December 8, 2014

Ontario Securities Commission
20 Queen Street West, 20th Floor
Toronto, ON M5H 3S8

Re: Comment on CCMRA

These comments are an adaptation of four op-eds that I wrote in the National Post on November 17, 18, 19, and 20. On. Nov. 28 Phillip Anisman published a response in the National Post, which I have responded to in an Addendum to this comment. Please consider the Addendum to form part of my comment.

My concerns about the proposed legislation are many, and include the following:

i) Excessive discretionary authority results in uncertainty for market participants in knowing what is permitted and what it not.

ii) Excessive discretionary authority abrogates fundamental principles of the rule of law.

iii) Unnecessary changes in wording from existing rules result in uncertainty as to how various provisions will be interpreted.

iv) There is already something like a vacuum of accountability in securities regulation; the proposals will only exacerbate the extent to which regulators are free from oversight and control from any quarter, again abrogating fundamental principles of the rule of law.

v) There are too many changes from existing regulation for commenters to adequately deal with at one time, greatly impairing the ability of market participants to contribute to the conversation.

vi) The drafters of the legislation have done something that was never part of the conversation leading up to a multi-jurisdictional regulator; greatly amending and extending existing securities regulation. Rather, it was sold to the business community on the basis that it would lead a single regulator, a single fee structure, superior enforcement capabilities (because of the jurisdictional reach of the regulator), and, with federal participation, a greater ability to deal with systemic risk. The substantial alteration of the regulatory structure is an opportunistic move that was not part of this conversation.

vii) The proposals allow securities regulators to intrude on both civil law (via the awarding of restitution and compensation) and the criminal law (through administrative fines) without the procedural or evidentiary protections that those venues furnish to those at bar, and subject to excessive and effectively uncontrolled discretion in the regulators, given (*inter alia*) the minimal likelihood that any appeal to a court will succeed. This again abrogates fundamental principles of the rule of law.

viii) The federal insider trading provision in the CMSA is no longer a truly "criminal" law provision, since it dispenses with the Crown's onus to prove a full *mens rea.* For this reason, it may well be unconstitutional. In addition, the potential 10 year jail term is justifiable only on the basis of the necessity of proving a full *mens rea*.

ix) There are unjustifiable differences in the drafting of the federal and provincial insider trading provisions. These are not explicable on the basis that the federal statute is a "criminal" statute while the provincial statute regulatory.

x) The privative clause is unacceptable. If meaningful oversight is to come from any quarter, it is from the courts. Any decision of the Authority should be appealable to the Tribunal (and from there to a court), in the manner of a decision of the Chief Regulator.

xi) The standard of appeal should be specifically stated to be "correctness" rather than "reasonableness". Otherwise, the right of appeal is essentially meaningless.

xii) The draft legislation will achieve only a small subset of the goals initially sought to be achieved by forming a multi-jurisdictional regulator. For example, at least initially, there will be no economies of scale, as all existing provincial employees will become employees of the CCMRA. In addition, the "one voice" problem will not be solved, nor will the proposals leave capital market participants with a single regulator.

xiii) Given the magnitude of the changes and the complexities of the new legislation, the period for comment is insufficient, which will inevitably allow many of the proposed features of the new legislation to adopted subject to the adequate reflection, rumination and feedback that has always been a part of legislative changes and rule changes in the past.

xiv) The reliance on a bare-bones "platform" statute violates the rule of law. It turns the regulators into their own legislature, without adequate oversight or review by the legislature.

xv) The emergency rule (or "regulation") making authority has insufficient procedural protections. A new rule may be adopted and announced without any public warning or other statement. This violates a fundamental precept of the rule of law – that the law be clear, well known, and signalled in advance with sufficient notice to allow market actors to know what their obligations are and to adapt their behaviour accordingly.

xvi) If an emergency rule-making power is desirable, it should be subject to at least a reduced notice and comment period.

The details follow.

A.V. Dicey's classic formulation of the rule of law is that:

> no man is punishable or can be lawfully made to suffer in body or goods except for a distinct breach of law established in the ordinary legal manner before the ordinary Courts of the land. In this sense the rule of law is contrasted with every system of government based on the exercise by persons in authority of wide, arbitrary, or discretionary powers of constraint.[1]

[1] A.V. Dicey, Lectures Introductory to the Study of the Law of the Constitution, "Lecture V: The Rule of Law; Its Nature", from a facsimile of the 1886 Second Edition published by MacMillan & Co., as produced in 1999 by The Legal Classics Library, Division of Gryphon Editions, New York, p. 174.

However, to some extent this view has been overtaken by the extraordinary growth of the public sector, with the commensurate growth of the administrative state. Saddling the courts with the burden of overseeing the application of the multiplicity of regulatory statutes would be overwhelming. Thus, the rule of law now plays out in two distinct (if related) battlegrounds; the courts and the administrative tribunals.

This is not to say, however, that the principles that underlie Dicey's classic formulation have or should be been abandoned. The rule of law may be divided into a number of constituent components:

i) the law must be sufficiently clear to guide the actions of those who are subject to it;
ii) the law must be relatively stable and not subject to frequent changes;
iii) substantive laws must be administered in a setting that provides adequate procedural protections from incorrect fact finding, incorrect application of the law, and arbitrariness;
iv) like cases must be treated alike;
v) decisions must be both reasoned and public;
vi) as Dicey states elsewhere, "wherever there is discretion there is room for arbitrariness"; thus, both judicial and administrative discretion must be contained;
vii) while administrative law making is unavoidable, the legislature must ultimately be sovereign.

My concern, as noted above, is that the high level of discretionary authority that will be reposed in the securities regulators under the CCMRA violates some or all of the above notions. Examples follow.

The federal legislation empowers the "Chief Regulator," without holding a hearing or even giving advance notice, to "issue a notice of violation [for breach of the statute or regulations]… if the Chief Regulator has reasonable grounds to believe that the person has committed a violation." The notice may specify a penalty of as much as $1-million for an individual and $15-million for non-individuals.

It is only after this notice is delivered that the person from whom the fine is demanded has an opportunity to make representations. Despite the potential economic burden, the pertinent burden of proof in the hearing is the civil standard (balance of probabilities) rather than the more demanding criminal law standard (beyond a reasonable doubt). Any director or officer "who authorized, permitted or acquiesced in the contravention" is potentially liable for the full amount of the fine.

This provision creates severe monetary consequences with minimal procedural (or substantive) protections. It trenches on the criminal law without offering anything like the procedural protections that are available in a court of law. It allows the Chief Regulator to notify a person

that they are being fined when they have only "reasonable grounds to believe that the person has committed a violation." This is an unacceptable violation of the rule of law.

The Chief Regulator can also order any person with a connection to capital markets to furnish the regulator (the "Authority") with any kind of information, including information that is personal and/or confidential. No judicial warrant is required.

This information can be passed on to a law enforcement agency or "a governmental or regulatory authority, in Canada or elsewhere." Indeed, it can be passed on to anyone of the Authority's choosing. It can also be made public, if "the public interest in disclosure outweighs any private interest in keeping the information confidential."

These provisions are again a manifestation of discretionary power without adequate procedural checks.

The statute specifically excludes any appeal to a court; the only appeal is to the regulatory tribunal (although the tribunal's decision can then be appealed to a court). But once the information has been collected and disseminated, the right of appeal is essentially useless in any case. All this means that there is no obvious check on the ability of the Authority to use its new information-gathering powers to conduct any number of speculative fishing expeditions into the affairs of anyone connected with the capital markets, looking for violations of securities laws – or perhaps other laws.

Under existing provincial legislation the licensing powers of the regulators are limited to "registrants", a limited set of "recognized entities", and "market participants". Under the new legislation these powers can arbitrarily be extended as the Authority chooses to virtually anyone connected with capital markets. Under the PCMA, this is achieved by allowing the regulators to designate virtually anyone as a "market participant", a "recognized entity", or a "designated entity" and then regulate these persons much as it regulates registrants or self-regulatory organizations. Once subject to a designation, the Chief Regulator will have the power to tell these parties what they can and cannot do by way of carrying on business, in addition to making orders relating to any "by-law, regulatory instrument, policy, procedure, interpretation or practice" of the entity.

One class of persons who can explicitly be designated as a "market participant", for example, is mediators. At the whim of the Chief Regulator, they will be required "to provide the Authority with any information, record or thing in [their] possession or under [their] control that relates to the administration or enforcement of capital markets law or the regulation of the capital markets." It is an offense to fail to cooperate.

Under the CMSA, the regulator may similarly expand the reach of its regulatory jurisdiction by designating virtually anyone as a "systemically important capital markets intermediary" and again regulating them like a registrant.

"Control persons" (which includes not just controlling shareholders, but those who have the power to materially affect the control of an issuer) are also drawn under the regulatory umbrella, and will be subject to many aspects of regulatory control now reserved for "registrants." Like mediators, they will become subject to an obligation to supply whatever information the Chief Regulator demands. They can also be required to submit to a review of their practices and procedures; to make changes to those practices and procedures; and to submit to a review of their business and conduct.

