The Proposals for a Securities Market Law for Canada: Purpose and Process

Philip Anisman

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A little over two years ago, on November 28, 1979, the Minister of Consumer and Corporate Affairs released the Proposals for a Securities Market Law for Canada, the result of a study initiated in May 1973 to provide a detailed analytic foundation upon which the Government of Canada might formulate its policy for the regulation of the Canadian securities market. In accordance with the study's design, the Minister emphasized that the Proposals do not reflect government policy but rather contain the recommendations of their authors. The Proposals were thus released as a discussion document to invite comments from provincial governments, members of the investment community and other interested persons so that the Government might develop its position in light of both the Proposals and the reaction to them.

Although the reactions initially reported in the press were less than fa-
vourable, the official organizations of the securities industry apparently concluded that the Proposals merit serious consideration and established a joint industry committee to review them, academic commentators praised the quality of the Proposals, and recent provincial legislation reflects their influence. Moreover, during the past year the current Minister of Consumer and Corporate Affairs, reaffirming his intentions concerning the Proposals, requested the views of provincial governments and other interested parties, and the Prime Minister indicated his desire that the federal government have authority over securities legislation, perhaps through a constitutional amendment. Now that Parliament has formally requested the patriation of the Canadian constitution with an amending formula, as well as a charter of rights, it is likely that the federal government will turn its attention to the allocation of legislative powers between Parliament and the provincial legislatures, especially as a constitutional conference of first ministers must be convened within a year after the Constitution Act, 1981 comes into force. A symposium issue on the Proposals is therefore timely and provides an occasion to outline their genesis and substance and to consider the continued viability of their underlying premises in view of events since their publication.

As in other federal jurisdictions, securities legislation was first enacted in

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4 See, e.g., Stephens, "Protest federal securities plan: Why tamper with system that works, industry asks", Toronto Star, Nov. 29, 1979 at E9, col. 3. The response to the Proposals is discussed more fully in the text accompanying notes 99-111, infra.

5 The committee is called the "Joint Industry Committee on a Securities Market Law for Canada"; see Toronto Stock Exchange, Members' Manual (1980) at A-7.


8 See Ouellet, Notes for Remarks to a Joint Meeting of the Ontario and Quebec Business Law Sections of the Canadian Bar Association, February 15, 1981 at 8.

9 See "Doesn't foresee unilateral move, Trudeau states", The Globe and Mail (Toronto), Feb. 21, 1981 at 1, col. 5.


11 See, e.g., Trudeau, A Time for Action: Toward the Renewal of the Canadian Federation (Ottawa: Minister of Supply and Services, 1978) at 25 (first phase of constitutional reform to deal with matters within Parliament's exclusive competence and the second phase primarily with the distribution of legislative powers). See also Chrétien, Securing the Canadian Economic Union in the Constitution (Ottawa: Minister of Supply and Services, 1980) at 29-33.

Canada at the provincial level in the early part of this century.\textsuperscript{18} Despite the Depression and a recommendation in 1935 by a royal commission that an "Investment or Securities Board" be created to review the capital structure of any federal corporation that wished to sell its securities to the public,\textsuperscript{14} no attempt was made by the federal government to enter the field, in part, perhaps, because of the Privy Council’s restrictive interpretations of Parliament's legislative jurisdiction over matters involving business relations.\textsuperscript{15} Whatever the reason, during the succeeding decades, even though there was some dissatisfaction expressed over the inconvenience and cost resulting from a lack of uniformity in the various provinces, local administration of legislation designed to prevent fraudulent sales of securities was generally accepted as preferable to a centralized federal scheme.\textsuperscript{16} By 1964, however, a desire for uniform securities laws with "high standards of disclosure, competence and ethics" and an antipathy toward unnecessary duplication under the existing provincial legislation led the Royal Commission on Banking and Finance to recommend the creation of a federal regulatory agency to clear interprovincial and international distributions of securities and to enforce the securities fraud provisions in the \textit{Criminal Code}.\textsuperscript{17}

The Royal Commission Report initiated a period, which is still continuing, of active and constant reconsideration and reform of securities laws in Canada. Within a year the Kimber Committee, appointed by the Attorney General of Ontario in 1963, recommended introduction of a new securities act with a number of innovations, similar to the prescriptions of the Porter Commission, intended to increase investor confidence and the efficiency of

\textsuperscript{18} The first statute was enacted in Manitoba; see \textit{Sale of Shares Act}, S.M. 1912, c. 75; see also \textit{Sale of Shares Act}, S.S. 1914, c. 18. The history of Canadian securities regulation is discussed in Williamson, \textit{Securities Regulation in Canada} (Toronto: U. of T. Press, 1960), c. 1; \textit{Supplement} (Ottawa: Gov’t of Canada, 1966), c. 1.

\textsuperscript{14} Can., \textit{Report of the Royal Commission on Price Spreads} (Kennedy Report) (Ottawa: King's Printer, 1935) at 44. The Securities Board was to operate as a division of a Federal Trade and Industry Commission; \textit{id}. at 44, 265 and 274.


\textsuperscript{17} See Can., \textit{Report of the Royal Commission on Banking and Finance} (Porter Report) (Ottawa: Queen's Printer, 1964) at 348-49; see also \textit{Criminal Code}, R.S.C. 1970, c. C-34, ss. 338-342. While the Commission emphasized the importance of uniformity, it also recognized the national scope of the Canadian securities market and the increasing international aspects of securities trading and of fraudulent schemes; see \textit{id}; and see 2 \textit{Proposals} at 1-4.
the securities market by "raising the standards governing the industry." The Committee's recommendations were quickly introduced and, after some consultation with the other provincial officials, were enacted as the Ontario Securities Act, 1966. In the same year the effects of the Porter Report were seen at the federal level; the Commission's recommendation, with an assist from the Canadian Bar Association, had directed the attention of the federal government to the securities market and resulted in the creation of a "Securities Task Force" under Marc Lalonde, then in private law practice in Montreal, with Professor J. Peter Williamson as director of research. The Task Force prepared a comprehensive survey of the current state of Canadian securities regulation, including an analysis of the new Ontario Act, and a number of papers on specific topics such as criminal law and securities markets, mutual funds, and self-regulation as background for a federal-provincial conference of administrators held in November 1966. The work of the Task Force was completed the following summer in the newly created Department of Consumer and Corporate Affairs under the direction of Professor William-


21 Professor Williamson was the author of the then leading text on Canadian securities regulation, supra note 13, and had written on the question of federal regulation; see Williamson, Securities Regulation: A Review of Some Current Problems (1962), 27 Bus. Q. 31 (Fall).

22 See Williamson, Securities Regulation in Canada: Supplement, supra note 13, at i.

23 A joint federal-provincial study of mutual funds previously approved at a meeting of first ministers in August 1966 was implemented at the November meeting; see Can., Report of the Canadian Committee on Mutual Funds and Investment Contracts (Ottawa: Queen's Printer, 1969) at iii.

The provincial administrators were in favour of the development of a "securities fraud squad" and a central information centre concerning securities fraud by the Royal Canadian Mounted Police. The securities unit is now a part of the R.C.M.P. Commercial Crime Branch; see, e.g., Moon, "Canada's top criminals move into big-time fraud", The Globe and Mail (Toronto), Apr. 2, 1975 at 3, col. 5; see also He Benton and Gibson, "International Aspects of Securities Legislation," in 3 Proposals 1139 at 1217-19; and see 1 Proposals, s. 11.13; 2 Proposals at 212-14 (R.C.M.P. computer system to include information on lost and stolen Canadian securities).

The conference of administrators agreed on the need for amendment of the wash trading provision in the Criminal Code, R.S.C. 1970, c. C-34, s. 340, and for a new section prohibiting certain fraudulent representations; see 2 Proposals at 227. The recommended amendment was included in the omnibus amendments introduced in 1978; see Criminal Law Amendment Act, 1978, Bill C-51, 1978 (30th Parl. 3d Sess.), cl. 46 (adding new section 340.1 which would have reversed the onus of proof). Although the bill did not pass, it is expected to be reintroduced in the near future with both of the recommended provisions.
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son and a second conference of administrators was held in the fall of 1967 to consider possible mechanisms for federal-provincial co-operation in light of the “Cansec” proposal circulated by the Ontario Securities Commission earlier that year. The “Federal-Provincial Committee of Officials on Financial Institutions and Securities Regulation” met again in October 1968, apparently for the last time.

Although a federal commission was discussed at the meeting of officials in 1968 and draft federal legislation prepared, no bill was introduced in Parliament and no concrete proposal was published. Nevertheless, the possibility of a federal agency continued to receive attention, encouraged by periodic intimations of federal interest in a role in the regulation of the Canadian market and by the occasional speeches of successive ministers of the Department of Consumer and Corporate Affairs asserting the need for federal regulation. The provinces, however, during this period made substantial progress toward uniformity. By 1969 the Ontario Act of 1966 had been adopted with minor modification in Alberta, British Columbia, Manitoba and Saskatchewan and a few years later Quebec brought its act substantially into line. In 1971 a series of national policy statements applicable across the country and another series of uniform act policies applicable in the five western provinces.

24 The second phase of the Securities Task Force involved preparation of further studies including the compilation of data on distributions in Canada during the preceding one and one half years.

25 See Cansec: Legal and Administrative Concepts, [1967] O.S.C. Bull. 61 (November); Langford & Johnston, The Case for a National Securities Commission, [1968] U. Toronto Comm. J. 21. The Ontario proposal was premised on the inability of the provincial commissions to deal adequately with problems in the securities market that extend beyond their borders and recommended the creation of a Canadian Securities and Exchange Commission on a co-operative basis involving the provinces and the federal government. The co-operative commission was to have its executive offices in Toronto and be responsible to a council of ministers. The proposal was not acceptable to the federal government or to some provinces; see, e.g., Solomon, “Ottawa plans dominant securities-policing role”, The Financial Post, Nov. 2, 1968 at 3, col. 1. The Cansec proposal and the reaction to it are discussed in Howard, “Securities Regulation: Structure and Process,” in 3 Proposals 1607 at 1689-97.


29 See, e.g., Basford, Notes for a Speech to the Annual Meeting of the Vancouver Stock Exchange (January 28, 1971); Baxter, “National securities plan is mooted—but no one cheers”, The Financial Post, Sept. 23, 1972 at 1, col. 2 (speech delivered in Quebec City to annual meeting of North American Association of Securities Administrators by Marc Lalonde on behalf of Minister, Robert Andras).

30 See Anisman, Takeover Bid Legislation in Canada: A Comparative Analysis (Toronto: CCH Canadian, 1974) at 5-7. Nevertheless, major amendments were made to the Ontario Act in 1971 and to Alberta’s and Manitoba’s in the following year; see id. at 6n. 30.

with "uniform acts."32 were initiated by the provincial commissions in an attempt to avoid unnecessary delays in processing prospectuses and to ensure consistency of administrative interpretation. Moreover, Ontario embarked on a complete revision of its securities act based upon the recommendations in a report prepared by the Ontario Commission in 1970.33 On June 1, 1972 The Securities Act, 1972,34 was introduced in the Ontario Legislature to invite comment in the hope that it would provide the basis for a new uniform provincial act to be "adopted by almost all jurisdictions across Canada."35

By 1973 the studies prepared by the Securities Task Force were largely out of date. More importantly, developments in the securities market indicated that reconsideration of the federal position and redefinition of the government's proposed regulatory role were necessary. The initial approach of the federal government, which was premised on a desire for uniformity and avoidance of duplication in the clearing of prospectuses for national distributions of securities, had been directed at the primary market, with secondary trading, including supervision of stock exchanges, to be left to provincial regulation. The provinces had, however, made a serious effort toward uniformity in this area through the adoption of national policies.36

Nevertheless, if the dimensions of the primary market were national, as had been acknowledged implicitly in the national policies and explicitly in the Cansec proposal,37 then the secondary market was necessarily so, for its efficient functioning was, and is, a prerequisite for the effectiveness of the

36 See supra notes 31 and 32. By the end of 1972 the Commissions had adopted twenty-seven national policy statements and twelve uniform act policies. The effectiveness of the commissions' attempt to streamline prospectus clearances was not, however, unquestioned; see, e.g., Lockwood, "Procedures in Cross-Country Prospectus Clearance and Regulation by Policy Statement," in Law Society of Upper Canada Special Lectures: Corporate and Securities Law (Toronto: De Boo, 1972) 111 at 114-16.
37 See supra note 25.
primary market’s operation. Moreover, it was apparent that the trading market was developing in a manner that necessitated co-ordination of and federal involvement in its regulation. New techniques of automation created the possibility of a national automated trading market which would replace the trading floors of the various Canadian stock exchanges. A project to consider the potential for such a system had been initiated by the Toronto Stock Exchange as early as 1969; in 1973 the Exchange approved a pilot operation to develop a computer assisted trading system on its own computers; and in the same year the Montreal Stock Exchange circulated a proposal for a Canada-wide securities market system premised on automated trading.

The fact that the major Canadian exchanges and other self-regulatory bodies had co-operated in the formation of a Canadian depository for securities which was in the process of developing a book-based automated settlement and transfer system for securities trading made a fully automated Canada-wide trading and clearing system, possibly connected to exchanges elsewhere, seem more likely. Finally, a number of scandals relating especially to offshore mutual funds demonstrated that securities markets were becoming increasingly international.

It was clear, therefore, that further study was necessary to enable the federal government to determine its policy with respect to the Canadian securities market. In this context I joined the Department of Consumer and Corporate Affairs, in May 1973, as director of the Corporate Research Branch to direct a study of the securities market designed to make recommendations

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39 The national character of the trading market was emphasized by the Ontario Securities Commission in a decision proposing a co-operative study of stock exchange commissions to develop a national rate structure; see In re Proposed Amendments to Part XV of the By-Laws of the Toronto Stock Exchange, [1973] O.S.C. Bull. 107 (June).

40 The constitutional implications of such a development are discussed in Anisman and Hogg, supra note 15, at 172.


42 See id. at 1026-27. The acronym of the project is “CATS.”

43 See id. at 1032-34. Both developments were encouraged by automated trading systems being considered in the United States; see id. at 1020-24. See also Jenkins, “Computer Communications Systems in Securities Markets,” in 3 Proposals 1057 at 1072-98 for a description of the various systems.

44 See Cleland, supra note 41, at 1003-1005 (Canadian Depository for Securities); see also Jenkins, supra note 43, at 1098-1101. Again, American parallels existed; see Cleland at 1005-1008.

45 The most obvious example is I.O.S. Ltd., which adversely affected Canada’s image abroad; see, e.g., Baillie and Grover, 1 Proposals for a Canada Mutual Funds Law (Ottawa: Information Canada, 1974) at 52 [hereinafter Mutual Fund Proposals]; cf. S.E.C. v. United Financial Group, Inc., 474 F.2d 354 (9th Cir. 1973); and see Anisman and Hogg, supra note 15, at 141.
on the federal government's regulatory role. Although the scope and details of the study had not been defined, it was generally understood that the resulting recommendations were to be published as a policy report to the government containing the views of its authors. The recommendations were to be embodied in a draft statute in order to provide a concrete focus for the comments of interested persons and were to be accompanied by an explanatory commentary outlining the substance of the scheme and the particular provisions, the reasons for their adoption and the alternatives considered. A similar format, used by the American Law Institute in the United States for its model codes and by Professor Gower when he drafted a companies code for Ghana, had been adopted in the Proposals for a New Business Corporations Law for Canada recently prepared for the Department. As a result of the success of the Business Corporation Proposals, similar sets of proposals on non-profit corporations and mutual funds had been commissioned by the Corporate Research Branch and their approach had also been followed in other divisions of the Department.

40 My predecessor as director of the Corporate Research Branch, John L. Howard, one of the authors of the Proposals for a New Business Corporations Law for Canada, infra note 50, had himself intended to initiate a similar study prior to his promotion to Assistant Deputy Minister for Corporate Affairs.

47 Some members of the Department expressed reservations about attribution of authorship to public servants, but the traditional approach of anonymity of public servants did not prevail because a declaration of authorship would emphasize that the report does not necessarily reflect government policy; and none of the authors desired the protection of anonymity. In any event, by the time the Proposals were released, none of the authors was a public servant; see Bloomfield, “Floor Talk: Securities administration is lively issue”, The Financial Post, Sept. 22, 1979 at 21, col. 1.


50 See Dickerson et al., Proposals for a New Business Corporations Law for Canada (Ottawa: Information Canada, 1971) (2 vols.: vol. 1, Commentary; vol. 2, Draft Canada Business Corporations Act) [hereinafter Business Corporation Proposals]. On the format of these proposals see 1 Business Corporation Proposals at iii.


52 See Cumming, Proposals for a New Not-For-Profit Corporations Law for Canada (2 vols.) (Ottawa: Information Canada, 1974); Mutual Fund Proposals, supra note 45.

53 See, e.g., Proposals for a New Competition Policy for Canada: First Stage
The format of the Proposals was varied, however, by a decision, taken at an early stage of the study, to publish any background papers prepared in connection with it as a companion volume to the draft statute and commentary. A number of reasons influenced this decision. Background papers analysing policy alternatives in light of current securities legislation and recent market developments had to be prepared on each major aspect of securities market regulation in order to provide a comprehensive overview of Canadian securities regulation as a basis for the recommendations to be made in the Proposals. As they would, in effect, constitute a current text on Canadian securities regulation, it made no sense to permit them to remain in government files once they had served their immediate purpose. At the least, authors of substantial research papers were entitled to have them published, and the prospect of publication with the Proposals appeared likely both to encourage people with expertise in the field, who were otherwise heavily committed, to agree to work on the study and also to provide a healthy incentive with respect to the work itself. More importantly, a third volume containing the papers would enable persons desiring to evaluate and comment on the Proposals to consider the background research on which they were based and would thus further the principle of openness in government, one of the major premises underlying the recommendations in the Proposals and the conduct of the Study itself. Publication in this format would also require the authors of the Proposals to explain any major divergence from the recommendations in the background papers and would thus impose on them a discipline desirable for such an exercise in law reform, to which the authors of the background papers were in any event entitled. The result is, at least physically, the most imposing volume of the Proposals.

(Ottawa: Consumer and Corporate Affairs, 1973); Proposals for a New Competition Policy for Canada: Second Stage (Ottawa: Consumer and Corporate Affairs Canada, 1977).

See 3 Proposals containing the fifteen background papers written for the Study. This and other similar structural and budgetary decisions were approved through normal departmental channels.

The papers prepared for the Securities Task Force, although intended for publication, had not been published. Nor were the background papers commissioned by the "Corporations Task Force"; see 1 Business Corporation Proposals, supra note 50, at iii-iv.

A term to that effect was included in each consultant's contract so that he might publish his paper himself if the Department failed to do so. The Department's research committee subsequently recommended that this approach be followed throughout the Department.


See, e.g., 2 Proposals at 120-21 (small transaction exemption from insider reporting) and 382-83 (constitutional basis of draft Canada Securities Market Act).

See 3 Proposals which measures over three inches in thickness and contributes substantially to the reported weight of the Proposals; see Bloomfield, "Floor Talk: Ottawa treads on provinces' securities toes", The Financial Post, Dec. 8, 1979 at 25, col. 1 ("'10 pounds in all' says... Ontario's Minister"). See also Johnston, supra note 6, at 635 ("remarkably comprehensive analysis of Canadian securities law and policy").
Although the various stages of the "Securities Market Study" are outlined in the preface to the Proposals, a more detailed discussion of the study process may provide a useful illustration of the organizational and methodological choices that are inevitable in any such effort in law reform. Soon after joining the Department I prepared a detailed outline of the Study, including a summary of each background paper that would be required. As publication of the Mutual Fund Proposals was imminent, the regulation of mutual funds and other financial institutions was excluded from the Study's coverage except in so far as consideration of their activities was necessary to a full analysis of the functioning of the securities market. Although temporal and budgetary constraints precluded a detailed empirical study of all aspects of the Canadian securities market, or a cost-benefit analysis of all, or even the major, provisions in existing securities legislation, the background papers were intended to provide a description and an assessment of the various laws from both a legal and economic perspective. In particular, two papers were devoted to economic aspects of the market and its regulation to ensure that existing economic studies would be evaluated in light of current practices in the Canadian market so that they might be taken into account in the formulation of the Proposals. And two papers on the implications of automation for the structure of the securities market and the integrity of its operations were included for similar reasons.

From its inception the Securities Market Study was conducted in as open a manner as possible. As the federal government had made known both its interest in the securities market and the fact that the drafting of legislation had been authorized, the Study was not viewed as a new matter for federal consideration but as a means of developing proposals that would provide a basis for consultation with interested persons, including provincial governments, and thus enable the federal government to determine its policy. As a result the provinces were not formally consulted concerning initiation of the Study.

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60 See 1 Proposals at vi-vii.
60a Supra note 45.
61 Accordingly, to accurately reflect its scope, the study was called the "Securities Market Study" rather than, as originally proposed, the "Capital Market Study."
62 The Study was initially, and unrealistically, to be completed in under three years. It was initiated in May 1973 and completed almost six years later.
63 The cost of the Study, including consultants' fees, salaries of public servants employed in the Corporate Research Branch and expenses involved in publication, was approximately one and one half million dollars.
64 See Williamson, "Capital Markets", supra note 38; Williamson, "Canadian Financial Institutions," in 3 Proposals at 719. A number of studies were undertaken internally to collect available data on public distributions and private placements and on securities trading in Canada; see, e.g., Williamson, "Capital Markets" at 63-66; Williamson, "Canadian Financial Institutions" at 773-76. Data was also provided by several self-regulatory organizations in the securities industry; see 1 Proposals at ix.
65 See Cleland, supra note 41; Jenkins, supra note 43.
66 See supra, text following note 26 and accompanying notes 37-45.
67 See Report of the Western Premiers' Task Force on Constitutional Trends (1977) at 22. The Western Premiers' Report commented on the lack of prior consultation concerning the Study and suggested that it should be reassessed in light of their concerns about possible duplication and conflicts.
Indeed, to have invited joint action at that time would have been presumptuous, for the provincial commissions were themselves engaged in active consideration of the recently introduced Ontario bill with a view to its adoption across the country as a new uniform act. 68

The initiation of the Study, however, was publicly announced almost immediately by the Honourable Herb Gray, the Minister of Consumer and Corporate Affairs. 69 And although there was no formal consultation with the provincial governments, a substantial amount of informal discussion with provincial officials did occur. I discussed the purpose and details of the Study with a number of provincial administrators informally at the annual meetings of the North American Association of Securities Administrators and sent a copy of the Study outline to any provincial administrator who expressed a desire to see it. The Study outline was also given to officials of each of the Canadian stock exchanges and of the Investment Dealers Association of Canada when their co-operation was requested for the background papers. 69a Indeed, a summary of the outline found its way into the press. 70

A similar openness to discussion was maintained throughout the course of the Study. In 1974, during its organizational phase, I met with and described the Study to officials of the Ontario office of federal-provincial relations. In 1976 John Howard and I provided a progress report to a number of provincial administrators, again on an informal basis, and the following year John Howard attended a meeting of the provincial securities administrators to discuss the Department's activities in areas relating to their interests including the progress of the Study. 71 Finally, at the annual May meeting of the provincial administrators in 1978, after the final meeting of the Study group, 72 I outlined the format and purpose of the Proposals and the scheme that would be contained in the final version and suggested a similar meeting to discuss the substantive provisions of the Proposals after their completion so that the experience of the provincial administrators might be brought to bear on them. A copy of the penultimate draft of the Proposals was, of course, sent to every

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68 See supra, notes 33-35 and accompanying text.
69a See 1 Proposals at ix.
70 The Proposals' format was also revealed in the press well in advance of publication; see Bloomfield, "Stock markets are acquiring a new Canadian identity", The Financial Post, Oct. 9, 1976 at 25, col. 2. However, not all of the press coverage was favourable; see, e.g., "Patillo opposes regulation of securities by Ottawa", Financial Times of Canada, Oct. 4, 1976 at 29, col. 4.
A list of the background papers and the names of the persons retained to prepare them was also tabled in Parliament; see Can. H. of C. Deb. (June 7, 1977) at 6392.
71 The results of this meeting were reflected in the western premiers' second report; see Western Premiers' Task Force on Constitutional Trends, Second Report (Victoria: Ministry of Consumer and Corporate Affairs, 1978) at 12 (premiers awaiting publication of the Proposals); see also Western Premiers' Task Force on Constitutional Trends, Third Report (Victoria: Ministry of Environment, 1979) at 15 (still awaiting publication; "this matter could be the subject of future constitutional review discussions").
72 See text accompanying notes 85-88, infra.
administrator who requested one. Thus, the attitude adopted toward the provinces during the Study, in keeping with its ultimate purpose, was intended to encourage an open and full discussion of the recommendations once they were formulated and published as Proposals.

In the fall of 1973 and early 1974 consultants were retained to prepare the background papers and a number of persons with special knowledge of various aspects of the Study were invited to act as advisers, several of whom were officials in other federal departments or agencies whose mandate related to the securities market or the Study. During this period efforts were also made to ensure that the results of similar projects undertaken in the United States and Australia would be available to the Study; Professor Louis Loss, the reporter for the American Law Institute's project to codify the federal securities laws, was early consulted with respect to the Study's design and correspondence was initiated with persons engaged in work on a federal securities act in Australia.

A first meeting of the consultants, advisers and departmental staff involved

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73 During the course of the Study a few of the initial consultants withdrew because of other commitments as is clear from the description of Professor Williamson's role contained in the preface; see 1 Proposals at vii-viii. The consultants who prepared papers are included in the list of advisers, id. at xii, and separately in the list of contributors in 3 Proposals at 1717-20.

Preliminary discussions with the consultants were based on the outline of the Study and on a draft outline of each paper to which a basic bibliography was appended. Once the consultants were retained I served as a clearing house for current publications relating to their research and sent them either copies of or references to each new publication concerning it.

74 Some of the advisers also withdrew and were replaced. The list of advisers in the Proposals includes those who attended the final meetings of the Study group. Advisers came from the Capital Markets Division of the Department of Finance, the Federal Provincial Relations Office, the Royal Canadian Mounted Police and the Law Reform Commission of Canada. Officials of the Bank of Canada, the Department of Justice and the Economic Council of Canada, while not acting as advisers, were informed of the progress of the Study and frequently provided helpful advice.

75 Professor Loss's contribution to the Study and the influence of his Code are acknowledged in 1 Proposals at x. By May 1973 the first two tentative drafts of the Federal Securities Code which cover the major substantive areas of the Study had been published. The official draft was adopted in May 1978, about a month after the final meeting of the Study group; see now Federal Securities Code (L. Loss, Reporter) (2 vols.) (Philadelphia: American Law Institute, 1980; 2d Supp. 1981) [hereinafter A.L.I. Federal Securities Code].

in the Study (the "Study group") was convened in early July 1974 to discuss its scope and structure. The consultants did not hesitate to raise basic issues. A few suggested that creation of a federal securities commission would be facilitated if the recommended statute followed existing provincial legislation, varying only where necessary for the administration of a federal act. Although this approach would have had the advantages of immediate uniformity, it was not adopted. Rather, the orientation of the background papers, and of the Proposals, was to be toward principled recommendations on the merits of the substantive issues under consideration. While the provincial acts and the experience under them received full and careful attention, they were not viewed as binding precedents but only as examples of solutions, albeit Canadian ones, among those possible. To have concluded otherwise would have undercut much of the purpose of the Study, for it would have restricted unnecessarily the scope of the policy alternatives that might have been available to the federal government, especially as the Proposals were intended to provide a basis for discussion with the provinces with a view to the formulation of a federal position. Equally important, no single provincial act could safely be followed. Although the Ontario legislation had provided the basic model for the western provinces in the preceding decade, not all of those provinces had adopted the amendments to it. Moreover, the provincial administrators were considering the adoption of a new uniform act based on the recent Ontario bill; a second version had been introduced in the Legislature less than a month before the meeting and the final form of the bill could not then be predicted. Thus, as is apparent from the Draft Act, although the provincial legislation received substantial attention, the basic approach remained one of principle.

The full Study group met three times. At the second meeting, held in November 1975 and based on preliminary drafts of the background papers, the basic policy questions raised in the papers were discussed and resolved, generally on a consensus basis. After the meeting I prepared a section-by-section outline, with references to existing and proposed Canadian legislation.

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27 A detailed outline of each background paper was circulated prior to the meeting so that the coverage of the various papers and their relationship to each other and to the Study as a whole would be understood by each consultant. The agenda was based on these outlines.

28 See The Securities Act, 1974, Bill 75, 1974 (29th Leg. Ont., 4th sess.). The Bill received first reading on June 7, 1974; the first meeting of the Study group was held on July 3 and 4. In fact, there were four further bills introduced before an act was passed in 1978; see 2 Proposals at xv. See also supra, text accompanying notes 30-35.

29 See 1 Proposals; 2 Proposals. In some areas there was little Canadian experience on which to draw; see, e.g., 2 Proposals at 238 (Part 13).

30 The fact that the Study adopted a principled orientation does not mean that compromises were not made; any co-operative effort of the nature of the Securities Market Study necessarily involves compromises of many types; see, e.g., 1 Proposals at viii (Proposals reflect views of authors "as modified by the Study process"); see also, e.g., 1 Proposals, s. 13.03(4); 2 Proposals at 244-45; and see notes 88 and 90, infra.

31 Copies of each paper were circulated to every consultant and adviser prior to the meeting. The agenda for the meeting was structured around issues with cross references to the papers in which they were discussed. The meeting ran from November 11-14, 1975.
the *A.L.I. Federal Securities Code*\(^{81a}\) and other relevant statutory provisions, to serve as a basis for drafting the initial version of the draft act and commentary which were to comprise the *Proposals*. The outline was sent to the consultants and advisers for their comments, and the drafting responsibilities were divided among Warren Grover, John Howard and me.\(^{82}\)

In all, four drafts of the *Proposals* were prepared.\(^{83}\) The various parts of the first draft, as they were completed, were sent to the consultants and advisers to whose work they were most directly related and formed the basis of discussions among the draftsmen. We each then revised our initial drafts in light of these discussions and any comments received, and the redrafted parts were similarly sent to the consultants and advisers. The second drafts were also discussed in detail at meetings with James C. Baillie and J. Peter Williamson and we again redrafted our parts to reflect the comments at those meetings.\(^{84}\) The third revision, the penultimate version of the *Proposals*, formed the basis of the final meeting of the Study group in May 1978;\(^{85}\) the policies in the draft *Proposals* and the manner of their implementation were discussed, with emphasis on the former.\(^{86}\) Again a consensus basis was followed for resolution of issues except with respect to a few of the more contentious matters on which votes were taken.\(^{87}\) At this meeting, as throughout the Study, it was assumed that the views of the Study group would be reflected in the *Proposals*.\(^{88}\)

As with any work of three hands, the penultimate version of the *Proposals* reflected three different styles of legislative drafting and three different approaches to the commentary.\(^{89}\) It was therefore necessary both to integrate them into a unified whole in style as well as content and to reflect the comments of the Study group. During the fall of 1978 I prepared the fourth and final version of the *Draft Act and Commentary* and over the next three months

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\(^{81a}\) *Supra* note 75.

\(^{82}\) Mr. Grover accepted responsibility for parts 3 to 8, Mr. Howard for parts 9 to 11 and I for parts 1 and 12 to 16. The definitions, to be included in part 2, were allocated on the basis of their connection with the other parts.

\(^{83}\) Copies of the drafts have been deposited in the Osgoode Hall Law School Library in keeping with the general approach to the Study.

\(^{84}\) These meetings occurred in June 1977. In October 1977 Mr. Baillie was appointed chairman of the Ontario Securities Commission and withdrew from the Study; see 1 *Proposals* at x; see also "No household name, but experience is there", *Executive Magazine*, Nov. 1977 at 26.

\(^{85}\) A copy of the final version of each background paper was also sent to the advisers.

\(^{86}\) As the draft *Proposals* were substantial, the meetings emphasized major issues of policy and drafting. The Study group was asked to make any other comments in their copies of the draft *Proposals* and leave them with me.

\(^{87}\) See, e.g., 2 *Proposals* at 134 (foreign ownership of securities firms), 237 (civil liability for market transactions) and 367-68 (appeals from decisions of the Canadian Securities Commission).

\(^{88}\) See *supra* note 80. As a result a given provision of the *Proposals* may not fully reflect the views of each of the authors, although in only two instances was there a sufficiently strong difference to warrant a dissent; see note 91, *infra*.

\(^{89}\) Compare, e.g., 1 and 2 *Proposals* with the *Mutual Fund Proposals*, *supra* note 45, and the *Business Corporation Proposals*, *supra* note 50.
met with my co-authors to review the draft final version and to resolve any remaining policy differences. As a result of those meetings a number of minor alterations were made\(^{90}\) and two dissents registered.\(^{91}\)

Although no general theory of drafting underlies the Proposals, an attempt was made to draft the statute in a clear manner that would be understandable to a knowledgeable layman without losing the precision required in technical legislation.\(^{92}\) The Commentary reflects a similar attempt through the use of introductory sections which provide an overview of each part in non-technical terms and frequent explanations of various drafting techniques.\(^{93}\) This approach was especially important with the Proposals which were intended to invite comments not only from lawyers, accountants, securities administrators and other experts,\(^{94}\) but also from members of the securities industry, corporate issuers and investors.\(^{95}\)

As the Proposals were also intended to provide a basis for discussion with the provinces on possible methods of developing a comprehensive co-

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\(^{90}\) The availability of a KWIC (key word in context) index of the penultimate draft facilitated preparation of the final version.

It may, however, turn out that not all of the alterations were minor. The draft final version omitted subsections 10.05(2) and 10.07(2) which prescribe the effect of a transfer and pledge of a security on the records of a clearing agency in terms of bearer form security certificates. The subsections were reinserted during the review, after some difference of opinion, those who had misgivings having concluded that, although apparently inconsistent with subsections 10.03(3) and 10.04(5), the provisions were merely redundant because the rights of security holders, once a security is deposited with a clearing agency and until the security is withdrawn in accordance with section 10.13, are expressly defined in sections 10.11, 10.12 and 10.17. However, as the provisions give a transferee the same rights a clearing agency is given under subsections 10.03(3) and 10.04(5), they may increase the difficulties discussed by Professor Guttman and Mr. Lemke; see Guttman and Lemke, The Transfer of Securities in Organized Markets (1981), 19 Osgoode Hall L.J. 400, text accompanying notes 182-87. It may be preferable to delete all of the provisions referring to certificates in bearer form and to substitute a simple declaration that a clearing agency is the legal owner of securities in its records so that the provisions in Part 10 expressly defining the rights of various persons with respect to securities in a clearing agency's records will alone be determinative of such matters.

\(^{91}\) See 1 Proposals, ss. 13.07(1) and 13.09; 2 Proposals at 237, 259-60 and 264.

\(^{92}\) See, e.g., 1 Proposals, ss. 3.01(e) and 7.03(2) and 2 Proposals at 49-50 and 112, respectively.

\(^{93}\) See, e.g., 2 Proposals at 7-8 (definitions), 45-46 (exemptions) and 381-82 (general provisions). If the Draft Act is enacted, the Commentary, and any published Parliamentary proceedings, may be used as aids to the interpretation of its provisions; see 1 Proposals, s. 16.16(1); 2 Proposals at 396-97.

\(^{94}\) See 1 Proposals, s. 2.19 (“expert”).

\(^{95}\) The fact that the Proposals were to be released as a discussion document, rather than as a bill to be introduced in Parliament for immediate enactment, also provided the flexibility to experiment, in a few instances, with novel approaches to particular issues such as the sale of a large amount of securities by non-control persons for which a sales effort is required; see 1 Proposals, s. 2.17(d), defining such a sale as a “distribution,” and ss. 5.02-5.04 which require the filing of a “block distribution circular” in connection with such a distribution. The provisions were included “as a means of focusing attention on the potential implementation of the recommendation to invite discussion and thus obtain a more accurate evaluation of...[their] likely consequences.” 2 Proposals at 19. See also id. at 237 on civil liability for market conduct.
ordinated national system for regulation of the Canadian securities market and on legislative jurisdiction with respect to it, their release was to be timed in consultation with the Federal Provincial Relations Office so that it might complement the second phase of constitutional discussions outlined in *A Time for Action*. In view of the fact that they do not reflect government policy, the Proposals were to be released with little fanfare but distributed widely to persons involved in the securities industry and other interested persons including administrators and professionals outside of Canada in order to encourage as full a discussion as possible. Although an election intervened and a new Conservative government with a much less active constitutional stance than its predecessor assumed power, the Proposals were released as outlined, accompanied by a short press release which characterized them as a report to the government and invited comments “from anyone interested in the Canadian securities market.”

The immediate response to the Proposals, or rather to the idea of a federal securities commission, as reported in the press, was generally hostile.

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96 See Trudeau, supra note 11; and see Western Premiers' Task Force on Constitutional Trends, Third Report, supra note 71.

97 One of the factors suggesting federal legislation was the increasing internationalization of securities markets; see supra, text at note 45 and text accompanying notes 164-74, infra.

98 Consumer and Corporate Affairs Canada, supra note 2. A rather jumbled background summary accompanied the release; see Consumer and Corporate Affairs Canada, Backgrounder Documentation, November 28, 1979.

Although the Proposals were released in the manner contemplated prior to the election of the Conservative government, their distribution was in many respects inconsistent with the purpose for which they had been prepared; for example, several months after their release, officials of federal-provincial relations offices across the country had not received copies, nor had senior securities lawyers and members of the securities industry of whom the Department was aware. Whether the disparity was the result of a political decision by the new government not to promote the Proposals or merely bureaucratic ineptness is not clear.

99 The newspaper reports of reactions to the Proposals' publication were published within a few days of their release and before most of those interviewed had an opportunity to read the Proposals or to consider the implications of the scheme contained in them; see, e.g., Stephens, supra note 4. A few respondents clearly stated that they had not seen or read the Proposals; see Dennison, “Caution urged for federal rules on securities”, *Winnipeg Free Press*, Nov. 30, 1979, 17, col. 1 at cols. 3-4. And one provincial minister refused to comment until he had an opportunity to study them; see “No one wants Ottawa to control securities market”, *The Gazette* (Montreal), Nov. 30, 1979, 47, col. 2 at col. 6.

100 See, e.g., Willoughby, “Federal agency for securities called unneeded”, *The Globe and Mail* (Toronto), Nov. 29, 1979 at B2, col. 3; Trigueiro, “Brokers and ASC reject federal controls”, *The Calgary Herald*, Nov. 29, 1979 at D1, col. 3; “We don't need an SEC: Demers”, *The Gazette* (Montreal), Dec. 1, 1979 at 95, col. 2; “Industry, administrators see no need for market regulation”, *The Chronicle-Herald* (Halifax), Nov. 29, 1979 at 1-F, col. 1. The Ontario minister's official statement was moderate in its expression of reservations, indicating that the Ontario Securities Commission was reviewing the Proposals to determine whether federal involvement in specific areas of the capital market system would simplify the quality of regulations”; Ont., Ministry of Consumer and Commercial Relations, News release: Proposed Federal Securities Law under Scrutiny: Drea (Nov. 28, 1979), reproduced in *Notice III*, O.S.C. Weekly Summary, Nov. 30, 1979 at 4A; see also Stephens, supra note 4, at cols. 4-5.
Indeed, the first sentence in one report declared the Proposals "as good as dead" and even those who did not view them as stillborn were less than sanguine about the chances of their being adopted. A number of representatives of the securities industry, however, also thought a federal agency likely to be beneficial in some respects, as did a few provincial administrators. After the initial flurry the Proposals began to receive more serious and systematic consideration. Securities lawyers have used them as a counterpoint against which to evaluate current and proposed legislation and have attempted to assess aspects of the Proposals in the context of current securities law reforms. Reviews in journals have started to appear. And this symposium issue indicates that the Proposals are likely to receive serious attention from academic and practising lawyers concerned with securities regulation outside as well as in Canada. Perhaps more important with respect to the

101 "No one wants Ottawa to control securities market", supra note 99.

