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ISSN 1180-4335

Legislative Assembly of Ontario

First Session, 39th Parliament

Assemblée législative de l'Ontario

Première session, 39e législature

Official Report of Debates (Hansard)

Monday 23 February 2009

Journal des débats (Hansard)

Lundi 23 février 2009

Standing Committee on Government Agencies

Agency review:

Ontario Securities Commission

Comité permanent des organismes gouvernementaux

Examen des organismes gouvernementaux :

Commission des valeurs mobilières de l'Ontario

Chair: Julia Munro
Clerk: Douglas Arnott

Présidente : Julia Munro
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111 Wellesley Street West, Queen's Park
Toronto ON M7A 1A2
Telephone 416-325-7400; fax 416-325-7430
Published by the Legislative Assembly of Ontario

Service du Journal des débats et d'interprétation
Salle 500, aile ouest, Édifice du Parlement
111, rue Wellesley ouest, Queen's Park
Toronto ON M7A 1A2
Téléphone, 416-325-7400; télécopieur, 416-325-7430
Publié par l'Assemblée législative de l'Ontario

LEGISLATIVE ASSEMBLY OF ONTARIO

STANDING COMMITTEE ON GOVERNMENT AGENCIES

Monday 23 February 2009

ASSEMBLÉE LÉGISLATIVE DE L'ONTARIO

COMITÉ PERMANENT DES ORGANISMES GOUVERNEMENTAUX

Lundi 23 février 2009

The committee met at 1303 in room 151.

SUBCOMMITTEE REPORTS

The Chair (Mrs. Julia Munro): Good afternoon, ladies and gentlemen. Welcome to the Standing Committee on Government Agencies. We are going to proceed with our agenda. Our first order of business this afternoon is the report of the subcommittee on committee business dated Thursday, February 12.

Mrs. Maria Van Bommel: I would move adoption of the subcommittee report dated Thursday, February 12.

The Chair (Mrs. Julia Munro): Is there any discussion? If not, all in favour? The motion is carried.

Our second order of business is the report of the subcommittee on committee business dated Thursday, February 19.

Mrs. Maria Van Bommel: I move the adoption of the report of the subcommittee on committee business dated Thursday, February 19.

The Chair (Mrs. Julia Munro): Is there any discussion? If not, all in favour? Opposed? The motion is carried.

AGENCY REVIEW

ONTARIO SECURITIES COMMISSION

The Chair (Mrs. Julia Munro): Our next order of business is the review of the Ontario Securities Commission.

Good afternoon, and welcome to the committee. As you may know, you will have 10 to 15 minutes in which to make any statements you wish. That will be followed by time for the committee members to ask questions and hear your responses. For the purposes of Hansard, I'd ask you to identify yourselves. You may begin.

Mr. David Wilson: As you may recall from my last appearance before the committee on December 2, I'm David Wilson, chair of the Ontario Securities Commission. Thank you for inviting us back to speak with you. I look forward to continuing our discussion and answering your questions about the OSC's mandate, goals and activities.

With me today on my right is Larry Ritchie, one of our vice-chairs at the OSC, and on my left, Peggy Dowdall-Logie, the OSC's executive director. Also in the room are four operational branch directors of the OSC: Susan Silma, of the compliance and registrant regulation branch; Margo Paul, of our corporate finance branch; Leslie Byberg, of the investment funds branch, and Brigitte Geisler, of our market regulation branch. The operational directors are here, should you want details about the proactive steps the OSC has been taking in response to the recent developments in the capital markets. They'll also provide a more fulsome overview of the OSC's operational branches, should you wish it. We hope to have the opportunity to provide such details during the question-and-answer period.

Before we answer your questions, I thought it would be useful to provide you with an update since I was last here in early December. Although it has been just a few months, the ground beneath the economy and the capital markets has continued to shift, and the OSC has been quite active on several fronts. Of course, we all know that despite our hopes to the contrary, the state of the financial markets remains very challenging. Stock markets are testing new lows. Fostering investor confidence is an ongoing challenge in the current market environment.

The difficult conditions in the financial markets have had a substantial impact on the so-called real economy, and we recognize that the response to developments in the markets is a clear priority of both the Ontario government and those of you in the room today.

At the OSC, we're committed to doing our part, and we have been responding appropriately. With uncertainty in the markets, we're sustaining a level of high alert. We believe increased vigilance is necessary, both to provide protection to investors and to foster confidence in the integrity of our capital markets. These are both important parts of the OSC's statutory mandate.

We, of course, can't dictate the ups and downs of the capital markets, but we can, and do, work hard to foster fair and efficient markets. Here are some key parts of our response to recent developments in the capital markets.

We are more closely monitoring continuous disclosure filings of public companies, especially in the banking and financial services sector, as well as highly leveraged issuers—those with high levels of debt.

We completed a fact-finding review of money market mutual funds in Ontario.

We conducted a similar fact-finding review of exchange-traded, closed-end investment funds.

We just recently began a focused review of Ontario-based hedge funds to assess any unusual risks to investors.

These activities are all part of the OSC's compliance oversight that I talked about here in December. We initiated these extraordinary programs to determine whether any additional regulatory responses are necessary as a result of dramatic market developments.

We're vigilantly monitoring issuers of securities to check that proper disclosure is being made to their investors. We're doing everything possible to fulfill our mandate in this time of unprecedented economic uncertainty.

During these reviews which we're conducting, we've found reasons to be reassured that meaningful disclosure is being made about the challenges facing public companies and funds in the investment fund industry. Nevertheless, we remain alert for any signs of improper conduct.

On another front, an agreement has been reached for a settlement of the crisis in the marketplace for non-bank-sponsored asset-backed commercial paper—ABCP. The restructured notes were formally issued in January, following a closing of the restructuring on January 21. We're pleased that the hard work of the restructuring committee and investors produced a settlement, even though some investors do have concerns about it.

This agreement is the resolution that was carefully developed by the pan-Canadian committee following very complicated negotiations that lasted more than a year. The vast majority of retail investors in non-bank-sponsored asset-backed commercial paper have now been made whole, with interest, as a result of this agreement and other arrangements. Other holders of the ABCP notes will receive longer-term notes.

Generally, that's good news, but it obviously does not address the underlying regulatory concerns with respect to the sale of non-bank-sponsored asset-backed commercial paper in the first instance. We're doing our part in addressing that through our involvement in the Canadian Securities Administrators, the CSA, the umbrella group for securities regulators in this country.

