

Securities Regulation at an Impasse: Developing Effective Regulation in an Ineffective Regulatory Regime

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In order for the Canadian securities regulatory regime to function effectively two types of uniformity are needed: substantive uniformity and structural uniformity. Substantive uniformity refers to the consistency in securities regulation, as a matter of substantive law, across jurisdictions. Structural uniformity refers to the processes by which securities regulation is implemented and depends on the particular institutions that are responsible for implementing and enforcing securities regulation. Recent proposals for reform, including the provincial ministers' passport system of regulation, and the Wise Persons' Committee's single regulator model, are discussed in light of their potential effectiveness in achieving these two types of uniformity.

Cet article propose deux types d'uniformité qui doivent être atteints au Canada afin d'arriver à un fonctionnement plus efficace du régime de réglementation des valeurs mobilières, soit l'uniformité substantielle et l'uniformité structurale. L'uniformité substantielle réfère à la cohérence de la réglementation des valeurs mobilières, comme question de droit substantiel, à travers les juridictions. L'uniformité structurale réfère aux processus par lesquels la réglementation des valeurs mobilières est mise en oeuvre et dépend des institutions particulières responsables de la mise en pratique et de l'application de cette réglementation. Les projets récents de réforme, notamment le système de réglementation de type «passeport» présenté par le ministre provincial, la Législation uniforme en valeurs mobilières de l'ACVM et l'organisme unique de réglementation au niveau fédéral par le Comité des personnes averties, sont traités à la lumière de leur efficacité potentielle d'atteindre ces deux types d'uniformité.

1. INTRODUCTION

The development of effective securities regulation in Canada is at an impasse. Provincial securities regulators have strong views about

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alternative regulatory systems that should (and should not) be adopted. Some provinces argue that a single regulator would be optimal for Canada while others contend that a reciprocal delegation model such as the proposed passport system should be adopted. The same provinces that decry the structure of securities regulation in Canada have no choice but to continue their usual business of implementing legislation aimed at improving the current regulatory regime within their own jurisdiction. An impasse exists because the efficacy and success of securities regulatory initiatives in Canada depend on implementation at a national level. Yet consensus leading to uniformity is unlikely to be achieved in the short term without a reformed securities regulatory structure.

The recently proposed Fair Dealing Model (FDM) illustrates many of the difficulties in Canada's securities regulatory structure in terms of implementing proposed initiatives.¹ The FDM recasts the relationship between advisers and their clients and, if implemented, would constitute an improvement over the current legal requirements that govern the relationship. However, the FDM requires national adoption or at least mutual recognition among provinces to be effective.² The story of the FDM highlights the fractured nature of the current regulatory system, a system that hampers both provincial regulatory initiatives and the business of market participants. In a sense, the FDM serves as a test case for the ability of the current securities regime to function effectively by responding to the needs of investors while continuing to make the system more efficient.

Although initiatives such as the FDM stand to be highly effective if implemented, its success, and ultimately the viability of the entire regulatory regime, is at risk. There are two reasons for this. First, the current regime is too fractured to be effective—I call this the “regulatory fragmentation effect.” Second, the level of uncertainty that surrounds which model, if any, will replace the current regime prevents market

¹ The Fair Dealing Model was proposed by the Ontario Securities Commission (OSC) in January 2004. See *The Fair Dealing Model: Concept Paper of The Ontario Securities Commission* (Toronto: Ontario Securities Commission, 2004) [Concept Paper], online: OSC <http://www.osc.gov.on.ca/Regulation/Rulemaking/Current/Part3/cp_33-901_20040129_fdm.pdf>. See also online: Fair Dealing <<http://osc.electramedia.com/>>.

² Concept Paper, *ibid.*, at 81.

participants generally, and advisors particularly, from developing an effective business plan³—I call this the “uncertainty effect”.

The necessity for reform of the securities regulatory regime is an underlying theme of this paper, however, the focus of the paper is not on the optimal regulatory model, but rather on the consequences for legislators and regulators if no reform occurs and the current model remains in place. Two types of change are necessary to ensure the viability of the Canadian securities market: structural uniformity and substantive uniformity. The consequences for effective legislation will be disastrous if there is no structural or substantive change to the current regulatory regime. Without such change, securities legislative initiatives will continue to be ineffective, contributing to a regulatory regime that lacks both efficiency and competitiveness.

Section 2 of this paper outlines the fractured character of the current regime and its uncertainty with respect to alternative regulatory models. Section 3 examines, from a practical perspective, regulatory fragmentation and the uncertainty effect. It analyzes in particular the proposed FDM, pointing out the significant improvements over the current legal requirements contained in the model. It also laments that capital market participants will likely not be able to benefit from these improvements because of regulatory fragmentation and uncertainty effect. Finally, Section 4 examines alternative solutions to the current impasse, including the possibility of achieving structural and substantive uniformity under current proposed models.

2. REGULATORY FRAGMENTATION AND UNCERTAINTY

A significant aspect of the mandate of securities regulators is “to foster fair and efficient capital markets and confidence in capital markets.”⁴ Implicit in this obligation is a duty to provide market participants

³ This evidence was obtained during the research for Anita I. Anand & Peter Klein, “The Costs of Compliance in Canada’s Securities Regulatory Regime” in A. Douglas Harris, ed., *Committee to Review the Structure of Securities Regulation in Canada: Research Studies* (Ottawa: Wise Persons’ Committee, 2003) at 522, online: Wise Persons’ Committee Research Studies <http://www.wise-averties.ca/report_en.html> [WPC Report].

⁴ Ontario *Securities Act*, R.S.O. 1990, c. S.5, s. 1.1(b). See also *Securities Act*, R.S.S. 1980, c. S-42.2, s. 3.1(1): “The purposes of this Act are to provide protection to investors and to foster fair, efficient capital markets and confidence in capital mar-

with certainty as to the rules underlying the regime as well as the structure of that regime. In particular, market participants must have certainty regarding how the regime will operate in a given set of circumstances. Unfortunately, there has not been uniform approval for one particular structure, though there are various models for reform on the table. A lack of consensus regarding the structure and operation of the securities regime has contributed to both fragmentation and uncertainty and is stifling the growth of Canadian capital markets.

Indeed, criticism of the current regime has been voiced a number of times in the recent past.⁵ This section analyzes the variety of complaints leveled against the current system in the context of two phenomena: regulatory fragmentation and the uncertainty effect.

(a) Regulatory Fragmentation

Technically speaking, in securities law, the term “fragmentation” denotes the effect of allowing the same security to be traded on multiple markets. Generally, this phenomenon is viewed to be undesirable because it can prevent willing buyers and sellers from finding one another to complete mutually beneficial transactions. In addition, in fragmented markets, share prices may become less stable and price discovery more difficult.⁶ These drawbacks can undermine the efficiency of the capital markets.

kets”; Unfortunately, there has not been uniform approval for one particular structure, though there are various models for reform on the table. *Securities Act*, R.S.N.S. 1989, c. 418, s. 1A(1), “The purpose of this Act is to provide investors with protection from practices and activities that tend to undermine investor confidence in the fairness and efficiency of capital markets and, where it would not be inconsistent with an adequate level of investor protection, to foster the process of capital formation.”

