

## **SUBMISSION TO THE EXPERT PANEL ON SECURITIES REGULATION**

CCGG believes that a single common securities regulator (the “National Regulator”) is the ideal long term regulatory structure for the Canadian capital markets, which are a part of the increasingly borderless global capital markets. A National Regulator should improve and speed up decision and policy making, have a consistent interpretation and application of securities laws, coordinate regulatory enforcement more effectively, have more specialized enforcement and industry expertise located across Canada, help to improve the global reputation of the Canadian capital markets, and may operate at lower cost to those involved in the capital markets than the current structure.

CCGG recognizes that the creation of a National Regulator is a political process and urges the federal and provincial governments to work expeditiously towards this objective. Until a National Regulator is created, the Passport System should be encouraged as an important step towards a national regulator. The Passport System is resulting in better coordination of securities regulation and the harmonization of securities laws – both of which are needed for an effective common regulatory system.

### **Lack of Credible Enforcement is a Critical Issue**

There is **widespread belief that there is no credible deterrent effect in Canada’s capital markets** – both administratively and criminally.

CCGG believes that the federal government should focus on quickly and significantly improving the enforcement of existing laws relating to the capital markets – both administrative and criminal – as a part of or in parallel with the National Regulator process.

There have been a number of situations where securities regulators have appeared to be “weak” and ineffective in enforcing existing securities regulations. Significant deterrence would result if securities regulators quickly responded to possible breaches of securities laws and rules – which, unlike criminal prosecutions, can be dealt with quickly and effectively using regulatory evidentiary standards which do not require proof beyond a reasonable doubt and permit the compelling of witnesses.

It is important that securities regulators be given the resources required - and the political direction - to significantly increase their focus on enforcement of securities laws.

A key challenge in Canada is that there are very few cases of the prosecution of criminal activity in the capital markets or, if charges are proceeded with, they take many years to get to trial. This weak criminal law deterrence is exacerbated in Canada by the existence of provincial quasi-criminal or “public welfare” securities law enforcement powers, which are often resorted to by securities

regulators because of the absence of a robust federal criminal law presence. This is an inappropriate and inadequate “halfway house” and often leads to poor results for serious crimes that are prosecuted using these quasi-criminal provincial statutes.

A National Regulator as generally contemplated would not (nor do the commissions in the Passport System) have the constitutional power to deal with the most serious enforcement challenges existing in the Canadian capital markets. Securities regulators have the function of ensuring the efficient administration of the capital markets, not the enforcement of capital markets crimes, which is the role of the federal criminal justice system.

Clearly, the federal criminal law system is not responsively addressing the near complete lack of effective prosecution of “white collar crimes” in the Canadian capital markets.

### **Consolidation of Administrative and Criminal Enforcement**

CCGG believes that the enforcement and prosecution of administrative rules (securities laws) and criminal laws (Criminal Code of Canada) should be consolidated in one combined national organization that has the resources, expertise and people to focus solely on capital markets activities.

Having centralized administrative and criminal enforcement would allow for the development of specialized investigative and prosecutorial capabilities in “centers of excellence” across Canada, streamline the investigation and prosecution of major securities and criminal law breaches, and create clear responsibility for criminal matters which are now scattered among a number of police agencies across Canada.

Enforcement powers would be given to a new agency or a division of the National Regulator with the combined powers and resources needed to investigate and prosecute securities law and Criminal Code offences in the capital markets. The agency or division would have two branches – focused separately on administrative matters and criminal matters.

If the matter was serious and worthy of criminal deterrence sanctions, the existing Criminal Code capital markets offences of fraud, insider trading, tipping, fake prospectus, wash trading, etc. would be used. The existing quasi-criminal provisions contained in provincial securities law, which provide inadequate sanctions and procedures, would become unnecessary and should not be included in a new national securities law. Some cases would require both criminal and administrative sanctions and would be prosecuted in both of these forums.

The Administrative Branch would work with the Criminal Branch by transferring cases that initially appear to be of an administrative nature to the Criminal Branch if, on investigation, it is clear that a crime has occurred. These transfers would use the protocols developed by the Canada Revenue Agency following the *Jarvis* Charter decision of the Supreme Court of Canada.