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The CSA is moving forward with recommendations from its ABCP consultation paper to develop firm proposals to help prevent a similar crisis from happening again. Our ABCP recommendations are an appropriate and proportionate response. They include proposals to constrain the ability of issuers of short-term asset-backed securities to use an exemption that currently allows issuers of short-term debt to avoid having to provide full prospectus-level disclosure to their investors. The proposals also include the establishment of a framework to permit regulatory oversight of credit rating agencies, whose role we and other regulators around the world see as having contributed to what happened in structured products.

The proposed framework for rating agencies would require public disclosure of all relevant information used by them in preparing a rating on a security. This complements our proposed requirement that rating agencies comply with a code of conduct prepared by the International Organization of Securities Commissions, known as IOSCO. The OSC provided substantive input into IOSCO's code of conduct for rating agencies.

Recognizing the dynamic nature of the rating agency industry, we have also recommended that we securities regulators be given the tools to actively regulate and impose requirements on credit rating agencies in the future.

These and other changes would provide more disclosure, making such complex investments more transparent to investors and market participants. Disclosure and transparency are fundamental to the OSC's approach to regulation.

The public comment period on our ABCP proposals in the consultation paper ended just last week. We will be assessing those public comments shortly and will then develop our final proposals.

Another development in the past few weeks has been the report of the Expert Panel on Securities Regulation in Canada. On January 12, the panel delivered its final report as well as a draft securities act to the federal Minister of Finance. The panel's central recommendation is the establishment of a single national securities regulator.

As you know, I am on record as fully supporting the position of the Ontario government and our minister regarding a common securities regulator. So, not surprisingly, the OSC welcomes any step that takes Canada closer to the goal of establishing a single regulator enforcing a single securities act and charging a single set of fees. The federal government has proposed to fund a transition office that is now preparing the groundwork for a new Canadian securities commission.

The chair of the panel, Tom Hockin, wrote in the report that Canada's current regulatory structure is costly, slow and confusing. Importantly, he notes, "In today's increasingly interconnected economy, how Canada organizes its own capital markets matters not only to Canadians but to the world ... investors will not tolerate outdated, cumbersome or duplicative systems. If Canada is to realize its potential in the global economy, the regulation of its financial markets must be among the world's best."

The OSC agrees with this statement and is prepared to assist in making that goal a reality.

I can also report some important developments from the OSC's enforcement and adjudication activities. One example is the Research in Motion settlement agreement regarding the backdating of stock options. The focus in this settlement was on ensuring that the company is and remains compliant with Ontario securities law. We also wanted the company and its shareholders to be made financially whole. The settlement also required that the corporation, RIM, submit to an independent review of its corporate governance practices and procedures.

The OSC tribunal stated that it hopes that RIM, and indeed all public companies, understand the importance of strong corporate governance. We believe that in the RIM case the OSC applied balanced sanctions where

they were most appropriate. What the tribunal did by approving the settlement was send a strong message that abusive conduct will not be tolerated.

Another recent and high-profile enforcement action was the sentencing of Barry Landen. In October 2008, following an OSC investigation, Mr. Landen, a former senior executive of a mining company, was found guilty of insider trading. In January of this year, the Ontario Court of Justice sentenced him to a 45-day jail term and a fine of $200,000. This is a significant verdict. It sends a strong message of deterrence against insider trading.

A third example in the enforcement area is the decision of the OSC—this is not really enforcement; it's more policy; excuse me—tribunal in relation to the treatment of shareholders of HudBay Minerals in connection with a contested proposed takeover. In January, the OSC tribunal reviewed a decision of the TSX and required that HudBay hold a shareholders meeting to vote on its takeover bid for Lundin Mining Corp. At the time of issuing its order, the OSC panel commented that fair treatment of HudBay shareholders must take priority, and that permitting the transaction to proceed without shareholder approval would adversely affect the quality of the marketplace and be contrary to the public interest.

I can also tell you that we have recently appointed a new director of enforcement at the OSC. His name is Tom Atkinson and he has extensive experience in securities regulation, enforcement and litigation. We selected Tom after a comprehensive search for a candidate who could bring not only the relevant litigation tools to the OSC but also vision and leadership. We're very pleased to have him join our team. Tom is respected for the commitment he brings to providing protection to investors and fostering market integrity.

In each of these cases I've cited, the OSC has sent a clear and unmistakable signal to investors and capital market participants: We will work relentlessly to provide protection to investors from unfair, improper or fraudulent practices. We will foster fair and efficient capital markets. And if a company or an individual acts contrary to Ontario's securities legislation, we will take action. As you've heard, we have taken action and we intend to keep making progress to make securities regulation in Ontario even better.

We can't make the markets of the broader economy recover, but we can foster the fairness and efficiency of capital markets, and foster public confidence in those markets.

Thank you for your attention, and now myself and my colleagues here at the table or those sitting behind would be happy to answer your questions.

The Chair (Mrs. Julia Munro): Thank you very much.

Just for the benefit of committee members, we're looking at just over 30 minutes per caucus. I'll divide it, then, with some balance given to the first round—a little more time for the first round than the second. Mr. Prue, are you ready to begin—

Mr. Michael Prue: Oh my goodness, yes. I had forgotten a couple of my papers there; I had to run out and get them. I guess I can go right away. I didn't know I was first.

The Chair (Mrs. Julia Munro): Yes, you are.

Mr. Michael Prue: My questions that I have written down here, thinking about them—the OSC is seeking to fill three part-time commissioner positions. The advertisement says the OSC is looking for somebody with management or leadership experience with a corporate issuer, an investment dealer or significant experience in securities litigation or adjudication. I put it to you that every one of the OSC's existing 13 commissioners has that experience. The OSC's senior management is comprised of two investment bankers and two Bay Street lawyers. You have an incredible opportunity to appoint a retail investor. Why haven't you done so?

Mr. David Wilson: The OSC has a board, and the board has a corporate governance committee. So the process you've described of posting openings for new commissioners is overseen by that corporate governance committee, which is a subcommittee of the board at the OSC. What the governance committee started doing three or four years ago, I believe, was to create a matrix of skill sets required for commissioners to fulfill their multifaceted roles that they have as commissioners of the OSC. Many of you may know this, but I'll describe the basic functions of an OSC commissioner: Commissioners meet twice a month for four hours to review new policy initiatives and revisions to existing policy initiatives. So there's an element that's very similar to passing new laws or discussing the creation of new laws that affect capital market participants, all of which is subject to the approval of the minister, of course, but all the development work is done around the commission table with the assistance of staff. So that's one function.

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Another function of commissioners is to sit as adjudicators on enforcement cases, and I described some recent cases to you this morning in my opening remarks.