Another provision effectively allows the Authority to re-write the coverage of the legislation at will. Under the current Ontario Securities Act, the Commission may designate any person as a "reporting issuer" or an "insider of a reporting issuer", or a derivative as a designated derivative. Under the PCMA, the Authority would have the power to make *seven additional designations*, including: orders designating any trade to be a distribution (requiring a prospectus or exemption from the prospectus requirement); any issuer to be a mutual fund or a non-redeemable investment fund; any person to be a market participant or a market place; a security, or class of securities, to be a derivative; and a derivative, or class of derivatives, to be a designated derivative. Unlike under existing legislation (where the person affected may appeal the Commission's decision to a court) under the PCMA there is no appeal to anyone (either court or tribunal) regarding any of these arbitrary designations.

Again, these are examples of excessive discretionary authority that threaten individual liberty and transgress fundamental principles of the rule of law.

Procedural protections against ill-considered, wrong-headed, arbitrary, or even malicious rule-making by the Authority have been greatly weakened. Thus, for example, the new legislation effectively allows the Authority to issue what were colloquially known as "blanket rulings" under their discretionary powers to exempt a class of market actors from any provision of the legislation or rules. While this sounds harmless, the current legislation in Ontario expressly prohibits regulators from doing so. This is because, under the guise of granting "exemptions," the regulators previously misused this power to effectively create entire new regulatory structures replete with a plethora of positive obligations. The short-form prospectus system, for example, was at one time entirely a creation of an "exemption" from the prospectus requirement.

In like fashion, the new provincial legislation allows the Authority to formulate rules defining anything at all as an "unfair practice." While this can only be done via a regulation, it nonetheless represents an abandonment of the current legislative practice of expressly defining

the matters in respect of which the regulator can make rules. Instead we are now to have a regulatory carte blanche. Indeed, the federal legislation makes this quite express, simply stating that "the Authority may make regulations for carrying out the purposes and provisions of this Act." The legislation thus turns the regulator into its own legislature, in violation of a fundamental tenet of the rule of law.

The regulators are also taking a stab at implementing a measure that failed in a previous attempt in Ontario because of widespread opposition – giving the regulatory tribunal the power to "compensate or make restitution to one or more persons" where they have determined that there is a violation of securities law. This is a startling usurpation of the role of the courts. It allows the tribunal to function like a court, but without any of the evidentiary or procedural protections associated with a lawsuit. The tribunal, for example, can decide its own rules of evidence. Worse, because it has no obligation to follow its own prior decisions, it can do so in an ad hoc manner. Nor will the vast majority of other procedural protections associated with a civil suit be available.

The power to award compensation or restitution arises in any case in which "capital markets law" is violated. That term is broadly defined to include a discretionary finding by the tribunal that a person has breached "the public interest." Past tribunal and court decisions have made it clear that the public interest may be breached without any violation of the statute, or the rules or regulations made under the statute. Thus, the tribunal will be empowered to award the equivalent of civil damages without any violation of pertinent legal requirements, and it will be able to do so in a case in which there is no violation of the Act or the regulations.

If it was not intendede that this be the case, the drafting must be made more explicit.

The proposed legislation also adds a new offense – doing anything that "results in an unjust deprivation or a risk of an unjust deprivation." This is a completely undefined term. Precisely because no one knows what it means or how the tribunal or courts will interpret it, it can be dangled by the regulators (like the power to award compensation or restitution) like a Sword of Damocles over the supine body of any market actor it chooses. A fine way to secure a settlement or dictate a course of action.

When securities laws are changed in material ways, a wide variety of market actors are potentially affected. Under current legislation, to guard against precipitous, ill-considered, or wrong-headed new laws, members of the public must be given at least 90 days to comment on proposed changes to rules promulgated by the regulators. The CCMRA would make such numerous and radical changes to existing laws that, for all intents and purposes, the notice and comment procedure is inadequate to the point of futility. Here are some of the reasons why.

In a move that is utterly without precedent, draft legislation has been published for comment with key provisions missing. These include the sections dealing with how the new cooperative regulator will interface with non-participant provinces. These go to the core of how Canada's regulatory system, consisting both of participants in the cooperative scheme and non-participants, will function. In addtion, the extent of the regulator's rule-making authority under the provincial legislation and the draft regulations themselves – the real meat and potatoes of the regulatory scheme – remain under wraps. Thus, the public has been asked to comment on a set of rules that is woefully incomplete.

The legislation seeks to put in place an extraordinarily long menu of fundamental changes to securities laws. Simply documenting these changes is itself a labour of Hercules, not to mention coming to grips with the legal and practical ramifications of the changes.

Insider trading laws, for example, will now apply to any public company, and not just one that is a reporting issuer in Canada. They will also apply not merely to a purchase or sale of securities, but to any act in furtherance of a trade, a change with completely unknown ramifications. While under current rules in the Ontario Securities Act and most other securities regulatory statutes, certain insiders are liable to the company in whose securities they trade for any "benefit or advantage" they receive, the new legislation extends the liability to include any benefit or advantage received by "all other persons as a result of the contravention." Similarly, under most current statutes, only persons who actually trade with an insider have a right of action. Under the proposal, all persons trading on the opposite side of the market when an insider trades will have a cause of action, with no limitation on the aggregate damages that may be claimed. In a large public company, an insider trading profit of $100 could lead to an aggregate liability in the millions.

Indeed, under the PCMA the inside trader or tipper is potentially exposed to no fewer than seven overlapping and non-exclusive monetary liabilities, in addition to potential jail terms under both the PCMA and the CMSA. This is regulatory overkill of heroic proportions.

Further complicating a comparison of old and new is that there are a myriad of unexplained changes in statutory wording. Thus, for example, the trigger for the all-important and wide-ranging public interest powers changes from "if in [the Commission's] opinion it is in the public interest" to if "[the Commission] considers that it is in the public interest to do so." In one of the most critical definitions in the statute (that of "misrepresentation"), "an untrue statement of material fact" morphs into "a false or misleading statement of a material fact." These and many other new formulations have never been tested in any court or tribunal. They therefore introduce an unnecessary (not to mention bewildering) wildcard into the scope and application of the securities laws.

The Sisyphusian task of commenting on the proposed legislation is exacerbated by a number of other factors. One is figuring out how the federal and provincial statutes will work together, as little attempt has been made to consolidate them into a seamless whole. Rather, there are innumerable overlaps with inexplicable differences in wording. In some cases, there are express contradictions. The insider trading provisions are an example. There are, in material respects, differences in the substantive triggers for liability, defences, onuses of proof, and penalties.

Contrary to one commentator's assertion, these differences are not explicable on the basis that the federal law is "criminal" law while the provincial law is "regulatory" law. True "criminal" law requires proof of a "*mens rea"* or guilty mind, as ia the case under the current *Criminal Code* offence of insider trading. However, the proposed CMSA abandons the requirement that the Crown prove a full *mens rea*, and thus abandons its claim to be true criminal law. But even if it were, the many differences between the provincial and federal insider trading liabilities owe little or nothing to this distinction.

In addition, comments on features of the proposals covered by the Memorandum of Understanding between the provinces and the feds (such as the CCMRA's governance structure) are likely to have little or no impact. Re-negotiating the MOU will require complex political manoeuvring. It is very unlikely that there is any political appetite to do so.

In the past, major overhauls of corporate or securities laws have invariably been effected by appointing a blue ribbon panel of experts to consult widely with stakeholders, ruminate at length, and publish a detailed report indicating not only the panel's recommendations for change but the whys and wherefores of the proposed changes. Not in this case. A massive overhaul, replete with an enormous expansion of regulatory powers, has been proposed with nary an explanatory peep. For an association of authorities that earnestly and piously sing at the altar of good corporate governance, impressing upon us daily the indispensable importance of fulsome disclosure, well-crafted decision-making procedures, and accountability, this is a truly astonishing feat of legerdemain.

All of these changes reek of unabashed opportunism. The proponents of the scheme have apparently decided that they can trade on the strong support of the Canadian business and financial communities for a multi-jurisdictional regulator to make whatever changes they want to the regulatory regime. Perhaps the hugely expanded array of regulatory powers is designed as a strategic inducement to get non-participating jurisdictions to sign up. Needless to say, neither of these is a legitimate motive for affecting such an expansionistic sea change in the legislation.

The nominal advantages of the proposed CCMRA include the application of a single set of rules in all participating jurisdictions. The CMRA will be endowed with the full panoply of provincial and federal powers relating to securities regulation, allowing for comprehensive and seamless

enforcement of securities laws across the participating jurisdictions. Proponents of the legislation tout the fact that market actors will have but a single regulator (and single fee structure) to deal with. For years, supporters of a multi-jurisdictional regulator have also asserted that, by eliminating duplication and exploiting economies of scale, a common regulator will reduce the aggregate governmental costs of supplying regulatory services. Another reputed advantage is that Canada will have a unified voice at the table in international negotiations over securities regulation. And of course, the feds have long championed the view that the CCMRA will lead to more effective control of systemic risk.