Securities law cases seeking only administrative penalties should be heard before a new National Securities Tribunal (as a part of the National Regulator or as a separate organization), which would eliminate any perceptions of bias, and result in more consistency in decisions and judicial sophistication and expertise.

The delegation by the federal government of responsibility for criminal matters to a new agency or to the National Regulator can be done within the existing constitutional system, as criminal law is clearly federal power. Consideration should be given to using the 1984 creation of CSIS as the structural model for creating a new agency if that route is chosen.

### **Canada should be a Global Leader in Enforcement**

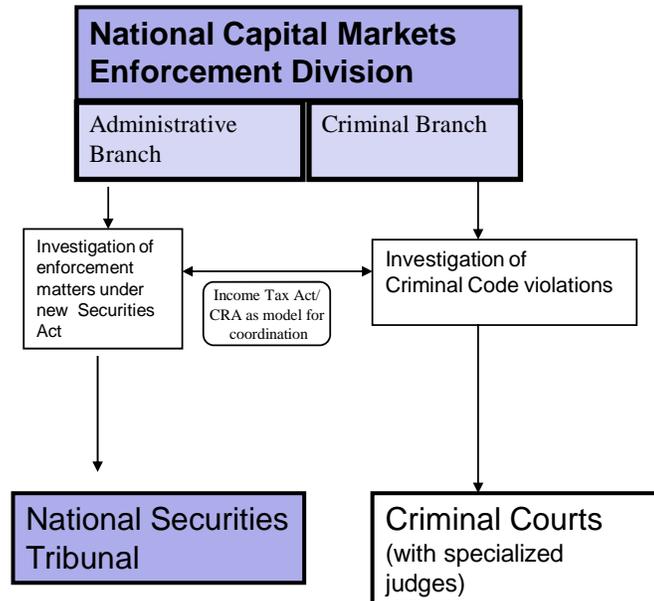
The creation of an enforcement division of the National Regulator, or a national capital markets enforcement agency, including both administrative securities law and criminal law, would leapfrog Canada ahead of most other countries by consolidating securities enforcement – and would be evidence that Canada takes securities enforcement seriously. In particular, it would:

- Address the perceptual and substantive concerns with respect to our fragmented securities regulatory system and ineffective criminal system
- Create accountability and an enhanced ability to marshal and coordinate enforcement resources
- Achieve coordination and consistency across Canada
- Create a clear choice between either administrative or criminal powers, or both, unlike the current “halfway house” approach in most provinces where enforcement decisions involve three choices – criminal, quasi-criminal or administrative
- Create a single interface for foreign government/regulators regarding MOUs, treaties, requests for co-operation, cross border investigations and enforcement actions.

### **Enforcement Structure if there is a National Regulator**

If a National Regulator is created, the National Regulator should have combined enforcement powers over (1) administrative securities laws, and (2) criminal (and quasi-criminal) enforcement relating to the capital markets. A structure should be created within the National Regulator, as follows:

## NEW FEDERAL PROSECUTION AND ADJUDICATION DIVISIONS



### Structure if the Passport System Continues

If the Passport System is continued in the near term, the Panel should consider the following structure to enhance enforcement:

- The creation of a National Capital Markets Enforcement Agency to assume responsibility for the investigation and prosecution of criminal laws relating to the capital markets across Canada
- The national consolidation of certain retrospective administrative securities law enforcement capabilities of the provincial securities regulators, either by the delegation of authority by provincial securities regulators to the National Capital Markets Enforcement Agency or through an enhanced CSA effort
- Prospective administrative securities law matters which are closely linked to the policy functions of securities regulators (such as take-over bids and cease trade orders) should remain with provincial securities regulators under the Passport System.

The National Capital Markets Enforcement Agency would be merged into the National Regulator as its enforcement division when the National Regulator is later formed.

If both retrospective administrative securities law and criminal enforcement matters are delegated to a National Capital Markets Enforcement Agency, the structure would be as follows:

