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CANADA'S SECURITIES ENFORCEMENT AND JUSTICE
SYSTEM

**A Presentation to Ontario Standing Committee of Finance and
Economics**

August 18, 2004 3 P.M.

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Room 151,
Main Legislature Building, Queen's Park,
Toronto, Ontario,
M7A 1A2

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Recommendations

In Canada, white collar crooks almost always get away with ill-gotten gains. Most investors do not get restitution for the losses caused by their fraud and illegal securities activities. As an investor advocate, I ask The Ontario Standing Committee on Finance and Economic Affairs to support the following recommendations:

- 1) Implement a single national securities regulator to formulate one uniform law and to conduct single investigations and prosecutions.
- 2) Create a separate court with administrative judges knowledgeable on securities laws for adjudication of securities violations and restitution of investor losses.
- 3) In the meantime, instruct the OSC to better utilize the enforcement tools presently available under the OSA and the Federal Criminal Code:
 - (a) throw out the OSC senior management policy to do few enforcement cases so that the public thinks there is very little crime in our markets;
 - (b) do more enforcement cases by raising the investigation and prosecution productivity of current OSC enforcement staff;
 - (c) complaints from directors of public companies handled under special procedures, with whistleblowing protection for both employees and directors;
 - (d) have more individuals that commit fraud and both criminal and quasi-criminal offences, taken to court by crown prosecutors and sent to jail. The OSC and IDA must refer criminal cases to the RCMP and the IDA must refer quasi-criminal cases to the OSC;
 - (e) use the new tools under the S. 127 power of the OSC for fines and disgorgement of ill-gotten gains and the creation of a trust fund under S. 3.4(2) for payment of the proceeds to third party victims, and use the S. 128 power to obtain an Ontario Superior Court of Justice order for the payment of restitution of investor losses caused by quasi-criminal offences under the Ontario Securities Act;
 - (f) change the OSC senior management, who are excessively paid and who over long tenures have demonstrated neither willingness nor effectiveness in addressing serious gaps in investor protection laws and in strong enforcement.
- 4) Introduce the following new provisions in the Ontario Securities Act:
 - (a) create powers under S. 127 for the OSC to award restitution for investor losses caused by non-compliance with the OSA and create powers under S. 122 for the Ontario court to award restitution for investor losses caused by offences under the OSA. Such direct restitution powers should be adopted now by Ontario and then ensconced in the new single national securities act and adjudicated by the new separate administrative court;

- (b) reintroduce immediately Part XXIII of the OSA, the civil liability provisions for continuous disclosure misrepresentations, that were recommended by the Five Year Review Committee and were withdrawn at the last minute from the Year 2002 Amendments;
 - (c) revise the definition of insider trading to specifically include trades in securities between insiders and the issuer, as recommended by the Insider Trading Task Force;
 - (d) implement whistleblowing protection for directors and employees of public companies and registrants, as recommended by the Five Year Review Committee but included in the OSA not the Ontario Business Corporations Act;
 - (e) implement clear mechanism for complainants to have avenue for appeal of OSC staff decisions to close enforcement files, where violation is acknowledged and prima facie cause and evidence exist;
- 5) Request the Ontario Standing Committee of Government Agencies, with the assistance of the Provincial Auditor, to review the OSC's effectiveness in fulfilling its mandate to provide effective protection to investors and public confidence in the integrity of the markets, while ensuring market efficiency. This Committee should:
- (a) examine the process for determining the compensation of OSC senior management, the terms of current compensation agreements with OSC senior management, including retirement and termination provisions, and performance criteria;
 - (b) examine the records of OSC senior management participation in calls, meetings and business functions to ascertain the appearance or existence of bias towards corporations and financial institutions being regulated versus the investors intended to be protected;
- 6) Request that the Chairman of the Management Board of Cabinet use his powers, otherwise given to the Ontario Minister of Finance under, Section 3.8(2), to designate that the Minister of the Attorney General review OSC enforcement procedures and OSC supervision of IDA enforcement procedures. The Provincial Attorney General should:
- (a) review the OSC definition and application of public interest as it applies to enforcement file closures, determination of case priorities and type of adjudication, without bias, political interference or corruption on who is not selected or selected.
 - (b) examine policies of disclosure on existence of investigations, pending charges and public interest criteria to alleged offenders, to complainants, and to the public;

