. If he's a good fund manager, he doesn't want other people copying him. Therefore, they give you this sort of lagged report and what's in it. But you have to understand that your mutual fund has very clear objectives. If it's fast growth in Canadian equities, then it has got to do that and it can't drift off that style. If it's something more conservative, it can't drift off that. Make sure your fund manager keeps to his style and keeps to his objectives. That's an expectation you're entitled to have, because that's what they disclose in their prospectus.

The Chair: Thank you for your presentation this afternoon.

CARP—CANADA'S ASSOCIATION FOR THE FIFTY-PLUS

The Chair: I would ask CARP—Canada's Association for the Fifty-Plus to come forward, please. Good afternoon. You have 20 minutes for your presentation. You may leave time within the 20 minutes for questions, if you so desire. I would ask you to state your name for the purposes of Hansard.

Ms Lillian Morgenthau: Before I begin, I know you've been here for a long day and I would like to thank the members who have stayed to hear the latest and the last of the day. It's been a tough time. Now I'll begin.

My name is Lillian Morgenthau. I am president and founder of CARP, Canada's national organization for the 50-plus. I would like to thank you for the opportunity to present our brief on the five-year review of the Ontario Securities Act. This act, which establishes the Ontario Securities Commission, has a great influence on the quality of life of seniors. These seniors depend on their investments in the marketplace for their retirement income. It is, of course, the responsibility of the OSC to ensure the honesty of financial advisers and investment firms.

Before I continue with my presentation, I want to briefly introduce you to CARP, if you don't already know about it, and if you don't, you should be ashamed of yourself.

CARP is Canada's Association for the Fifty-Plus. We are a non-profit organization with over 400,000 members across the country. Our magazine, 50Plus, is read by almost one million Canadians, and our Web site is accessed by 250,000 unique individuals per month. We receive no operating funding from any level of government. Our mandate is to promote and protect the rights and quality of life for older Canadians, and our mission is to provide practical recommendations on the issues we raise.

Needless to say, we come before this review committee without any vested interests in the financial industry. Rather, we speak for consumers whose only interest is survival, and especially today, when the interest level on their retirement funds is so low that the amount of money they thought they would have when they were retiring has gone out the window. So, this particular committee is of great importance.

We applaud the Ontario Securities Commission for its policy of engaging knowledgeable consumers on their various committees. This policy is also workable for the tribunals. As well, the investor education fund is on the right track by collaborating with organizations like CARP to educate consumers on the mechanics and intricacies of investing.

The marketplace is to be protected, and it must be protected in every single possible way against scams and frauds. Every day there is a new scam and a new fraud, and older people who grew up in a time when the doors were open and you were polite find it very difficult to hang up when someone calls and offers them something. This is one of the things that CARP has been doing. We have been telling our members: "When you get an offer that sounds good, is too good. Hang up. If it's really important, then they will call you back."

I remember one of our members saying that someone called them and told them that they had just won a Cadillac. They said, "Wonderful. What colour is it?" He said, "It's black." He said, "Oh, I don't want that; I want a white one," and hung up. That's what you should be doing.

At the same time, we suggest that the Ontario Securities Act enable the OSC to adopt a proactive approach to protecting consumers against wrongdoing by financial advisers and investment companies. We should take Eliot Spitzer in New York state as a model.

To this end, the OSC should adopt a policy of immediately informing consumers of any actions initiated against financial advisers and investment companies. They should suspend their financial activities while they are under investigation, and vigorously prosecute those found guilty with appropriate fines and even imprisonment. If charges against them are found to be baseless, then they should be well publicized. Improper, misleading or false advice and actions by financial advisers and investment companies must be legally recognized for what they are: a form of fraud and scam, and certainly of elder abuse.

Those on the receiving end of such activities have limited, if any, recourse to recoup any losses they incur because of the time and expenses involved. So-called white-collar crime must be dealt with seriously. Let us understand that we're talking about people over 50, and people over 50 are the ones who have accumulated, hopefully, enough to invest. So, they are the major investors in any of the mutual funds.

Regulation of the mutual fund industry is of particular concern to CARP. Therefore, a partnership with the Small Investor Protection Association (SIPA) and CARP has written a report with recommendations on the reforms required to ensure the protection of small investors in the mutual fund industry. This report will be released shortly at a press conference.

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Our recommendation in the report reiterates the point we made last year to the provincial financial ministers who were examining the interprovincial framework on securities regulations. What we want to see is the creation of a single national regulatory agency jointly administered by the provincial, territorial and federal governments. In this way, harmonization of securities regulatory standards can be achieved across Canada, and this will ensure that investors are protected. Canadian investors must feel protected regardless of where they live. A Canadian is a Canadian. Regulations should follow investments across provincial lines. I must point out that Premier McGuinty and Finance Minister Sorbara have both endorsed the establishment of a national regulatory agency.

Before I close, I must comment on the selection process of this committee. It is my understanding that it

did not permit all of those who expressed interest in appearing before them to do so. This is not the first time that CARP has encountered this undemocratic procedure by legislative committees, and it is undemocratic indeed. It brings into question the validity of the consultation itself.

As an expression of our opposition to this policy, we actually debated whether to appear before the review committee at all, assuming we would be selected. But as you can see, we decided to do so, because our message is important. Our goal is to work with governments in a constructive way, and I trust that our remarks will be accepted in that manner. Thank you.