The reality may be rather different.

Take the "single voice" problem. At present, there are typically four provincial actors who show up at in international goings-on related to securities regulation: Ontario, B.C., Alberta, and Quebec. If the CCMRA goes through, this will be reduced to three; the CMRA, Alberta, and Quebec. Indeed, as Quebec and Alberta look to be hardened targets resilient to the most spirited barrage of federal bunker-busters, the number may never be fewer than three. Hardly a problem solved.

Nor will the goal of achieving a single regulator be realized. To date, only Ontario, B.C., Saskatchewan, N.B., and P.E.I. have signed on. Thus, if the CCMRA were to be adopted tomorrow, there would still be five provincial and three territorial regulators outside the fold. If Quebec and Alberta continue to be unsympathetic suitors, market actors doing business across the country will have at least three regulators to deal with.

Proponents of a cooperative scheme have long claimed that a single regulator will achieve fiscal savings by eliminating the duplication of regulatory functions performed in a multi-regulator system. There is little reason to believe that the CCMRA will achieve this result. Regulation is an activity with a high labour-to-capital ratio. For example, for the past several years the OSC's employee compensation and occupancy costs have totaled about 85% of its annual budget. Thus, if more than marginal savings are to be achieved, this can only be done by reducing the aggregate number of employees involved in securities regulation across the participating jurisdictions.

The agreement between the provinces and the feds, however, provides initially for the secondment, and subsequently for the transfer to the CMRA of all provincial employees currently engaged in securities regulation. In addition, no provincial regulator will disappear. Rather, each will morph into a branch office of the CMRA. Thus, there appear to be essentially no initial economies in moving to a cooperative regulator. Savings can only be achieved in the long run through expensive buy-out packages or attrition.

No doubt this is a convenient inducement to get more provinces and territories to sign up, since no one in any of those respective organizations need hand out any pink slips. And indeed, to the extent that duplication is in fact eliminated, many employees will end up with a substantially reduced workload. But in any case, this makes mincemeat of the argument, long one of the stoutest arrows in the quiver of the "one regulator" crowd, that regulatory amalgamation will produce substantial fiscal savings.

Another much-touted advantage of a common regulator is the application of a single set of rules, or, as the Memorandum of Understanding (MOU) states, "common standards reflected in cooperatively-developed regulations consistently applied." However, the meaning of neither legislation nor rules is self-executing. Any legal text is subject to interpretation by the courts, and courts in different provinces may give common statutory provisions different meanings, sundering the much-touted uniformity.

A further perusal of the MOU indicates that the rules may in fact differ from one jurisdiction to another. The MOU allows any participating jurisdiction to request special rules in order "to accommodate provincial or territorial government programs that relate to specific economic development initiatives within [the] provincial or territorial Participating Jurisdiction." The meaning of this phrase is conveniently left undefined, and it is fraught with manifold political baggage.

In the past, one of the greatest bones of contention between provincial holdouts such as Alberta (and, at one time, B.C.) is that the capital markets that they administer are "venture capital" markets with a much greater preponderance of small entrepreneurial endeavours than found in Ontario's large-firm-dominated regulatory environment. Westerners have long argued that these small companies require a different regulatory calculus so as not to stifle economic growth. It is difficult to imagine that this concern is merely an artefact of past political wrangling that will easily melt into little-lamented obscurity. Rather, it is likely that these long-standing concerns will create abiding pressure for an expansive interpretation of "specific economic development initiatives." It is not beyond the ken of man to imagine, for example, that some provinces will press the argument that the phrase embraces exemptions from the requirement to file a prospectus when raising capital. The ability to maintain custom-designed exemptions has long been a rallying cry of western opponents of a pan-Canadian regulator, and maintaining different provincial exemptions would be a serious blow to the cause of uniformity.

The tension between the desire for uniformity and the drive to accommodate special needs has given us an MOU that totters on the brink of schizophrenia. The MOU states, for example, that "the Initial Regulations will be drafted taking into consideration the economic and regional interests of each Participating Jurisdiction" and will "reflect the needs of the various participants in those capital markets within a common securities framework." On the other hand, the MOU's

explicit aim is to develop “common standards… consistently applied.” On its face, this is Orwellian doublethink of an Olympian character. How can you take into account the varying needs of different jurisdictions with a single set of uniform rules?

Will the CCMRA better address systemic risks than the current provincially based scheme of securities regulation? This is highly doubtful, and based on the manifestly false premise that the Credit Crisis of 2008 might have been averted had Canada had a pan-Canadian regulator. The Credit Crisis leaked into Canada from the U.S., which, coincidentally, happens to have a powerful national regulator. There was a regulatory failure in Canada just as there was in the U.S., and it had nothing at all to do with the regulators’ respective jurisdictional domains. Even if we believe that the feds have an ability to deal with systemic risks or gather information on capital markets that the provinces lack, this can be effected without the joint delegation of provincial and federal powers to a common regulatory authority. The proof of this lies in the fact that the CMRA will exercise its federally delegated powers not only in provinces that are a part of the cooperative scheme, but in non-participating provinces as well.

The CCMRA, if adopted, would be a watershed event in the architecture of Canada’s political institutions. And in no way for the better.

Since the Great Depression, the rise of the welfare state has been associated with a vastly expanded role for government, and this vast expansion has received its expression in the commensurate growth of the administrative state. Government administrators, who exercise powers delegated to them by government, have tentacles into virtually every walk of life, from the TV we watch to how we behave in the workplace to the pedigree of the hamburgers we throw on the barbecue in the summer.

More and more the leviathan that tells us what we can and cannot do is not Parliament or the provincial legislatures, but administrators exercising delegated power to promulgate rules of their own creation. For this reason, the political and legal accountability of these administrative agencies is of foundational importance to our representative democracy. There must be both timely and effective redress for citizens whose rights are trampled, flouted or ignored by careless, indifferent, or abusive administrators.

Various features of the CCMRA suggest that the administrative officials who staff the agency will be largely unaccountable to anyone. One of these arises out of the pesky little problem of maintaining legislative uniformity going forward, which will require legislative amendments in each and every one of the provinces and territories that are party to the scheme. Given the overwhelming lack of importance of securities regulation to the polity, and therefore the average politician, moving the legislative behemoth in a single jurisdiction is labour enough. Doing it in

multiple jurisdictions is like attempting to safely shepherd an army of banana slugs across King and Bay during rush hour.

Unfortunately, the proposed cure for this problem is worse than the disease. The CCMRA essentially cuts the various legislatures out of the regulatory process. This is done by turning the uniform provincial legislation (the PCMA) into a skeleton, and imbuing the CMRA with the authority to tack on the fleshy structures that constitute the pith and substance of the regulatory apparatus. They do this via a purely administrative rulemaking process.

A good measure of just how much securities law is to be swept out the collective doors of the provincial legislatures and into the steel and glass towers of the regulatory agencies may be found in the comparative lengths of the new and the old. The draft PCMA is less than half the length of the current Ontario Securities Act (85,000 words versus about 42,000). Some features of the statute have been almost completely gutted. The Ontario Securities Act provisions relating to takeover bids, for example, currently run to about 12,000 words. The PCMA has fewer than 700. Equally astonishingly, the statutory provisions relating to the various continuous disclosure obligations are poised to shrink from about 3300 words to fewer than 300. Thus, where once the legislature erected the framing and basic architecture of the regulatory edifice and allowed the administrative agency to decorate the interior, now the regulators, via rules of their own creation, get to do both.

This is deeply troubling. While our parliamentary system is far from perfect, it is comparatively easy to hold politicians' feet to the fire in relation to primary legislative enactments. The process is fully transparent to the press and to the public at large. The legislative forum invites parties with different regulatory philosophies to engage in an active debate reflecting a variety of viewpoints. There are no kinks or gaps in the causal connection between the legislature and the law that might allow the politicians to evade responsibility. Moreover, whether convenient or not, the process of exposing major changes in the regulatory framework to legislative debate imposes a layer of discipline on regulators that is an important piece of the accountability puzzle.

The rules that are promulgated by administrative agencies are buried one layer deeper in the institutional onion, at one remove from those who are directly accountable to the public via the ballot box. True, securities regulators are required to expose proposed rules to a public notice and comment procedure, to publicly respond to the comments they receive, and to secure the approval (or at least the non-disapproval) of their Ministerial masters. However, aside from periodic scandals that provide a custom-made dais for some spirited posturing, politicians typically take little interest in the arcane and voter-irrelevant world of securities regulation. Thus, little effective oversight originates from that quarter. Similarly, Ministry bureaucrats know little about securities regulation and are largely content to let the regulators do their thing. Indeed, Ontario and many other provinces have moved securities regulators out of Ministry digs and into

“independent” crown corporations, precisely to minimize political involvement (or “interference”). This makes it all the easier for politicians and Ministry officials to dodge responsibility for regulatory actions.