⁵ See e.g., *Five Year Review Committee Draft Report: Reviewing the Securities Act (Ontario)* (Toronto: Ontario Securities Commission, 2002), online: OSC <http://www.osc.gov.on.ca/Regulation/FiveYearReview/fyr_20020529_5yr-draft-report.pdf>; *Five Year Review Committee Final Report: Reviewing the Securities Act (Ontario)* (Toronto: Ontario Securities Commission, 2003) [Final Report], online: OSC <http://www.osc.gov.on.ca/Regulation/FiveYearReview/fyr_20030529_5yr-final-report.pdf>; WPC Report, *supra* n. 3; and submissions sent into the WPC, online: Wise Persons’ Committee Submissions <http://www.wise-averties.ca/submissions_en.html>.

⁶ James McAndrews & Chris Stefanidis, “The Emergence of Electronic Communications Networks in the U.S. Equity Markets” *Current Issues in Economics and Finance* 6:12 (October 2000) at 2-3, online: Federal Reserve Bank of New York Research Publications <http://www.ny.frb.org/research/current_issues/ci6-12.html>.

In this paper, I employ another definition of the term “fragmentation” and call it “regulatory fragmentation.” The Oxford Dictionary defines a fragment as “a small part broken off or detached; an isolate or incomplete part.”⁷ This definition aptly describes the current state of securities regulation in Canada. The regime consists of numerous provincial and territorial securities regulatory regimes that are isolated and detached from each other. The effects of regulatory fragmentation are manifold, with the major ones relating to costs, enforcement and international competitiveness.

Regulatory fragmentation in Canada leads to inefficient markets. In many cases, market participants (issuers, registrants, advisers and even investors) must deal with 13 separate regulators in a given transaction. For example, an individual or firm seeking to become a registrant must register in each provincial or territorial jurisdiction.⁸ Similarly, an issuer attempting to complete an exempt offering on a national basis must ensure that the transaction falls within an available exemption in every jurisdiction, even though the exemptions in all jurisdictions may not be identical. Further, separate fees must usually be paid to each provincial and territorial regulator.

Admittedly, the Canadian Securities Administrators (CSA) has significantly enhanced the level of harmonization in the system.⁹ The CSA is an informal body that functions through meetings of regulators, communications between executive directors and staff of each of the regulators, and interregulatory committees formed to oversee joint initiatives. The CSA has introduced several initiatives that reduce the costs of a fragmented securities regime to market participants, including the Mutual Reliance Review System (MRRS), the National Registration Database, the System for Electronic Disclosure by Insiders, and the System for Electronic Document Analysis and Retrieval, to name a few.

⁷ *The Concise Oxford Dictionary*, 10th ed. s.v. “fragmentation”.

⁸ See Charles River Associates Canada Ltd., “Estimating the Incremental Costs of Multiple Securities Regulators in Canada: A report prepared for the Investment Dealers Association of Canada” (2003), online: Wise Persons’ Committee Submissions <http://www.wise-averties.ca/submissions/IDA_Annex1.pdf>.

⁹ See Canadian Securities Administrators, online: <http://www.csa-acvm.ca/html_CSA/about.html#mission>.

The most significant CSA innovation has been the MRRS.¹⁰ The MRRS has allowed for extensive harmonization in areas such as exemptive relief applications, prospectus approvals and registration applications, and reinstatements and renewals. The MRRS permits a regulator to rely on the analysis and review of another regulator so that the applicant receives comments and a decision from only one regulator who acts on behalf of all others. The applicant thus deals only with one regulator, as opposed to 13 as long as non-principal regulators do not exercise their ability to opt out.

However, the MRRS has drawbacks, some of which relate to costs to market participants. For example, the MRRS does not alleviate the necessity for market participants to pay fees in each jurisdiction. Furthermore, the MRRS is based on voluntary cooperation, indeed goodwill of sorts as it allows a regulator to opt out of the system at any time and deal with the market participant directly. Because securities laws are not uniform in each jurisdiction, market participants often must obtain advice on legal requirements in each jurisdiction.¹¹

Because it consists of 13 regulatory regimes, the current regulatory structure is inefficient in terms of the costs of compliance for issuers and registrants. In a study commissioned by the federally appointed Wise Persons' Committee (WPC), authors Anand and Klein analyzed the differential costs associated with the current securities regulatory structure relative to alternative structures. They focused on the material incremental costs incurred under the current system. Their results were based on interviews and written responses received from market participants who agreed to take part in their study on a confidential basis.¹²

In the Anand and Klein report, case study participants uniformly reported both direct and indirect costs. They reported extensive indirect costs, in the form of incremental opportunity cost risk under the current system, and indicated that such risk is manifested in delays in transactions or the commencement of trading.¹³ The delays arise for various

¹⁰ See National Policy 43-201 *Mutual Reliance Review System for Prospectus and Annual Information Forms*, online: OSC <http://www.osc.gov.on.ca/Regulation/Rulemaking/Current/rn_part4_index.jsp>.

¹¹ Final Report, *supra*, n. 5 at 33-34, 36.

¹² Anand & Klein, *supra*, n. 3 at 521.

¹³ *Ibid.*

reasons, including the necessity to clear transactions with separate regulatory authorities. Furthermore, delays in executing transactions entail a significant risk to issuers that they may not be able to complete their transaction within the desired time frame. Thus, the inefficiencies that arise from the current regime derive not simply from the direct cost of multiple securities regulators, but also from an indirect cost in the form of opportunity cost.¹⁴ These inefficiencies stem from a fragmented securities regulatory regime.

The research studies completed for the WPC identified other negative effects of regulatory fragmentation. For example, there are coordination difficulties in enforcement matters across the country since each securities regulator bears the responsibility for enforcing its own laws, whereas enforcement issues tend to transcend provincial boundaries.¹⁵ Furthermore, the statutory bases of liability vary across the country and can result in sanctions that vary depending upon the jurisdiction in which misconduct occurs.¹⁶ As one commentator has stated, there are inefficient allocation of resources, coordination difficulties and variations in both enforcement priorities and statutory protections for investors under the current system.¹⁷

In addition to costs and enforcement, the third major area in which regulatory fragmentation affects Canadian capital markets is in the ability to compete in international markets. Many have claimed, including the Wise Persons' Committee, that Canada's fragmented regulatory structure leads issuers and investors to bypass Canadian capital markets.¹⁸ For example, if a U.S. venture capital firm seeks to raise capital, it may well be dissuaded from using Canadian markets if it needs to

¹⁴ Note that Anand and Klein found that registrants are more likely to incur material incremental costs than issuers who, by and large, do not incur such costs as a result of the existence of multiple securities regulators in Canada. See *ibid.*

¹⁵ WPC Report, *supra*, n. 3 at 28.