What I'm trying to portray, Mr. Prue, is a very thorough and rigorous process to bring people with the very sophisticated skills needed to do the job of an OSC commissioner. Sitting as an adjudicator, developing new policies, and understanding the complexities of new policies and their impact on the marketplace and market participants is a job requiring significant specialized expertise and skills. So our governance committee, which is all made up of part-time commissioners—none of us at the table here are involved—has created a matrix of required skills: accounting skills, adjudicative skills, skills as an issuer or experience as an issuer etc., and some of our existing commissioners do have experience as investors as well. I'm giving you a long-winded answer, but what I'm trying to say in answer to your question is that we have a very robust, thorough process at the commission to assess the skills needed to do the job that we are mandated to do under the statute.

The final point I'll make is that, of course, the commissioners who come forward through the Public Appointments Secretariat process are screened and reviewed

by our governance committee, but ultimately the minister makes the decision and the cabinet makes the appointment.

That's the process and that's the thinking behind the matrix of skills that we require to do the job which the act requires of us.

Larry Ritchie, do you have any comments to add to that?

Mr. Lawrence Ritchie: The only thing I would like to add is that we have had discussions at the board level, and I can assure you that experience with and sensitivity to retail investor issues is certainly a criteria that the nominating committee will take into consideration within the skill sets that form part of that matrix.

Mr. Michael Prue: I've heard all that, but I have to take it that in your opinion, or in the opinion of the board, if you don't share it: A retail investor representative wouldn't have the necessary skills set.

Mr. David Wilson: There may be somebody out there. If they have the skills, they should apply. Absolutely, they should. It's an open process. The public appointment process, in Ontario, in my personal opinion, is a very open process and anyone can apply. One of our recent commissioners that we recruited in the last round applied spontaneously on her own. Her name is Paulette Kennedy. She was a superb candidate. Our governance committee thought she was a superb candidate. The minister liked her candidacy, so she went to the cabinet and she was approved. The process is very, very open.

Interjection.

Mr. David Wilson: If I could just interrupt for a second, Mr. Prue, Peggy Logie would like to correct a statement you made about her background.

Ms. Peggy Dowdall-Logie: Yes. I'm not sure whether you made it about my background—

Mr. Michael Prue: Oh, I have no idea—I don't even know who you are, so go ahead.

Ms. Peggy Dowdall-Logie: There was a suggestion that of the four executives, two were Bay Street lawyers and two were former investment bankers. As we know, David Wilson is a former investment banker. I am not a former investment banker. I'm a lawyer. I've spent most of my career in compliance/regulatory risk. This is my third time at the OSC in the policy area.

Mr. Michael Prue: Okay. I had no idea. The statistics that I had did not include your name. It said that of the 13—

Ms. Peggy Dowdall-Logie: Four.

Mr. Michael Prue: Four. So there are nine others.

Mr. David Wilson: Three of the four are here. The fourth is missing; he's a Bay Street lawyer. So we've got a Bay Street lawyer. The one that's missing is a Bay Street lawyer. You've got an investment banker. Peggy's correcting the record on her own background.

Mr. Michael Prue: All right. Let's go to the Bay Street lawyers and others from Bay Street. There's a widespread belief that the OSC represents corporate Bay Street interests and not the everyday retail investors. It is those everyday retail investors that we keep seeing in the newspapers, we keep seeing on the television programs and everything else, who are being hammered and hurt. I don't see many Bay Street lawyers and Bay Street interests out there losing their shirts. Maybe they are, but I don't see that on television.

Mr. David Wilson: We can certainly take you on on that allegation, but retail investors—let me back up, and, Larry, you may have something to say. We have established, with the approval of our board, four principal goals for the operation of the OSC. One of them is protection of investors, including retail investors. Everything we do at the OSC has, at its core, investor protection of one sort or another—not necessarily just retail investors; all investors: institutional investors, global investors and small individual investors. They all form the universe of investors. We think that our commissioners and our goals are all focused in the right direction vis-à-vis investors, including retail investors.

Mr. Michael Prue: Would it not assuage the fears and the concerns of the retail investment community for the OSC to reach out and say quite simply, "It's time for a real retail investor representative," so that that community would say there was somebody who understood their particular concerns, who had knowledge and who could plug into the system? There are 13 commissioners. Surely to God one could represent the interests, or at least be knowledgeable of the interests, of that separate community without throwing the whole thing into turmoil.

Mr. David Wilson: I've discussed the notion of having constituencies represented on the board with the chair of our governance committee, anticipating that someone may ask this question of us today. The chair of the governance committee, and I believe she reflects the views of the governance committee, does not believe that the Ontario Securities Commission should be populated with representatives of specific interest groups. It should be a cohesive board to perform all the complex functions that the OSC is mandated to perform under the act, with multiple skills to deal with the complex functions, and various constituencies should not be represented in clumps around the board table. That's not me speaking; that's the chair of our governance committee.

Mr. Michael Prue: But almost every board in Ontario, almost every board and committee set up by the government in no matter what government department or agency, has people on it who serve, bring their own knowledge and skills sets. The skill sets can be very different. Nobody's asking for, nobody even wants, a homogeneous board except the OSC. I'm at a loss to understand why that's the rationale.

Mr. Lawrence Ritchie: Chair, let me wade into this. First of all, in one of the comments that you made, you suggested that there should be a representative of a separate community of retail investors. I don't believe there exists a separate community of retail investors. I believe that all of us are retail investors. We're all consumers. We have different skill sets. We have different backgrounds, and I think that the responsibility of board members and commission members is to bring their

experiences and their perspectives to the table with due regard of the statutory obligations of ensuring that investors are protected and that confidence is maintained in the public market. The concern, and I agree with your underlying premise, is you cannot do that without due regard to one of the most vulnerable classes in our society that we have to look after, and that is retail investors. From that point of view, we expect ourselves and all commissioners to bring that perspective to the table.

The other thing: Within the three areas that the board is looking for to fill its complement of commissioners, one of them is someone who has the skill sets—and you're quite right that it's not necessarily the perspective; it's the skill sets—to have a litigation or adjudicative background so that they can chair panels of the commission. That person need not be someone with Bay Street experience or corporate experience. That person, for example, could fill the very position that you're looking at. I would think that there are lots of lawyers out there who have represented the interests of retail investors and other consumers who could bring that perspective to the table, but also meet the threshold of the skill sets that the board is looking for to adjudicate and chair panels.

I don't see the inconsistency, in terms of the three areas that are being looked at, in representing and filling the position of the retail investors. As David mentioned, if there is someone with that skill set, the board is very open and anxious to see the resumé of that person and will put them forward if they have the requisite skill sets.

Mr. David Wilson: Just for the record, the Public Appointments Secretariat process is open until the end of February, and so anyone who has some of the background interest that you referred to is free to submit their name.

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Mr. Michael Prue: How much time do I have left?

The Chair (Mrs. Julia Munro): You have about five minutes.