Nor do other potential sources of oversight work well. The Supreme Court of Canada has instructed Canadian courts to give a high level of deference to administrative tribunals acting within their expertise. For this reason, judges have largely adopted a hands-off policy and appeals from decisions of the securities regulators almost never succeed.

Market actors who are treated badly by securities regulators have little incentive to fight back. The practical imperative is almost always to get on with the business at hand. And everyone knows that fighting the regulator by insisting on a regulatory hearing is a mugs game. The regulators have made it clear that they will treat those who don’t “cooperate” (i.e. settle on Commission-dictated terms) much more harshly than those who role over and play dead. And if they decide to cream you, your right of appeal plus $4.08 will buy you a Grande Latte at Starbucks. Added to this is the powerful and ever-present incentive of securities lawyers and their clients to remain in the good books of the regulators, lest present squalls breed future tempests.

In short, even under our current system of provincially based securities regulation, where a single Minister is on the hook, there is a something approaching a vacuum of accountability in the securities regulatory domain.

The CCMRA only exacerbates these problems. At the top of the CCMRA governance hierarchy stands a Council of Ministers with as many Ministers as there are provinces and territories participating in the system, plus the federal Minister of Finance. This makes it child’s play for any individual Minister to dodge political responsibility for regulatory actions by blaming the other Ministers who sit on the Council. Since Council debates will be held in private, who can gainsay what any one of them might claim about what went on behind closed doors?
The multiplicity of political overlords also creates a problem of incentives. Since any individual Minister’s vote will not necessarily be pivotal, why waste time and effort monitoring what the regulators are up to? Better to let the other Ministers and their staffs do the work. Unfortunately, as each is subject to the same incentives, there does not seem to be anyone who we count on to supply meaningful oversight.

There is also the question of expertise. How much will the Ministers know about securities regulation? How much will their staffs know? If the past is a reasonable guide to the future, the answer to both of these questions is – virtually nothing.

In fact, the Ministers who sit on the Council of Ministers can further deflect blame by pointing their collective finger at the Board of Directors that stands between them and the regulatory boots on the ground. The Board has the responsibility of supervising the day-to-day management of the regulator. If something goes wrong, the politicians can simply fire one or more directors and sweep their own responsibility under the carpet.

The CCMRA is an ill-considered and opportunistic proposal that should be completely scrapped. If pan-provincial legislation is desirable, the adopters owe it to Canadian capital markets to start with something that looks very much like the current legislation that predominates throughout the country (and Ontario in particular, the seat of more than 80% of Canada's capital market activity), and to institute changes only going forward and on a sufficiently incremental basis to allow for fulsome discussion and reflection.

ADDENDUM

Mr. Anisman, in a recent critique, states that my criticisms of the proposed Cooperative Capital Markets Regulatory System (which aims at creating a one-stop regulator for all of B.C., Ontario, Saskatchewan, N.B., and P.E.I., and any other jurisdictions that may sign on) are "tendentious, overstated and often incorrect." In fact, they are fair, balanced, and accurate. The factual errors are his, not mine.

Overlapping and Excessive Insider Trading Liabilities and Penalties

With respect to liability for insider trading, Mr. Anisman disputes my assertion that under the proposed provincial legislation (the Provincial Capital Markets Act, or PCMA), a defendant earning an insider trading profit of $100 could be liable for millions of dollars in civil damages. He states "this is not so; the PCMA limits damages to the lesser of the plaintiff's loss and triple the profits from the insider's violations", and he further states that the potential damages for an insider profit of $100 are no more than $300.

This, unfortunately, misses the point. The way the legislation is drafted, anyone who was trading on the opposite side of the market from the insider has a cause of action, and this includes not merely those who were trading contemporaneously with the insider, but also those trading "during the period beginning at the time when the contravention occurred and ending at the time when the material change or material fact is generally disclosed" (s.129(1)). Thus, there are potentially thousands of plaintiffs. If each plaintiff collects the maximum allowable damages, the aggregate damages could indeed be in the millions (or even the tens of millions in respect of a large public company in which there is active trading). In fact, the damages owing to *any single plaintiff* could be in the millions, if the plaintiff is a large-block trader and damages are computed as the difference between the purchase or sale price and the price that the market goes to when the insider information is revealed (we won't know the details of how the plaintiff's "loss" will be calculated until we have the unpublished regulations).

Mr. Anisman also fails to point out the PCMA's method for calculating damages *is not binding on the court,* which "may consider any other measure of damages that may be appropriate in the circumstances" (s.129(4)).

The situation is actually much worse for the inside trader or tipper than this brief recounting suggests. There are multiple overlapping liabilities, none of which net out civil damages or penalties paid pursuant to other parts of the statute. An insider who passes information to others and who happens to be is an insider, affiliate or associate of the issuer "must pay to the issuer an amount equal to the benefit or advantage received or receivable by the insider, affiliate or associate *and all other persons* as a result of the contravention" (s.130(1)): the italicized words do not appear in most existing securities law statutes). For those who illegally tip inside information, the liability could easily be in the millions, since the tipper is liable for all profits made (or losses avoided) by each and every tippee and sub-tippee in an indefinitely long chain

that may include large-block traders. This liability to the issuer is *on top of the liability to individual traders.*

But we're not even close to being done. If the insider is convicted of the *offence* of insider trading under the PCMA, the minimum fine that a court may levy is the profit made or loss avoided (s.115(1)). This is *in addition to* any civil liability incurred by the insider. Indeed, the fine may be as large as "the greater of $5 million and an amount equal to triple the profit made or the loss avoided by all persons as a result of the contravention" (s.115(1)). Incredibly enough, *in addition to the imposition of the aforementioned fine,* s.112(3) of the PCMA authorizes the court to "make one or both of the following orders: (a) an order that the person compensate or make restitution to another person; or (b) an order that the person pay to the Authority any amount obtained, or payment or loss avoided, directly or indirectly, as a result of the offence."

Furthermore, if the Tribunal holds an administrative hearing in which it determines (on a balance of probabilities, rather than the criminal standard of beyond a reasonable doubt) that the inside trader "has contravened capital markets law", it can order the offender to pay either or *both* "an administrative monetary penalty of not more than $1 million for each contravention" and "any amounts obtained, or payments or losses avoided, as a result of the contravention" (s.90(1)). There is no netting out provision, so this adds not one, but two additional layers of potential liability to those previously discussed.

And yes, there is one more. Insider trading is an offence not only under the provincial legislation, but also under the twin federal statute – the Capital Markets Stability Act (CMSA). Under s.67(9) of the CMSA, the offender may serve a jail term of as long as ten years (versus five years less a day under s.112(1) of the PCMA). Nothing but prosecutorial and judicial discretion protects the insider from being charged under *both* the provincial and the federal statutes, allowing the prosecutor two kicks at the can (and because they are different offences, the doctrine of double jeopardy may not apply).

If my arithmetic is correct, there are thus seven overlapping and potentially additive civil liabilities and fines that can be levied against an inside trader or tipper, plus two potential jail terms.

Yes, we need to punish inside traders and tippers. Inside trading is a cancer that damages public confidence in securities markets and raises the cost of capital. But no, we don't need to destroy insiders by piling on sprawling overlapping liabilities. This is regulatory overkill of heroic proportions.

Inexplicable Differences in the Drafting of the PCMA and CMSA Insider Trading Liabilities

In my second article, I criticize the many differences in the drafting of the provincial and federal insider criminal trading liabilities, stating that "there are, in material respects, differences in the substantive triggers for liability, defences, onuses of proof, and penalties." Mr. Anisman is not troubled by these departures, stating that "the PCMA creates a regulatory offence, while the CMSA creates a criminal offence. This explains the differences he finds inexplicable." If only this were so.

Under our constitution, only the federal government has the constitutional authority to create criminal law. Nonetheless, the Supreme Court has given its imprimatur to the creation of provincial "regulatory" or "quasi-criminal" offences. Like truly criminal legislation, these may result in the imposition of large fines or significant jail terms (though with lower upper bounds than for many federal criminal offences).

The Supreme Court of Canada has also held that truly criminal offences are those that relate either to conduct that is "abhorrent to the basic values of human society", or which, if unregulated, "would result in dangerous conditions being imposed upon members of society, especially those who are particularly vulnerable." By contrast, provincial regulatory offences involve "a shift of emphasis from the protection of individual interests and the deterrence and punishment of acts involving moral fault to the protection of public and societal interests." Thus, regulatory offences "may be thought to import a significantly lesser degree of culpability than conviction of a true crime." In particular, while federal criminal offences require that the Crown prove a "*mens rea*" or guilty state of mind, "conviction for breach of a regulatory offence suggests nothing more than that the defendant has failed to meet a prescribed standard of care."