¹⁶ *Ibid.*, at 29. See also Mary Condon, "The Use of Public Interest Enforcement Orders by Securities Regulators in Canada" in A. Douglas Harris, ed., *Committee to Review the Structure of Securities Regulation in Canada: Research Studies* (Ottawa: Wise Persons' Committee, 2003) at 448-449, online: Wise Persons' Committee Research Studies <http://www.wise-averties.ca/report_en.html>.

¹⁷ Doug Harris, "Passport flaws: Alternatives to a national securities regulator do not measure up in terms of enforcement, policy innovation, development and service" *National Post* (5 March 2004) FP15.

¹⁸ WPC Report, *supra*, n. 3 at 39.

retain counsel in several separate jurisdictions and comply with differing requirements in each. Furthermore, no one securities regulator can claim to represent Canada internationally in bodies such as the International Organization of Securities Commissions.¹⁹

Regulatory fragmentation stifles the development and implementation of effective securities legislation. Regulation that is implemented in only one provincial jurisdiction will be less effective than harmonized regulation implemented nationally. Harmonized legislation that is implemented in the same way at the same time across the country renders the legislation itself more effective, whether one is speaking of statutory rules relating to enforcement or rules governing a nationally exempt distribution. There is a strong link between what may be termed substantive uniformity, structural uniformity and the overall efficacy of regulation. These terms, and their interrelationship, are discussed in detail in Section 4 below.

(b) The Uncertainty Effect

In their study of compliance costs, Anand and Klein found that market participants were frustrated with the current state of uncertainty in Canada's regulatory regime.²⁰ Market participants noted that the high level of uncertainty regarding which alternative model, if any, would be adopted, detracts from their ability to manage their businesses. They noted rightly that this uncertainty has become increasingly pronounced in recent years because of the variety of regulatory reform proposals placed on the table, such as, the provincial ministers' proposal for a passport system of regulation,²¹ a formal proposal for a single regulator

¹⁹ *Ibid.* See also Final Report, *supra*, n. 5 at 50: "Harmonizing Canadian Securities Laws: Considering Alternatives" in Anita Anand & William Flanagan, eds., *Responding to Globalization: Proceedings of the 8th Queen's Annual Business Law Symposium* (Kingston: Queen's University Printer, 2002) at 51. Note also the submission of the OSC to the WPC, online: Wise Persons' Committee <http://www.wise-averties.ca/submitted_en.asp?file=sub_ont_se>, in which the OSC stated that Canada is the only G-7 nation without a single securities regulator and, of the 103 countries represented at the International Organization of Securities Commissions, only two lack a national or supra national securities regulator: Canada and Bosnia-Herzegovina.

²⁰ Anand & Klein, *supra*, n. 3 at 522.

²¹ See Steering Committee of Ministers, *Securities Regulation in Canada: An Inter-Provincial Securities Framework* (Edmonton, 2003) (Chair: Greg Melchin), online:

from the Wise Persons' Committee,²² and the Uniform Securities Legislation (USL) project.²³ At the same time, some argue that British Columbia has adopted a "principles-based" approach to legislation in contradistinction to Ontario's "rules-based" approach,²⁴ and that these

Alberta Revenue <http://www.revenue.gov.ab.ca/publications/securities_regulation/securities_discussion_paper_english.pdf> [Discussion Paper]. See also "A Provincial/Territorial Memorandum of Understanding Regarding Securities Regulation" (Sept. 30, 2004), online: <<http://www.securitiescanada.org>> [mou].

²² See Wise Persons' Committee, Press Release, "Wise Persons' Committee Calls for Single Securities Regulator Built on Joint Federal-Provincial Model" (17 December 2003), online: Wise Persons' Committee <http://www.wise-averties.ca/about_press_121703_en.html>.

²³ See Canadian Securities Administrators, Press Release, "CSA Release Proposed Uniform Securities Legislation" (16 December 2003), online: Canadian Securities Administrators <http://www.csa-acvm.ca/html_CSA/news/uniform_securities_32.htm>.

²⁴ The rules-based approach is characterized by the implementation of rules in response to specific market events, whereas a principles-based approach favours regulation that contains broad rules with little detail contained therein. A prime example of the rules-based approach is the *Sarbanes-Oxley Act* in the United States, and the OSC's response to this Act, which consisted of proposing three new rules for comment on June 27, 2003 (Multilateral Instrument 52-108 *Auditor Oversight*; Multilateral Instrument 52-109 *Certification of Disclosure in Issuers' Annual and Interim Filings*; and Multilateral Instrument 52-110 *Audit Committees*). These rules were given ministerial approval in Ontario on March 9, 2004 and came into force in most Canadian jurisdictions on March 30, 2004. See "Notice of Ministerial Approval" 26 March 2004, online: OSC <http://www.osc.gov.on.ca/Regulation/Rulemaking/Current/Part5/rule_20040326_52-108-aud-oversight.jsp>; Multilateral Instruments 52-109 and 52-110 were not adopted in British Columbia. See Canadian Securities Administrators' Press Release, "New rules promote investor confidence, change issuers' disclosure and governance practices" (29 March 2004), online: <www.csa-acvm.ca/html_CSA/news/04_05new_disclosure.htm>. Advocates of the rules-based approach feel principles are hard for participants to apply, difficult for courts to interpret and difficult to enforce. See David Brown, "Giving Investors Reason for Confidence: A Robust Response to the Financial Reporting Scandals" Remarks at the Board of Trade (23 May 2003), online: OSC <http://www.osc.gov.on.ca/About/Speeches/sp_20030523_db_investor-confidence.jsp>. On the other hand, proponents of the principles-based approach say that the rules-based approach results in an excessive volume of rules, complicated regulation, and can lead to searches for loopholes. They believe that if rules focus on principles, they are much more likely to cover new threats. As well, a principles-based approach yields far fewer rules as well as producing rules that are easier to understand, which will improve compliance. See Brent W. Aitken, "A New Way to Regulate: Innovative, Low-cost, Tough but Fair" (Paper presented to the Investment Funds Institute of Canada 16th Annual Conference, 18 September 2002), online: British Columbia Securities Commission <http://www.bsc.bc.ca/Publications/Aitken_IFIC.pdf>. Also see Bill 38, *Securi-*

types of divergences cause uncertainty with regard to the direction in which securities regulatory regime will evolve.²⁵

The institutions behind each of the above reform proposals have separately requested comments from market participants on the workability and desirability of the proposed model at hand. Despite the various opinions about which model should be adopted, most would agree that the securities regulatory regime is in a state of flux. It is not surprising that some market participants have called for finality in the reform process once and for all.²⁶ As one commentator has stated, “The diversity

ties Act, 5th Sess., 37th Leg., British Columbia, 2004 (Certified correct as passed Third Reading on the 11th day of May, 2004), online: Legislative Assembly of British Columbia <http://www.legis.gov.bc.ca/37th5th/3rd_read/gov38-3.htm>. (This is the so-called “BC Model,” which is discussed below.)