- (c) recommend the structure for an oversight committee of civilians to ensure ongoing integrity in the OSC enforcement procedures, including the definition of public interest and a fair process for case closures and determination of priorities and type of adjudication, without bias, political interference or corruption on who is not selected or selected,
- (d) examine all the procedures undertaken by the OSC in its oversight of the IDA and MFDA enforcement process, such as the handling of misappropriation of funds, excessive churning and unsuitable investments in individual client accounts.

A Single National Securities Commission

SLIDE 2 - CANADA'S SECURITIES ENFORCEMENT & JUSTICE SYSTEM

Justice for individual investor victims is practically impossible in Canada's securities enforcement and justice system. Self-regulators, regulators, the police and the courts are a maze that victims enter, but few exit with justice. Today, Canada and Bosnia-Herzegovina are the only two major countries without a single national securities regulator.

SLIDE 3 - CANADA'S INSTITUTIONAL STRUCTURE

There are just too many different regulators, self-regulators, police authorities and court options. No-one knows who to complain to. No-one can figure out the different degrees of egregiousness or criminality in offences. No-one knows whether you should be dealing with the police, regulators or the self-regulators?

SLIDE 4 - CANADA'S STATUTES, RULES & PROCEDURES

There are thirteen sets of provincial securities and corporate laws, plus federal corporate law and the criminal code. These are not capable of being understood by directors and individual investors, and even a lot of lawyers. The various authorities do not themselves know the laws and who is responsible for what. In this maze, passing the buck on investigations and prosecutions is commonplace. Investigations are not coordinated across provincial jurisdictions when there are multiple offences. Regulators and the police do not co-operate on the criminal aspects of cases.

It is expensive and time-consuming for investors and their lawyers to communicate with several different authorities on multiple offences in different exclusive jurisdictions. Investor financed forensic investigations and legal research are just too costly.

SLIDE 5 – MISCONDUCT & RESTITUTION

The RCMP and police submit criminal prosecutions to the courts. The OSC can submit a quasi-criminal prosecution to the court. The OSC also conducts its own administrative hearings for the sanctioning of OSA violations. The IDA conducts administrative hearings on violations of its rules by industry personnel. Neither the IDA nor the OSC provide for restitution of investors' losses, after determining offences and crimes have occurred. Investors must go to arbitration or the courts for remedies. The prospects for court success are high after successful quasi-criminal and criminal prosecutions. It is inefficient and costly, however, for investors to start another court procedure for restitution of their losses.

Another problem is that Canada's self-regulators, regulators and police do very few prosecutions relative to the number of complaints made to them. It is prohibitively expensive for individual investors to have white collar crime adjudicated on their own, without prior regulatory or police prosecutions. Few white collar court cases will cost less than \$50,000 for individual investors and the court outcomes are risky. Civil court procedures are tedious and expensive, with the corporate defendants having much deeper pockets than the individual plaintiffs. Judges tend to have corporate bias. They are loath to hear cases and award investor damages because they perceive that the regulators and police are the experts and they would have taken enforcement action if the alleged violations had occurred. The OSC commissioners and IDA arbitrators also have corporate bias, which stacks the odds against investor awards.