This distinction is reflected in the current provincial and federal statutes. The insider trading offence in the Ontario Securities Act (OSA), for example, requires only that the insider be shown to have traded while in possession of material non-public information (OSA, s.76). By contrast, to establish the federal offence of insider trading under s.382.1 of the *Criminal Code,* the Crown must prove that the defendant bought or sold a security "knowingly using inside information". Mere possession of inside information or a showing of negligence is insufficient to secure a conviction.

Under the proposed federal legislation, this distinction disappears. Section 67(2) of the federal statute provides that "a court may infer from the fact that the person had knowledge of the material change or material fact before or at the time they traded, or entered into the transaction, that the person used that knowledge to trade or enter into the transaction." Thus, the Crown's burden of proving a full *mens rea* is abandoned. Aside from the fact that this might render the provision unconstitutional, it annihilates any argument that there is anything fundamentally different about the provincial and federal insider trading liabilities.

Moreover, this longer jail term is only justifiable on the basis that the insider trading liability is in fact "truly criminal", requiring that the Crown to prove a full *mens rea.* But under the proposal, this will no longer be the case. This is yet another expansion of securities laws that the proponents of the legislation no doubt hope will slip through the cracks without notice.

But even if the federal legislation preserved the Crown's onus to prove a *mens rea,* there are many other differences in the drafting of the provincial and federal statutes that owe nothing to the difference between a regulatory and a truly criminal liability. For example, while both statutes allow the court to make restitution orders (PCMA s.112(3), CMSA s.77(1)), the federal statute compels the court to consider whether to make such an order while the provincial statute does not. If the purpose of a regulatory statute is protection of the public, as the Supreme Court has stated, one might well think that it should be the other way around. Moreover, the federal

legislation does not provide a custom-drafted restitution remedy, but draws on longstanding restitution provisions in the federal *Criminal Code*. However, these provisions are a singularly poor fit for crafting a restitution order in respect of insider trading, if indeed they fit at all.

There are other differences that are not explicable on the basis that the provincial insider trading offence is regulatory in nature while the federal offence is criminal law. The federal legislation contains sentencing guidelines specifying that the court must consider various factors as "aggravating circumstances" (s.75); the provincial legislation does not. Only a subset of these aggravating factors relate to the accused's state of mind (again, of particular relevance to a "true" criminal offence). The rest relate to the degree of harm occasioned, and would comfortably into a provincial "regulatory" offence. Furthermore, the substantive triggers for the tipping liabilities are different. The PCMA has provisions specifically dealing with front running, while the CMSA does not. While both statutes attach liability to "entering into a transaction" in a "related financial instrument", these phrases are defined differently in the two statutes. This is merely a sampling of the various differences that are not explicable on the basis that one statute is regulatory and the other criminal.

Expansion of the Regulator's Licensing Powers

Mr. Anisman erroneously asserts that I said that the PCMA authorizes the Authority "to require anyone 'connected to capital' markets to register". In fact, what I said was "while under existing provincial legislation the licensing powers of the regulators are limited to 'registrants,' under the new legislation these powers can arbitrarily be extended as the Authority chooses to virtually anyone connected with capital markets." What this means is that many features of the regulatory regime that are now applied only to registrants (and to select "recognized entities") could be extended to market participants that are *non-registrants*. I stand by this assertion.

Currently, the OSC has the power, *via the rules*, to designate any person as a "market participant". That person is then subject to a financial examination order, record-keeping requirements, orders to produce information, compliance reviews, reviews of practices and procedures under the public interest powers (which may result in an order to "institute such changes as may be ordered by the Commission"). Market participants are also subject to various kinds of court orders requiring disclosure of various matters to the public. These powers are far from trivial. Nonetheless, those in the PCMA and the CMSA go much farther.

The PCMA (s.2) preserves the ability to designate a person as a market participant via the rules, with all that this entails (in particular, following the statutory notice and comment procedure). However, it also allows the Authority, "on its own initiative", if it "considers that it would be in the public interest to do so", to designate a person to be a market participant (s.95(2)). This is a very significant change. Under the OSA (OSA), if the regulator wants to designate a person as a market participant, it must meet all of the relevant procedural requirements attendant upon the adoption of a new rule. Under the PCMA, the Authority may do so at will (s.95(2)), subject only to the requirement to give the affected person "an opportunity to make representations" (s.95(3)).

Similarly, under the existing law, the OSC has the power to grant recognition orders to a

variety of "recognized entities" such as stock exchanges, alternative trading systems, self-regulatory organizations, clearing agencies, and other classes of entity specifically set out in the statute. This power allows them to regulate these entities much as it regulates registrants. Indeed, it arguably allows them to regulate these entities more closely, as most recognition orders are long and detailed documents chock full of conditions and requirements tailored to the individual applicant.

The PCMA, once more, extends the recognition power by allowing the Authority (if it believes it to be in the public interest) to "make an order recognizing…a person engaged in a prescribed activity" (s.9(1)). While any "prescribed activity" must be set out in the regulations, these could easily be drawn sufficiently broadly to allow the Authority to make a "recognition" of virtually anyone connected with capital markets. Regrettably, since we don't have the regulations (why?), it is uncertain how far this authority will extend. However, the drafting of the PCMA is not suggestive of regulatory restraint.

The Authority's powers in relation to recognized entities are far from trivial. The PCMA states that "at any time, the Authority may impose conditions, restrictions or requirements on a recognition after giving the applicant or recognized entity an opportunity to make representations" (s.9(2)). The Act gives the CR the power to "make any decision respecting… the manner in which a recognized entity carries on business" (s.12). It also states that "a recognized entity must, at the time and in the form required by the Chief Regulator, provide the Authority with any information, record or thing in its possession or under its control that relates to the administration or enforcement of capital markets law or the regulation of the capital markets" (s.10).

The PMCA also adds a new category of persons who may be regulated in the manner of registrants – the designated entity (DE). The statute provides that "the Authority may, after consultation with the Chief Regulator, make an order designating" various entities as DEs. These include a trade repository, credit rating organization, investor compensation fund, dispute resolution service, information processor, or market place (s.17(1) and s.2)). But the Authority may also designate as a DE "… a person who provides investors or market participants with prescribed services." This again allows for an expansion of regulatory authority without returning to the legislature.

As with recognized entities, once you are a DE, you are subject to rather supple discretionary powers. The Act provides that "at any time, the Authority may impose conditions, restrictions or requirements on a designation after giving the designated entity an opportunity to make representations" (s.17(2)). A designated entity is also required to "provide the Authority with any information, record or thing in the designated entity's possession or under its control that relates to the administration or enforcement of capital markets law or the regulation of the capital markets" (s.18). The CR, with no bar other than a determination that it is in the public interest, may "make any decision respecting… (a) a by-law, regulatory instrument, policy, procedure, interpretation or practice of a designated entity; (b) the manner in which a designated entity carries on business; (c) the trading of securities or derivatives on or through a designated market place" (s.20). The Tribunal can make an order, if it "considers that it is in the public interest to do so", requiring "that a person resign from one or more positions that the person holds as a director or officer of …

[a] designated entity" or "that a person is prohibited from becoming or acting as a director or officer of… [a] designated entity" (s.89). Finally, since a DE is defined to be a "market participant" (s.2), it is subject to all of the regulatory powers that may be brought to bear on a market participant.

The DE designation thus constitutes yet another mechanism whereby the regulators can happily skip through the looking glass into a Wonderland of largely unrestrained regulation.

The PMCA also creates (via s.2 and s.9) yet another new type of entity – the "recognized auditor oversight organization" (RAOO) - that will be of interest to accountants. The RAOO may compel "a member or participant of the organization" to "provide the organization with information, records or things that relate to the audit or review of financial statements that must be filed under capital markets law" (s.16(1)). This includes "information, records or things relating to, or prepared by, an issuer, whether or not the issuer is named in the request" (s.16(1)).

The federal CMSA is no different in ceding broad powers to the Authority to adapt its regulatory reach as it sees fit. The statute defines a "capital markets intermediary" (CMI) as "a person that, as a significant part of its business, trades in securities or derivatives or provides services related to trading or holding securities or derivatives" (s.2). The definition of "trade" is broadly defined (as under existing legislation) to include any act or conduct in furtherance of a trade, giving the definition of trade, and therefore of "CMI" a wide ambit. However, that ambit is broadened even further by the inclusion in the definition of persons providing "services *related to* trading *or holding* securities or derivatives". It is thus no stretch to say that virtually any market actor is potentially a CMI and subject to these licensing-like powers.