²⁵ The tension between the approach of the Ontario Securities Commission on the one hand and the British Columbia, Alberta and Quebec commissions on the other was further exacerbated when the two western regulators and Quebec’s *Autorité des marchés financiers* (formerly the *Commission des valeurs mobilières du Québec*) chose not to sign on to corporate governance proposals introduced by the CSA. Proposed Multilateral Instrument 58-101 *Disclosure of Corporate Governance Practices* and Multilateral Policy 58-201 *Effective Corporate Governance* were published for comment on January 16, 2004, in all Canadian jurisdictions, except British Columbia and Quebec. See Canadian Securities Administrators “Notice 58-301” (12 March 2004), online: Alberta Securities Commission <<http://www.albertasecurities.com/index.php?currentPage=232>>. The B.C., Alberta and Quebec commissions felt that this proposal could pressure companies to adopt supposed “best practices” whether those practices are appropriate for their company or not, and requested comments on “the regulatory approach that should be developed, in the context of the Canadian markets, in the matter of corporate governance disclosure requirements” in their “Notice and Request For Comment on Effective Disclosure of Corporate Governance Practices” (30 January 2004), online: Alberta Securities Commission <<http://www.albertasecurities.com/index.php?currentPage=240>>. On April 23, 2004, the B.C., Alberta and Quebec commissions published Multilateral Instrument 51-104 *Disclosure of Corporate Governance Practices* for comment as an alternative to the proposals set forth by the CSA. See British Columbia Securities Commission, News Release NR#04/22, “Regulators encouraging debate on corporate governance disclosure” (23 April 2004), online: British Columbia Securities Commission <<http://www.besc.bc.ca:8080/comdoc.nsf/allbyunid/9de635ed4e3b6b9c88256e7f005cbbff?opendocument>>. Recently, securities regulatory authorities from each jurisdiction in Canada published revised corporate governance policies 58-201 and 58-101 which reflect their consensus on some of these issues.

²⁶ See Anand & Klein, *supra*, n. 3 at 522. The uncertainty has compounded with changes in federal and provincial elected officials. Prior to the election of the Liberal

of views is healthy but . . . this conflict leads to compromise solutions, delays in finding solutions, a lack of predictability of solutions or, on occasion, no solution. This does not inspire the confidence in the marketplace which is fundamental to sound regulation.”²⁷

Relative to the issue of regulatory fragmentation, uncertainty in the current regulatory regime is an issue that has not received much attention by those who have commented on the state of Canada’s securities law structure.²⁸ Nevertheless, like regulatory fragmentation, uncertainty about which regulatory model will be adopted can also undermine confidence in the capital markets. If market participants are unsure about the stability and future structure of the regime, and the attendant substantive legal rules that govern the regime, their confidence in that regime can, and likely will, diminish. This is not a rule-of-law argument, which would say that market participants must know what the law is in order to obey the law. Rather, this argument is about confidence and integrity in Canadian capital markets. Without question, market confidence will diminish if participants and regulators are unsure what the structure of the regime will be.

Of particular concern is the multitude of proposals that request feedback from issuers and registrants. Responses to these proposals tend

government in late 2003, the Conservative provincial government in Ontario supported the provincial ministers’ passport system spearheaded by the Alberta government. Once the Liberal government was elected, this position changed and Ontario threw its support behind a single regulator model. On June 24, 2004, Ontario released a single regulator proposal. See *Modernizing Securities Regulation in Canada, Discussion Draft* (7 June 2004), online: Ontario Management Board Secretariat <<http://www.gov.on.ca/MBS/english/mbs/releases/general/june2404-report.html>>. The absence of support from Ontario has apparently forestalled the further development of the initial proposal for a passport system. A more detailed account of the precise way in which the system would operate was expected in Fall 2003 and has not yet been issued. At the federal level the Liberal government, and various contenders for the Liberal leadership prior to the ascension of Paul Martin, voiced their support for a single regulator. It was not until the release of the WPC Report, however, that the federal government threw its full support behind the proposal.

²⁷ Submission of Robert MacLellan to WPC, online: Wise Persons’ Committee <http://www.wise-averties.ca/submitted_en.asp?file=sub_mac>.

²⁸ As part of this project, we reviewed 88 submissions made to the WPC. We found that this issue was discussed in only five of the submissions, including those from McCarthy Tétrault, Canadian Listed Company Association, AGF, Robert MacLellan, and Ontario Teachers’ Pension Plan. See online: Wise Persons’ Committee Submissions <http://www.wise-averties.ca/submissions_en.html>.

to take up valuable senior management time, which is sub-optimal.²⁹ This cost will remain as long as controversy continues about the direction in which Canada's regulatory regime should evolve. Admittedly, issuers are likely resigned to adapt to changes in the structure of the regulatory regime, and it is unlikely that they would choose to go private solely because the governing legal regime is fragmented. On the other hand, issuers seeking to raise private equity likely prefer to do so from an intraprovincial investor, so that they need only deal with one provincial securities regulator. In short, existing public issuers and prospective new issuers alike are negatively affected by the fragmented regulatory regime and their plight is exacerbated by numerous proposals for regulatory reform.³⁰

A further cause of uncertainty in Canadian capital markets stems from the process by which new provincial initiatives are adopted—or not. When a jurisdiction introduces a new concept in securities regulation, the typical procedure is to bring the initiative to the CSA and seek approval from other regulators so that the initiative can be adopted nationally. However, a regulator may choose not to utilize the CSA process. Furthermore, other regulators may not be inclined to adopt the initiative for their own jurisdictions. Perhaps the initiative does not meet local needs, or perhaps the jurisdiction has another project or legislative provision that, in its view, adequately addresses the issue at hand. Consequently, new provincial initiatives can further frustrate the overall effectiveness of the regime and create even more uncertainty.

The present structure results in a proliferation of regulatory requirements that individual provinces are unable to scale back easily. For example, if one province heightens the requirements pertaining to public offerings, then an issuer seeking to complete a national offering would be obliged to comply with these heightened requirements even if the rules in all of the other provinces remained less onerous. In addition, if a jurisdiction seeks to simplify its rules to make the regulatory regime less onerous it cannot do so unilaterally. Unless all other jurisdictions unanimously agree to the amendment, issuers will need to continue complying with the most onerous rules.

²⁹ Anand & Klein, *supra*, n. 3.

³⁰ My thanks to Marc Paulez and Doug Harris for discussions on these points.

Another problem arises if a new initiative proposed by a particular jurisdiction does not gain widespread approval and can not, therefore, be implemented nationally.³¹ This scenario can lead to the oft-cited dilemma of sacrificing innovation for harmonization.³² As the Ontario Securities Commission (OSC) has stated, "It is difficult to shape creative policies when attempting to bring together so many jurisdictions. Some observers have described the process of harmonization as a 'race to the bottom' in which jurisdictions hold each other back from pursuing innovative policies in a timely fashion."³³ According to this view, regulation becomes less innovative as provinces attempt to gain national approval for their own initiatives.