The Chair: Thank you for your presentation. I want to just point out to the committee and to you and those in the audience here that all persons who applied before the deadline were accepted for these hearings. There were some, however, who, given that opportunity, chose to withdraw. But everyone was accepted who applied before the deadline.

Our first round of questioning—we have about three minutes per caucus—will begin with the government.

Mr Milloy: Thank you very much for your presentation. I think what is very important in your presentation is that you draw the link that this isn't about people with suits on Bay Street but this is about the small investors, the pensioners and individuals like that. I just wanted to, first of all, applaud the work that CARP is doing in raising this awareness and ask about any specific steps you're taking to try to turn this into a doorstep issue. We weren't going around in the federal campaign talking about a national securities regulator. Yet, as you point out very forcefully, that probably has a lot more to do with the pocketbooks of average Canadians, especially those who are in their retirement years, than a lot of other issues.

Ms Morgenthau: First of all, we have put together a very good brief on giving small investors a fair chance. This will be released at a press conference coming up in September, to which we will probably invite some of the ministers. But it is essential that the consumer be the one you look at. It is essential that the recommendations we make are looked at with gravity. There are so many out there for mutual funds, for stocks and bonds—this is all economics. I remember that the first thing my economics professor ever said to us as students was, "Ladies and gentlemen, everything, but everything, depends upon economics." I was a 17-year-old girl with stars in my eyes, and I thought that he was awful. But life has taught me that it is all economics.

So what we do here is to make sure that the economics of your parents, your grandparents and the sandwich generation, don't get messed up, that the money they worked so hard for doesn't go for fees, doesn't go for anything that isn't disclosed. If we all keep our eye on the consumer, which we all are and which you will be, as God gives you years—this is important. We have to look at the consumer and protect them, because they really don't know what fees are out there, whether it's a good investment, whether it isn't. If you have an adviser who doesn't look to you, then you have an adviser who is going to play you false. That's what this committee is all about.

The Chair: We'll move to the official opposition, Mr O'Toole.

Mr O'Toole: We both have a quick question, Mr Barrett and I.

SIPA sent us a report speaking to the issues you bring to our attention: retired persons. This is Hayward v Hampton Securities. She won in a lower court, and it was overturned in a higher court. It took her from when she was 80 to 92 to get a decision on something that affected her source of revenue. One of the most important considerations of this committee is the potential separation of the judicial functions of the Ontario Securities Commission from the regulatory functions. Do you think it would be better served to have the disputes resolved in a different forum?

Ms Morgenthau: Yes, I do, actually. I'm sure that everybody disagrees with me, but I think that the Ombudsman and arbitration on a lower level, first of all, would be much easier on the consumer.

Mr O'Toole: Less expensive.

Ms Morgenthau: And much less expensive. I think we should look to making sure that it is a good form of arbitration. Courts, as you said before, are very expensive, and the only ones who really make the money are the lawyers. I don't have a lawyer in my family, so I really am not interested. But you know what I'm saying. Basically, if we can do it on a low level, on a level of arbitration, where the Ombudsman really must come in, then that's good. But you have to have enough ombudsmen. You cannot have one in a province. You have to have a true amount. If we can do that, we're away with the wind.

Mr Barrett: Much of our discussion has been on regulation and enforcement. You mentioned fees. Do you feel there is much information or education?

Ms Morgenthau: No.

Mr Barrett: I've got a few brochures here. There's a picture of a nice cedarstrip boat here and a number of people with grey hair, like myself. In the small print, fees and commissions are mentioned. People who want to know about it are directed to the prospectus.

Ms Morgenthau: I think you're 100% right. I think it is something that never seems to come forth. You don't know if it's front-ended; you don't know if it's back-ended; you don't know what they're charging; you don't know whether the next level is charging; you don't know who gets what or why. If you're informed and you know these fees and you agree with them, fine. But if you think that you're getting a free ride, you're not.

The Chair: We'll move to the NDP.

Ms Morgenthau: Hi, Mr Prue.

Mr Prue: How are you today?

Ms Morgenthau: Pretty good.

Mr Prue: Excellent. My question comes from page 5 of your prepared statement, wherein you write, "What we want to see is the creation of a single national regulatory agency jointly administered by the provincial, territorial

and federal governments." I'm just trying to get my head around how you envisage this happening. I think the closest thing I can think of is probably the Criminal Code of Canada, which is an act of Parliament, the federal government, but it is administered in each of the provinces and territories so that the judges, lawyers and courts are a provincial responsibility. Is this what you see: having a federal law related to regulation of stocks and securities but provincially run like the courts are run? Is that what you're recommending?

1610

Ms Morgenthau: I think the mechanics of this have to be something that people sit down and work at. It's very difficult for the provinces to give up anything, as we all know. But when you have an investor in Ontario who has invested in Vancouver and it has gone sour, do you know that you have to go out to Vancouver?

Mr Prue: Yes.

Ms Morgenthau: That's ridiculous, isn't it—first of all the money that's involved and everything else? So if we can get ourselves somebody at the top whom you can go to with your complaint and say, "Look, I invested in Vancouver in good faith and all of a sudden I have a bad deal, but I can't go out to Vancouver." Do you know what happens? That bad deal stays out in Vancouver, you lose the money in Ontario and life is very cruel. So let's work at something we can do that will put us together and say, "We want it for the consumer. The consumer is actually the person we should be looking at." I think if we get someone in a committee who is at the top and put on the committee somebody from every province and territory, maybe that will work. No province really wants to give up anything, so we have to make it plausible and something they will do, not only for them but for the consumer, for their people. Maybe that's idealistic, but then what's CARP all about?