A CMI may further be designated by the Authority as "systemically important" (s.2 and s.27(1)). While this requires the Authority to "give the capital markets intermediary the opportunity to be heard" (and to notify the Council of Ministers), there is no appeal from the Authority's decision. Once designated as a systemically important CMI, the Authority can require the CMI to dispose of an asset, increase its capital or financial resources, not enter into a merger or business combination, terminate or restrict its activities, implement plans for business continuity, recovery or winding up, or "do anything else that is necessary to address the risk" (s.29(1)). The Authority need only secure the approval of the Minister of Finance, which is unlikely to be withheld, notify the Council of Ministers, and be "satisfied that there is a serious systemic risk that is about to be realized" (s.29(1), (2), and (3)). The latter limitation is essentially meaningless, since there is no appeal to a court, and even if there were, the court would almost certainly defer to the Authority's decision.

The Authority may also adopt regulations to "prescribe requirements, prohibitions and restrictions for systemically important capital markets intermediaries" (s.28). These include regulations in respect of policies and procedures for risk management and internal controls; public disclosure of information; the imposition of governance, organizational or

ownership structures related to risk management; regulating capital, leverage, financial resources, or liquidity; imposing plans for business continuity or recovery and winding up; and regulating any other aspect of business that poses a systemic risk related to capital markets (s.28). In like manner, via the regulations, the Authority "may prescribe a class of securities or derivatives to be systemically important if, in the Authority's opinion, the trading in, the holding of positions in or the direct or indirect dealing with securities or derivatives within the class could pose a systemic risk related to capital markets" (s.30(1)). If this is done, the Authority has the power to regulate not only the manner in which such securities and derivatives trade, but also the entities that trade them (s.31).

By similar means, the Authority "may prescribe a practice to be systemically risky", with similar regulatory results (s.32).

These provisions allow the Authority to elastically expand its regulatory domain without ever returning to Parliament, which indeed is a major theme in the CCMRA draft legislation. These proposals cede essentially legislative power to the CR and the Authority, and do so in a manner that is inconsistent with both accountability and the rule of law.

Administrative Fines Under the CMSA

In my discussion of the ability of the CR to levy an administrative fine, Mr. Anisman states "contrary to his suggestion, there is no obligation to hold a hearing to determine whether to hold a hearing." I'm not sure which article Mr. Anisman was reading, because I never made any such assertion. He also says that I treat a notice from the CR "that initiates a disciplinary proceeding as a decision." That too is incorrect. In fact, I do no more than recount precisely what the proposed federal legislation says. Section 44 of the federal CMSA provides for an "administrative monetary penalty" which may be levied in respect of any violation of the federal statute (other than those sections specifically creating criminal offences). On his or her own initiative, "the Chief Regulator may issue a notice of violation and cause it to be served on a person if the Chief Regulator has reasonable grounds to believe that the person has committed a violation." *The notice specifies the penalty that the CR is demanding the person to pay.* The ostensible violator then has 30 days to respond, either by electing to "made representations to the Chief Regulator" or by paying the fine, which may be as high as $1 million for an individual and $15 million for a non-individual. If the person does not do either, they are presumed guilty and required to pay the fine.

Importantly, such a notice may be sent out *without any hearing, or even advance notice.* Moreover, the ostensible violator is not entitled to a formal hearing even *after* receiving the notice. The Act merely provides an opportunity to "make representations" to the CR. As the statute specifically requires a hearing before the adjudicative Tribunal in respect of various other matters, and as the representations are made only to the CR, the opportunity to make representations falls short of an entitlement to a formal hearing. The ability to make

representations may in fact amount to little more than the opportunity to make private submissions, either written or oral, to the CR.

Strangely, Mr. Anisman states, in relation to the above-mentioned administrative fine, that "a notice of hearing issued by the Chief Regulator (CR) would follow existing practice; staff would issue the notice and the CR or a delegate would hear the evidence and decide on the merits." But there is nothing in the statute that supports this statement. On the contrary, the statute quite clearly authorizes the CR to being the process by serving a *notice of fine*. It is then up to the person on whom the notice has been served to apply to "make representations" to the CR. Mr. Anisman seems to be inventing law on the fly.

Novelties: The "Unfair Practice" Provision

In the third of my articles, I criticize a provision in the PCMA that would allow the regulators (via the rules) to define anything at all as an "unfair practice" (s.70). A person who engages in an unfair practice is guilty of an offence potentially punishable by a $5 million fine or a jail term of five years less a day (s.112(1)). In response, Mr. Anisman states, "both the OSC and BCSC may currently make rules defining 'unfair practices'". He is wrong on both counts.

The phrase "unfair practice" does not appear anywhere in the OSA, and the word "unfair" occurs in only three places. The first two crop up, respectively, in a section defining the purposes of the Act ("to provide protection to investors from unfair, improper or fraudulent practices") and a section defining "the primary means for achieving the purposes of this Act" (which includes "restrictions on fraudulent and unfair market practices and procedures"). These sections do not confer powers. Rather, they are essentially a regulatory preamble instructing the regulators about the sorts of things they should bear in mind when exercising their statutory powers. The third provision in the statute (s.143(1)13) allows the regulators to make rules "regulating trading in or advising about securities or derivatives to prevent trading or advising that is fraudulent, manipulative, deceptive or unfairly detrimental to investors." But this stops short of the allowing the regulator, via the rules, to define *anything* as an unfair practice, in two ways. First, it is restricted to "trading in or advising" (although of course, as I indicate elsewhere in this article, trading is a broadly defined term). Second, it applies only to something that is unfairly detrimental "to investors". The PCMA has no corresponding restrictions.

Moreover, contrary to Mr. Anisman's assertion, the B.C. statute does not authorize the BCSC to adopt rules defining unfair practices. Rather, the B.C. Securities Act specifically enjoins unfair practices in relation to a narrow slice of securities market activity - investor relations activities and the flogging of securities (ss.50(1) and (3)). The statute specifically defines what it means by "unfair practice", and does so in narrow terms related to high-pressure sales tactics (s.50(4)).

Mr. Anisman asserts (in the longer online version of his article) that two sections in the B.C. statute authorize the B.C. Commission to make rules defining the meaning of "unfair practice" (ss. 183(1)46 and 184(2)(c)). The first of these (which is actually s.183.46 and not 183(1)46) authorizes the making of regulations by the Lieutenant Governor in Council – not the Commission - and states that the Lieutenant Governor in Council may make regulations

"defining words and expressions used but not defined in this Act". However, since the term "unfair practice" is defined in the statute, the Lieutenant Governor in Council has no authority to expand the definition. The second of the sections cited by Mr. Anisman serves no better, since it only allows the Commission to make rules where the Lieutenant Governor in Council has authority to make regulations. But since the Lieutenant Governor in Council has no authority to make regulations extending the definition of "unfair practice", neither does the Commission.

Novelties: The "Unjust Deprivation" Provision

Another provision in the PCMA that I identity as novel and criticize for potential overbreadth is the first part of s.63 (i.e. s.63(a)), which states in full that "a person must not, directly or indirectly, engage in, or participate in, any act, practice or course of conduct relating to securities or derivatives that (a) results in an unjust deprivation or a risk of an unjust deprivation of a person's money or other property or of the value of the person's property; or (b) the person knows or reasonably ought to know perpetrates a fraud on any person." Criticizing my criticism, Mr. Anisman states that "conduct that 'results in an unjust deprivation or risk of an unjust deprivation' describes elements of fraud and is prohibited in the PCMA's antifraud section (s. 63). Courts and commissions have interpreted the existing antifraud provisions in securities laws to require subjective knowledge (OSA, s. 126.1; BCSA, s. 57; NBSA, s. 69). The additional phrase would create an offence for regulatory fraud, without having to meet a quasi-criminal standard. The change is incremental."

I will start out by noting that neither the phrase "unjust deprivation", nor anything like it, can be found in any of the statutory provisions cited by Mr. Anisman above. But more than this, his interpretation makes little sense. The second part of the prohibition noted above sweeps into its embrace all conduct that is fraudulent. Thus, it is illogical that the legislature would add another section that prohibits a specific subset of fraudulent conduct; it is already caught by the broader general prohibition and therefore completely redundant. Mr. Anisman's interpretation thus violates a fundamental edict of statutory construction – that each part of the statute be given independent meaning.

The words "unjust deprivation" are highly suggestive of a very different cause of action that is firmly established in our law – the remedy for "unjust enrichment". The basis of a recovery for unjust enrichment is simply that it is not fair for a defendant to retain property unjustly obtained from the plaintiff. It is a so-called "equitable" remedy that requires no demonstration of any fraudulent state of mind of mind on the part of the defendant; indeed, no particular state of mind at all.

This interpretation is made all the stronger by two aspects of the drafting of s.63. First, the second part of the definition dealing with "fraud" explicitly requires the demonstration of a mental element; the person commits an act that the person "knows or reasonably ought to know perpetrates a fraud on any person." The first element requires no demonstration of any particular state of mind, and the natural assumption is that the legislature therefore intended that none is required.