There is only one lawyer in Canada, John Hollander, who will take on investment advisory abuse cases on a fully contingent basis. There are few investors' plaintiff lawyers in Canada because individual investors, who have just lost hundreds of thousands of dollars due to fraud and securities offences, cannot afford to throw more tens and hundreds of thousands of dollars at lawyers to file court claims. The consequence is that justice for white collar crime victims is inaccessible. This is why it is necessary for the regulators and police to do more prosecutions. Unaffordable court costs is why restitution of investor losses must become an adjunct to the original adjudication of fraud and securities law violations at the OSC and in the courts.

SLIDE 6 – BREAKDOWN OF PENALTIES PER \$10 BILLION GDP

U.S. monetary penalties for securities offences are thirteen times larger than Canadian penalties, per \$10 billion GDP. The administrative penalties and fines are comparable, on average, between Canada and the U.S. However, the SEC and U.S. states order restitution for investors' losses, while Canadian commissions do not do so.

SLIDE 7 – BYZANTINE JUSTICE FOR INVESTOR VICTIMS

I have been through Canada's regulatory and court system as a director dealing with unauthorized related party transactions, press release misrepresentation, stock trading manipulation and illegal share sales to the company by insiders. Our byzantine system of justice for investor victims is a nightmare. My negative experience is chronicled at website address http://regulators.itgo.com/Cases/Urquhart/insider_trading.htm and in Exhibits 1 to 6.

It is your duty as public legislators to fix Canada's broken regulatory and justice system for investor victims. The failures in the system encourage the crooks to commit fraud and securities violations without fear of consequences from the regulators or police or from court actions by the individual investor victims. People should not invest in Canadian securities and mutual funds until the regulators, self-regulators and police are compelled to enforce fraud and securities laws more frequently and more effectively.

SLIDE 8– ESTIMATED COST SAVINGS FROM CONSOLIDATING REGULATORS

According to the Charles Rivers Associates Report, Canadian securities commissions collectively spend only \$21 million on securities law enforcement. If Canada combined the thirteen provincial and territorial securities commissions, there would be cost savings of \$47 million. If this cost savings went into enforcement, the benefits to the Canadian economy would be significant multiples of the \$47 million due to the improvement in investor confidence that would occur.

The OSC Enforcement Policy Of Cover-Up Must Stop

The OSC has a policy to do few enforcement actions annually so as not to alarm the investing public about the prevalence of illegal activity in the financial industry or at public corporations. This policy of cover-up must stop.

The OSC delegates most individual complainants to the self-regulators (IDA, MFDA or MRS), who have inherent conflicts of interest and an objective to discourage the merit of complaints and to do few enforcement cases annually so as not to alarm the investing public about the prevalence of illegal activity in the financial industry.

Public Opinion Polls Express Loss of Investor Confidence in OSC

SLIDE 9 – PUBLIC OPINION POLLS

Close to 90% of the Canadian public want a national securities commission according to both Investment Executive and Globe and Mail public opinion polls. 79% participating in

the Investment Executive poll said that securities regulators do not do a good job of protecting the interests of the small investor. According to a Jan. 2004 Globe Investor Survey, respondents expressed little confidence that securities regulators will protect their investments from fraud and unethical practices. More than one-third said they have only "weak" confidence, while 18 per cent said they have "no confidence at all."

SLIDE 10 - ASSOCIATION OF INVESTMENT MANAGEMENT AND RESEARCH

The Association of Investment Management and Research (an international organization of buy-side and sell-side chartered financial analysts) received 600 responses from Canadian investment professionals in a Spring 2003 survey. Eighty percent agreed that the best solution for securities regulation in Canada was a single regulator. In answering questions about why the need for reform, approximately half said the fairness, consistency and strength of enforcement is poor or very poor, compared to 16% who said it is good or very good.