Mr Prue: Exactly.

The Chair: Thank you very much for your presentation.

Ms Morgenthau: Thank you very much for having me, and don't forget that everybody has to be able to come and say what they want in the ideal forum.

ROBERT VERDUN

The Chair: I would ask Robert Verdun to come forward, please.

Mr Robert Verdun: Thank you for hearing me. Winston Churchill said in 1940 to Franklin Roosevelt, "Give us the tools and we will do the job." As an investor, I'm asking you to give us the tools so that, as much as possible, we in the marketplace can do the job, because we don't want to rely unnecessarily on bureaucrats.

Self-regulation can work if the organization in charge has the right tools and the right direction. Certainly self-regulation works very well in the real estate industry and, Mr Prue, there are huge numbers of complaints in the real estate industry and they get resolved. That's the target that I think you need to do. Let's make sure that the IDA works, and if it doesn't, then get something that does work so that those kinds of complaints are dealt with efficiently. The marketplace will do it, because there are lots of agents and brokers who will complain about their colleagues because they don't want to endure unfair competition. That's what happens in the real estate industry all the time. So self-regulation really can work.

My bigger concerns, though, are about the whole issue of corporate governance and how investors can do a better job of regulating the company. My biggest experience was fighting with the TD Bank all the way to the Supreme Court of Canada over the shareholder proposal system. I lost the battle but won the war. It was a very expensive procedure and I won't do it again, but corporate governance in this country is much improved and I'll take some of the credit for that. Other people have been involved as well. But there's a good example of how the market can regulate itself. So we do have much more responsive corporations in terms of corporate governance through the shareholder proposal system. Corporations do not like having to be held to account that way, because the shareholders do have the direct authority of the board of directors on a referendum basis. So that works.

What doesn't work in this country is that there is no place for me to turn when I have a significant problem. For example, right now Manulife and Sun Life, the big demutualized insurance companies, are abusing participating policyholders terribly and there is really nowhere to turn. That just did not get addressed properly in demutualization, and there is nowhere to turn. The OSC would be useless in its current attitude.

There is a really egregious example, where I just finally had to sell my shares. An organization that started out as Municipal Trust Co, became Municipal Financial Corp, became Municipal Bankers Corp, became Newco, and at every stage of the way the people who controlled the company enriched themselves and hurt the shareholders. Again, nobody paid any attention at the OSC. I tried to get them to do something about it. This is an organization where the insiders were involved in vanity publishing, among other things, that had nothing to do with the business they were in. They continued to spend huge amounts of company money on their own company for providing services to the public company, and there wasn't anywhere to go on it.

The problem I also see is that the foxes are in charge of the henhouse. You're going to hear from Purdy Crawford tomorrow, and Purdy Crawford, I respectfully submit, is one of the worst examples of someone abusing the position that you can have in big business.

He was CEO of IMASCO, Imperial Tobacco's holding company, which, in 1987, bought Canada Trust. Under the law, Canada Trust was supposed to have 35% of its shares widely held. The federal government gave them a 10-year exemption to comply, and Purdy never intended to comply. He kept asking for a permanent exemption, and finally, on the last day of that 10-year period, they created the fiction of 35% of the votes being

cast by a little class of preferred shares. Have you ever heard of voting preferred shares? Well, it was a farce. I owned a bunch of them and I never had a vote. When he came to sell the company to TD, there was no vote. The whole function of the law which was supposed to be—the 35% was set so that the dominant shareholder at least had to put it to a vote and had to get more than 67% approval to do a major transaction, selling the company. He never had to do it, and he got away with it because he's Purdy Crawford.

This is what I see happening. Nortel's a good example. After the greatest pump and dump in Canadian history, perpetrated by John Roth, nothing happened. The board of directors is still there. At the very least—and this is coming down to my key point—there should have been a supervised election of a new board of directors.

As I'm sure you're all aware, there's no such thing as corporate democracy. Boards of directors are all elected by acclamation. They're all insiders, they're all members of a nice, cozy social club, and real investors are not welcome. Boards of directors do not represent individual investors; they represent the interests of the corporation.

Mostly, they do a good job. I'm not casting aspersions widely on this, but the problem is, when there is a bad situation, like Nortel, they stay in office. In fact, if there had been a supervised election of a new board of directors, we wouldn't have had the next step, which was Frank Dunn doing a dump and pump. I was there in 2002 at the annual meeting. I questioned them for almost three hours, because I kept seeing things in their financial statements that showed the company was actually doing better than they said it was. I had no idea how much I was right on the money. That's what they were doing. They were grossly understating their position so they could return to profitability more quickly and just do the reverse of what they had already done under John Roth.

Again, there's no one to turn to on that. I held them to account in the marketplace, but this was a case where there needed to be a tribunal of some kind which is accessible, affordable, expeditious and, I would add, sympathetic. In my battle with the TD Bank at the Supreme Court, thank goodness the Supreme Court of Canada was sympathetic. But the judge at the first level in Kitchener and two of the three judges at the Court of Appeal of Ontario basically said, "Run along, sonny. You can't be playing in the big boys' sandbox. You don't belong here." Fortunately, as I said, I prevailed in the end and the Supreme Court of Canada said shareholder proposals should be taking place. That is exactly what the law intended they would do: that shareholders can have a direct role in improving the corporate governance of the companies in which they invest.