102 See, e.g., Bloomfield, supra note 59; Anderson, “Call for commission brings issue into focus”, The Globe and Mail (Toronto), Nov. 30, 1979 at B2, col. 4. A few professional journals included a description of the Proposals derived primarily from the press release or background summary issued by the Department; see Proposals for a securities market law for Canada (1980), 45 Bus. Q. 45 (Spring) (edited version of press release); SEC Canada inevitable? (1980), 113 CA Mag. 20 (February) (based on Background Documentation, supra note 98).

103 See, e.g., Dennison, supra note 99, at col. 3 (might expedite filings for new issues); “No one wants Ottawa to control securities market”, supra note 99, at col. 5 (would be easier for underwriters and investors). The president of the Montreal Stock Exchange, who had previously been the chairman of the Quebec Securities Commission, was quoted as having said that a federal commission was undesirable, even though it would simplify matters, because a single body would be harder to deal with than a number of commissions; see “We don’t need an SEC: Demers”, supra note 100.

104 See id. (international trading); Willoughby, supra note 100 (“for regulating international distributions”: James C. Baillie, Chairman, Ontario Securities Commission); Trigueiro, supra note 100, at col. 5 (involvement in regulation of international securities transactions a federal “obligation”: Joanne B. Veit, Chairman, Alberta Securities Commission). And see the statement of the Ontario minister in Stephens, supra note 4, at cols. 4-5 (“federal government could be supportive in certain areas, such as interprovincial trading and international markets”).


106 See, e.g., Simmonds, supra note 57. The Proposals have also been considered in works concerned with more general legal issues; see, e.g., Evans et al., Administrative Law: Cases, Text, and Materials (Toronto: Emond-Montgomery, 1980) at 238-41 (rule-making procedure); Braithwaite, Developments in Criminal Law and Procedure: The 1978-79 Term (1980), 1 Sup. Ct. L. Rev. 187 at 204-205n. 74 (ignorance and mistake of law as defences).

107 See Johnston, supra note 6; Simmonds, supra note 6.

108 All of the contributors to the symposium teach or practise securities law in the United States. The Proposals have also been used in Australia in connection with a proceeding before the Trade Practices Commission to consider stock exchange commission
formulation by the federal government of its policy concerning the securities market, the Canadian self-regulatory organizations have created the Joint Industry Committee on a Securities Market Law for Canada to study and report on the Proposals. And it has recently become apparent that a substantial majority of the business community favour federal involvement in the regulation of the Canadian market. In fact, in a recent survey seventy-three percent of the businessmen questioned favoured federal securities regulation, over one third of whom thought that the federal government should have exclusive jurisdiction over the field.

The reservations concerning federal securities legislation expressed in Ontario when the Proposals were released appear to have hardened into strong opposition during the past two years. The current Minister of Consumer and Commercial Relations and the Chairman of the Ontario Securities Commission have recently asserted their unequivocal opposition on the grounds that the federal government would likely use any power over the securities market to further its regional economic policies and "to achieve broad social objectives, such as nationalizing industry and for the redistribution of wealth."
Even though a glance at the Proposals demonstrates the baselessness of such assertions, the Minister has stated that all of his provincial counterparts are agreed that the federal government should not enter the field and they have the support of some members of the opposition in Ontario and of the opposition in Quebec. The views of these ministers concerning a threat to their own portfolio, however, are understandably stronger than those expressed by a number of provincial premiers who appear ready to include the regulation of the securities market as a matter for discussion in future constitutional conferences.

The universal opposition of provincial ministers with responsibility for securities legislation may also be belied by the securities acts in Alberta and Manitoba that are modelled on the Ontario legislation. The Manitoba Securities Act, 1980 contains provisions expressly authorizing the Manitoba Commission to co-operate with a federal agency in its decision-making and the

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114 Cf., e.g., Johnston, supra note 6, at 626 (Proposals “refine existing legal principles rather than strike bold new approaches”). The policies suggested by the Minister and the Chairman are extraneous to the Proposals as is clear from the Draft Act’s purpose clause; see 1 Proposals, s. 1.02. An attempt to impose them would be beyond the Commission’s jurisdiction under the Draft Act and could be overturned on judicial review; see 1 Proposals, Parts 5 and 9; and see id., s. 15.19. Indeed, a securities act is not an appropriate vehicle for the accomplishment of such policy goals; if the federal government wishes to achieve them, it can undoubtedly do so more directly; see, e.g., Hogg, Constitutional Law of Canada (Toronto: Carswell, 1977), c. 4 (federal-provincial financial arrangements); and see, e.g., Regional Development Incentives Act, R.S.C. 1970, c. R-3; Department of Regional Economic Expansion Act, R.S.C. 1970, c. R-4; H. of C. Parliamentary Task Force on Federal-Provincial Fiscal Arrangements, Fiscal Federalism in Canada (Ottawa: Minister of Supply and Services, 1981). The Constitution Act, 1981 embodies the device of equalization payments as a constitutional commitment of the federal government; see Resolution respecting the Constitution of Canada, supra note 10, sched. B, s. 36(2).

115 See Ont. Leg. Standing Comm. on Administration of Justice, supra note 112, at 261.


117 See Constitutional Committee of the Quebec Liberal Party, A New Canadian Federation (Montreal, 1980) at 104. One of the reasons given for the proposed new Quebec Securities Act was a need for Quebec to “occupy the whole field of its jurisdiction before the federal government acts on its own draft bill”; Quebec Securities Commission, supra note 7, App. A at 2. The Proposals have also prompted similar arguments for greater uniformity in provincial legislation; see Kennedy, “ASE felt likely to show growth of natural resources industry”, The Globe and Mail (Toronto), Jan. 3, 1980, B4, col. 4 at col. 6 (James Milliken, Alberta Stock Exchange President).


119 See Ontario Securities Act.

120 See S.M. 1980, c. 50, s. 2(8) [hereinafter Manitoba Securities Act, 1980] which permits the Commission to hold joint hearings with any body “empowered by a statute of Canada or any province or territory thereof to administer or regulate trading in securities” and to consult with it when making its decision (emphasis added). Section 116 also recognizes the possibility of a federal agency by enabling the Commission to
new Alberta Act, while less clear, appears to do so as well. Moreover, the proposed Quebec Securities Act contains a provision, like one in the Proposals, which authorizes federal-provincial interdelegation; the Quebec government or the responsible minister may enter an agreement delegating the administration of powers under the proposed act to an agency of the federal government or accepting a delegation of the administration of a federal act to the Quebec Commission. Thus both enacted and proposed legislation contemplates the possible creation of a federal body with some regulatory power over the securities market.

The influence of the Proposals on provincial legislation appears not to have been limited to enabling provisions respecting joint hearings and interdelegation but to have extended to the substantive provisions of recent and proposed provincial acts. The new act proposed by the Quebec Securities

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121 See Securities Act, 1981, S.A. 1981, c. S-6.1, ss. 16-17 [hereinafter Alberta Securities Act, 1981]. Section 16 gives the Alberta Securities Commission the capacity to exercise outside of Alberta any power granted it under the Act if the jurisdiction in which the power is to be exercised authorizes it to do so; the Commission may also hold joint hearings outside of Alberta with an “extra-provincial commission” concerning any matter within its jurisdiction in Alberta. Cf. Bonanza Creek Gold Mining Co. v. R., [1916] 1 A.C. 566, 26 D.L.R. 273, 10 W.W.R. 391 (P.C.); P.E.I. Potato Marketing Bd. v. H.B. Willis Inc., [1952] 2 S.C.R. 392, 4 D.L.R. 146. Section 17 authorizes the Commission to hold such joint hearings in Alberta. It is not clear whether a federal securities commission is an “extra-provincial commission” within the meaning in the sections. The phrase is defined in subsection 1(g.1) in terms of another “jurisdiction” but it is also unclear whether “a jurisdiction” within the definition or one conferring power under subsection 16(1) would include the federal government. As the provisions are susceptible of an interpretation that includes them, they will likely be so interpreted if a federal commission comes into existence.

122 See Quebec Securities Commission, supra note 7, s. 296. Compare 1 Proposals, s. 15.06; and see 2 Proposals at 334-35. The Quebec provision may also authorize interprovincial delegation to a commission, like the Alberta Commission under the new Alberta Act, with capacity to accept a conferral of power exercisable in Quebec; see supra note 121.

123 The criteria for evaluating the success of the Proposals varied among my co-authors, some emphasizing more than others potential enactment of the Draft Act. It is probably preferable during the preparation of proposals for legislative reform to refrain from a commitment to enactment in order to avoid as much as possible any unconscious inclination to compromise the recommendations with a view to early introduction of a bill in Parliament. While most choices made in the formulation of the Proposals involved questions of emphasis and degree, the introduction of factors relating to the passage of legislation, albeit omnipresent, seems better left to the political process when those considerations are inconsistent with a conclusion that would otherwise be reached on the substantive merits, especially with respect to an exercise like the Proposals which is intended to provide an analytic basis for political decision-making. Indeed, undue emphasis on political practicalities necessarily involves a risk of prematurely excluding provisions that might turn out to be politically acceptable. The general approach to the Proposals, therefore, was to develop a statutory scheme that is both feasible in the present Canadian context and desirable in principle and to explain fully the alternatives considered and the reasons for any specific provision so that the recommended scheme might be considered not only in connection with federal policy
Commission, for example, while compatible with existing securities legislation in other provinces, adopts a format like the Proposals' and is similar to them in structure; in fact the sequence of the various substantive parts of the proposed Act follows exactly that of the Proposals. More significantly, several of the essential requirements of the statute, such as the registration of brokers, dealers and other securities professionals and the supervision of self-regulatory organizations, reflect the approach of the Proposals. And a substantial number of specific provisions adhere more closely in substance to those recommended in the Proposals than to the existing provincial acts, ranging from the period within which continuous disclosure documents must be filed to the defences available in an action for improper insider trading. The proposed Act by no means follows the Proposals in every respect. Rather it attempts to integrate the conceptual approaches and provisions of the new Ontario Act with those in the Proposals and in several

124 See Quebec Securities Commission, supra note 7, App. A at 2. The Quebec Commission emphasized the “compatibility” of its proposed legislation with that of the other provinces while acknowledging that it had not given great weight to “uniformity” but had instead stressed basic principles; see, e.g., Racine, “ Valeurs mobilières: un projet de loi innovateur”, Le Devoir (Montreal), Jan. 22, 1981, 7, col. 1 at col. 2. Mr. Racine was closely involved with the preparation of the Commission’s proposal; see Letter of Gérald A. Lacoste, Quebec Securities Commission Chairman (Oct. 3, 1980), which accompanied the Working Paper.

125 Compare Quebec Securities Commission, supra note 7, App. B with 1 Proposals at xix-xxiv (tables of contents). The Commission acknowledged that it had considered the Proposals; see Quebec Securities Commission, supra, App. A at 1-2.

126 Compare Quebec Securities Commission, supra note 7, s. 133 with 1 Proposals, s. 8.01 and with Ontario Securities Act, s. 24. The Quebec proposal bases its registration requirement on the carrying on of business; see also 2 Proposals at 127-28 (comparing approach of Proposals and provincial acts).

127 Compare Quebec Securities Commission, supra note 7, Part VIII with 1 Proposals, Part 9 and with Ontario Securities Act, Parts VIII-IX; see also 2 Proposals at 145-49.

128 Compare Quebec Securities Commission, supra note 7, s. 78 with 1 Proposals, s. 7.01 (90 days) and with Ontario Securities Act, s. 77 (140 days from end of financial year); and see 2 Proposals at 110 (90 day period “clearly feasible”). The timing for quarterly reports is, however, different in each; see Quebec, s. 79 (45 days); 1 Proposals, s. 7.02 (30 days); and Ontario, s. 76 (60 days). The Quebec Securities Commission has sent to the minister a revised, but not yet published, version of its proposed act which apparently reverts to the period in the Ontario Act; see Kerr, “Draft securities act tightens definition of takeover offer”, The Globe and Mail (Toronto), Aug. 25, 1981, B1, col. 4 at col. 6.

129 Compare Quebec Securities Commission, supra note 7, ss. 188-190, 224-225 with 1 Proposals, ss. 12.02, 13.03-13.04 and with Ontario Securities Act, ss. 75, 131. In brief, both the Quebec Act and the Proposals apply to “tippees” and omit the defence available under the Ontario Act to a person who proves he did not “make use of” confidential information. (The Ontario Act does not apply to all “tippees”.) The Quebec Act, however, following the Ontario approach with respect to the scope of civil liability, does not include a civil remedy for impersonal transactions; see 2 Proposals at 221 and 238-39.
stances departs from both. Nevertheless a comparison of the Quebec Working Paper with the Proposals indicates undeniably that the influence of the latter was pervasive.

Although no other provincial act demonstrates the same degree of influence, legislation enacted or proposed in two provinces reflects the Proposals in some provisions. The Alberta Securities Act, 1981, while generally following its Ontario predecessor, has a substantial number of variations in detail, some of which appear to derive from the Proposals. The new Alberta Act not only removes the "make use of" defence, like the Quebec Working Paper, but also includes a "chinese wall" defence similar to a draft provision included in the commentary to the Proposals. The Act contains as well, in almost the same words as the Proposals, a section new to provincial legislation which prohibits a person who is offering to trade in a security from making representations relating to the market price of the security unless he reasonably believes that the price results from an independent market. And it provides new protections for persons subject to an investigation by the Commission and imposes a new requirement that the Commission prepare an annual report to be tabled in the Legislature. Finally, and most significantly, the Alberta Act has added a new part authorizing the Commission, in effect, to register self-regulatory organizations, specifying the duties of such bodies once registered and authorizing the Commission to delegate to them the administration of any of the Act's provisions with respect to their mem-

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130 See, e.g., Quebec Securities Commission, supra note 7, ss. 58-60, which essentially adopts the "seed capital" or "limited offering" exemption in Ontario Securities Act, s. 71(1)(p) but adds a modification deriving from 1 Proposals, s. 6.03 by expressly exempting trades between persons who acquire securities pursuant to the exemption. Compare also, e.g., Quebec, ss. 76-77 with 1 Proposals, s. 7.03 and with Ontario, s. 74 (timely disclosure).