But how persuasive is this argument and what are its implications for structuring an optimal regulatory regime? Certainly most would be in favour of promoting innovation in policy-making. However, it seems that commentators from all sides of the debate believe that their own model promotes innovation. Those in favour of a passport system based on regulatory competition contend that it, and it alone, promotes innovation.³⁴ They argue that a national regulator would have a monopoly on the development of regulation and therefore would have no incentive for innovation, including innovation to address local issues, while the proposed provincial passport system provides an incentive for innovation by facilitating competition among regulators.³⁵ In opposition, those in favour of a national regulator postulate that regulatory competition as contemplated under the passport system is not necessarily the best source of innovation; a national regulator would have the incentive to develop cost-effective and responsive regulation.³⁶ Embedded in each of these

³¹ Admittedly, the initiative could still be implemented as a so-called "multilateral instrument" or in the originating province alone.

³² See submission of OSC to WPC, *supra*, n. 19; submission of Ed Waitzer to WPC, online: Wise Persons' Committee Submissions <http://www.wise-averities.ca/submitted_en.asp?file=sub_wai>; submission of Canaccord Capital Corporation to WPC, online: Wise Persons' Committee Submissions <http://www.wise-averities.ca/submitted_en.asp?file=sub_can_na>.

³³ See submission of OSC to WPC, *ibid*.

³⁴ Jeffrey MacIntosh, "Canada's passport to regulatory competition: Backers of a national securities regular have it all wrong—a passport system would spur innovation and competition across the securities industry" *National Post* (18 March 2004) FP15.

³⁵ *Ibid*.

³⁶ *Supra*, n. 17.

contentions, and the reform proposals from which they stem, is the claim that the current system can stifle innovation. An examination of the proposed Fair Dealing Model in the next section further illustrates this claim.

3. FAIR DEALING MODEL CASE STUDY

The argument thus far has been that the problems with Canada's regulatory regime are twofold. First, the regime is highly fragmented. Second, the level of fragmentation, coupled with the numerous proposals for reform, has created an undue amount of uncertainty in the capital markets. In this section, it is argued that these two factors undermine effective policy-making in the securities regulatory arena and that unless they are resolved, the efficiency and competitiveness of the Canadian securities regulatory regime will continue to decline. I use the proposed Fair Dealing Model (FDM) as an illustration.

In January 2004, the OSC issued the Concept Paper in which it proposed the FDM.³⁷ The FDM reconceptualizes the relationship between registrants (both firms and individual representatives) and the clients they serve. Currently, this relationship is, in the words of the Concept Paper, "product based" or "transaction-based."³⁸ That is, the regulation is based on the products being sold rather than the advice being given. The FDM seeks to ensure that the current regulatory regime is consistent with the reality in which these relationships function. The FDM would thus bring the regulation into line with the advice-driven business and focus on the responsibilities of representatives to their clients.

Under the FDM, the type of relationship between an adviser and a client would determine which legal rules apply. Three types of relationships will be available from which clients can choose at the opening of their account: "self-managed," "advisory," and "managed-for-you." In proposing these three different types of relationships, the FDM recognizes that the investment industry cannot be forced into a "one size fits all" approach.³⁹ The model is flexible in allowing clients initially to choose the relationship that best corresponds to the transactions into

³⁷ *Supra*, n. 1.

³⁸ *Ibid.*, at 1, 8, 50.

³⁹ *Ibid.*, at 19.

which they will be entering.⁴⁰ Indeed, the Investment Dealers' Association of Canada utilizes a conceptually similar approach in its arrangements for brokers and carrying brokers that classifies accounts into four different types depending on the level of discretion exercised by the representative.⁴¹

Currently, advisers are bound by the know-your-client and suitability rules.⁴² These rules require registered dealers and advisers to deal "fairly, honestly and in good faith with clients."⁴³ This is a very general statement that provides investors with only vague guidance of what they can expect from their adviser. Thus, the FDM seeks to specify the obligations owed by advisers and sets forth three fundamental principles: clear allocation of responsibilities; transparent dealings with retail investors; and, management of conflicts of interest to avoid self-serving outcomes.

The FDM would also replace the know-your-client forms, which vary from firm to firm, with a standard Fair Dealing Document. The adviser would complete this new document with the client at the beginning of the relationship. It is in this document that the type of relationship will be chosen and the responsibilities and expectations of the relationship will be outlined. In addition, the FDM would replace the current

⁴⁰ To be sure, clients do not elect a different relationship on a transaction-by-transaction basis in the FDM. All transactions are classified under that initial relationship. The relationship can be changed, but a new Fair Dealing Document will have to be negotiated.

⁴¹ Investment Dealers Association of Canada (IDA) By-law No. 35 "Introducing Broker/Carrying Broker Arrangements", online: IDA <http://www.ida.ca/Files/Regulation/RuleBook/RuleBook_en.pdf>, s. 35.1(g) states, "Each introducing broker/carrying broker arrangement must be classified as an Introducing Type 1, Type 2, Type 3 or Type 4 Arrangement and must meet the requirements for such arrangement as set out in this By-law 35." These are four different account arrangements in which the introducing broker's and carrying broker's duties and responsibilities are set out. Generally, as the level of discretion and participation of the introducing broker increases, the carrying broker's duty's decreases. See IDA, Compliance Interpretation Bulletin C-111, *Introducing and Carrying Broker Arrangements* (4 March 1997) at 4 and 5, online: IDA <http://www.ida.ca/Regulation/BulleAndNotic/CI_Bulletin_en.asp>; see also online: IDA <http://www.ida.ca/Regulation/ReguFAQ/IntroCarRel_en.asp>.

⁴² OSC Rule 31-505 *Conditions of Registration*, s. 1.5(1).

⁴³ *Ibid.*, s. 2.1(1).

licensing regime for advisers and brokers with a single licence for all financial service providers.

Market participants have expressed concern that the FDM “would lead to increased fragmentation if it was adopted only in Ontario.”⁴⁴ Anticipating this legitimate concern, the Concept Paper identifies harmonization as a key factor in the success of the FDM with the ultimate goal being adoption of the FDM in all jurisdictions. As an alternative to harmonization as a basis for implementing the FDM, the Concept Paper suggests that a reciprocal delegation model apply to registrants whereby registrants based in Ontario who comply with it are deemed to satisfy requirements of jurisdictions other than Ontario. Thus, the Concept Paper contemplates that the implementation of the FDM requires adoption by more than one jurisdiction. Because advisers do business in numerous jurisdictions at the same time, it stands to reason that the more jurisdictions that adopt the FDM, the more successful it will be.

No CSA member other than Ontario has committed itself to the FDM. Critics of the model have said that if implemented, the FDM could undermine consensus-building, uniform securities legislation, and possibly, other initiatives aimed at creating a national regulator.⁴⁵ Comments such as these emphasize the tension between innovation on the one hand and harmonization on the other. This tension touches on the core of policy-making in the securities regulatory field in Canada today. It is true that the implementation of the FDM may undermine harmonization, since it may be difficult to obtain the commitment of each separate jurisdiction to the model. However, this is a problem not with the FDM but with Canada’s securities regulatory structure itself. The FDM does not and will not undermine the creation of a national regulator. It is an initiative that pertains to one area of securities regulation and does not stand as an alternative to the current system, or to any other proposed model. As argued in Section 1, the fragmentation inherent in the current regime stifles the innovation contained in initiatives such as the FDM. Ultimately, investors will suffer and will not be as well off as they would otherwise be if the FDM is not implemented.