The OSC IPSOS-REID Poll Says Public Unaware of OSC

SLIDE 11 - IPSOS REID STAKEHOLDER SATISFACTION STUDY

The OSC's IPSOS REID Stakeholder Satisfaction Study July 2004 was released by the OSC on July 28, 2004. The stakeholders surveyed are the general public (closest category to individual investors), inquiries line users, registrants, and reporting issuers. I prepared the chart below for comparison of how these different stakeholders rated the OSC's enforcement record. Not surprising, about two thirds of registrants, reporting issuers and inquiries line users strongly agree that the OSC is a strong enforcer, while only 28% of the general public say this. 28% of the general public strongly agreeing that the OSC is a strong enforcer needs to be taken with a grain of salt, given the general public's lack of awareness about the existence of a securities regulator in Ontario.

SLIDE 12 - STAKEHOLDERS' RELATIONSHIPS WITH THE OSC

Of note in the slide only 9% of the inquiries line users made contact for the purpose of a complaint on an institution or company and only 2% of the general public had ever made a contact with the OSC. Only 27% of the general public had awareness of any organization responsible for regulating the capital markets in Ontario and only 19% of the general public could specifically name the Ontario Securities Commission or the OSC. Individual investors who have been the victims of financial industry and corporate illegal conduct are simply not represented in this Stakeholder Satisfaction Study and our experience shows this group is dissatisfied with the current securities regulatory system's ability to obtain justice and restitution.

Other Evidence of Dissatisfaction with OSC Enforcement

A groundswell of government committee reports and media articles have sought reform of both the self-regulators (the Investment Dealers Associations and TSX Exchange) and the provincial securities commissions. These can be found at the following website address: <http://regulators.itgo.com/>

SLIDE 13 – REPORTS AND STUDIES

Canada was rated the worst for potential profits from insider trading amongst 52 countries in the February 2003 Arturo Bris, Yale University study. A June 2003 Wilfred Laurier University study, prepared by William McNally and Brian Smith, found there was a scarcity of Ontario insider trading prosecutions and large scale evidence of insider trading and reporting violations.

Reports and Studies (Available Electronically in Attached CD)		
5 Year Review Committee Report	Mar. 21, 2003	 C:\Reports\Five Year Review Committee.pc
Osborne Report	April 2004	PUBLIC DISCLOSURE DELAYED
Wise Persons Committee Report	Dec. 17, 2003	 C:\Reports\Wise Persons Committee.p
Ontario Management Board of Cabinet – Modernizing Securities Regulation in Canada	June 7, 2004	 C:\Reports\Ontario Management Board o
Charles Rivers Associates – The Effect of Multiple Regulators	Oct. 21, 2003	 C:\Reports\Charles Rivers Associates - T
OSC Audit of IDA	Aug. 2000	PUBLIC DISCLOSURE REFUSED
Regulatory Burden Task Force Report	Dec. 12, 2003	 C:\Reports\ Regulatory Burden Tæ

Reports and Studies (Available Electronically in Attached CD)		
IPSOS-REID Stakeholder Satisfaction Study	July 2004	 C:\Reports\ IPSOS-REID Stakehol
Fraser Institute – Commissions Unbound	Nov. 2001	 C:\Reports\Fraser Institute - Commissior
Fraser Institute – OSC Governance	Aug. 2002	 C:\Reports\Fraser Institute - OSC Gover
Insider Trading Task Force Report	Nov. 2003	 C:\Reports\Insider Trading Task Force.p
Yale University – Do Insider Trading Laws Work?	Feb. 2003	 C:\Reports\Yale University - Do Inside
Wilfred Laurier University – Do Insiders Play By the Rules?	Feb. 2003	 C:\Reports\Wilfred Laurier University - Di
OSC Staff Notice 11-719 Public Interest Criteria for Enforcement	Dec. 18, 2002	 C:\Reports\OSC Staff Notice 11-719 -
Small Investor Protection Association – A Voice for the Small Investor	Feb. 27, 2004	 C:\Reports\SIPA - A Voice for the Small In
Canadian Association of Retired Persons – CARP Investigates Mutual Fund Abuses	June 2004	 C:\Reports\CARP Investigates Mutual F
Consumer Council of Canada – The Scorpion and the Frog		http://www.consumerscouncil.com/frog.htm