131 See Alberta Securities Act, 1981, ss. 119 and 171. To avoid liability a defendant must prove that he did not know the confidential information in question. See also supra note 129.

132 Compare Alberta Securities Act, 1981, ss. 171(3)(d) and (4) with 2 Proposals at 221-22. The Alberta defence is more limited than the one suggested in the Proposals in that it is available only with respect to civil liability and only when the insider trading or tipping relates to a sale of securities. The provision in the Proposals would have been included in the prohibition against insider trading in 1 Proposals, s. 12.02, and thus available in both criminal and civil proceedings, and it would not distinguish between sellers and purchasers. The defence was included in the Commentary rather than the Draft Act, because the advisers to the Securities Market Study were not convinced of its effectiveness but thought it advisable to draw attention to it to invite discussion.

133 Compare Alberta Securities Act, 1981, s. 70(4) with 1 Proposals, s. 12.04(2)(a). The prohibited representations are likely to be covered in amendments to the Criminal Code, R.S.C. 1970, c. C-34 as well; see supra note 23.

134 Compare Alberta Securities Act, 1981, ss. 28-29 with 1 Proposals, s. 14.01 and with Ontario Securities Act, s. 11; see also 2 Proposals at 304-308.

135 Compare Alberta Securities Act, 1981, s. 195 with 1 Proposals, s. 15.11; and see 2 Proposals at 341-43.
The amendments to the Ontario Act recently proposed by the Ontario Securities Commission include provisions to the same effect which would give the Commission supervisory powers over associations of registrants equivalent to those now exercised over the Toronto Stock Exchange. Whether the proposed amendments came from the Alberta Act or reflect the influence of the Proposals more directly is speculative.

It would appear, therefore, that the pronouncement of the Proposals' demise was somewhat premature. The Proposals are receiving attention from securities lawyers and the securities industry in and outside of Canada and appear to be taking a place in the ongoing process of securities law reform in the provinces. Nor is consideration of them likely to be limited to these spheres. The continued interest of the federal government during the last two decades, and the frequent recommendations for federal jurisdiction and legislation suggest that they will still serve as a focus for the discussion that was their primary purpose. Indeed the recent statements of the Prime Minister and the Minister of Consumer and Corporate Affairs confirm that the Proposals remain on the federal government's political agenda.

136 Compare Alberta Securities Act, 1981, ss. 48-53 and 176-183 with 1 Proposals, Part 9 and with Ontario Securities Act, ss. 19-23; see especially Alberta, s. 183 and 1 Proposals, s. 9.05; and see 2 Proposals at 155-56. See also supra note 127.


138 One proposed amendment to the Ontario Act does appear to come from the implementation in the Alberta Act of a stricter condition on the distribution exemptions. The Ontario Securities Act, ss. 71(4), (5)(c) and (7)(c) impose a condition on the resale of securities purchased pursuant to a distribution exemption that precludes any "unusual effort... to prepare the market or create a demand for the securities." As the adjective, "unusual," creates doubt about the type of efforts that may be permissible under the Act and as there seems to be no reason to permit any "market grooming" in such circumstances, the Proposals preclude any such activities in an analogous exemption; see 1 Proposals, s. 6.04(2)(b); 2 Proposals at 103. The Alberta Act accomplishes the same result simply by deleting "unusual"; see ss. 109(2) and 112. (But see s. 110(2)(c) which mysteriously retains the term.) And the proposed amendments to the Ontario Act would do the same; see Securities Amendment Act, 1981, supra note 137, at 130A-137A.

Similarly, the exemption contained in the Proposals for trades between persons who purchase securities in a limited offering which found its way into the proposed Quebec Act, see supra note 130, is included in the Alberta Act and has been recommended in the proposed Ontario amendments; see Alberta Securities Act, 1981, ss. 107(1)(i) – (l.3); Securities Amendment Act, 1981, supra note 137, at 127A (proposed new s. 71(1)(v). Cf. Metafuse Ltd., 3 O.S.C. Bull. 4D at 5D (Jan. 15, 1982) (para. E(iv)).

139 See supra, text accompanying notes 17-29.


141 See "Doesn't foresee unilateral move, Trudeau states", supra note 9.

142 See Ouellet, supra note 8. Mr. Ouellet's statement of his intention to turn his attention to the Proposals and his request for comments from the provinces attracted much attention in the press; see, e.g., McGillivray, "Who should regulate our stock markets?", The Gazette (Montreal), Feb. 9, 1981 at 13, col. 1; "Ottawa studies controls over securities markets", The Globe and Mail (Toronto), Feb. 6, 1981 at B9, col. 6.
Any other position would be surprising, for the factors that indicated a need for federal regulatory involvement in the securities market in 1979 are still present and, if anything, have been reinforced by events during the past two years. The Proposals are premised ultimately on the national and international character of the Canadian securities market and its importance to the economic welfare of the country. The fact that the market is national in scope has long been acknowledged and is demonstrated by the cooperative efforts of the provincial commissions with respect to the adoption of national policies and by the statutory authorization for and increasing frequency of joint hearings held by a number of provincial commissions to decide issues that transcend provincial boundaries. Further demonstration is apparent even in technical provisions in recent provincial legislation, for example, the "seed capital" and "government incentive" exemptions from the prospectus requirements in the new Alberta Act and proposed Ontario amendments which limit solicitations to a specified number of persons "in all

143 See 1 Proposals, s. 1.02 (purpose of Draft Act); cf. Securities Exchange Act of 1934, § 11A(a)(1)(A), 15 U.S.C. § 78k-1(a)(1)(A) (securities markets "an important national asset which must be preserved and strengthened"). Canada's requirements for investment capital during the remainder of this century demonstrate vividly the importance of an efficient securities market; see 1 Proposals, ss. 1.02(a)-(c); 2 Proposals at 2; and see Kiewasser, Canada's Investment Program 1981-2000 (1981), 5 For. Invmt. Rev. 13 at 14 (Autumn) ("$6.2 trillion of new capital investment over the next 20 years").

144 See, e.g., Kimber Report, supra note 18, para. 9.01; Can., Report of the Canadian Committee on Mutual Funds and Investment Contracts, supra note 23, c. 19; Que., Report of the Study Committee on Financial Institutions (Parizeau Report) (1969) at 133 ("essentially unified Canadian capital market and its close association with international markets provide motive enough for some degree of central and uniform regulation"). See also Ont. Leg. Standing Comm. on Administration of Justice, Estimates, Ministry of Consumer and Commercial Relations, No. J-12 (Oct. 30, 1981) at 234 (statement of Henry J. Knowles, Ontario Securities Commission Chairman: "The OSC posture for many years... has been to seek wherever possible either uniform laws or compatible laws across the country in recognition of the fact that the capital markets are not provincial but are indeed national if not international in context."). See also 2 O.S.C. Bull. 239A (November 27, 1981).

145 The first twenty-nine national policies dealt with the clearance of and requirements for prospectuses filed in connection with national distributions of securities; see supra note 31. The current practice with respect to the adoption of new national policies or amendments to existing policies is to request that comments be sent to all of the interested provincial administrators; see, e.g., Draft National Policy: Unincorporated Issuers: Requirement to Maintain a Register of Security Holders, 2 O.S.C. Bull. 86E (November 27, 1981) (comments to be sent to administrators in all provinces and territories except British Columbia and Prince Edward Island); Notice: Requests for Comments: National Policy No. 2, A.S.C. Summary, November 13, 1981 at 3 (containing report of Task Force respecting National Policy No. 2 recommending amendments to policy; persons commenting requested to send copies of submissions to all Canadian administrators). The proposed amendments to National Policy No. 2 were also published in the Ontario Bulletin; see Notice: Draft Amendment to National Policy No. 2, 2 O.S.C. Bull. 310A (December 11, 1981); Alberta Securities Commission, Draft Amendment to National Policy No. 2, 2 O.S.C. Bull. 88E (December 11, 1981).

146 See supra, text accompanying notes 119-22. In the last six months joint hearings have been held to consider questions relating to the use of non-voting common shares, stock exchange commission rates and public ownership of securities firms. See notes 151-55 and accompanying text, infra.
jurisdictions including the enacting province. Moreover, the recent efforts of the Ontario Securities Commission to apply the follow-up offer provisions of the Ontario Act to transactions occurring outside of the province and to ensure that persons outside of the province observe minimum standards of conduct at the risk of losing their right to trade in securities in Ontario.

147 See Alberta Securities Act, 1981, ss. 107(1)(p)-(s); subsections (p) and (q) permit solicitation of up to fifty “prospective purchasers” and sales to twenty-five and subsections (v) and (s) specify seventy-five solicitations and fifty purchasers. See also Securities Amendment Act, 1981, supra note 137, at 125A-127A (ss. 71(1)(p) and (z)). The limitation codifies the interpretation of the existing Act adopted by the Ontario Commission; see Exemptions from Prospectus Filing Requirements after Proclamation of the Securities Act, 1978, O.S.C. Weekly Summary, March 30, 1979, Supp. X-1 at 3.

148 See Ontario Securities Act, s. 91(1), which requires a person who in purchasing voting securities of an issuer sufficient to raise his holdings above twenty percent of the outstanding voting securities pays a premium over fifteen percent above the average of the security’s closing price during the ten days preceding the purchase to make, within 180 days of the purchase, a takeover bid for all securities of the same class held by others; see also R.R.O. 910/80, s. 163. And see, e.g., In re Atco Ltd., [1980] O.S.C. Bull. 412 (September) holding a purchase of shares of Canadian Utilities Limited by Atco from IU International Corporation, in a private transaction in the United States, subject to the follow-up offer requirement because the consideration paid for the Canadian Utilities shares consisted of IU International shares previously obtained by Atco through a takeover bid made in accordance with the Ontario Act; see also id. at 425-29 (Commissioner Thom, dissenting).


A former chairman of the Commission has criticized it for “applying its rule nationally even though no other province has a similar rule”; Baillie, “Shareholders' Remedies,” in Law Society of Upper Canada Special Lectures: New Developments in the Law of Remedies (Toronto: De Boo, 1981) 21 at 32. And a committee of securities lawyers established by the Commission to consider this matter has recommended that the Commission refrain from extraterritorial application of the follow-up offer requirement in the Ontario Act; see Notice: Interim Report of the Committee to Review the Provisions of the Act regulating Take-Over Bids, 2 O.S.C. Bull. 212A at 236A-238A (November 27, 1981). Surprisingly, the Commission referred this question to a committee one of whose members represents one of the Alberta corporations involved in the pending proceedings described in the preceding paragraph.

149 See, e.g., In re Clark, 2 O.S.C. Bull. 442C (November 20, 1981) (proceeding to consider denial of exemptions for insider trading and tipping in British Columbia; application dismissed, Commissioners Knowles and Bray dissenting); In re Kaiser Resources Ltd., 1 O.S.C. Bull. 13C (April 10, 1981). The fact that the Commission has jurisdiction to deny exemptions in order to protect the integrity of Ontario’s market...
make clear that geographical borders are irrelevant to the functioning and regulation of the securities market.

The Proposals cited the manner in which stock exchanges in Canada obtain approval of their commission rates as another example of the trans-provincial nature of the securities market.\textsuperscript{100} The hearings held across Canada late last year to reconsider the exchanges' commission rate structure strengthen the conclusion in the Proposals. Although the Alberta and Quebec Commissions convened local hearings as well,\textsuperscript{101} a joint hearing was held in Ontario from persons who have engaged in improper conduct elsewhere does not detract from the conclusion in the text.

The difficulties of ensuring compliance with provincial securities legislation by persons outside the province are illustrated by the recent events involving the Caisse de dépôt et placement du Québec, a major financial institution incorporated in Quebec which "has the country's largest portfolio of Canadian stocks and bonds." Kerr, "New law to cover Quebec agencies", \textit{The Globe and Mail} (Toronto), Jan. 20, 1982 at B1, col. 1. The Caisse has refused to file insider reports with any provincial securities commission because it is an agent of the Quebec Crown. This refusal led the Director of the Ontario Securities Commission to conclude that he should not grant a receipt for a prospectus filed by an issuer controlled by the Caisse and to submit a question to the Commission concerning his decision. The Commission published a notice of hearing but subsequently cancelled the hearing because of a change in the Director's position concerning the prospects based on a declaration by the responsible Quebec minister, Mr. Parizeau, that the proposed Quebec Securities Act will treat the Caisse in the same manner as all other issuers of securities; see \textit{Gaz Métropolitain, Inc.}, 3 O.S.C. Bull. 5A (January 8, 1982) (notice of hearing); \textit{In re Gaz Métropolitain, Inc.}, 3 O.S.C. Bull. 33B (January 15, 1982) (cancellation of hearing). The Director's question is appended to the notice of hearing; 3 O.S.C. Bull. at 6A-7A. The Ontario Commission has, however, attempted to preclude the Caisse from trading in Ontario by denying it the use of the exemptions under the Ontario Act because of an alleged improper takeover bid and its refusal to file insider reports; see \textit{Caisse de dépôt et placement du Québec, supra} note 148 (takeover bid for Domtar Inc.); \textit{Caisse de dépôt et placement du Québec, 3 O.S.C. Bull.} 44A (January 15, 1982) (notice of hearing); 3 O.S.C. Bull. 37B (January 15, 1982) (temporary order denying exemptions for failure to file insider reports). The hearing to consider the orders is scheduled for January 25, 1982.