⁴⁴ Concept Paper, *supra*, n. 1 at 81.

⁴⁵ See Submission of Canadian Securities Institute to WPC, online: Wise Persons’ Committee Submissions <http://www.wise-averties.ca/submitted_en.asp?file=sub__can__sec>.

In particular, the FDM codifies existing legal standards of fairness into a model that emphasizes clarity in defining the relationship between adviser and client. These fairness standards are not currently contained in legislation but emanate from case law. The FDM seeks to create regulation that will do what the courts so far have been successful in doing: looking behind the stated obligations of advisers and applying the same standards to anyone who provides expert financial advice regardless of the product they are selling.⁴⁶ The advantage of using regulation to reach this result is that it can provide the rules of the game up front, before the conduct that gives rise to the legal dispute even occurs.⁴⁷ Investors benefit because they do not need to wait for litigation to ascertain their adviser's responsibilities to them; these responsibilities are set forth in the regulation. Thus, the "Fair" in "Fair Dealing Model" seems to relate primarily to increased transparency regarding the responsibilities of advisers.

From the investor's perspective, the FDM would be a welcome addition to the regulation of advisers.⁴⁸ We should hesitate, therefore, before criticizing the FDM for undermining the current system of regulation or any other proposed model for reform in the Canadian securities regime. Rather, we must once again look from a broad perspective to the structure of the regulation itself and ask whether we will continue to sacrifice innovative and potentially useful initiatives, such as the FDM, because of a faulty, inadequate regulatory system. If the goal of capital markets regulation is truly to protect investors and to maintain efficiency, then structural reform of Canada's regulatory system is necessary. The FDM is just one example of an innovative legislative instrument whose potential cannot be maximized if such reform does not occur.

Some may argue that discussion of whether the FDM is a useful innovation is premature. After all, no cost-benefit analysis regarding the

⁴⁶ Concept Paper, *supra*, n. 1 at 14.

⁴⁷ *Ibid.*, at 15.

⁴⁸ See IDA, News Release, "IDA Responds to OSC Fair Dealing Model Concept Paper" (29 January 2004), online: IDA <http://www.ida.ca/Media/MRGeneral_en.asp>, "The IDA supports the core principles of the Fair Dealing model that is based on relationships (Self-managed, Advisory and Managed for you) currently governed by IDA rules. We endorse the principles it espouses: a clear allocation of responsibilities; transparency in all dealings with retail investors; and management of conflicts of interest to avoid self-serving outcomes."

effects of the FDM has yet been published. The OSC has stated that another concept paper will be published,⁴⁹ which leaves one to question what more will be said about the FDM. However, on the basis of the documents published to date, the FDM appears to fill a gap in current regulation by matching investor expectations with the services that advisers provide to them. The FDM is able to accomplish this while also retaining flexibility in the adviser-client relationship. It clarifies the principles on which the relationship is based and makes it more transparent. For these reasons, the FDM appears to be a potentially useful innovation that could die on the drafting table because national consensus regarding the model will not be achieved.

If this is indeed the fate of the FDM, then we may note again the fragmentation in Canada's securities structure. And when separate jurisdictions attempt innovations, their efforts are wasted when these innovations do not receive national commitment and cannot be implemented nationally. Perhaps a compromise position to increase procedural effectiveness would be to compel jurisdictions that seek to have new initiatives implemented on a national basis to work through the new Policy Coordination Committee of the CSA.⁵⁰ However, even if the provinces agreed to this innovation, the regime would still remain fragmented: separate regulators, introducing separate initiatives that stem from different philosophies about the proper approach to regulating, would each be stifled by the inability to implement their initiatives nationally.

Admittedly, individual regulators will assert that their own initiatives warrant consideration, indeed preference, for adoption in other jurisdictions. Regulators will be convinced of the merits of their own initiatives and would likely wish to retain the ability to ignore at least some initiatives of other jurisdictions. A prime example is the BC Model of regulation proposed by the British Columbia Securities Commission,

⁴⁹ (2004) 27 O.S.C.B. 1334.

⁵⁰ In 2003, the CSA established the Policy Coordination Committee (PCC) to be responsible for oversight and coordination of all CSA projects, and facilitate decision-making among jurisdictions. The PCC consists of six member jurisdictions drawn from the CSA who will serve for a two-year term and may be reappointed. Canadian Securities Administrators, News Release, "Canadian Securities Administrators Restructure" (4 September 2003), online: Canadian Securities Administrators <http://www.csa-acvm.ca/html_CSA/news/csa_restructure_25.htm>.

which is set to be implemented in that province but which other provinces have not adopted.⁵¹ Because the model represents such a fundamental shift away from the current model of securities regulation in most other Canadian jurisdictions, it seems unlikely that it will be adopted outside of British Columbia.

One may ask: how does the BC model differ from the FDM since each is an initiative that is more likely to succeed if adopted nationally? These two initiatives are very different in terms of the structural reform they would occasion if implemented nationally. The BC Model is an alternative to the current system of regulation, whereas the FDM is an initiative that can be adopted within the confines of the current system. In this way, the BC Model undermines the creation of a national system of regulation. However, both initiatives highlight a weakness in the current system. Under it, local regulators seek to hang on to their freedom to depart from what may be optimal regulation for individual provinces. In seeking to retain this freedom, however, local regulators undermine the implementation of initiatives that could be best for the country as a whole. While Ontario contemplates what would be optimal for Ontario markets and British Columbia proposes what would be optimal for its markets, the country as a whole suffers because there can be, and often is, a lack of consensus on these issues. Furthermore, there is no uniformity in the process by which regulation is introduced and implemented. In addition, apart from the CSA process (which provinces can opt out of), there seems to be little consideration in the individual jurisdictions of whether a particular initiative would be optimal for Canada's markets as a whole.

⁵¹ The BC Model led to the introduction of Bill 38, *supra*, n. 24. The Bill has had its third reading in the B.C. Legislature; see "New securities regulatory framework protects investors and improves BC's business climate" (5 May 2004), online: British Columbia Securities Commission <http://www.bsc.bc.ca/news/NR04_23.asp>. See also British Columbia Securities Commission, *Securities Regulation That Works The BC Model: Draft Legislation, Commentary And Guides For A New Way To Regulate* (15 April 2003), online: British Columbia Securities Commission <<http://www.bsc.bc.ca:8080/comdoc.nsf/allbyunid/8415fd58ec7a533488256d090054aa94?open&document>>.