SLIDES 14 TO 18 – IMPORTANT MEDIA ARTICLES

On Jan. 2, 2004, the Wall Street Journal published an article highly critical of Canada's feeble enforcement record and its failure to curtail illegal insider trading. On Jan. 13, 2004, US Stock Patrol says Canada has proven itself woefully deficient when it comes to regulating public companies. It says the laissez faire approach of Canadian regulators is staggering. Alan Radlo, who runs \$7-billion of Canadian assets from Boston for the world's biggest mutual fund company, was interviewed by Karen Howlett of the Globe and Mail on December 19, 2003. He says Canada seems to deal with insider trading chiefly by putting people on their honour not to cheat. "I don't believe in the honour system," he says.

	Important Media Articles		
<u>1136</u>	Let the sun shine on regulators	Aug. 2004	Investment Executive
<u>1109</u>	OSC tries to block release of report on brokerage watchdog	20 July 2004	Globe and Mail
<u>1101</u>	Probe is evidence OSC moves at glacial speed	17 July 2004	Globe and Mail
<u>1087</u>	Good news, bad news from OSC compliance report	12 July 2004	Investment Executive
<u>1083</u>	Death of a saleswoman	09 July 2004	Canadian Content
<u>1080</u>	Canada discounts white-collar crime	09 July 2004	National Post
<u>1059</u>	Grievances never see the light of day	25 June 2004	National Post
<u>1056A</u>	Select few reap unfair gain	21 June 2004	Globe and Mail
<u>1047</u>	The true north strong and fleeced; Little Protection for Canadian Investors	09 June 2004	National Post
<u>1040</u>	Cozy era ends for securities regulators	05 June 2004	National Post
<u>1025</u>	Spitzer and Co. v. David Brown's Ontario Securities Commission	29 May 2004	National Post
<u>1009</u>	Valentine gets home detention	22 May 2004	Toronto Star
<u>725</u>	OSC chairman faces new questions on Royal Group	04 Mar. 2004	Globe and Mail
<u>902</u>	Securities regulators assailed over governance	18 April 2004	Globe and Mail
<u>886A</u>	Taken for a ride	12 April 2004	Canadian Business
<u>882</u>	Felderhof 's trial to resume — 3 years later	10 April 2004	National Post
<u>876</u>	Investors need better protection	07 April 2004	Mississauga
<u>870</u>	OSC clearly not ready for the big leagues	06 April 2004	National Post
<u>849</u>	It's time for tougher sanctions on white-collar crime	31 Mar. 2004	Globe and Mail
<u>843</u>	Corporate Canada's silence on market regulation embarrassing	30 Mar. 2004	Globe and Mail
<u>842</u>	Nicer rules for a nicer market	30 Mar. 2004	National Post
<u>834</u>	Stop the slide in trust	26 Mar. 2004	Globe and Mail
<u>813</u>	'I'm flat, busted broke'	21 Mar. 2004	London Free Press
<u>812</u>	Proposed mutual fund rules are `dangerous' to the	21 Mar. 2004	Toronto Star