These events make clear that the enforcement techniques necessary to deal with persons outside the province may not only be ineffective but may also be harmful to local investors, for a refusal to permit the issuer, Gaz Métropolitain, to raise capital in Ontario affects its minority shareholders as well as the Caisse; \textit{cf. In re Bralorne Resources Ltd.}, [1976] O.S.C. Bull. 258 (September); Anisman and Hogg, \textit{supra} note 15, at 140 (effect of cease trading order to prevent stock exchange takeover bid deprived Ontario shareholders of opportunity to obtain premium). They also highlight the fact that the doctrine of crown immunity with respect to the normal application of legislation is not appropriate in an age when governments and their agents are direct participants in business affairs; see, \textit{e.g.}, Kerr, "OSC's Gaz Metro decision may stop Ontario issues", \textit{The Globe and Mail} (Toronto), Jan. 8, 1981 at B8, col. 1. The Quebec minister has stated that the new Quebec Act will apply to governments and their agents; see Kerr, "New law to cover Quebec agencies", \textit{supra}. See also 1 Proposals, ss. 2.29(c) and 16.15; 2 Proposals at 26 and 396 (Draft Act applies to federal and provincial governments and their agents).

\textsuperscript{100} See 2 Proposals at 3; Anisman and Hogg, \textit{supra} note 15, at 139.

by the Alberta, British Columbia and Ontario administrators and attended by members of the Quebec Commission in an “official observer” capacity. These administrators have apparently “acknowledged that if one jurisdiction determines to deregulate commission rates, that in itself would have an impact on the financial markets of the other jurisdictions in Canada where there are exchanges” and as a result have come to a “gentleman’s understanding... that if one jurisdiction determines to deregulate commission rates, it will make the determination but postpone the effective date for some months to allow the other jurisdictions to react to the decision.” Recognition of the national character of the securities market was reflected as well during the past year in the manner in which the provincial commissions handled a moratorium imposed on the issuance of “restricted” common shares, hearings to consider whether to permit their use and a hearing to consider a by-law of the Toronto Stock Exchange concerning the public ownership of member firms.

162 Ont. Leg. Standing Comm. on Administration of Justice, supra note 144, at 236 (testimony of Henry J. Knowles). Although invited, the Manitoba Commission did not participate “because of the relative inactivity” of the Winnipeg Stock Exchange and “budget constraints”; id. See also In re Part XV of the By-laws of the Toronto Stock Exchange: Notice, 1 O.S.C. Bull. 96A (May 22, 1981) (copies of submissions to be provided to Alberta, British Columbia, Manitoba, Ontario and Quebec administrators and to the Toronto Stock Exchange).

163 Ont. Leg. Standing Comm. on Administration of Justice, supra note 144, at 236 (Henry J. Knowles). The Commissions have not yet published their decisions. The Chairman of the Ontario Commission has stated that the decision will be made in the form of a recommendation to the minister; see id. at 237. And the minister has recently requested further representations from the industry pending receipt of the Commission’s recommendations; see Walker, supra note 35, at 6; 3 O.S.C. Bull. at 36A; and see Willoughby, “Walker suggests willingness to assist dealers on issue of fees regulation”, The Globe and Mail (Toronto), Jan. 16, 1982 at B5, col. 4. This approach is perhaps questionable as the Ontario statute requires the decision to be made by the Commission; see Ontario Securities Act, s. 22(2)(b).

164 The Ontario Commission announced its concern over the use of equity shares with restricted voting rights and that of the British Columbia, Manitoba and Quebec administrators in June 1981, gave notice of a hearing and declared a moratorium on the distribution of such shares; see O.S.C. Interim Policy No. 3-58, 1 O.S.C. Bull. 46E (June 26, 1981); O.S.C. Interim Policy No. 3-59, 1 O.S.C. Bull. 48E (June 26, 1981). The moratorium announced in the latter policy was joined by the Montreal, Vancouver and Toronto Stock Exchanges but not by the Alberta or Manitoba Commission. The hearing was held by the administrators of Alberta, British Columbia and Ontario and attended by official observers from Quebec; both Alberta and Quebec held separate hearings. The history of the affair is outlined in O.S.C. Interim Policy No. 3-58: Restricted Shares (Uncommon Equities), Distributions and Disclosure, 2 O.S.C. Bull. 77E (November 20, 1981); and see Ont. Leg. Standing Comm. on Administration of Justice, supra note 144, at 237-41 (Henry J. Knowles). The most recent interim policy reflects the position of the Ontario and Quebec Commissions. See also Avis d’audience publique, 12 Q.S.C. Bull. 2 (September 1, 1981, no. 35); Re le placement, et l’amission à la cote de la Bourse de Montréal d’actions ordinaires ne comportant pas droit de vote, 12 Q.S.C. Bull. 1 (November 17, 1981, no. 46). And the Ontario Commission adopted a final policy as of January 22, 1982; see O.S.C. Policy 3-58: Restricted Shares (Uncommon Equities), Distributions and Disclosure, 3 O.S.C. Bull. 1E (January 22, 1982).

165 See Notice: Public Ownership in the Canadian Securities Industry, 2 O.S.C. Bull. 9A (July 10, 1981) (hearing by British Columbia and Ontario, Manitoba to be represented, and Alberta and Quebec invited to send representatives; copies of submissions to be sent to these administrators and to Alberta, Montreal, Toronto, Vancouver and
Nevertheless, despite their acceptance of the extraprovincial effects of a decision concerning any of these matters, the provincial administrators must make their decisions on the basis of the consequences for their own province.\(^{156}\)

The *Proposals* also referred to developments in computer technology which highlighted the increasing national aspects of the securities market through the use of automation for the dissemination of information relating to trading through the exchanges, for the clearing and settlement of securities and even for the trading of securities.\(^{157}\) In fact the “Computer-Assisted Trading System” (“CATS”) then being tested by the Toronto Stock Exchange created the potential for “an automated Canada-wide trading system which would replace the trading floors of . . . the Canadian exchanges.”\(^{158}\) Despite the fact that the CATS system is still being assessed, the Toronto Stock Ex-

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\(^{156}\) See, e.g., Ont. Leg. Standing Comm. on Administration of Justice, *supra* note 144, at 237; *In re Proposed Amendments to Part XV of the By-Laws of the Toronto Stock Exchange*, [1973] O.S.C. Bull. 107 at 126 (August) (“we have been as sensitive to the national interest as our duty to the Ontario public permits”). The dominance of provincial interest was also shown in Alberta’s refusal last summer to join the moratorium on non-voting and restricted voting common shares because the Alberta Commission had received no complaints and the Alberta legislation (including the new Act) does not require a follow-up offer; see Slocum, “Dealing in special shares placed under moratorium”, *The Globe and Mail* (Toronto), June 30, 1981 at B1, cols. 3-4. And see Anisman and Hogg, *supra* note 15, at 142.

\(^{157}\) See 1 *Proposals*, ss. 1.02(d)-(e); 2 *Proposals* at 2-3. See also R.R.O. 910/80, s. 140(1)(b) which exempts trades made through the facilities of a recognized stock exchange where the trades are effected by “telephone or other telecommunications equipment linking the facilities of that stock exchange with the facilities of another [recognized] stock exchange” and are made in a type or class of security designated by the Commission between dealers registered in their respective provinces in Canada. The exemption is intended to facilitate trading in exchange-traded options. And see *Securities Amendment Act, 1981, supra* note 137, at 108A-109A (s. 34(1)(28)).

\(^{158}\) Anisman and Hogg, *supra* note 15, at 140; see generally Cleland, *supra* note 41; Jenkins, *supra* note 43.
change recently decided to retain an expanded trading floor in its new building and to increase the use of automation in the support facilities for the new floor but not in the execution of trades. As the automated support systems have apparently been designed to facilitate transactions on a trading floor, the Exchange’s decision appears to preclude the use of computer assisted trading in actively traded securities. The fate of the CATS system is, however, not yet clear; it is therefore probable that an attempt will be made to ensure that the support systems for the new floor are compatible with computer assisted trading in the event that CATS is successful. In any event, the recent success of the Canadian Depository for Securities in connection with the new issues of shares deposited with it by two resource corporations to enable them to comply with the requirements of the federal Petroleum Monitoring Agency concerning ownership of their shares increases the likelihood of a successful book-based system for securities transfers and concomitantly the potential for a Canada-wide trading system.

These developments reinforce the potential impact of automation on the already increasing internationalization of securities markets. Indeed, the continued movement in the United States toward the national market and clearing systems mandated by Congress in 1975 adds support to the prediction in the Proposals of “links between the two markets, facilitated by computer technology and clearing mechanisms that already exist,” especially in light of the fact that over fifty percent of the trading in shares of Canadian

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101 See id. (“although floor traders will continue to handle most of the actual trades, a multi-million dollar communications system will automate much of the process before and after the transactions.”).

102 See In re the Canadian Depository for Securities Ltd., 2 O.S.C. Bull. 519C (December 18, 1981) approving the use of the Canadian Depository so long as it ensures delivery to shareholders of materials sent by the issuer or an offeror. Compare 1 Proposals, s. 10.14; 2 Proposals at 190-92. See also Toronto Stock Exchange Bylaw 20.06, 3 CCH Can. Sec. L. Rep. ¶ 89-831 – 89-834.

103 See also, e.g., Dewey, “Computerized stock deals will be put to the test”, The Globe and Mail (Toronto), Dec. 5, 1981 at B1, col. 1.

104 See 1 Proposals, s. 1.02(f); 2 Proposals at 3-4. See also Guttman and Lemke, supra note 90, text at note 205 and following.


106 2 Proposals at 3-4.
corporations listed on both the Toronto Stock Exchange and an American exchange occurs in the United States.\footnote{167}{See Slocum, “ASC is examining foreign trading”, \textit{The Globe and Mail} (Toronto), May 1, 1980, B8, col. 2 at col. 3.}

It is not surprising, therefore, that provincial administrators are required to deal with the local implications of international transactions such as the acquisition of control of a Canadian issuer through purchases outside of the country,\footnote{168}{See, e.g., Anisman and Hogg, supra note 15, at 141 and 148-49 (acquisition of control of Husky Oil Limited by Alberta Gas Trunk Line Company through purchases on American Stock Exchange). Although Alberta Gas acquired control in the United States, the Ontario Securities Commission characterized the purchases as subject to its jurisdiction, but within an exemption in the Act for acquisitions through the facilities of a stock exchange, and announced it was considering the possibility of regulations to confine the exemption; see \textit{Notice I: Husky Oil Ltd.}, O.S.C. Weekly Summary, June 29, 1978 at 2A; cf. Anisman, \textit{supra} note 30, at 51-57. The Commission subsequently published for comment a draft regulation, intended to preclude such acquisitions, premised on the conclusion that “an offer made through a stock exchange outside Ontario is made to security holders resident in Ontario”, and stated its view that the new Ontario Act when proclaimed would accomplish the same result; \textit{Notice I: Request for Comments on Exemption for Take-Over Bids effected through a Stock Exchange}, O.S.C. Weekly Summary, July 21, 1978, 2A at 3A. Before the regulation was adopted Edper Equities Ltd., after having been refused an exemption from the takeover bid provisions of the Ontario Act, acquired control of Brascan Ltd. by the same means; see \textit{In re Brascan Ltd.}, [1979] O.S.C. Bull. 108 (May) (denying application for exemption); Brascan Ltd. v. Edper Equities Ltd., 477 F. Supp. 773 (S.D.N.Y. 1979) (upholding legality of purchases under United States law). A little over a week later the Ontario cabinet adopted the previously published regulation; see O.R. 310/79; \textit{Regulation 310/79 as to Exemption from Take-Over Rules through a Stock Exchange or Over-the-Counter Market}, O.S.C. Weekly Summary, May 11, 1979, Supp. D; [1979] O.S.C. Bull. 122 (May). It is likely that the desired effect of the regulation was beyond the jurisdiction of the Ontario Legislature and that the current Act too cannot be applied to preclude offers made outside of Ontario; see Anisman and Hogg, \textit{supra}, at 149; \textit{In re Ato Lct.}, [1980] O.S.C. Bull. 412 at 425-29 (September) (Commissioner Thom, dissenting).} and frequently to resolve matters of international import such as the foreign trading of Canadian securities\footnote{169}{See, e.g., Slocum “OCC will ask OSC for consent to list Canadian options on U.S. exchanges”, \textit{The Globe and Mail} (Toronto), Jan. 13, 1982 at B21, col. 4. The application is necessary because the Commission had permitted the Chicago Board Options Exchange to sell options in Ontario on condition that it not list options on Canadian securities; see \textit{In re Chicago Board Options Clearing Exchange Corp.}, [1975] O.S.C. Bull. 22 at 28-29 (January). The purpose of the condition was to permit the development of a similar market in Canada based on securities of Canadian issuers. See also \textit{In re The Montreal Options Clearing Corp.}, [1976] O.S.C. Bull. 93 (March) (requiring co-operation between Montreal and Toronto Stock Exchanges to develop single clearing facility for Canadian options).} and foreign ownership of securities firms carrying on business in Canada,\footnote{170}{See, e.g., \textit{In re Bache Halsey Stuart Canada Ltd.}, 2 O.S.C. Bull. 493C (December 4, 1981). Although the Commission concluded that it is in the public interest to permit the Bache firm to retain its Ontario registration because it provides unique services to Ontario investors, it upheld the Toronto Stock Exchange decision refusing approval of the transfer of the firm’s ownership to the Prudential Insurance Company of America. The orders are included in the same issue of the Bulletin; see 2 O.S.C. Bull. 326B and 328B (December 4, 1981). Approximately two weeks later the Commission published notice of its intention to hold a public hearing to determine the question of institutional ownership of securities firms, the issue on which the Toronto Exchange had}
ferent results.\textsuperscript{171} Such matters, as well as the utilization of international markets by perpetrators of fraudulent schemes,\textsuperscript{172} emphasize the difficulties that must inevitably be encountered by a regulatory agency whose jurisdiction is territorially limited\textsuperscript{173} and may help to explain why even provincial administrators have consistently supported federal legislation dealing with international aspects of the securities market.\textsuperscript{174}