Second, the liability attaches to conduct that "results in" an unjust deprivation. Conduct that completely lacks any impugnable motive may nonetheless *result in* an unjust deprivation (an interpretation consistent with the manner in which the courts have construed the "oppression remedy" in corporate law).

However much the drafting is suggestive of unjust enrichment, however, we cannot know the full meaning of the text until it has undergone analysis in the Tribunals and courts. And so we have yet another wildcard in the operation of the legislation.

This is to say nothing of the even more vexed (and vexing) issue of what constitutes a "risk of an unjust deprivation". This concept is so facile and so capable of multiple (and extended) interpretations that it fairly boggles the imagination.

Novelties: Changes in Wording

In my articles, I criticize what appear to be unnecessary changes in wording from the current legislation to the proposed legislation, suggesting that these create a wildcard in determining the meaning, application, and scope of various provisions. Focusing on one of my examples, Mr. Anisman states that "there is no difference between a commission's authority to make an order 'if in its opinion' or 'if it considers that' it is in the public interest". He may be right, but where is his authority? Conventional rules of statutory interpretation suggest that differences in wording are presumed to signal different meanings. This principle applies not only to contemporaneous differences in wording within a statute, but changes in wording over time. If Ontario adopts the PCMA, for example, the change from one formulation activating the public interest powers to another could conceivably be interpreted as effecting a corresponding change in meaning. We have no way of knowing unless and until the new formulation is tested in the courts and before the regulatory tribunals. Moreover, different provincial courts might give different answers to that question. The various changes in wording thus create a risk of sundering the uniformity that proponents of the plan seek to achieve. There are many such changes in wording in the proposals, and each one indeed constitutes a "wildcard" in the legislative proposals.

In my second article, I note that current insider trading liabilities are triggered by either a purchase or a sale of securities, while under the PCMA the trigger is a purchase or a "trade". I criticize this for introducing uncertainty into the extent of the insider trading liabilities. In response, Mr. Anisman states that "the PCMA defines 'trade' to include a sale of a security and an act in furtherance of a sale, [and so] the prohibition against insider "trading" can only apply to sales. MacIntosh's argument is based on an unrealistic application of this definition and has no practical implications. An act in furtherance of a trade in the context of insider trading would be tipping or recommending."

But if Mr. Anisman is correct in asserting that the change in wording has no real impact on meaning (and thus has "no practical implications"), then why make the change in the first place? It only creates downside risk (i.e. the risk that courts and tribunals will give the new wording an unanticipated, if not unwise interpretation) without any

corresponding upside benefit.

But once again, Mr. Anisman's interpretation defies bedrock principles of statutory interpretation. The PMCA has provisions that deal expressly with tipping (s.66(2)) and recommending (s.66(4)). Thus, construing the statute in the manner suggested by Mr. Anisman results in the sort of redundancy that courts have been instructed to avoid when interpreting a statute.

Added to this, the PCMA defines "trade" not only as a sale, but "any act, advertisement, solicitation, conduct or negotiation directly or indirectly in furtherance of" a sale. It does not unduly burden the imagination to come up with examples of behaviors (outside of those cited by Mr. Anisman) that might thus satisfy the definition of "trade", such as deliberately creating a situation in which a person or persons have easy access to inside information. As well, one may "trade" in a security even where there is never a concluded sale; there need only be an act etc. in furtherance of an intended trade. In short, the change from "sale" to "trade" marks a significant broadening of insider trading liability, and one that is fraught with uncertainty.

The Collection and Dissemination of Confidential and Privileged Information

Mr. Anisman states, "the CR's authority to compel information follows existing securities legislation and is subject to confidentiality obligations. Contrary to MacIntosh's assertion, the CR is not authorized to require disclosure of privileged information, whether solicitor-client or mediation-settlement." It is unclear which statutes Mr. Anisman has been reading. Under s. 193 of the PCMA, *confidential* information obtained by "the Authority" may be disclosed to a host of parties, including law enforcement authorities, other regulators, various enumerated public and private actors, and "any other person, authority, entity or agency, if the Chief Regulator considers that exceptional circumstances exist for doing so and that it is necessary for the purposes of this Act." The PMCA contains a provision (s.195) that, on its face, would seem to forbid collection of "*privileged* documents" and "*privileged* information". However, this section applies only to a subset of the provisions in the Act under which information may be collected by the Authority or the CR. While the drafting is murky, it does not appear to prevent the collection of privileged information under information-gathering powers conferred by other sections in the Act. It merely forbids the Authority from passing on that privileged information to anyone else.

With respect to mediation services, s.17(1) of the PCMA allows the Authority to designate a "dispute resolution service" (i.e. a mediator) as a "designated entity". The Act further provides that, "a designated entity must, at the time and in the form required by the Chief Regulator, provide the Authority with any information, record or thing in the designated entity's possession or under its control that relates to the administration or enforcement of capital markets law or the regulation of the capital markets." There are no restrictions on the collection of *confidential* information pursuant to this authority, and the restriction on the collection of *privileged* information arguably does not apply.

In addition, the protection of *privileged* information under s.195 of the PCMA applies only to information gathered by the Authority. It does not extend to information collected by third

persons authorized by the Authority to conduct a review or an investigation of a market participant.

In like fashion, the s.14 of federal statute states that "information obtained by the Authority under this Act" (which includes *confidential* information) can be disclosed "in Canada or elsewhere" to a law enforcement agency, or more generally if "(a) the disclosure is consistent with the purposes for which the information was obtained; or (b) the Authority considers that the public interest in disclosure outweighs any private interest in keeping the information confidential." There is nothing at all in the federal statute that protects information subject to *privilege* of any kind, with one exception. In connection with court-ordered disclosure of information, the court may, but need not, include "terms to protect a privileged communication between a lawyer and their client".

Economies of Scale Not Important?

While I show that the new cooperative regulator will not shed any employees, Anisman states "efficiencies from employee layoffs are not the primary reason for a cooperative securities regulator". This is mere obfuscation. It may or may not be the "primary reason", but proponents of a cooperative scheme (particularly governments and academics) have long since touted economies of scale as one of the greatest advantages of a single regulator. The Hockin Report commissioned by the federal government in 2009, for example, expressed the view that overlap and duplication is one of the biggest problems with the current structure. The panel stated that this structure "fundamentally misallocates resources, causing securities regulation to be less efficient and effective", and furthermore that "resources must be devoted to keep 13 separate securities regulators operating in Canada… [and] most efforts are duplicative, which results in unnecessary costs, overstaffing, and delays." Thus, Mr. Anisman's assertion that overcoming duplication and misallocation of regulatory resources is not the "primary reason" for moving to a multi-jurisdictional regulator does little more than throw sand in the eyes.

Local Development Initiatives and the Fracturing of Uniformity

Mr. Anisman states that "MacIntosh's quibble about accommodating governmental economic development initiatives within a province is primarily conceptual", but he doesn't explain what he means by this. It may be that the ability of particular jurisdictions to request province-specific rules to encourage local economic development will be interpreted narrowly, in order to preserve uniformity of laws. But then again, it might not. Longstanding concerns, particularly in the west, about preserving the unique structure of their local capital markets via a custom-blend of legal rules will not simply evaporate into the ether and be consigned to the "Oh yes we have long since forsaken that silly creed" file of history. Nor can we simply assume that the more general and longstanding concerns that westerners have often evinced about the perceived excesses and predations of Ontario autocrats vis-à-vis the west are a thing of the past. These tensions will continue to be felt from the bottom of the organization to the top, from the conflicting rule preferences of regional regulatory offices right up to the Council of Ministers.

Mr. Anisman also states that "the obvious purpose of this accommodation is to permit provincial initiatives that do not implicate other provinces or territories. This should not create the difficulties he suggests." But Mr. Anisman forgets that the purpose of pursuing uniformity is to ensure that companies that do business in multiple jurisdictions are not faced with complying with a host of different rules. A multiplicity of intra-provincial initiatives may not directly "implicate other provinces or territories", but it jeopardizes one of the most fundamental objectives sought to be achieved by the creation of a multijurisdictional regulator.

The Missing Sections and the Missing Regulations

Mr. Anisman states that my conclusions about the Authority's accountability are premature, since the published drafts "do not include the legislation that will create the Authority and implement the Agreement among the federal government and participating provinces… [nor the] provisions for coordination with non-participating provincial regulators. Both are necessary to evaluate the potential effectiveness of the cooperative regime and the Authority's accountability." This, surely, must be some kind of joke. Yes, it is impossible to get a whole picture of what we are facing without these important statutory provisions, but the real question is why the drafts were put out for comment *with neither those key provisions nor the regulations attached.* Mr. Anisman's criticism is properly directed at the provincial and federal authorities who, contrary to universal practice and sound governance, put out drafts for comment in an incomplete form – not to mention for only 60 days, as opposed to the 90 days that is required under current legislation for comments on proposed rule changes (extended only because of industry pressure). The entire enterprise smacks of amateurism and opportunism – not an encouraging prelude to how we might expect the Authority to operate once it is up and running.