	Important Media Articles		
	investor		
773	Rule change (monetization) long overdue, expert says	11 Mar. 2004	National Post
746	Government corruption described as widespread	06 Mar. 2004	London Free Press
733	Mad as hell	05 Mar. 2004	Globe and Mail
731	Twiddling while investors burn	04 Mar. 2004	Globe and Mail
707A	Open Season. Where's the OSC?	01 Mar. 2004	Canadian Business
662	OSC chief defends fund reforms	19 Feb. 2004	Reuters
653	An ethical industry?	.17 Feb. 2004	Investment Executive
646B	Canada needs a securities watchdog with teeth	16 Feb. 2004	Maclean's
638	Corporate Canada fails to protect stakeholders	10 Feb. 2004	Canada Newswire
631	A tip for securities regulators: More enforcement	09 Feb. 2004	CBC News
588A	Must "do better" in area of regulatory reform: Goodale	27 Jan.2004	Investment Executive
588	IDA says complaints soared 41% last year	27 Jan. 2004	Globe and Mail
578	Getting their money back	19 Jan. 2004	Investment Executive
570	I apologize for remark, Greenspan tells OSC	17 Jan. 2004	National Post
557	Regulatory system 'convoluted'	15 Jan. 2004	National Post
550	Blame Canada	13 Jan. 2004	Stock Patrol
546	They have seriously undermined investor protection	10 Jan. 2004	National Post
543	Fraud, scandals keep investors on the sidelines	10 Jan. 2004	Globe and Mail
542	Watchdog to abolish mutual fund conflict rules	10 Jan. 2004	Globe and Mail
536	Ex-Technovision Director Awaits Cdn Regulator's Ruling	07 Jan. 2004	Dow Jones Newswire
534	Canada Moves to Tighten Securities Markets Regulation	02 Jan. 2004	Wall Street Journal
521	Honour system doesn't work: top U.S. manager	19 Dec. 2003	Globe and Mail
510A	Self-policing an ethical disaster	17 Dec. 2003	CBS.Marketwatch
497	Task force report seeks better investor protection	17 Dec. 2003	Toronto Star
495	Sadly, lawsuits are best remedy for investors	16 Dec. 2003	Globe and Mail
491	Report seeks IDA revamp	13 Dec. 2003	Globe and Mail
488	Study finds OSC has lots of warts	13 Dec. 2003	National Post
465	Restructuring the OSC	19 Nov. 2003	Investment Executive
463	CEOs want malfeasant managers charged	17 Nov. 2003	National Post
448	Canada amazed at speed of Spitzer's reforms	10 Nov. 2003	Globe and Mail
432	Blowing the whistle on securities violations	Nov. 2003	Financial Executives International
431	No rhyme or reason to prosecutions	Nov. 2003	Investment Executive
430	74-year-old widow's case just drags on	02 Nov. 2003	Toronto Star
427	Industry muzzles its victims	23 Oct. 2003	National Post
426	OSC misses the mark on Corel	23 Oct. 2003	Toronto Star
405	Canada tops inside trade list	30 Sept. 2003	National Post
389	Canada's GAAP not good enough	17 Sept. 2003	National Post
387	Court criticizes OSC	16 Sept. 2003	National Post

	Important Media Articles		
358	Securities review reveals discontent	28 July 2003	Globe and Mail
356	Provincial securities regulators do a dismal job of policing	23 July 2003	Globe and Mail
353	YBM ruling won't reassure investors	22 July 2003	Globe and Mail
341	Revamping the OSC	06 July 2003	Toronto Star
335	The OSC fumbles	03 July 2003	Globe and Mail
332	The Taint is There	02 July 2003	National Post
331A	Ottawa lawyer ready to fight brokers of losing investors	29 June 2003	Ottawa Citizen
304	Director finds no road map on route to disclosure	19 April 2003	Globe and Mail
294	Canada is heaven for market sleazes	25 Feb. 2003	Globe and Mail
269	OSC: Lawmaker, judge and executioner	03 Dec. 2002	Investment Executive
249	Mobsters infiltrating markets	12 Nov. 2002	Globe and Mail
244	Colossal bungling at OSC	04 Nov. 2002	National Post
188	Scandal would kill market, OSC head says	20 Sept. 2002	Globe and Mail
186	Ontario Securities Circus	14 Sept. 2002	National Post
179	Why didn't regulators listen to TK warnings?	31 Aug. 2002	Globe and Mail
76	How Canada stacks up	23 Oct. 2001	Globe and Mail