Perhaps the strongest and most consistent impetus for federal legislation has derived from a desire for uniformity.\textsuperscript{175} The adoption of national and uniform policies and the consideration by the provincial administrators at their semi-annual meetings of the bills that resulted in the \textit{Ontario Securities Act, 1978}, with a view to a new uniform act were similarly motivated.\textsuperscript{176} These efforts and the consequent "progress . . . towards uniformity" led the chairman of the Ontario Commission to question "the necessity or desirability" of broad federal regulatory involvement when the \textit{Proposals} were released.\textsuperscript{177} The degree of uniformity achieved by the provincial administrators,
however, is not sufficiently substantial to support this position. Indeed, the 
securities laws in Canada have not been uniform since the 1930s.\textsuperscript{178} Although 
the attempts at uniform legislation in the late 1960s and at uniform adminis-
tration in the 1970s were laudable, they did not remove substantial differ-
ces in legislation and policy. The acts in even the so-called “uniform act 
provinces” vary in detail and substance,\textsuperscript{179} the national policies were criticized 
soon after their adoption and have recently been declared to be in need of 
revision\textsuperscript{180} and in any event each of these provinces retains a residue of local 
policies, some of which may be applicable to transactions involving more 
than one province.\textsuperscript{181}

Nor is the new Ontario Act likely to lead to the uniformity envisioned 
prior to its enactment.\textsuperscript{182} Five provinces are apparently resigned to the re-
tention of their present acts,\textsuperscript{183} none of the three that have enacted or pro-
posed new legislation follows the Ontario Act without variation and the re-

\textsuperscript{178} For a summary of the differences as of 1960 and 1966 see Williamson, \textit{supra} note 13, \textit{passim}.

\textsuperscript{179} For example, the British Columbia legislation does not require the filing of a preliminary prospectus and does not permit solicitations during a waiting period; see \textit{Securities Act}, R.S.B.C. 1979, c. 380, s. 36; compare, e.g., \textit{Securities Act}, R.S.S. 1978, c. S-42, ss. 42-47. For the differences in the provisions governing takeover bids and insider trading and reporting as of 1974 see Anisman, \textit{supra} note 30, \textit{passim}.

\textsuperscript{180} A broad overview of the legislative schemes in the provinces does not improve the picture; there are essentially five models of securities acts currently in force in Canada. British Columbia and Saskatchewan retain versions of the Ontario Act of 1966; Alberta and Manitoba have the 1966 Ontario Act with the amendments enacted in 1971; see \textit{supra} note 30; and see The \textit{Securities Act}, R.S.A. 1970, c. 335; The \textit{Securities Act}, R.S.M. 1970, c. S50. (The new acts have not been proclaimed; see infra note 184.) The Quebec Act is unique as it is the only one with a permit system for distributions; see \textit{Securities Act}, R.S.Q. 1977, c. V-1. The maritime provinces have versions of the old Security Frauds Prevention Act with the addition of a provision requiring a registration statement or prospectus when a distribution occurs; see \textit{Securities Act}, R.S.N.B. 1973, c. S-6; \textit{The Securities Act}, R.S. Nfld. 1970, c. 349; \textit{Securities Act}, R.S.N.S. 1967, c. 280; \textit{Securities Act}, R.S.P.E.I. 1974, c. S-4. The securities ordinances in the two territ-
ories are similar to the latter acts; see \textit{Securities Ordinance}, R.O.W.T. 1974, c. S-5; \textit{Securities Ordinance}, R.O.Y.T. 1971, c. S-5. Finally, the new Ontario Act is also unique 
at present. The prospects for uniformity are discussed in the text accompanying notes 182-93, infra.

\textsuperscript{181} See Lockwood, \textit{supra} note 36; and see Ont. Leg. Standing Comm. on Administration of Justice, \textit{supra} note 144, at 235 (“The national policy system... is alive and well and still functioning. It is suffering from some old age and from some antiquated concepts and needs revamping very much.” Henry J. Knowles).

\textsuperscript{182} The local policies are numbered as the third series; see, e.g., Alberta Policies Nos. 3-01 – 3-21, 1 CCH Can. Sec. L. Rep. §§ 24-501 – 24-521; British Columbia Policies Nos. 3-01 – 3-33, 2 CCH Can. Sec. L. Rep. §§ 29-951 – 29-996d; Ontario Policies Nos. 3-01 – 3-61, 2 CCH Can. Sec. L. Rep. §§ 54-895 – 54-978a. (Several of the Ontario policies have been adopted on an interim basis.) Ontario Policy No. 3-37 governs the conduct of “going private transactions, issuer bids and insider bids” and Ontario Policy No. 3-41 deals with exemptions from the follow-up offer requirement. Both affect interjurisdic-
tional conduct; \textit{cf. supra} note 148.

\textsuperscript{183} See \textit{supra}, text accompanying notes 35, 68 and 177. See also Ont. Leg. Standing Comm. on Administration of Justice, \textit{supra} note 144, at 234 (Henry J. Knowles).

\textsuperscript{184} New Brunswick, Newfoundland, Nova Scotia, Prince Edward Island and Sas-
katchewan; see \textit{id.} at 234-35 (Henry J. Knowles).
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maining province, British Columbia, is also unlikely to do so. The difficulty of achieving uniformity is perhaps best exemplified by the treatment of the follow-up offer and timely disclosure requirements of the Ontario Act in the three provinces with new legislation. Only one of the three, Manitoba, is a potential “uniform act province” for purposes of the follow-up offer requirement; Alberta has rejected it and Quebec, although initially rejecting it as well, has indicated that it will enact a substantially different version. And while all three provinces have a provision mandating timely disclosure, each varies to some extent from Ontario’s and no two are identical. In short, the proposed Quebec Act, while compatible with the regulatory schemes in Ontario and the other provinces, differs both in format and substance; the Alberta Act, while generally following the Ontario model, contains a number of variations in detail concerning the types of matter for which uniformity is usually advocated, such as the conduct of takeover bids and prospectus amendments; and the Manitoba Act, which approximates Ontario’s most closely, contains a few differences that require an issuer to make special provisions in

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184 See id. Neither the Alberta nor Manitoba Act has been proclaimed in force; the delay in the latter province is intended to permit amendments that reflect the experience under the Ontario Act; id. at 234.

185 See Ontario Securities Act, ss. 74 (timely disclosure) and 91 (follow-up offer); see also supra note 148.

186 See Ontario Securities Act, s. 88(1)(1); Manitoba Securities Act, 1980, ss. 88(1)(1), 91(1) and 129. A “uniform act province” is one specified in regulations as having “legislation in effect containing provisions substantially the same” as those in the act.

187 See Alberta Securities Act, 1981, Part 13; Quebec Securities Commission, supra note 7, s. 106(2) (exempting offers not made to shareholders generally to purchase securities from no more than five persons); see also Racine, supra note 124, at cols. 2-3, explaining that the exemption was included to permit economically desirable transfers of control and to enable persons who control and manage a corporation to benefit through receipt of a premium for their shares. The revised version of the proposed Act submitted to the minister apparently limits the exemption to offers to purchase the shares of the founding shareholders or of those actively involved in building the corporation over a long period, but does not specify a number; see Kerr, supra note 128, at cols. 4-5. It appears that the revised Quebec Act may go far beyond any legislation in Canada by treating an agreement to vote shares together as a takeover bid requiring a follow-up offer; see id. at col. 5 (Caisse de dépôt et placement du Québec and Société Générale de Financement would be required to make a follow-up offer “since they announced they are acting together”); cf., e.g., GAF Corp. v. Milstein, 453 F.2d 709 (2d Cir. 1971), cert. denied 92 S. Ct. 1610 (1972) (re accelerated reporting under Securities Exchange Act of 1934, § 13(d), 15 U.S.C. § 78m(d)).

188 Compare Ontario Securities Act, s. 74 with Alberta Securities Act, 1981, s. 118, Manitoba Securities Act, 1980, s. 74 and Quebec Securities Commission, supra note 7, ss. 76-77. The Manitoba Act differs from Ontario only by the addition of a provision authorizing the Commission to require an issuer to take appropriate steps to ensure adequate dissemination of the information contained in a press release; s. 74(5). The major difference in the other two is that they do not require that a confidential filing be made with the Commission where public disclosure would be harmful to an issuer. For a further variation see 1 Proposals, s. 7.03; 2 Proposals at 111-12.

189 See supra notes 124-30 and accompanying text.

190 See supra notes 131-36 and accompanying text. See also Alberta Securities Act, 1981, ss. 134(4)-(6) granting a further ten day right of withdrawal in the event of a competing takeover bid to offerees whose shares have been deposited but not purchased
that province, for example, with respect to exempt distributions. Finally, British Columbia has announced its intention to introduce a new securities act that appears not to be based exclusively on Ontario’s. And even Ontario itself may create further disparities, for the Minister of Consumer and Commercial Relations has announced that he plans to create a committee to revise the Ontario Act. Thus, while compatibility of the provincial acts seems reasonably assured for the most part, the prospect of uniformity is diminishing.

As the Proposals were intended to provide a basis for discussions that would “ultimately lead to a coordinated and cooperative legislative scheme for the regulation of all aspects of the Canadian securities market,” they contain a comprehensive securities act which is divided into sixteen parts to facilitate consideration of its various provisions and to enable the government more easily to adopt and sever the parts that it decides to enact. The Draft Act incorporates the regulatory mechanisms commonly embodied in securities legislation; it imposes disclosure obligations on issuers, requires market professionals to register and proscribe improper conduct. These provisions are pursuant to the earlier takeover bid; and see s. 144 which prohibits offeree directors from communicating with their shareholders during a takeover bid otherwise than by means of a statutory directors’ circular. And compare Alberta Securities Act, 1981, ss. 85-88 with Ontario Securities Act, s. 56(1). The Alberta Act does not require an amendment to be filed as soon as practicable and requires an amendment to a preliminary prospectus if a non-adverse material change occurs; in both it differs from Ontario.

Compare, e.g., Manitoba Securities Act, 1980, s. 71(1)(h)(i) with Ontario Securities Act, s. 71(1)(h)(i). The exemption in the Ontario Act applies to both a rights offering and the subsequent exercise of such rights while the Manitoba Act exempts only the latter transaction but not the rights offering itself. As rights offerings have traditionally been exempt from prospectus requirements in Canada, it may be that the disparity is the result of a drafting oversight.


194 Proposals at ix.

195 See id. at viii-ix. See also s. 16.17 which declares the severability of every provision of the Draft Act in the event of a finding of invalidity; and see 2 Proposals at 397-98. The Draft Act does not attempt to regulate mutual funds or other financial institutions; see supra, text accompanying note 61. It may, however, affect them in some circumstances; see 1 Proposals, s. 3.02(1)(c); 2 Proposals at 52-53.

196 See 1 Proposals, Parts 4-7; 2 Proposals at 59-64.

197 See 1 Proposals, Parts 8-10.

198 See id., Parts 11-12.
substantive requirements are supported by civil and criminal remedies\(^\text{199}\) and by the creation of a commission with investigative, adjudicative and rulemaking powers.\(^\text{200}\) The Draft Act implements these regulatory techniques in a manner that reflects modern developments in similar legislation with, of course, a number of variations peculiar to it. In brief, disclosure is premised on the registration of issuers whose securities are sufficiently widely held to permit an active trading market to develop.\(^\text{201}\) Once registered they become subject to an integrated continuous disclosure system designed to make technical data available to analysts and other professionals and to ensure that information is supplied to investors in a form that will be understandable to laymen.\(^\text{202}\) Registration also enables an issuer to avail itself of trading exemptions from the prospectus requirements that are generally applicable to distributions of securities\(^\text{203}\) and it is expected that such issuers will be subject to less onerous prospectus disclosure requirements than others.\(^\text{203a}\)

While the Draft Act varies the approach in the provincial securities acts to licensing of brokers, dealers and other market actors by basing its registration requirement on the carrying on of business activities, it is generally compatible with them in substance.\(^\text{204}\) It is also consistent with respect to self-regulatory organizations, even though it specifies a comprehensive regulatory structure containing the standards according to which such organizations must operate and according to which their conduct is subject to review by the “Canadian Securities Commission”\(^\text{205}\). And it establishes a new statutory scheme that would legitimate and regulate a book-based clearing and settlement system for securities transactions.\(^\text{206}\) Prohibitions supporting the regulatory scheme and reinforcing the integrity of the Canadian market range from the conduct of market actors with respect to their customers\(^\text{207}\) to antifraud

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\(^{199}\) See id., Parts 13-14.


\(^{201}\) See 1 Proposals, s. 4.02; 2 Proposals at 64-68. Registration involves the filing of a registration statement.

\(^{202}\) See 2 Proposals at 59-64 and 108; see generally Parts 4 and 7.