There's my basic position. I hope there's time for a few questions.

The Acting Chair (Mr Bruce Crozier): We have three minutes, so I think what I'd like to do is have the official opposition ask one question.

Mr O'Toole: I think it's rather unfair. A very interesting presentation—

The Acting Chair: What's unfair?

Mr O'Toole: I'll just say it's hard to frame the question here in three minutes.

Mr Verdun: Fire away, John.

Mr O'Toole: Just quickly, you seem to be more on the consumer advocacy side of the issue. A specific question might be, for fairness and the perception of fairness—I think Mr Brown and everyone else has said it, including the most recently tabled Coulter Osborne report. The separation of the judicial function: Is there a way, in your experience, you can see that that could be handled but still retain some of the insightful, business-related acumen necessary to make those kinds of rulings and informed decisions? What would that be?

1620

Mr Verdun: Absolutely. I definitely see this is the direction to go. With the separation what happens is you have two dynamics. Now, you have the investigators who don't have a judicial role. So they have a mandate to really get out there and dig into it and find out what actually happened. They can be a little biased. They can really dig into it, because it's somebody else who has to sit in judgment. Then, your people who do sit in judgment need to be specialists, and they need to be carefully chosen so that, as I said, they're sympathetic as well to the point of view of the individual investor.

If you have that separation and have the right people in place, then the things that I'm talking about will get done, and an investor will have confidence and reason to involve the OSC so that some of these things—like I said, with Nortel, if I had known there was an agency to go to with what I saw in 2002, I would have gone and said, "I think these guys are now intentionally understating their finances." But there was nobody to go to.

Mr O'Toole: I guess my point is the retired justices of the commercial list courts probably, if there isn't enough workload volume, would be familiar with the issue; had in many cases practised law in the area and then latterly on the bench. I just feel that needs to be stated, because they're going to say, "Well, who can actually understand this myriad of regulations and rules and players," as was described earlier by Ms Urquhart.

Mr Verdun: Well, that's absolutely essential, because in my experience of going from the Superior Court of Justice in Kitchener to the Court of Appeal to the Supreme Court of Canada, it was amazing how little some of those people actually knew about business. I mean, they can't know everything. There were some incredibly stupid comments and questions that came out in that process.

The Chair: Thank you for your presentation this afternoon.

CANADIAN BANKERS ASSOCIATION

The Chair: I call on the Canadian Bankers Association to come forward, please.

Mr Warren Law: My name is Warren Law, and I am the senior vice-president and general counsel of the

Canadian Bankers Association. I'm joined today by Terry Campbell, who's CBA's vice-president of policy. On behalf of Canada's banks, we would like to thank you for the opportunity to provide you with comments about the Crawford report.

Although we have been following the committee's deliberations since it was established and have provided a number of detailed comments on a range of issues, most of which are of a technical nature, we will be focusing our comments today—and we have in our written submission which we've provided to the committee—on three matters: the need to establish a single securities regulator for Canada; the importance of implementing the proposed Uniform Securities Transfer Act; and the civil liability for disclosure in the secondary market.

Terry will be addressing the issue of the need for a single securities regulator in Canada, and I will follow with comments on the latter two points.

Mr Terry Campbell: The CBA is a strong proponent of fundamental reform of the securities system in Canada, for a number of reasons. The current system is too complex and too slow in responding to changes in the marketplace. There are gaps in enforcement across the country, and that hurts investors and consumers. Businesses and registrants face conflicting rules, as well as costly duplication in having to deal with 13 different provincial and territorial regulators, and there's no one voice speaking for Canada internationally on the securities issues.

We get a sense that there's a consensus across the board about the need for a reform of the system, but there are different views as to how those improvements should be achieved. In our view, creating a single securities regulator would really be in the best interests of all Canadians. It would be in the best interests of investors seeking the best possible protection and return, in the best interests of entrepreneurs and small businesses seeking to raise capital, and in the best interests of employees of companies that depend on the capital markets for financing and for growth.

So we strongly support the review committee's report recommendations. Its number one recommendation, indeed, is that governments across the country work together to create a single regulator. We do note that Ontario has proposed a single regulator model for Canada, and we think that's a very positive contribution to the debate. I'll return to that in just a moment.

As you know, there's another model on the table. It's the passport system, a model where each province would recognize the rules of the other provinces but where individual securities commissions would remain in place. I'd like to share with the committee some of the concerns we have about the passport model and how it compares to the Ontario system.

Briefly, as we understand it, the passport model would not result in any meaningful efficiency improvements over the current system. It would leave all the infrastructure, all the costs, all the fees of the current multiple-regulator system in place across the country. We think it would result in confusion for investors and consumers. It would leave large and small businesses having to deal with a continuing lack of uniformity, rules and standards. In our view, it would also effectively forestall future efforts to achieve more fundamental reform; that is, moving toward a single regulator.

In our written submission, we've highlighted some of these comments in a little bit more detail. I'd just like to share a couple of illustrative examples with you.