Net Sale of Canadian Equity Mutual Funds in 23 of Past 26 Months

SLIDE 19 – MUTUAL FUNDS MONTHLY NET SALES

Foreigners Volatile Buyers of Canadian Stocks Need Confidence

SLIDE 20 – FOREIGNERS NET PURCHASES OF CANADIAN STOCKS

The OSC Has Low Enforcement Case Productivity

SLIDE 21 - CASES BY SETTLEMENTS OR HEARING DECISIONS

The OSC cases resolved by settlements or hearing decisions are low relative:

- (a) to number of OSC enforcement staff
- (b) to the number of complaints received by the OSC
- (c) to number of OSC Commissioners available for hearings
- (d) to the U.S. SEC

SLIDE 22 – OSC COMPLAINTS RECEIVED

The OSC has closed more files than the new complaints received each year since 1998, except for 2003 when the closed files were about equal to the new complaints received. The really interesting statistic is that the OSC has only 49 open complaint files in 2004, or one half a file per employee in the enforcement division. The open files count has been between 49 and 79 since 2002. The cases being resolved by settlement or decision are not keeping pace with the open files, so in terms of accomplishments per enforcement employee the record is very weak. It is no wonder that investors are angry about their treatment by the OSC, when they hear the lame excuse of inadequate resources and see these low productivity statistics.

SLIDE 23 – IDA ACTIVITY

The IDA receives more annual complaints than the OSC. The IDA's prosecution rate relative to complaints was close to 1 in 5 cases in the year 2000-2002. This compares to less than 1 in 20 cases for the OSC during the same period. The typical IDA prosecution is a ban from the industry and a fine. IDA fines are up to \$1 million or three times the ill-gotten gain.

SLIDE 24 – IDA CRIMINAL CASES NOT SENT TO RCMP OR OSC FOR PROSECUTION

IDA settlement agreements are reached where there are written admissions to fraud, such as misappropriation of funds or forgery and these are not sent to the RCMP, local police or the OSC for criminal prosecutions involving jail time.

SLIDE 25 - COMPLAINTS, INVESTIGATIONS & PROCEEDINGS IN FOUR KEY PROVINCES

The OSC does fewer settlements and hearings than Quebec, Alberta and B.C. per \$10 billion of GDP

The OSC staff process of selecting the small number of OSC enforcement cases is non-transparent, unfair and perhaps corrupt in terms of who is not selected and who is selected for prosecutions.

SLIDE 26– CRIMINAL SECURITIES CASES

During 2000 to 2002, the OSC did no quasi-criminal cases in the Ontario courts, while Alberta and B.C. did criminal cases as did numerous U.S. states.

SLIDE 27 – CANADIAN ENFORCEMENT BUDGET AS A SHARE OF TOTAL BUDGET

SLIDE 28 – U.S. ENFORCEMENT BUDGET AS A SHARE OF TOTAL BUDGET

The OSC spends 17% of its budget on enforcement compared to 30% by the SEC and higher percentages by most U.S. states.

A Separate and Less Biased OSC Adjudicative Function

The OSC has 11 Commissioners, who are its Board of Directors. The key issues on the structure and current incumbents of the OSC's board of directors are:

1. The Board contains adjudicators who must also oversee the management of lawmaking, prosecutions and adjudications. Section 3.1 (2) of the OSA says the board of directors shall oversee the management of the financial and other affairs of the Commission. The OSC should separate adjudication from lawmaking and prosecutions into two entities with distinct supervision.
 - Individual who are alleged to have violated the OSA have an independent and fair adjudication process, without reprisals for failing to accept OSC staff settlement proposals.
 - Individual complainants have a fair and inexpensive process for obtaining compliance orders, investigations and prosecutions against corporate and financial industry personnel, corporate lawyers and accountants.