\(^{203}\) See 1 Proposals, s. 6.04; see generally Parts 5-6; 2 Proposals at 63, 71-74 and 102-103. The continuous disclosure system is also supplemented by disclosure related to special events such as takeover bids; see 1 Proposals, Part 7D.

\(^{203a}\) See 2 Proposals at 62-63.

\(^{204}\) See 1 Proposals, Part 8; 2 Proposals at 127-30; see also supra, text accompanying note 126.

\(^{205}\) See 1 Proposals, Part 9; 2 Proposals at 145-49. It is worth noting that the Draft Act would also authorize the Commission to delegate the administration of the Act’s provisions to a registered self-regulatory organization with respect to its members; 1 Proposals, s. 9.05. Apart from section 9.05, the major departure of the Draft Act from the provincial acts lies in the articulation of the scheme rather than in its scope; compare, e.g., Ontario Securities Act, s. 22. On Part 9 generally see Ratner, Self-Regulatory Organizations (1981), 19 Osgoode Hall L.J. 368.

\(^{206}\) See 1 Proposals, Part 10; 2 Proposals at 171-77. “Clearing agencies” are treated as self-regulatory organizations; 1 Proposals, ss. 2.10 and 2.46. See also Guttman and Lemke, supra note 90; and see supra note 162.

\(^{207}\) See 1 Proposals, Part 11; 2 Proposals at 197-98.
provisions that would replace and supplement those in the Criminal Code concerning manipulation and other forms of fraudulent activity.\textsuperscript{208} Finally, the Draft Act attempts to ensure that a person who suffers harm as a result of improper conduct in the securities market will be compensated in so far as possible by establishing a comprehensive scheme of civil liability based on violations of its provisions.\textsuperscript{209}

Although the Draft Act would create a “Canadian Securities Commission” to administer and enforce its provisions,\textsuperscript{210} its administrative structure was devised to permit a maximum amount of flexibility so that any solution resulting from discussions with the provinces might be accommodated. The minister designated for purposes of the Act\textsuperscript{211} may, for example, negotiate and enter an agreement with a provincial government whereby the administration of the Draft Act, or any part of it, is delegated to the securities commission in that province or whereby the Canadian Securities Commission undertakes responsibility for enforcement of the provincial securities act.\textsuperscript{212} Varying understandings with different provinces may thus be incorporated into a single scheme.

Interdelegation is not, however, the only device contemplated in the Proposals for the co-ordination of federal and provincial regulation of the securities market.\textsuperscript{213} The Commentary suggests that members of provincial commissions might be appointed as part-time members of the Canadian Commission “to increase the degree of cooperation between the...Commission and its provincial counterparts and to ensure that local needs are considered.”\textsuperscript{214} The Cabinet may also require the Commission to invite a provincial commission to designate one of its members to participate in any proceeding under the Draft Act\textsuperscript{215} and the Commission may do so itself by appointing such a person as an expert.\textsuperscript{216} The Commission may thus, like the provincial commissions, hold joint hearings with members of another commission with overlapping jurisdiction in order to avoid duplicate proceedings\textsuperscript{217} and it may also avail itself of provincial expertise on matters within


\textsuperscript{209} See 1 Proposals, Part 13; 2 Proposals at 235-38; see also Johnston, supra note 6, at 634 (“considerable improvement on existing law”).

\textsuperscript{210} See 1 Proposals, s. 15.01. Part 15 of the Draft Act contains a code of procedure to govern the conduct of the Commission in the exercise of its powers and provides for judicial review of Commission decisions; see ss. 15.13-15.21.

\textsuperscript{211} See id., s. 2.23.

\textsuperscript{212} See id., s. 15.06; 2 Proposals at 334-35; and see supra, text accompanying note 122. If administration of the Draft Act is delegated, the provincial commission must nevertheless comply with its provisions; 1 Proposals, s. 15.06(2).

\textsuperscript{213} For a discussion of these issues from a former state securities commissioner's perspective see Makens, An American State-Federal Perspective on the Proposals (1981), 19 Osgoode Hall L.J. 424.

\textsuperscript{214} 2 Proposals at 332.

\textsuperscript{215} See 1 Proposals, s. 15.07; 2 Proposals at 334-35.

\textsuperscript{216} See 1 Proposals, s. 15.10.

\textsuperscript{217} See supra, text accompanying note 146.
its exclusive jurisdiction. Moreover, the Draft Act requires the Commission to co-operate with provincial securities commissions and other provincial and federal authorities "in order to minimize duplication of effort and maximize the protection afforded investors" and authorizes it to delegate the exercise of its investigative and adjudicative powers to a provincial commissioner or employee in furtherance of such efforts.

The Draft Act contains as well a number of non-discretionary devices to avoid duplication and to encourage harmonization of federal and provincial regulatory schemes. It exempts intraprovincial distributions from the prospectus requirements in order to enable a provincial government to establish the standards of investor protection for its own residents and also requires the Commission to permit securities to be sold in any province that clears a prospectus even though it refuses permission with respect to other provinces. A similar duty is imposed on the Commission with respect to applicants for registration under Part 8 of the Draft Act who are already registered under a provincial securities act. All of these provisions facilitate co-ordination of federal and provincial schemes by permitting a provincial decision to prevail so long as only citizens of the particular province are affected. Finally, the Draft Act avoids the unnecessary imposition of duplicate disclosure requirements by permitting issuers subject to its provisions to file similar reports required in the jurisdiction in which they are incorporated or organized. The Draft Act thus provides a framework for a comprehensive national regulatory scheme with a maximum amount of federal-provincial co-operation, co-ordination of requirements and a minimum of unnecessary duplication.

Federal-provincial co-operation is an essential component of the scheme recommended in the Proposals both for reasons of policy and because Parliament's legislative jurisdiction over the securities market is not plenary. While it is reasonably clear that Parliament may enact legislation with respect to interprovincial transactions in securities and interprovincial works and

218 1 Proposals, s. 15.12(1); see also 2 Proposals at 344.
219 See 1 Proposals, s. 15.09; 2 Proposals at 336-39. Similar powers are also granted the Commission with respect to international transactions in securities; see, e.g., 1 Proposals, ss. 15.09 and 15.12; and see id., s. 16.16(2) (interpretation of act to implement treaties).
220 See 1 Proposals, s. 6.05; 2 Proposals at 104-106 and 383-84.
221 See 1 Proposals, s. 5.10; 2 Proposals at 85-86.
222 See 1 Proposals, s. 8.03; 2 Proposals at 135-36.
223 See 1 Proposals, s. 7.18; 2 Proposals at 121. The Commission may also accept documents filed with other securities commissions under its general power to grant exemptions; see s. 3.04.
224 The need for federal-provincial and international co-operation is recognized in the purpose clause of the Draft Act; see 1 Proposals, s. 1.02; 2 Proposals at 4-5.
225 See supra, text accompanying notes 213-23.
226 There are, however, no constitutional limits on Parliament's extraterritorial jurisdiction; see, e.g., Anisman and Hogg, supra note 15, at 150; see also id. at 201-14 (paramountcy).
227 See, e.g., id. at 157-61.
undertakings, and also with respect to general matters of trade and commerce of transprovincial significance, it is doubtful whether it can do so to regulate intraprovincial transactions in securities. As an attempt to encompass both interprovincial and intraprovincial transactions would be of questionable validity, the Draft Act is framed to apply only to the former; it expressly excludes intraprovincial transactions that are not made through the facilities of a stock exchange and is otherwise limited to matters of greater than provincial import. Jurisdiction over the stock exchanges, for example, is predicated on their being institutions of national significance which perform functions relating to "general trade and commerce" and the operations of which make them interprovincial works or undertakings; the remaining provisions apply only to interprovincial transactions and businesses. The

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228 See, e.g., id. at 171-76.


230 On occasion the applicability of federal legislation to intraprovincial transactions has been upheld on the basis of the ancillary doctrine; see, e.g., Caloil v. A.G. Can. No. 2, [1971] S.C.R. 543, 20 D.L.R. (3d) 472, [1971] 4 W.W.R. 37. Such a result is rare, however, and is unlikely in view of recent Supreme Court decisions; see, e.g., Dominion Stores Ltd. v. R., [1980] 1 S.C.R. 844, 106 D.L.R. (3d) 581, 50 C.C.C. (2d) 277 (1979). The Dominion Stores decision is especially significant in view of the conscious disregard of the difficulty of determining the origin of a specific apple and the potential application of the ancillary doctrine to which it gave rise; see, e.g., id. at 847 (S.C.R.), 584 (D.L.R.), 280 (C.C.C.) (per Laskin C.J. dissenting) and 855 (S.C.R.), 590 (D.L.R.), 286 (C.C.C.) (per Estey, J.). The Court reversed the decision of the Ontario Court of Appeal upholding the federal legislation on the basis of the ancillary doctrine; see id. at 854 (S.C.R.), 590 (D.L.R.), 286 (C.C.C.).


232 See 1 Proposals, s. 16.01; 2 Proposals at 383-84. The Draft Act defines an intraprovincial transaction in terms of "a trade initiated and completed in a single province"; id. Thus a distribution of a security by a corporation in a province other than its province of incorporation is necessarily interprovincial; see 1 Proposals, s. 16.01(2); Anisman and Hogg, supra note 15, at 160.

233 See, e.g., 1 Proposals, s. 8.07. (person who carries on business "only in one province" not required to register); 2 Proposals at 142-43; see also 1 Proposals, s. 9.01(2) (interprovincial association of securities firms); 2 Proposals at 150 ("to make clear that it applies only to associations that have more than intraprovincial significance").

234 See 2 Proposals at 383 ("transprovincial character"); see also Anisman and Hogg, supra note 15, at 167 and 172-75.

235 The requirement that persons carrying on a business obtain registration under 1 Proposals, Part 8, is constitutionally perhaps the most difficult part of the Draft Act to justify; see 2 Proposals at 128-29. The difficulty is exacerbated by the tone of a recent Supreme Court decision declaring invalid federal legislation establishing standards for the labels (and contents) of "light beer" because it related to the regulation of business in a single province; see Labatt Breweries of Canada Ltd. v. A.G. Can., [1980] 1 S.C.R. 914, 110 D.L.R. (3d) 594, 52 C.C.C. (2d) 433 (1979). The decision may be distinguished because it is premised on the assumption that the beer was sold in the province of manufacture, see id. at 939 (S.C.R.), 622 (D.L.R.), 461 (C.C.C.) ("production and local sale"), whereas Part 8 is limited to interprovincial businesses. Indeed, a decision by a provincial commission concerning, for example, permissible limits on public ownership of registered securities firms necessarily affects the conduct and operations of such firms throughout Canada regardless of their province of origin; see, e.g., supra notes 155, 170 and 171; but see Labatt Breweries at 940-42 (S.C.R.), 623-25 (D.L.R.), 462-
Draft Act remains, therefore, “likely within Parliament’s jurisdiction to en-
act.”

Nevertheless, as the results of constitutional adjudication cannot be pre-
predicted with certainty, the Draft Act contains a declaration that its provisions
and parts are severable so that a holding of invalidity with respect to one will
not affect the others. The severability provision may be more advisable now
than when the Proposals were drafted in view of a series of recent Supreme
Court decisions that evince a provincial reorientation in judicial outlook re-
miniscent of the Haldane era. Although none of these decisions negates the
constitutional premises of the Proposals, they do increase the uncertainty
surrounding them. Clarification through a constitutional amendment, there-
fore, would be desirable.

In view of the forthcoming constitutional conference this symposium
issue is to be welcomed, for the articles contained in it provide a perspective
on various aspects of the Proposals based on regulatory experience in the
United States with the most developed securities market in the world and the
one with which the Canadian market is most closely linked. They therefore
introduce a valuable international dimension to the discussion of the sub-
stantive recommendations in the Proposals and will assume an appropriate
place in the decision-making process relating to the development of a na-
tional co-ordinated system of securities regulation in Canada.

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64 (C.C.C.), excluding “the regulation of a single trade or industry” from Parliament’s
jurisdiction over matters of general trade and commerce.

236 1 Proposals at ix. But see supra note 235; and see text accompanying notes 237,
infra.

237 See 1 Proposals, s. 16.17; 2 Proposals at 397-98. This provision will become
especially important if the Draft Act is enacted, for Part 12 would replace a number of
provisions in the Criminal Code, R.S.C. 1970, c. C-34; see supra note 208. These
provisions would remain valid as matters relating to criminal law.

238 See, e.g., Dominion Stores Ltd. v. R., supra note 230; Labatt Breweries of Can-
(3d) 718 (prohibition against driving without a licence colourable invasion of provincial
jurisdiction); compare, e.g., In re Board of Commerce Act, 1919, [1922] 1 A.C. 191,

239 Both Dominion Stores and Labatt Breweries were premised on the application
of the legislation in question to intraprovincial transactions; see supra notes 230 and
235; and see supra, text accompanying notes 232-34. The recent Supreme Court decision
upholding the application of provincial legislation to a hydro tower straddling the border
between Alberta and British Columbia, while consistent with the Court’s new orientation,
see supra, text accompanying note 238, does not affect the jurisdictional premises of the
Proposals concerning stock exchanges because a major element of the decision was the
fact that no federal legislation existed to govern the interconnecting hydro lines; see Fulton
that the decision might have been otherwise had there been applicable federal legislation;
id. at 162 (S.C.R.), 589 (D.L.R.), 251 (W.W.R.). See also Anisman and Hogg, supra
note 15, at 174-75.

240 See supra, text accompanying note 9.

241 See supra, text accompanying note 12.

242 See supra, text accompanying notes 164-74.