If we look at investor protection first, far from simplifying the current system, as we understand it the passport model would actually entrench a confusing and overlapping system. It would give both the home regulator—the jurisdiction of the company—and the host regulator—where the investor lives—a role of enforcement, with either being able to take action that they deem appropriate. That means investors would face four possible outcomes if they felt there were violations in the securities law: Neither the host nor the home regulator could take any action; or the home regulator could take action but the host wouldn't; or the host regulator would take action but the home wouldn't; or both would take action, either independently or perhaps together. For us that doesn't seem like a very clear and straightforward approach for consumers or investors.

A second concern we have, just an illustrative concern, is that in our view the passport system would entrench the current problems we see of regulatory inconsistency across the country, regulatory burden and unresponsiveness to changing market conditions. The decision-making model in the passport system would either be by consensus among 13 different governments, or issues would come to a vote, but only in a non-binding, consensus kind of way. In addition, each province would retain its ultimate sovereignty for legislation, where individual securities ministers across the country would only be required to make best efforts within their own provinces to see if they can improve their securities legislation. This is kind of where we are already, and we see it as a recipe for some continuing problems.

For its part, Ontario is proposing a phased process that would ultimately result in a single regulator with significant regional presence. As we understand it, Ontario would agree to a version of the passport system as a first step if the other provinces would also commit to moving to a single-rule, single-fee, single-regulator structure within a time frame—four years, we understand.

We've been of the view that there's no structural, legal or other impediment for the provinces to move to a single regulator right now, so we have some concerns that accepting a passport system first may cause unnecessary delay. Having said that, we do recognize that some provinces are not ready to take that step to a single regulator. So we think the Ontario proposal is actually a useful, constructive, bridge-building kind of approach, and we think it merits support.

The key message we really want to convey is that it's so important that we not lose momentum. We've made a lot of progress on that. The opportunity for a revised system is within our grasp; we can't lose momentum. We've been at this round of discussions for nearly three

years. If the momentum is not to be lost, it is imperative that provincial ministers redouble their efforts to achieve an agreement. We're encouraging Ontario and the other provinces to press on and try to find ways that those principles which have been articulated—that is, a single-regulator, single-fee, single-rule system within a time frame—can be made a reality.

But what happens if that doesn't happen? What happens if they're unable to reach agreement and we reach an impasse? First, the pressure for fundamental reform of the system is not going to go away. There's just too much change in the marketplace, both domestically and internationally. That pressure for change just will not go away. Second, if there is an impasse in one venue, then solutions are going to need to be found elsewhere. In this regard, I would note that there are other models out there. For instance, the Wise Persons' Committee, after considerable research, reflection and consultation, has recommended a federal securities commission, albeit one with significant provincial input.

So we're encouraging the provinces to press ahead on this front, and we would certainly urge this committee to recommend likewise.

I'm going to turn it over to my colleague Warren for a couple of other comments and some concluding remarks.

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Mr Law: Turning very briefly to the two other issues that I'm dealing with, first the Uniform Securities Transfer Act, we strongly support the report's recommendation that a USTA be put in place. The Canadian securities settlement system handles an enormous quantity of transactions on a daily basis, and it is critical for the economy that the system operate efficiently.

With technology, the holding and transfer of these securities is now done electronically, and the system isn't based on the physical exchange of papers—share certificates—anymore. Unfortunately, our legislative regime still is. It's stuck in an earlier era, and it's based on paper certificates. It doesn't reflect modern practice, and it's out of step with the United States particularly, which has modernized its laws to deal with the electronic transfer environment. Indeed, I would suggest we are in danger of losing business to neighbouring states such as New York because of the antiquated state of our laws. So we urge the committee to support the Crawford report's recommendation that a Uniform Securities Transfer Act be implemented as soon as possible.

This is not "sexy" legislation, but I would suggest to you that it's really important, for the province to remain pre-eminent in the commercial world, to update our commercial laws for this—I thought I'd throw that word in just to get your attention on a relatively dry topic.

Finally, I'd like to briefly address the matter of civil liability for disclosure in the secondary market. The banking industry clearly supports, and we practise, proper disclosure in the marketplace. We feel strongly, however, that the civil liability amendments to the Securities Act, which were passed originally in Bill 198 but never made law, as they have been drafted, could jeopardize the safety and soundness of our financial institutions, and I'll tell you why.

The amendments would impose a liability limit of up to 5% of market capitalization. This could mean that a bank with a market cap of, say, $30 billion could be faced with a liability of up to $1.5 billion for one instance of a misrepresentation or failure to disclose, albeit how innocent it might be. This potential liability goes well beyond serving as a reasonable deterrent and could open institutions to US-style strike suits and class actions.

Another important point about the proposals that have been made in this regard: We obviously have no problems with instituting a regime that protects investors in the secondary market, but we believe that the law in Ontario should be consistent with the regimes in other important commercial jurisdictions. The regime proposed for Ontario, I would submit, is not consistent with the law as it stands in the United States in many important respects. So we continue to feel strongly on this issue. We've taken this position ever since it was first proposed in Bill 198, and we take this position also with this committee.

Mr Chair and members of the committee, we thank you very much for providing us with this opportunity. If you have any questions, we're here.

The Chair: Thank you very much. We have about two and a half minutes per party, and we'll begin with the NDP.

Mr Prue: I think my question is going to relate to the passport system. I consider it kind of bizarre, personally. I think it's kind of a bizarre proposal that's before us.