SLIDE 29 – OSC COMMISSIONERS

2. The OSC cannot fulfil its mandate to administer and enforce the OSA covering the majority of Canada's registrants and reporting issuers, with only three full-time commissioners, and eight part-time commissioners. There are three full-time commissioners, the Chair and two Vice Chairs. The Chair is the only OSC Commissioner required by the Ontario Securities Act to devote his full time to the work of the Commission. The Chair does not preside over OSC hearings. The adjudicating commissioners should work full-time in a separate administrative court.
3. The current incumbents by their current and prior work experience have corporate bias, and a propensity to tilt justice against investors. The current Board has no representative of individual investors or experience as investors' plaintiff legal counsel. The newest incumbent is a career OSC staff legal counsel, and one cannot be faulted for perceiving that it will be difficult for her to act independently of her

long-time OSC staff colleagues. There are five other lawyers, all of which are corporate lawyers, and three of which still practice corporate law at their Bay Street law firms. There is one retired money manager corporate counsel. There is one retired managing partner of a major accounting firm and the remaining three commissioners are retired bankers.

OSC Public Service Compensation High, Without Demonstrated Performance

SLIDE 30 – COMPENSATION FOR GOVERNMENT AND JUDICIAL LEADERS

David Brown, Charlie Macfarlane and Michael Watson must be held accountable for the OSC’s abysmal record for not adopting the recommendations of investors for investor protection laws and for weak enforcement. We need new leaders willing to implement the Commission’s mandate to provide effective protection to investors, to foster confidence in the integrity of the capital markets, while not inhibiting the market’s efficiency.

The Fraser Institute asks for a provincial auditor Value-for-Money Audit in its report entitled *Commissions Unbound: The Changed Status of Securities Regulators in Canada*, 2001. The report says, “Overall, the conversion of the commissions into crown corporations was not a success but a lesson on why bureaucrats should not have independence in setting budget and salary levels. Little was achieved in that the commissions had adequate policy independence before the conversion. The change came clearly at the cost of financial accountability. Measures are needed to restore financial accountability. The budget of the securities commissions should be subject to arm’s length review and approval. The salaries and benefits of the commission’s senior management should be based upon clearly stated benchmarks of positions of similar responsibility and authority. The fee levels of the securities commissions should be set to cover commissions’ legitimate expenses over a medium term horizon. Provincial auditors should periodically conduct performance (Value-for-Money) audits on securities commissions.”

http://oldfraser.lexi.net/publications/critical_issues/2001/CommissionsUnbound.pdf

SLIDE 31 - OSC CASES NOT DONE OR NOT DONE WELL

Other Necessary Changes in the Ontario Securities Act

The Ontario Standing Committee on Finance and Economic Affairs should recommend reintroducing immediately **Part XXIII of the OSA, the civil liability provisions for continuous disclosure misrepresentations**, that were recommended by the Five Year Review Committee and were withdrawn at the last minute from the Year 2002 Amendments;

The definition of an insider trading offence should be revised to include transactions between an insider (or other persons in a special relationship) and the issuer. Under provincial legislation, a person is exempt from the insider trading prohibition where the person reasonably believed that the other party to the purchase or sale had knowledge of the material fact or change. The ‘mutual knowledge’ exemption is also incorporated in the civil liability provisions. However, as the ASC pointed out in Richard Harry Seto (ASC, Feb.19, 2003), the legislation does not appear to address the harm that can occur when the parties to the transaction are the reporting issuer itself and an insider directing or causing the issuance or redemption of securities. The potential harm arises from the possibility that insiders can structure to their own benefit the acquisition or sale of treasury securities at prices that do not reflect the price that would apply were the inside information generally disclosed. In such circumstances, other shareholders are harmed as a result of the issuer receiving or paying proceeds from the sale of securities that do not reflect the market value of the securities that would have applied had the inside information been generally disclosed.

There should be special complaint and personal liability protection legislation and procedures for whistleblowing directors in the front line of corporate governance on behalf of the investing public. This whistleblowing protection for directors should be placed in the Ontario Securities Act. Independent directors are ineffective without the power to enforce illegal securities activity and the predisposed commitment for enforcement support from the securities regulators.

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