Mr. Michael Prue: Five minutes? Okay. I'm going to go on to a slightly different topic, then, in the five minutes remaining.

In November 2005, the OSC created the investor advisory committee—the IAC—following a successful investor town hall initiative. The OSC said this about the committee: "We believe that effective communications with the stakeholders who are affected by our actions is an essential part of the regulatory process and helps us ensure we achieve the appropriate balance between protecting investors and fostering efficient capital markets."

Mr. Wilson, you were quoted in a statement—and I quote you directly—saying this: "IAC members will help identify and address issues affecting investors and ensure that the views of consumers of financial services are accessible to the commission."

The committee met for two years. In May 2008, a trade publication said that the OSC decided not to continue with the investor advisory committee, saying it had "run its course." This was a surprise to all the members. Why did the OSC determine they needed to shut down the investor advisory committee?

Mr. David Wilson: The investor advisory committee, as you quite accurately point out—you characterized it as a successful town hall meeting. It was created with a two-year term, so there was no sudden termination. It was created with a two-year term at the time, and members were recruited for the committee. It was a very productive, active two-year period; lots of good ideas were forwarded and lots of discussions were held. We felt at the end of the two years that we should take a pause and decide if there was an improvement in the way we could get input from retail investors. At that point, Larry Ritchie got quite actively involved in creating a new body, but why don't I pass the baton to you, Larry—describe what happened after we decided to move from the two-year term of the original investor advisory committee to what you're now doing.

Mr. Lawrence Ritchie: One of the things that we learned in the course of the investor advisory committee is that the concerns of retail investors transcend just the Ontario Securities Commission. It involves, for sure, the Ontario Securities Commission, but it transcends it because of our system of SROs and also other complaint-handling processes.

What we felt we needed to do was for all of the organizations in Ontario that deal with retail investor issues to hear the same things from the same group of retail investors and to be in a position to have a coordinated and coherent approach to retail investor issues.

So we created a joint standing committee of the executives from the Ontario Securities Commission, the IIROC, which is the self-regulatory organization for investment dealers, as well as the MFDA, which is the Mutual Fund Dealers Association. As well, we asked our fourth partner to be OBSI, the ombudsperson for financial sectors. So the four organizations—three of which are national, and the Ontario Securities Commission—got together. Basically, we are not meant to talk to ourselves on issues that we raise ourselves, but rather, we are trying to brainstorm on issues to better facilitate getting input for retail investors. We've already had a consultation with investors on product suitability, which we thought was timely, in the fall. We started with a questionnaire and then we had a conference call with interested persons, and we issued a report on the input from that. We're also moving to the next stage of consultations, which will take a different approach. We're looking at a broad-based survey of some of the issues that are of concern with retail investors. Again, we will try to make that as broad-based and inclusive as possible.

One of the things that you mentioned was—I forget the wording that you used—that the committee was terminated. As David said, the term had expired. One of the things that we are talking about in the context of the joint standing committee is a more effective or the most effective way to have ongoing input from retail investors. We have not closed the door to opening up a replacement

committee for the retail investment community. We are very much aware that the Hockin committee report talked about a consumer panel or an investor panel. I know there has been a lot written about consumer panels. Many of us are quite taken with the idea, and we're exploring whether it can work as an Ontario-only initiative, whether it can work as a securities-only initiative, and, if it's better to get broad-based input from consumers dealing with all financial products, how best to facilitate that.

So we're very open. The very issues that you have raised, Mr. Prue, are exactly the issues that we're talking about in the context of the joint standing committee.

Mr. Michael Prue: I would gladly be persuaded, but the joint standing committee on retail investor issues does not have a single retail investor voice. It is made up of several self-regulating organizations. So you've taken this investment retail committee, the one that existed for two years; you've more or less shoved it aside—or however you want to describe it—you've taken none of the people who were part of that who are part of the retail investment community, and you have set up a new joint committee that does not include them. Then you're saying that you're studying whether or not they should be included. I don't understand an inclusive process, and I don't understand that whole investment community that now suddenly feels left out. Obviously they're angry and obviously they don't think their voice is being heard, and the actions give some considerable credibility to that.

Mr. Lawrence Ritchie: We have not replaced the investor advisory committee with this body, as I mentioned. This body that's in existence, the joint standing committee, is meant to be an organization to facilitate a broader dialogue. If people are angry and feel they've been excluded, then it is absolutely a problem and we have got to roll up our sleeves and rectify that situation. I think that's what we're trying to do. We have to find a better way of getting some input.

So we're open for suggestions. We're talking directly to retail investors about how best to engage them and to find a more permanent mechanism to receive input from that perspective, from the retail investor perspective.

Mr. Michael Prue: Wouldn't it start by just putting one or two people on the joint committee?

Mr. Lawrence Ritchie: The committee is a committee of executives of regulators. The idea of the committee is to hear from the same group of people. One of the things that we can do—and we're doing it through surveys, focus groups, consultations. You're suggesting that people should come in and talk to us and be part of the dialogue. We're trying to find the best means of doing that. But I take your point. That is exactly what we are doing, and if people, as I said, are feeling excluded, then it's clearly something that we have to work hard to remedy and get that input and that feedback as a top priority.

Mr. Michael Prue: Is my time up?

The Chair (Mrs. Julia Munro): No, you have a couple more minutes.

Mr. Michael Prue: Oh, my goodness, I'm doing well, then. How long is this going to take you, then? How long is it going to take before some kind of decision is made that will include this investment community, which was welcomed in, had a two-year stint and was sort of removed? How long is it going to take to get them back in?

Mr. Lawrence Ritchie: I'm going to have to take issue with the fact that they were removed. They went through their two-year term. They got a great deal of very constructive input. By the way—and this predated me—my understanding is that the recruitment process for composition of the committee was a very rigorous recruitment process. So it became apparent that if there was going to be a reappointment in that form, there had to be a real tight examination about what criteria should be used for having that input. So in the face of that regime, that committee process concluding, we decided to bring all four major organizations together and talk about how to broaden the exposure to the retail investor concerns to all four constituent elements. So that's exactly what we're looking at right now.

In terms of the timing, we're working—and I'm turning to my colleague—as we speak towards a further consultation, a further survey that could lead to focus groups on the very issues that we're talking about. The Hockin committee report has come out.

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Remember, we are just a provincial—I don't mean "just"—but we are a securities regulator in the province of Ontario, and retail investor issues transcend provinces. We've seen that many of these issues transcend national borders. We're talking about whether it's more effective to have some kind of national organization with three other partners that are national organizations. We're also looking at specifically whether we should limit the involvement of retail investors to just securities. There are other financial products out there. We are raising these very issues in another organization we're involved in, the Joint Forum, which is a national organization of securities regulators, pension regulators and insurance regulators, to see if that is the most effective mechanism to move towards broader input on a consumer level.