How do you see us moving more rapidly, given all the political problems? We've had a number of people here today wondering if 13 jurisdictions can ever agree on anything. I have opined here today that if we had not had a medicare program all those years ago, we would be unlikely to have one today. How do you see this, fundamentally being a provincial matter, getting a national statute? How do you see us getting there? Nobody has been able to address that. I came up with, you know, maybe like the Criminal Code that is administered provincially—that's one idea—or there are a couple of joint jurisdictions under the BNA: agriculture and immigration. How do we get there?

Mr Campbell: It's an excellent question; it really is a good question. There are a number of different models on the table that people could consider. First of all, I would say that our sense is, if you compare it to previous rounds of discussion in the mid-1990s and earlier, we're further along than we have ever been before. What I take great heart in is that literally all the provinces across Canada now recognize that there's an issue here and they are dealing with it. This is very positive. There is momentum.

The issue, of course, is exactly your question: How would you get a single—there are a couple of different ways. The passport system—and quite frankly, we have a concern with this—says, "We'll try to come up with model and then each jurisdiction will go away and write its own law based on that model and then pass it." I think

our sense is that that would be very hard to achieve, and how would you keep that harmonized and uniform going forward in perpetuity?

Another model, and I believe it's the one that Ontario has suggested, is that you take a law, the best law that there is—and there's a lot of input out there; there's work going on on a uniform securities law—have one jurisdiction pass it, and then have every other jurisdiction simply incorporate it by reference. That way, you don't get the individual drafter saying, "I'm going to change this comma and that comma." Every province would simply adopt it by reference. Therefore, there are automatically uniform standards across the board.

Another way to do it would be—I think your example, sir, was the Criminal Code. You could have a federal statute that gets implemented at the local level.

There are different models out there. There's no one ideal model; otherwise, we would have settled on it. But, I can say, I think we have some concerns about the process laid out in the passport model. We just don't see that it's going to be a recipe to get not just harmonized legislation, because harmonized can be different in many respects, but literally identical, uniform legislation, so you don't have to spend a lot of time that could be spent on enforcement, for instance, worrying about, "Does this comma mean something different?" There are models out there, OK?

The Chair: We'll move to the government.

Mr Milloy: Thank you very much for your presentation. I wanted to talk a bit about the international context with, actually, all three of the items that you brought up. I know it's hard to quantify, but you get the sense that Canada is suffering with the fact that, as you say, we're still dealing in certificates while other regimes aren't; the fact that we have 13 different models. Do you have some thoughts on how much and to what extent we are losing out?

To come to your third section and the international context about liability, if you don't support the provisions and you're looking for something that's a bit more harmonized with the United States or other jurisdictions, what would be an approach that you think would be acceptable internationally?

Mr Law: I don't have any quantitative information to give you about where Ontario is losing out. Anecdotally, though, I understand that on numerous transactions that involve businesses in Ontario, lawyers very often have difficulties opining on various aspects of the transaction because of the fact that transactions are held by intermediaries and for various other reasons that are connected with the USTA. I would think that that alone would have a negative impact and would drive business to other jurisdictions where, in fact, under the laws, say, of New York, they could opine. That's just one example of where the USTA really has a practical impact on commercial transactions: the difficulties that lawyers have in giving opinions.

The Chair: Mr O'Toole?

Mr O'Toole: Under the Wise Persons' Committee report, there's a section on page 12 called, "Who Has the Responsibility for Change? Addressing a Misconception." I'll just read here: "The history of provincial regulation has led to a misconception that the federal government lacks jurisdiction over capital markets. This is not the case. The federal government has the constitutional authority to pass comprehensive legislation regulating all capital markets activity within Canada." They go on and reference general regulations under subsection 91(2) of the Constitution Act, 1867.

It demonstrates to me that almost every presenter, even the stakeholders who are more for the client as opposed to the institutions, wants a single national regulator. I've heard it since I was a PA at finance in 1999 or whenever. It's still there. We support it. I don't think we have any problem amongst all of us. There's a lack of federal leadership here.

You're a federally regulated institution. What is their public policy position on this response by the Wise Persons' Committee, which they would be very well aware of? That's where the initiative has to happen. Why have they not taken action to solve this one part of a very large challenge? Without them, it won't happen. We can bark and quibble and they'll throw a health care dollar at us and tell us to take it off the radar screen. It's just ridiculous. There's a void of leadership there. But Paul Martin, in all honesty, talked about the bank merger issues and all that stuff. I wonder, do you get a sense that he might go there? That's where this has got to happen.

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Mr Campbell: I'd hesitate to speculate or try to speak on behalf of the federal government as to what their policy is. What they've said publicly is they're taking a very strong interest in this, to the extent of forming a very high profile committee called the Wise Persons' Committee. It had some first-rate people on it. That was a major step to take on their part. They came out with, I would say, a fairly gutsy kind of recommendation.

From our point of view, where the discussions are right now—like Yogi Berra said, "It's not over till it's over." The discussions are still happening among the provinces. That's where we're getting some substantive action right now. We're seeing proposals, we're seeing counterproposals. What we're saying is, let's see how that plays out. The provinces are acting on this. If we can come up with an agreement, that's great, because that's where the action is now. It's a little premature to say, "What if it falls off the table?"

What I can say is, as I said earlier, if the provinces, which are now actively in discussions—which is a good thing—cannot reach an agreement, then the pressure for change will not go away and the model you have in the book there has a lot to commend it.

The Chair: Thank you both for your presentation this afternoon.