4. ACHIEVING RESOLUTION

The story that has been told here thus far is one about failure: the failure of Canada's securities regulatory regime to provide avenues in which initiatives such as the Fair Dealing Model can be implemented on a national basis. This failure stems from the highly fragmented character of Canada's regulatory regime as well as from the uncertainty that this fragmentation creates for market participants. Admittedly, these claims are not new, but they have been voiced here in a manner that isolates the main deficiencies with the current regime. The analysis of the FDM above further emphasizes the outmoded and ineffective tools that Canada has available to implement policy initiatives. This section outlines two types of uniformity that need to be achieved in order for the securities regulatory regime to function more effectively: substantive uniformity and structural uniformity. To begin, I describe two competing models of reform that have recently been proposed in Canada.

In 2003, provincial ministers released a discussion paper in which they proposed a passport system of regulation.⁵² The discussion paper was followed by a Memorandum of Understanding (MOU) issued in 2004.⁵³ Under this system, jurisdictions enter into agreements pursuant to which one jurisdiction would recognize the decisions made by another on the basis of the rules applicable in the latter. The system is premised on the notion that there will be "host regulators" and "primary regulators." Host regulators are those in the jurisdiction where the market participant is operating or offering securities. Primary regulators are those that bear the responsibility for overseeing the market participant. Under the passport system, registrants and issuers would need to meet the requirements of the primary regulator only.⁵⁴ At the moment, the model contains no requirement for harmonized legislation, although this requirement may be included in a subsequent draft of the model.⁵⁵

⁵² Discussion Paper and MOU, *supra*, n. 21.

⁵³ MOU, *supra* n. 21. Note that the MOU was signed by Quebec, New Brunswick, Manitoba, British Columbia, Saskatchewan, Alberta and Yukon. Ministers from Nova Scotia, Prince Edward Island, Newfoundland, the Northwest Territories and Nunavut also agreed in principle to sign the MOU or to present it to their cabinet for discussion. Ontario does not favour the passport system.

⁵⁴ Discussion Paper, *supra* n. 21, at 10.

⁵⁵ *Ibid.*, at 3, which states, "Legislative harmonization, at least in key areas, may be a necessary but not sufficient solution to the problems raised by stakeholders."

In 2003 also, the federal appointed Wise Persons' Committee proposed a single securities regulator to regulate the Canadian capital markets. Under its model, a nominating committee with representation from the provinces would select commissioners of a Canadian Securities Commission. This body would administer a single statute and have a head office located in the Ottawa region. It would be responsible for policy development, the coordination of regional and district office activity, as well as dealings with other Canadian financial sector regulators and international matters. Regional offices would be established in cities across Canada to review prospectuses and registration applications, grant exemptions, conduct compliance reviews and investigations, and initiate enforcement proceedings, as well as contribute to policy development.⁵⁶

Numerous debates relating to the advantages and disadvantages with each of these models have occurred.⁵⁷ The debates hinge on various issues, such as which regime would be more attentive to local needs, accountable to investors and the public at large, effective in enhancing enforcement activities, and beneficial for Canada internationally. But, apart from these specific issues, the two models force us to ask whether there are any minimum requirements that must exist in order for Canada's securities regulatory regime to operate more efficiently and more effectively? I argue that without both structural and substantive uniformity, Canada's regulatory regime will continue to be ineffective, and that the passport model of regulation is less satisfactory than the single regulator model because it requires neither of these two types of uniformity.

(a) Substantive Uniformity

Substantive uniformity is a necessary component of securities regulatory reform in Canada, and refers to consistency in securities regulation, as a matter of substantive law, across jurisdictions. The frequently voiced claim is that the lack of uniformity in securities legislation across the country prevents issuers from effectively completing transactions at the national level. Admittedly, there are many areas in which securities

⁵⁶ WPC Report, *supra*, n. 3 at 57-59.

⁵⁷ See, for example, the debate between Jeffrey MacIntosh and Douglas Harris in the *National Post*, 29 January 2004, 5 March 2004, & 18 March 2004.

regulation is generally harmonized, such as the regulation relating to takeover bids and public offerings. But there are other areas, such as the law relating to exempt distributions⁵⁸ and registration, where regulation is not harmonized. This lack of consistency makes transactions less efficient, since issuers and registrants must be sure to comply with the particular laws of each jurisdiction before undertaking their business there. The absence of harmonization creates a deterrent to transacting outside the issuer's or registrant's home province.

The CSA has made significant strides towards achieving substantive uniformity in the Uniform Securities Legislation (USL) initiative. Its motivation for the USL was the need in Canada for "a more streamlined system of securities regulation with fewer administrative hurdles. . . ."⁵⁹ Yet, while some provincial regulators have sent representatives to the USL negotiating table, it is not clear how it will be adopted in each jurisdiction (for example in Quebec with its civil law regime, and in British Columbia if the new B.C. Model of legislation is implemented). Furthermore, even though substantive uniformity exists in some areas of regulation, there is always the potential for this harmonization to decrease. Under the USL there are still 13 regulators in Canada that can decide, at their will, to alter what was previously harmonized legislation.⁶⁰ Thus, there are serious limitations to USL in the context of the current securities regulatory structure. It alone cannot solve the woes of Canada's securities regulatory regime.

Some may argue that substantive uniformity is achieved under the passport system (as conceived under the Memorandum of Understanding). The MOU stipulates that the passport system will apply to areas

⁵⁸ Note the differences between Ontario's Rule 45-501 *Exempt Distributions*, online: OSC <http://www.osc.gov.on.ca/Regulation/Rulemaking/Current/Part4/rule_20040109_45-501_rule.jsp> (for amendments that have occurred after the posting of the full rule: <http://www.osc.gov.on.ca/Regulation/Rulemaking/Current/Part4/rule_20040402_45-501-consq-amends.jsp>), and Multilateral Instrument 45-103 *Capital Raising Exemptions*, online: British Columbia Securities Commission – Securities Act <http://www.qp.gov.bc.ca/statreg/reg/S/Securities/69_2002.htm>, agreed to by the other provinces. Recently the provinces have attempted to harmonize their exemptions though they have not completely done so under the proposed initiative. See proposed National Instrument 45-106 "National and Ontario Prospectus and Registration Exemptions" (2004) 27 OSCB (Supp-3) 1 (Dec. 17, 2004).

⁵⁹ (2004) 27 O.S.C.B. (Supp-1).

⁶⁰ See OSC submission to WPC, *supra*, n. 19.

that have been designated as highly harmonized, including prospectus requirements and clearance, prospectus and registration exemptions, continuous disclosure requirements and routine discretionary exemptions.⁶¹ The problem is that a number of areas of securities regulation, such as areas that are not harmonized (*e.g.*, registration) as well as areas that are harmonized (*e.g.*, takeover bids), will continue to operate outside the passport system, at least at present. We have therefore at best only a *partial passport system*. Without fully harmonized law (*i.e.*, substantial uniformity), the passport system will not succeed in creating a more effective regulatory structure.