So these are complicated issues. It involves a lot of discussion with various players in the market to, hopefully, get their participation in the process.

Mr. Michael Prue: I need to ask this question, because this is still troubling to me. The investor advisory committee was described by Mr. Wilson as being an essential part of the regulatory process. All of a sudden, it was said it had run its course. Today you're telling me they did a good job?

Mr. Lawrence Ritchie: Yes.

Mr. Michael Prue: But they're not being appointed, and you're going off to study it some more. So I don't understand—

Mr. David Wilson: Let me try to explain a little bit about how the system works, Mr. Prue. The retail investors, when they are touched by the system, are not

directly touched by the Ontario Securities Commission. When retail investors get involved in the system of investing securities, their point of contact is through a registered investment adviser. Registered investment advisers are regulated by IIROC, the self-regulatory organization for investment dealers. To really have a forum where retail investors' issues get to the core of who regulates investment advisers, IIROC has to be in the tent. In the original incarnation of the investment advisory committee, there was no IIROC formally sponsoring it; it was strictly an OSC-sponsored advisory committee. If the advisory committee is going to have its ideas land on fertile soil, it should have the IIROC people listening to it. They regulate the brokers; we don't. We oversee IIROC, but they do the regulation of the investment advisers at the ground level.

Larry has described that the standing committee that he has created includes the self-regulatory organizations. How those groups then maximize the input of investors is what is being studied right now.

The Chair (Mrs. Julia Munro): We'll move on to Mr. Flynn.

Mr. Kevin Daniel Flynn: Thank you for your appearance here today, Mr. Wilson and your staff. Thank you for the information that you were able to provide.

At the last meeting, I asked you to bring me back some information or to send us all some information on where you saw us ranking in the world when it came to the protection of people who decide that they'd like to get into investing. You actually had put us at number 5, or I think the World Bank had put us at number 5—somebody decided we were number 5 in the world.

I suppose, looking at it from the view of an ordinary Canadian who maybe five or 10 years ago probably had some savings and maybe had some investments but maybe didn't even know that the OSC existed, all of a sudden your organization has become a very important part of their life and something that they're very interested in and something that has had a profound impact on their life in some respects.

I'm framing all my questions as—if you look at a retail investor who wants to have confidence in the market and wants to know that somebody is out there looking out for them. When you look at an annual report, for example, and you see that the financial statements are in there and you go through them and then you get into the fluff—into the glossy photos and the bios of the directors and the latest product and all the other stuff that makes up the other portion of the annual report—is there any way, or has any thought ever been given by the OSC, to include other information in a mandatory nature in the annual report that would be of more use to an investor than the president holding the latest weed whacker or the newest toothbrush or something like that; something that actually gave you some information?

I'm thinking specifically, as an example: Why wouldn't it be mandatory to include a basic set of financial ratios? I know that they're not the be-all and the end-all, but it's something that an investor could sink their teeth into a little bit and say: "This means something. This is something that I can start to gauge as to whether this company is profitable, whether its leverage is fine, whether it's liquid."

Why do we have so much fluff in annual reports and limited hard data?

Mr. David Wilson: I have a couple of responses. You're right: Last time, we did talk about Canada's ranking, and we did submit to the clerk the details of the rankings. I can confirm Canada's fifth ranking in the world. I've got that letter here.

The statutory required content of annual reports versus what you characterize as the fluff: We have rules and regulations that have mandatory contents of annual reports. You've asked about broadening it. What I'd like to do is bring Margo Paul, who is director of our corporate finance branch—her branch spends most of its time looking at company filings, annual filings of financial information—and let her give her view as to additional information that might be useful to investors in addition to the formal financial statements and the pictures and those sorts of things that you've characterized.

Mr. Kevin Daniel Flynn: That's great. Perhaps you can answer something else, then, while you're in the seat. I understand that in the fall of 2004 the SEC in the States started to publish its own comments on the filings of companies, on the financial statements, as I understand it. Are we doing the same thing in Ontario?

Mr. David Wilson: Margo, could you handle Mr. Flynn's questions, please?

Ms. Margo Paul: Yes. I'm going to start with your last question. No, we are not publishing our comments. The SEC published their comments as a result of a freedom of information request that they received, and they publish their comments a fair time away from when they actually issue them, and that's—

The Chair (Mrs. Julia Munro): Excuse me. I'm sorry to interrupt you, but just for the purposes of Hansard, could you tell us who you are?

Ms. Margo Paul: Margo Paul. I'm the director of corporate finance at the OSC.

The Chair (Mrs. Julia Munro): Thank you.

Ms. Margo Paul: There's quite a significant time lag between the actual comment period and when the comments go up on their website, and the reason for that is a concern that sometimes we might be asking questions where the tone of our question indicates that there's something wrong when there really isn't something wrong and there's a good explanation for it. We don't want to be in a position where companies and their investors, quite frankly, are hurt by questions that we may ask or the dialogue that's going on until it's pretty much finished and any actions that are to be taken have been taken.

That being said, though, if a company is required to respond in some way to the public by virtue of our reviews—for example, if they have to do a restatement of their financial statements, and we got, I believe, over 100 restatements last year—the company goes on what's

known as our errors and refilings list, which is on our website, and it indicates what the problem was and what the solution was, and the company stays on that list for three years.

To get to your first question, I can talk a little bit about annual reports. The requirements for continuous disclosure, which is the ongoing disclosure that is issued by companies, are set out in our rules. Most of the detailed disclosure is described in the company's annual information form, actually. One of the things that's probably most interesting to investors—two things, actually; one is the financial statements. We feel that they're absolutely central to the investor's understanding of the financial health of the company.

The other area is called management discussion and analysis. MD and A is management's interpretation of their financial results. They talk about their liquidity situation, they talk about future prospects, and we are quite strict about MD and A not being able to be boilerplate. It really has to advise the investor as to how the management feels about the condition and the future prospects of the company. So I think that's an area that is not fluff and should be focused on.

There are parts of annual reports that are not regulated, and you will get the picture of the latest plant and that sort of thing. But there is a lot of really good regulatory information in there.

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As for ratios, it's an interesting point. We know that analysts in particular run a large number of ratios and do a tremendous amount of analysis of the financial information. As far as what the company does, in our view, the actual plain language at the MD and A is probably more helpful to the individual investor, but I take your point. I think it's an interesting idea.