WEISSGLAS MEIER MEDIATION/ARBITRATION SERVICES

The Chair: I call on Weissglas Meier Mediation to come forward, please.

Mr William Weissglas: Last, but hopefully not least.

Mr Chairman, members of the committee, my name is William Weissglas. I'm a lawyer. I want to give you a little background so you'll understand why I'm here. I also possess a master of laws degree in alternative dispute resolution, and I'm presently the CEO of a mediation/arbitration firm.

Prior to October 2003, I was, for two years, senior legal counsel and head of the legal department at RECO, which is the Real Estate Council of Ontario. That's the Ontario government agency that administers the Real Estate and Business Brokers Act and licenses and disciplines real estate brokers and sales reps. One of RECO's raisons d'être is to protect the public through an equitable marketplace.

Now, I'm not an expert in securities law, but I am an interested consumer.

One of the many things you're here for is to review the structure of the OSC and, by implication, the IDA. The Crawford report recommended the government should review whether to split the OSC's—and the IDA's—dual role as both a prosecutor and its judicial role of presiding over disciplinary hearings. The Crawford report said this dual role can give rise to "perceptions of potential for conflict or abuse," ie bias.

I'm appearing before you on a very narrow issue, and that's to urge you to support the recommendations that these two roles—adjudicator and prosecutor—be split and that a separate adjudicative tribunal, independent of the OSC, the IDA or any future national regulator, be created. It should be created to adjudicate securities violations and also for the restitution of investor losses. The rulings, of course, of this independent tribunal would be appealable to the courts. More importantly, the OSC or its national successor would still retain its investigative and prosecutor roles.

As senior legal counsel at RECO, I had the unique opportunity of being able to compare consumers' and stakeholders' perceptions of two different approaches to fielding complaints and obtaining justice.

One approach, which was the RECO complaints and compliance discipline process, was similar, although not identical, to the existing OSC/IDA system. Pursuant to the CCD process, a complaint was received by the manager of CCD after the complaint was reviewed and investigated by a number of RECO staff, after the respondent had an opportunity to rebut in writing the complaint. Then, and only then, if it was still determined that a contravention of the RECO code of ethics may have occurred, either the respondent was issued a caution for a minor infraction or, for more serious matters, an allegation statement was issued and the matter was referred to a CCD tribunal for adjudication.

The tribunal was composed of three realtors who were members of RECO and carried on their practices in a different jurisdiction than the respondent, because you didn't want to have them judging someone in their own area. The tribunal members were part of a panel of adjudicators chosen annually by RECO staff and directors. In my department, lawyers acted as prosecutors at these hearings.

The second approach was for a complaint to be channelled to the real estate registrar for an alleged abuse of the Real Estate and Business Brokers Act. The registrar's staff would again investigate, and if a contravention of the REBBA appeared to have been committed, the respondent was invited to appear before the registrar to explain why he should not be put on terms and conditions, if it was a minor matter, or for a major breach, why there shouldn't be a proposal issued to rescind his licence.

If the respondent refused to accept the terms and conditions in a minor matter or, in a major matter, if the registrar remained unconvinced of the respondent's innocence, a proposal to terminate the respondent's licence was issued by the registrar and the matter would then be referred to the Ontario government Licence Appeal Tribunal, called LAT. My department lawyers would act as prosecutors for the registrar at LAT.

LAT is an independent tribunal, set up by the Ontario government, which has the power to validate the registrar's proposals to revoke a respondent's licence or make any other terms and conditions it deems appropriate. LAT hears cases referred to it not only from RECO but also from numerous other provincial agencies, such as TICO, which is the tourist industry council, OMVIC, the Ontario motor vehicle council, etc. LAT's part-time judges—and I emphasize that—are independent lawyers who are not necessarily experts in specific matters being heard before them, but they usually do have an expertise in providing natural justice to the parties.

What I would like to provide you with is some of my observations of the two different hearing systems, by way of anecdotal evidence.

For clarification, through one system, the CCD system, a complainant is brought before a tribunal made up of industry members who are required by law to be members of the prosecuting agency. Through the other system, LAT, the complainant is brought before a tribunal made up of a non-expert, independent third party who is appointed by the Ontario government.

In a CCD hearing, if the tribunal found the respondent not guilty or rendered a less-than-substantial fine or verdict, the complainant, time and time again, would voice the complaint that the panel had been sympathetic to the respondent, ie biased, because they were also real estate brokers, just like the respondent.

On the other hand, if the CCD tribunal rendered a substantial monetary fine or verdict, the respondent would voice the complaint that his or her peers had been unfair or biased because they were jealous of his success—because everyone knows that successful realtors don't have time to serve as tribunal members—or that the tribunal members were unfairly making an example of him or her, when they knew this type of thing was rampant in the industry and even occurred in their own brokers' offices. As well, and surprisingly, the complainant would often be annoyed too, because the tribunal

did not order restitution to him or her for the damages he or she had suffered, because the tribunal didn't have the authority to do that. The same complaints in the CCD system about alleged bias would come up when we asked for adjournments and when costs were ordered.

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Surprisingly, in the LAT hearing it was very rare indeed that the complainant or respondent complained that a tribunal member was biased, because the tribunal member was viewed as being an independent, impartial, third-party adjudicator with no axe to grind and no special sympathies. As well, CCD tribunal verdicts were appealed much more frequently than LAT tribunal hearings.