Accountability

As against my assertion that we can expect very little oversight from the joint Council of Ministers, Mr. Anisman asserts that we are likely to get *enhanced* oversight. This is based on the observation that under the current system, "a minister in any province is unlikely to reject a national rule adopted by the CSA." By contrast, "participating ministers, together, will have a greater ability to do so, and their collegial review of regulations is likelier to result in responsible, cooperative regulation of our securities market." We may charitably characterize this view as quixotic. In essence, it amounts to saying that that we are more likely to get cooperation when Ministers feel that they don't have to cooperate. Perhaps Mr. Anisman is right in saying that the Council of Ministers as a whole will feel that they don't have to bother with the views of non-participating jurisdictions. They will simply steamroll along using their collective capital market power as a battering ram to force their own views on the rest of the country. If so, this is hardly an example of enlightened cooperative federalism, nor is it in any sense indicative of enhanced legislative oversight.

But in addition, Mr. Anisman's assertion is based on the factually incorrect premise that under the current system it is the Ministers in the different jurisdictions who actually decide (other than in a strictly formal way) whether to sign on to a proposed national instrument. In fact, it is the regulators who decide the content of national instruments, by intense negotiation among themselves. While each regulatory authority must secure the assent of the relevant Minister, it is a rare case when this is more than a cheerful exercise in rubber-stamping, since (as I point out in my articles) most Ministers regard a briefing on securities regulation as more-or-less on par with a difficult root canal.

Other Expansions of Regulatory Authority

In the longer online version, Mr. Anisman states "In authorizing the CR to order that a person or company is a reporting issuer, insider, or mutual fund or that a security is a derivative, the PCMA follows provincial models (e.g., OSA, s. 1(11); BCSA, s. 3.2; NBSA, s. 1.1). It requires a hearing before the CR and, contrary to MacIntosh's comment, permits an appeal to the Tribunal (ss. 95 and 99)." This is incorrect. Under s.95 of the PCMA, it is *the Authority*, and not the CR that may decide if a person or company is a reporting issuer, etc. This leads him into a second error, which is to assert that there is an appeal from this decision. Under the PCMA, there is no appeal from any decision of the Authority except on jurisdictional grounds (s.176(1); s.99 only allows appeals from a decision of the CR). Moreover, no hearing is required for the Authority to make a designation; the PCMA only provides "an opportunity to make representations" which does not require a "hearing" in the formal sense (just as the right "to be heard" under the OSA does not require a formal hearing).

These are important changes from the OSA (which, despite Mr. Anisman's urgings, is the most important securities statute in the country and the one most deserving to be recognized as the benchmark). Because under the OSA it is the Commission that makes the decision, that decision can be appealed to the Divisional Court (s.9(1)). No such right inheres under the PCMA.

Another significant change is that the OSC's authority extends only to ordering that a person or company be recognized as a reporting issuer, a person or company be recognized as an insider of a reporting issuer, or that a derivative be recognized as a designated derivative (s.1(11)). By contrast, the PCMA authorizes the Authority to recognize: an issuer as a reporting issuer, a mutual fund, or a non-redeemable investment fund; a person to be an insider, market participant, or marketplace; a trade to be a distribution; a derivative, or class of derivatives, to be a security; a security, or class of securities, to be a derivative; or a derivative, or class of derivatives, to be a designated derivative. No amount of backing and filling ("Philing"?) can minimize the importance of these changes.

Usurpation of the Role of the Civil Courts

Anisman states that "MacIntosh's assertion that the PCMA would authorize the Tribunal to award compensation "on a completely ad hoc basis" is incorrect. It may order compensation only if a violation of the act, regulations or a previous order directly harms a person (PCMA, ss. 2 "capital markets law" and 90). It fact it is Mr. Anisman who is incorrect. Section 90 of the statute states that "if the Tribunal determines, after a hearing, that a person has contravened capital markets law and if the Tribunal considers the order to be in the public interest, the Tribunal may order the person to compensate or make restitution to one or more persons." The term "capital markets law" is defined as "this Act and the regulations and, in respect of a person, includes a decision of the Authority, the Chief Regulator or the Tribunal to which the person is subject." Of particular importance to the latter, the Act includes a section allowing the Tribunal to make a variety of orders when "the Tribunal considers that it is in the public interest to do so". Under similar provisions in extant legislation, prior Tribunal and court decisions have held that an order may be made in the public interest even without any violation of the Act, regulations, or rules. But if the Tribunal should make such an order, that order is, *ipso facto,* part of the "capital markets law", thus allowing the Tribunal to make an order under s.90 compensating a person. There is no requirement that the person have breached a *previous* order of the Tribunal.

As a footnote, I would add that it is obviously implicit in the notion of awarding "compensation" or "restitution" that the Tribunal believes that a person has been harmed. It is a stretch to construe what I said as asserting that the Tribunal could make an order compensating a person when that person has suffered no harm.

Changes and Precedents

Mr. Anisman makes much of the fact that some of the provisions of the PCMA have precedents in other jurisdictions, with a view to countering my suggestion that the PCMA proposals are novel. He states, for example, that "MacIntosh's second column asserts that the PCMA contains 'an extraordinarily long menu of fundamental changes to securities laws.' His examples belie this." Mr. Anisman then points to insider trading provisions in the B.C. statute that are similar to those that I assert are changes from the current law.

This misses the point in a number of ways. Yes, I do use the OSA as my benchmark. This is amply justified on the basis that 80% of Canada's capital market activity is in Ontario and therefore something like 80% of the lawyering that goes on takes place in Ontario. There are no changes that will be responsible for more professional and transactional re-tooling than changes from the Ontario template.

In addition, the majority of the changes that I note are *not* anticipated in other statutes anywhere in the country. Mr. Anisman has mostly given us an account of a handful of provisions in a handful of provinces that anticipate the PCMA. He has not, however, given us an account of the provisions in the PCMA that are entirely novel, or that greatly extend powers found in current legislation. Nor has he given us a comparative accounting of the precedented versus the unprecedented – a rather vital statistic for the purpose of benchmarking the new versus the old.

In addition, as pointed out elsewhere in this reply, a number of Mr. Anisman's claims that

various features of the PCMA were anticipated in a number of provinces are exaggerated or erroneous. And indeed, in respect of some of these (such as many of those relating to insider trading) he is able to point to only a single province (B.C.) with provisions like those in the PCMA. That is hardly a persuasive reason for rejecting the benchmark that we find in Ontario and elsewhere across the country.

In addition, he says nothing about the novelty or overreach of the federal statute. Yes, part of this novelty is both deliberate and expected; the statute seeks to address previously unaddressed systemic risks (real or imagined). But it does so by tools and instruments that grossly exacerbate the problem of accountability and materially go beyond the devices employed in the existing securities legislation.

Oddly enough, Mr. Anisman acknowledges that various parts of the proposals that have precedents in other jurisdictions are not "preferable from an accountability perspective" or are "undesirable". These include the ability to make blanket orders, and "the movement away from encasing basic principles in legislation, toward broader rulemaking authority" (including both the power to make regulations without specific statutory restrictions, and the conversion of the statute into a "platform" that serves mainly as a skeleton on which the regulators can pack the sinew and regulatory muscle via their rule-making authority). He also states that the proposed legislation presents "significant issues", and that "as the timetable for the Authority's creation is ambitious, substantial effort will be required to review and comment on the published drafts." In light of these observations, perhaps Mr. Anisman ought to have focused his efforts on solutions to some of the pressing issues in these proposals, rather than pinning his star to "worst of breed" statutory precedents. That various aspects of the proposed PCMA are derivative of some of the worst features of the B.C. or other statutes is hardly a warranty of fitness.

A "Last-Ditch Attempt to Scuttle the Proposed Cooperative National Securities Regulator"?

Mr. Anisman states that "Jeffrey MacIntosh's comments last week appear to be a last-ditch attempt to scuttle the proposed cooperative national securities regulator." But as I state in the last part of the fourth article in the series, that is not my intention (subject to constitutional law quibbles, to be aired in a subsequent piece). While I won't deny that I have written frequently in this space on the inadvisability of doing do, the MOU has been signed and (aside from potential constitutional infirmities) it appears that the lemmings are heading inexorably for the cliff. Rather, my aim is to encourage the participant jurisdictions to eschew radical alteration of the existing regulatory structure and to start with something that looks more like the regulatory template that currently predominates both in Ontario and much of the rest of the country, making changes on an incremental basis going forward.

The borrowing from the B.C. statute in particular is highly suggestive of the logrolling that has gone on behind the scenes in order to induce B.C. to join the posse. The draft proposals are a monument to the triumph of expedience over principle, and I stand by my comment that these drafts should be chucked in the dustbin in favour of a fresh start – without the regulatory overreach that fairly seeps out of every pore of these ill-advised overtures.