Mr. Kevin Daniel Flynn: There was some news that came out of Europe over the past day or two that I think would be of interest to your organization. What they seemed to be saying was that they plan to take some action in the European Union that would put them out of step with the North American securities regulators and, I guess in the average investor's opinion, would put them in a better position. It seemed to me that the media reports that I've seen on this were saying that a European investor, were this to happen, would be protected more thoroughly than a North American investor. Would you agree with that or not?

Mr. David Wilson: There are many initiatives going on in Europe. Which specific initiative are you referring to?

Mr. Kevin Daniel Flynn: Okay. This is the one where European Central Bank president Jean-Claude Trichet called for a coordinated international framework for regulating hedge funds and credit rating agencies.

Mr. David Wilson: Yes. The hedge funds and credit rating agencies are two important players in the financial crisis that have been getting a lot of attention. The European Union has proposed legislation to regulate hedge funds in Europe, and this recent announcement is that there's an appetite in Europe to regulate hedge funds more closely as well.

There has been a huge amount of discussion about the causes of the financial crisis, and in particular, the roles of these two organizations. Hedge funds and credit rating agencies have occupied a lot of discussion. Larry Ritchie and I were in Washington last Monday at an IOSCO all-day meeting, and we spent two hours at least, maybe a bit more, talking about the regulation of credit rating agencies and the regulation of hedge funds. Over 100 countries are members of IOSCO. But the SEC was at this meeting, as were the European countries that are involved in this proposal or that are part of this proposal. So there's a huge amount of discussion going on.

There will be regulations, as I said in my opening remarks, of credit rating agencies in Canada. We have a regime in place right now for the regulation of hedge fund portfolio managers in Ontario. There are different regulatory regimes in different parts of the world.

I think your general statement that Europe is moving in a direction to give European investors greater protection from the risks of hedge funds is too broad a statement, and we can talk about exactly what the hedge fund regime is in Ontario if you wish. But the broad answer to your question is that there is a lot of thinking going on globally on regulation of rating agencies and hedge funds, and what lessons there are from the financial crisis and what further things should be done to regulate those two big, important groups.

I don't know if that covers your question, Mr. Flynn.

Mr. Kevin Daniel Flynn: I think it does. I'm sure there'll be a variety of opinions on this issue, as you can imagine.

There's been a lot of talk, too, out of the federal government, as well as ourselves—certainly, firm resolve from this government—to see a common securities regulator for our country. There are still a few provinces that don't think that's a good idea. Could you give us your opinion as to why it's a good idea, why Ontario should be part of a common securities regulator, and what that would mean to enhanced protection for the average Ontarian who chooses to invest?

Mr. David Wilson: Sure. In my opening remarks, I quoted from the Hockin report, which was a pretty punchy summary of why Canada could be a modern, efficient capital market attracting capital from around the world. It should have a modern, contemporary securities regulatory structure. It has been said a number of times that no country in the world has a fractured securities regulatory structure like Canada, a small country with 13 securities regulators. It just doesn't make sense on the very surface of it, and there are lots of reasons below the surface why it doesn't make sense as well.

As I said back in December and I'll say again today, we are, at the OSC, very supportive of the proposal for a national securities regulator in Canada. We support the current minister's view on it and we supported Gerry Phillips when he was quite involved in this file before. We've told the Ministry of Finance that we're ready and

willing to do whatever work is required to assist in the analysis of how a transition could occur.

As to how investors might be better protected by a national securities regulator—I think that was the second part of your question—Larry, that's a broad question. Do you have any thoughts on that?

Mr. Lawrence Ritchie: I think, as I tried with my answer to respond to Mr. Prue's question, there's a lot of work that is done currently. I think we do it well, but it's a lot of work to coordinate the efforts and avoid duplication and try to reach a common standard of protection across the country. But we do it through our coordination with other regulators, and obviously any move toward greater harmonization will ease that workload and allow us to devote more attention to the problems at hand.

As I said, we work with the system we have now to do it. We probably could do it more efficiently if we didn't have a fragmented regulatory system.

Mr. David Wilson: At a minimum, things take longer to conclude when you've got to consult with 13 other bodies if you're going to put in a new disclosure regime or a new investor protection plan for certain aspects of the system. So if nothing else, a national regulator would get things done more quickly. As Larry said, the output could also potentially be of a higher quality.

Mr. Kevin Daniel Flynn: When the commission decides that it's going to go to the step of issuing a freeze order, how is that step arrived it? What criteria do you go through to reach that, and what does that actually mean? How does that protect an investor? What does that mean to an average person?

Mr. David Wilson: Larry, you're the lawyer here. Are you comfortable answering Mr. Flynn's question on freeze orders? I have an answer, but you're probably better equipped.

Mr. Lawrence Ritchie: I'm not sure about that. But I can tell you from the adjudicative side because, as you all know, the OSC is an integrated organization, and the commissioners play a role as a policy adviser as well as an adjudicator. Being that we issue the freeze orders, I can tell you what goes into that. What we're looking to when matters are brought to us in terms of freeze orders is protecting the public, protecting investors on a going-forward basis.

We're presented with some evidence that says that certain harm could come to investors if assets aren't frozen, and from that point of view, we exercise our public-interest jurisdiction to make sure that on a going-forward basis, investors are fully protected. So if evidence can come to us and we can issue a freeze order to ensure that assets are not dissipated, then investors are adequately protected, in comparison to an order that is made to punish or to stop certain activities from happening in the future.

Mr. David Wilson: An example is sometimes worth 1,000 words, Mr. Flynn, so just allow me to use an example of a freeze order in a very high profile case of a few years ago. Portus is a name that many people know as a large mutual fund operation; $700 million was raised from the public. Based on a call that we got from the compliance group and a fellow provincial regulator, the Ontario Securities Commission put a freeze order in and froze the assets of Portus based on preliminary evidence, as Larry said, to prevent the assets from being dissipated. Then a fulsome investigation and a long series of steps have happened with Portus, including criminal proceedings.

The net result of the freeze order, though—or it was a contributor to the final result, which was just announced a few weeks ago—is that investors in Portus are going to receive in excess of 92% of their original investments back, because the assets were frozen and protected from dissipation while the investigation and the criminal proceedings in this case ran their course. So it can be a very, very effective tool in protecting investors.

Mr. Lawrence Ritchie: I should say, when we're talking about freeze orders as a broad statement, the freeze orders that come to the Ontario Securities Commission are really freezing assets that are in the hands of the people we regulate, the registrants. The other freeze order, like in the Portus situation, is something where staff proactively go into court and ask the court to make an order to freeze the assets. So there are two—or more than two, probably—mechanisms by which to do the same thing. I think the OSC enforcement staff are very proactive in making sure that the appropriate steps are taken in the particular circumstances.

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Mr. David Wilson: We just happen to have some numbers for freeze orders this year, just for the record. Peggy, could you give those?