So one asks, was there any more actual tribunal bias in a CCD hearing than in a LAT hearing? From a legal point of view, and I stress this, the answer is a resounding no. There is a recent case, Barrett v Layton, which was a motion for retrial heard this January by the Superior Court of Justice. The Ontario court states, "The test for disqualifying apprehension of bias is, 'what would a reasonable and right-minded person, applying himself to the question and in possession of all the relevant circumstances, viewing the matter realistically and practically and having thought the matter through, conclude.' The grounds for disqualifying apprehension of bias must be substantial. A real likelihood or probability of bias must be demonstrated. Mere suspicion is not enough."

Although there may not be a legal bias, as Robert Kyle so ably states in his paper that he'll present to you tomorrow, "Perception is critical. A perception of bias is noted with respect to the OSC's and IDA's role as policy-maker, investigator, prosecutor, adjudicator and sanctioner."

For this reason, I'm urging you to support the recommendation that the OSC's roles as adjudicator and prosecutor be split and a separate adjudicative tribunal, independent of the OSC or any future national regulator, be created.

In today's world of instant information, instant communication and disclosure legislation, the average investor-consumer has the tools, the knowledge and possibly the right to demand that not only should there be an absence of actual bias in the OSC/IDA role, but also an absence of any perception of such bias. It is incumbent upon you, the members of this committee, as the elected representatives of Ontario's consumers, to make certain that their wishes are adhered to and that consumers are afforded all the encompassing protection they deserve.

Thanks. Sweet and short.

The Chair: Thank you. We have about three minutes for each party. We'll begin with the government this time.

Mr Berardinetti: I'll try to split my time with my colleague here. This adjudicative tribunal that you want to see or are supporting from the report would be made up of lawyers or of—

Mr Weissglas: Competent people, part-time. What I'm envisioning is almost a supertribunal, because, remember, most of the people appearing before that will the public, the consumer who's not sophisticated. A lot of times they just want to be heard, and anyone who's got a sense of natural justice can probably do the job.

Mr Berardinetti: But the OSC would be the prosecutor—

Mr Weissglas: And investigator.

Mr Berardinetti: —and investigator. The persons would be defending themselves, and the adjudicative role would be covered by competent lawyers who would be part of this tribunal.

Mr Weissglas: That's right, and the tribunal would become more competent because, over the years, the people in charge of appointing these people would weed out the chaff from the wheat.

Mr Berardinetti: Thank you.

Mrs Jeffrey: Thank you for your passion. It's good to have at the end of the day. It's been a long day.

A quick question: You have a very narrow focus and you admitted that at the beginning. Is there anything else you would recommend about the commission? It clearly has a huge administrative function. Is there anything else that doesn't work well, in your opinion?

Mr Weissglas: Many things, but I feel that we don't have the time and I don't have the expertise to go into a number of other areas. I would love to, but I'm not prepared to do that today and I don't think you're prepared to listen to me.

The Chair: We'll move to the official opposition.

Mr Barrett: Very briefly on the separation of the adjudicator and prosecutor: By and large, is this the case in the United States or other—

Mr Weissglas: It's not even the case in Ontario.

Mr Barrett: I know that, but is the separation *[inaudible]*?

Mr Weissglas: I'm not expert enough to tell you, but anecdotally I would say they're usually about 10 to 15 years ahead of us. So they're really working toward it and they're very sensitive to it.

Mr O'Toole: Just an observation: In 1996, I think, in the United States that was separated from the Securities and Exchange Commission. It seems to me that since 1996 we've had more problems. If you look at the disclosure requirements for accounting principles and all the rest of it, that's where the new insiders are aware of how to mask, display, report—

Mr Weissglas: But you must remember that you still have the securities commission doing the investigation.

Mr O'Toole: I think the separation would be better—I want to make that clear—for perception as well as reality. The roles are quite different. These are the roles. These are what we will prosecute. Right now there's some blurring of that vision of the judiciary.

Mr Weissglas: Absolutely. I'm sorry; I misunderstood what you were saying. Yes.

The Chair: We'll move to the NDP.

Mr Prue: I don't think I disagree with a single word you're saying. Mr Brown was here earlier today. Did you see him? Were you here?

Mr Weissglas: No, I unfortunately didn't have the pleasure. I was busy.

Mr Prue: In his report he presented both sides of the argument, but, quite bluntly, to me he appeared to want to keep things the way they were. I have some considerable difficulty with that, because I will never believe a two-cornered justice system like we have now works nearly so well as a three-cornered one, where you have an independent adjudicator deciding.

The example you gave of real estate works very well. I'm more familiar with immigration. They took that sort of thing and put in an independent adjudicator that took away all of the sting.

I don't understand why business people or anyone would oppose this. Do you have any explanation why the Ontario Securities Commission wants to hold on to a vestige of the past that everybody thinks doesn't work anymore?

Mr Weissglas: I don't want to commit a slander, but I can just tell you that if you polled a lot of the administrative agencies in Ontario, they would love the idea for the adjudicative part to always go to tribunals that have nothing to do with them, because it takes the heat off. I am at a loss to understand the reactionary attitude I have perceived. But that's just me personally.

The Chair: Thank you for your presentation this afternoon.

Mr Weissglas: Thank you for your time.

The Chair: This committee stands adjourned until 9 am tomorrow.

The committee adjourned at 1658.

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