(b) Structural Uniformity

The drawbacks of the USL thus underline the need not only for substantive uniformity but also for structural uniformity. Structural uniformity refers to the processes by which securities regulation is implemented and depends on the particular institutions that are responsible for implementing and enforcing the regulation. The objective of structured uniformity is to achieve consistency in the adoption and implementation processes. For instance, is a proposed instrument issued for comment as a rule and then implemented once a comment period has expired? Or is the proposed instrument enforced on a case-by-case basis? The disadvantages inherent in a system that does not have structural uniformity is evident in the following submission to the WPC:

[T]he legal status of national and multilateral instruments varies from jurisdiction to jurisdiction (*i.e.*, the same national or multilateral instrument can have the status of policy, blanket ruling, rule, or regulation, depending upon the jurisdiction which adopts it). In those jurisdictions in which an instrument is not adopted as a rule or regulation, but as a policy, relief will be needed from the local regulator so as to rely upon the policy in that jurisdiction. In jurisdictions where the instrument has the force of law no such interaction with the regulator will be necessary. Thus although the substantive law may have been harmonized across some or all jurisdictions through the multilateral or national instrument, market participants wishing to rely upon and/or comply with the instrument must still analyze (usually with the assistance of advisers) whether the instrument has the force of law in each relevant jurisdiction.⁶²

⁶¹ *Ibid.*, at section 5.2 and 5.3.

⁶² Submission of Osler Hoskin & Harcourt to the Wise Persons' Committee, online: Wise Persons' Committee Submissions <http://www.wise-averties.ca/submitted_en.asp?file=sub_osl>.

The difficulties with the current system raised in this excerpt are not solved by substantive uniformity alone. Although the USL would serve to further streamline the substantive law, the system would still suffer from the inefficiencies outlined above that result from the existence of 13 separate regulators. The proposed passport system also suffers from this weakness. Indeed, the main drawback of both the USL and the passport system is that they allow for the significant structural differences that plague our regulatory system. They both permit differences in modes of implementation. Furthermore, the continued existence of multiple regulators in both models means that jurisdictions can apply the law differently (even though the law may be harmonized). Differing philosophies among securities regulatory authorities may exacerbate this potential problem, preventing true uniformity from being achieved.

Proponents of the passport system argue that it is the existence of separate regulators that makes the system workable in the Canadian political context. This is perhaps the passport system's strongest claim, as I have discussed elsewhere.⁶³ Other advocates of the passport system posit other advantages, such as that numerous regulators will promote "competition" in the market for regulators that can be analogized to other markets, such as the market for cars.⁶⁴ As Jeffrey MacIntosh states, "The core virtue of any competitive system is the incentive for innovation. Imagine what we would be driving, for example, if a single car company operating out of Detroit serviced the entire North American automobile market. A regulatory monopolist, like a monopolist in any market, has little incentive to innovate because it does not have to innovate to survive."⁶⁵ For proponents of the free market, the idea is compelling: a single securities regulator will have a monopoly over the markets it regulates. Thus it will see no need to innovate. Rather, it will become stagnant and settle for lower standards in regulation.

However, regulatory competition is not the answer to Canada's securities law dilemmas. Indeed, recent scholarship in the field of economics has cast doubt on the claim that monopolists have less incentive to innovate than firms in a competitive environment. Frederico Etro

⁶³ Anita I. Anand, "Inefficiency and Path Dependency in Canada's Securities Regulatory System" (2005) *Canadian Business Law Journal* (forthcoming).

⁶⁴ *Supra*, n. 34.

⁶⁵ *Ibid.*

contends that monopolists have greater incentive than potential rivals to innovate.⁶⁶ In attempting to maintain its monopoly, the market leader acts *more* competitively than firms in markets in which there is no dominant actor.⁶⁷ Analogized to the current securities regulatory regime, this argument undermines the contention that the “monopoly” that the OSC (and other provincial regulators) exercise over their respective markets stifles regulatory innovation. On the contrary, the OSC’s leadership position spurs it to innovate aggressively for fear of losing its monopoly. The FDM discussed in the previous section is a case in point. Furthermore, a national regulator would not be a global monopolist; it would face competition from regulators outside of Canadian borders and would respond to competition *internationally* rather than nationally.

The current lack of structural uniformity prevents Canada from effectively competing for capital with the United States and other G-7 nations. Issuers and investors are discouraged from doing business in Canadian capital markets because Canada does not have one regulator operating under one law. Rather, it has numerous individual regulators and numerous legislative schemes, making the system overly complicated for foreign issuers. The number of regulators will not decrease under the passport system, and one can only predict that issuers and investors will continue to shy away from Canadian capital markets because of its fragmented appearance. If issuers ask, “How do we go about raising capital in Canada?”, the response will continue to be “You don’t raise capital in Canada, but in different jurisdictions in Canada.” In short, it seems strange that Canada has sanctioned a system where boundaries (in the form of provincial securities regulators) remain in place while the world witnesses the trend towards globalization.

The only positive aspect of the passport system of regulation is that provinces can retain their separate boundaries and hang on to the provincialism that has characterized many years of federal-provincial relations in this country. With separate regulators and unharmonized law, provincialism will continue to profoundly affect Canadian capital markets. It will be issuers, registrants and investors who suffer under a

⁶⁶ See Federico Etro, “Innovation by Leaders” (2004) 114 *The Economic Journal* 281.

⁶⁷ For commentary on this point, see “Slackers or pace-setters?” (20 May 2004), online: *The Economist* <http://www.economist.com/finance/PrinterFriendly.cfm?Story_ID=2686130>.

passport regime. Investors in particular will continue to have unharmonized statutory protections. Coordination difficulties will continue to plague enforcement activities, as will differences in enforcement priorities of provincial regulators.⁶⁸ How will the passport model address these significant concerns? In short, even with a passport system, Canada will still have a fragmented regulatory regime. There will be uncertainty regarding how the system operates and the applicable laws in each province. While competition in and of itself is a laudable objective, it cannot override these fundamental issues.

5. CONCLUSION

This article is not a plea for the WPC proposed model but rather an argument in favour of a reformed system composed of the characteristics of structural and substantive uniformity. These two characteristics are necessary to ensure that the securities regulatory regime functions efficiently and that policies are implemented effectively. A model with these two characteristics will not stifle but rather inspire innovation, since market leaders such as the OSC will continue to fight for their leadership positions. This will be beneficial for capital market participants as a whole.

There was a time when even proponents of the passport system favoured a single regulator model.⁶⁹ Perhaps they recognized that in light of the dire state of affairs of Canada's securities regulatory system, some reform was better than no reform. With a federal government that has highlighted the need for regulatory change in a more deliberate way than many governments before it, reform seems to be a possibility. However, in order for broad structural reform to be meaningful, leadership is required. The federal government is the only body that can alleviate the impasse in the current regime. If it does not, both fragmentation and uncertainty will continue to plague Canadian capital markets and those participating in them.

⁶⁸ *Supra*, n. 17.

⁶⁹ Jeffrey MacIntosh, "Forget Quebec: The OSC's plan for a pan-Canadian regulator won't work. The solution is to leave Quebec out and form a commission for the rest of Canada" *National Post* (30 November 2001), and Jeffrey MacIntosh, "Let's revive campaign for a national regulator: The behemoths of the financial world will continue to avoid Canada until we ensure our securities regulators are not just cops but service providers" *National Post* (26 June 2001).