Ms. Peggy Dowdall-Logie: Yes. For the 10 months ended January 31, we issued 15 freeze orders totalling approximately $23 million in assets, and 13 interim cease-trade orders, which are similar kinds of tools, affecting 38 corporations and 58 individuals. For us, it's a very productive and useful tool.

Mr. Kevin Daniel Flynn: Thank you. You mentioned registration reform, as I think you referred to it, as a tool that you thought would do some good for some people in these days. Can you explain that a little bit more? Could you expand on that a little bit? What benefit is that for me as an investor?

Mr. David Wilson: Sure. I'll try to make this as understandable as possible because the registration reform project is the largest single project that has ever been undertaken across the Canadian Securities Administrators. It's a big, complex product to streamline and modernize the whole registration system in Canada.

Susan Silma is with us today. She's the director of the compliance and registrant regulation branch. Susan, if you could come to the table; I'll just make a couple of other brief remarks and you can elaborate for Mr. Flynn on what registration reform is, in as simple terms as you can describe it, and how it will benefit investors directly and indirectly.

Ms. Susan Silma: Hello; my name's Susan Silma. I'm the director of the compliance and registrant regulation

branch. We register and oversee the conduct of securities dealers and advisers that investors rely on.

We find that investors are relying increasingly on registered securities dealers and advisers when they're making investment decisions, but the rules governing these registrants are really fragmented and out of date, with 13 different sets of them across the country. Two years ago, we published for comment a new registration regime. This is the so-called registration reform project. Its objectives are to harmonize the many disparate rules across the country on registration that exist today in each province.

We also wanted to streamline the rules to create a more efficient business environment, which results in cost savings for the industry but ultimately for investors as well. We also wanted to modernize the rules to bring them up to international standards for industry conduct and investor protection. One of our objectives was to have the outcomes more clearly set out. Some people call this principles-based regulation. This is a proposal that takes principles-based regulation and balances it with some very specific rules that we believe are necessary on the registration side.

We also wanted to have more clarity around how the registration requirements applied and what our expectations were. These requirements overall will be more comprehensive and will allow us to more effectively regulate participants in the industry. We would have an expanded regime that would capture, for the first time, investment fund managers who manage mutual funds and similar retail products.

We're also trying to improve our oversight of the exempt market. We're doing it in a way that's mindful of the importance of doing all we can to foster capital-raising, particularly for small companies, while still protecting investors.

Securities regulation is always about fostering fair and efficient capital markets, but we're trying very hard to balance our role to provide the platform for capital formation which is going to fuel economic growth but to do all we can to ensure that individual investors are protected.

Mr. David Wilson: That's a very brief tour of registration reform. It's a massive project, but any further questions, Mr. Flynn, feel free.

Mr. Kevin Daniel Flynn: Just moving off that topic and back to a previous one: When I asked a question about financial statements and whether we could have some more information included on a mandatory basis that was meaningful, the answer was that a lot of that information is included in the MD and A. What happens if I make a filing and, as a manager, I put information in the MD and A that you don't agree with or you think is faulty or you think that I'm maybe overstating my case? What steps follow? How is that corrected?

Mr. David Wilson: I'll begin an answer, but again, if you'll allow me to invite Margo Paul to come up—she's the expert in this. She, I am confident, knows exactly what happens when there's something in the MD and A that we think may be misleading or inaccurate or inappropriate for management to say about their financial results.

Ms. Margo Paul: I'm just going to pull back a bit and tell you a little bit about the branch. That will give you a sense of how this all fits together.

The corporate finance branch is responsible for the regulation of public companies other than investment funds. We also oversee mergers and acquisitions transactions. The question you asked focuses on one of our central roles, which is continuous disclosure review. It's the oversight monitoring of the ongoing disclosure of the over 1,100 public companies that have head offices in Ontario. Each year, we look at over 25% of issuers and provide comments to the issuers, engage in dialogue with them and often convince them to correct their disclosure. Our review programs are risk-based, so we select companies and issuers for review based on risk to the market.

Just to get back to MD and A for a moment, we do full reviews of issuers where we look at everything that they file. We also do targeted reviews, and we have done targeted reviews on MD and A, so that is one that I can speak to specifically. A compliance function is usually very cooperative. What we do is we'll have accountants assigned to review the MD and A of the particular company. We look at it; we ask a variety of questions. If we don't think it's strong enough, if we think it's only telling good news and not bad news, if we think that there is information that's missing, there will be a comment letter issued, and the company has a limited period of time to respond to the comment letter. We set deadlines. The company normally responds in writing, and then there will be a discussion. We engage in discussions with the issuer.

Normally, if the deficiency is very severe, we'll ask them to restate. We have had issuers refile their MD and A. It's a corrected MD and A. Again, the company's name goes on our refilings list that I referred to earlier.

Other times, what we're trying to do is just improve the level of disclosure, so we have conversations about how they may want to think about their disclosure in the future. We don't see anything particularly concerning, but it's an ongoing discussion about improvements. If we see something that is very bad, that's when we refer to enforcement.

Mr. David Wilson: Your question was about the consequences of discovering something inappropriate. There are cases where Margo's branch will find something troubling and will refer it to enforcement for investigation and possible sanctions.

Mr. Kevin Daniel Flynn: What form would the sanctions take? Can you compel a company to change its MD and A?

Ms. Margo Paul: You can compel it to refile documents, yes.

Mr. David Wilson: But the sanctions, if it gets past enforcement, can range very widely, depending on the nature of the bad disclosure. It's quite a wide range. Peggy has been involved in a few of these lately.

Ms. Peggy Dowdall-Logie: Yes. The consistency in a proper disclosure is one issue. So if you have a company that has repeatedly engaged in this behaviour, then you're probably going to see greater fines, maybe directors' and officers' bans, that sort of thing.

Mr. Kevin Daniel Flynn: But at the end of the day, even taking into account the risk, I suppose there's a variety of opinion that you can read financial statements and you can read almost what you want into them. At the end of the day, is the average investor in Ontario assured that they're getting accurate information from management in those filings?

Ms. Margo Paul: The chief executive officer and the chief financial officer are required to file a certificate with their financial statements certifying that the financial statements fairly represent the financial condition of the company, unless the statements are audited. So in terms of whether there's a guarantee, it's hard for there ever to be a guarantee against people misbehaving in quite a dramatic way. However, there are a lot of protections built in and we do have a very robust review program to look at financial information.

One of the stats that I have is that in fiscal 2007-08, 67% of our continuous disclosure reviews resulted in disclosure- or accounting-related improvements, so we have a very significant impact on the issuers we review.

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The Chair (Mrs. Julia Munro): Thank you very much. I think we'll move on and catch you in the next round. Ms. MacLeod.

Ms. Lisa MacLeod: Welcome back to committee. I appreciate your taking the time to meet with us today. I have a few questions and I'm going to cede the rest of my time to my colleague Tim Hudak.

Given the dramatic shift in the economy, the restructuring and the settlement of the asset-backed commercial papers and the Hockin report, which made it into Mr. Flaherty's budget, there have been significant changes since we last saw you in December. I'm wondering if you have met since that time with the Minister of Finance in Ontario.

Mr. David Wilson: Yes. I've had one phone call and I think two meetings since we were here last time.

Ms. Lisa MacLeod: Okay. I'd like to ask, again, if you've at all met by invitation to the province's cabinet.

Mr. David Wilson: No. The OSC has not been to the cabinet.

Ms. Lisa MacLeod: Have you ever been?

Mr. David Wilson: No.

Ms. Lisa MacLeod: Okay. Have you had any conversation with the Premier during this time?

Mr. David Wilson: No, I have not.

Ms. Lisa MacLeod: Okay. I appreciate that, and I'll be very forthcoming with why I asked. The economy has shifted quite dramatically. I know that every member of this committee has received concerns in e-mail or by phone call from people right across the country. Given the situation we're now in and the severity of it, I was just curious to see if you had met with the cabinet, as is defined that you're able to do through your MOU.

I just have another quick question to follow up on Mr. Flynn's question about the OSC and how it would impact consumers. I'd rather ask today how it will impact this province: How will it impact the OSC, and what steps do you see this province taking in the next year or two years?

Mr. David Wilson: Just for clarity, Ms. MacLeod, what will what impact, precisely, have you got in mind?

Ms. Lisa MacLeod: The OSC, specifically your organization; your agency that's here today.

Mr. David Wilson: The nature of the economic recession, you mean, or what's—

Ms. Lisa MacLeod: No. I'm actually asking an operational question with respect to how you will operate. What are the next steps? I assume that one of the conversations you would have had with the Minister of Finance in the province of Ontario was to discuss Mr. Flaherty's announcement in the budget in January. As a legislator—and I know there are many Ontarians watching here today—what's going to happen to the OSC?

Mr. David Wilson: Oh, under the federal budget proposal to create a national regulator?

Ms. Lisa MacLeod: Right.

Mr. David Wilson: Okay, now I understand your question. As I said, I've had discussions with the minister a couple of times, and with his officials many times, on the role of the OSC in the transition. As I think was said earlier, the federal budget provides for the creation of a transition office and a budget of $150 million, I believe, to fund the transition process. So what we have communicated to the Ministry of Finance in Ontario is that the OSC will be available to provide our resources and our expertise to work on the new Securities Act. There was a draft tabled with the budget, but it's just a draft. Most observers believe it's a draft that needs quite a lot of work, so we will bring our resources to bear on that process.

I've also expressed to the ministry the desire of the OSC to be involved in and knowledgeable of the transition process. So those are pretty broad reactions, but it's early days. The Hockin report has been out for about a month now, so we haven't heard exactly how the transition is going to unfold.

Ms. Lisa MacLeod: So you have no set timeline? There's no timeline either from the federal government or, at this stage, from the Minister of Finance in Ontario?

Mr. David Wilson: No. In fact, we have a monthly meeting with staff at the Ministry of Finance. We call it our work-in-progress meeting, the WIP meeting. We're having one tomorrow morning for an hour and a half. We have it every month. One of the items on our agenda tomorrow is to discuss the Hockin report, consequences for the OSC and the work that should be undertaken. So your question is very much on live dialogue; it's happening right now.

Ms. Lisa MacLeod: Great. Are there any consequences that you could speak of here today that we might

want to know about? I assume what's going to occur, when Ontario does sign on to this common securities regulator that we will be dealing with in the Legislature through—you're governed by statutes. I'm sure there will be legislation coming forward. While we have you here today, it might help us—

Mr. David Wilson: I've really described the process, and unless my colleagues have other things that can be added to the dialogue we've had with the ministry in the months since the Hockin report was tabled—Peggy, anything to add?

Ms. Peggy Dowdall-Logie: No. As David said, we do have our monthly with Ministry of Finance staff. Throughout the month, in between those meetings, we have other meetings that are going on, but we have had no discussion with respect to the next steps.

Ms. Lisa MacLeod: Okay, thanks. Just quickly, the last time you were here we discussed the fact that you didn't have a chief enforcement agent. Since then, you have hired somebody.

Mr. David Wilson: Yes.

Ms. Lisa MacLeod: I had three questions. One was, why didn't you have someone there? I also asked if you were actively reviewing your enforcement activities and if you think you require additional enforcement power. I'm just wondering: At this time, are you reviewing your enforcement activities with the appointment?

Mr. David Wilson: I'd like to ask both Peggy and Larry to contribute to the answer on this. Peggy was very involved with me in the recruiting of the new head of enforcement and she's had discussions with him, Tom Atkinson, about the positioning of the branch, which is in its strategic direction, which is part of your question. Peggy, why don't you go first in answering Ms. McLeod's question?

Ms. Peggy Dowdall-Logie: I'll just set the context to say that with respect to each of our operating branches, of which there are five, at the beginning of the business planning season we step back to look at the operations of each branch, enforcement being one of them. We are in business planning season, coming to the end of it at this point. That said, the enforcement branch—the structure of it and the operating initiatives of it are being very focused on at this stage, of course, as a result of the hire of a new head of enforcement. So Tom and I have looked at the organizational structure; we've made some changes since his arrival. We're also looking at various initiatives that we have ongoing within the enforcement branch.

I think, when I was last here, we talked about the enforcement branch being divided really into three pieces. One is intake, the other is investigations and the third is litigation. So that overarching umbrella of activity would essentially remain the same. The question that we're focused on now is, what new consideration should we have over, on top of, those three day-to-day operating areas?

Mr. David Wilson: The second part of your question, Ms. McLeod, if I'm correct, was what new enforcement powers would be considered to be useful. Was that the second part of your question?

Ms. Lisa MacLeod: Right.

Mr. David Wilson: Larry, Peggy and I and the other vice-chair, Jim Turner, spent a lot of time talking about what other enforcement powers we might need that would improve our performance. With a new enforcement director on board, that dialogue will be more active than ever, and we would expect to come back to the minister with some suggested changes. The only legislative change that we asked for, which he put through the House, was reciprocal orders. That was passed by the Legislature last year. It means that an order granted in one province in Canada is reciprocated automatically by statute—not automatically. What's the process, Larry, for a reciprocal order being in place?

Mr. Lawrence Ritchie: There's an application that is made and a satisfaction that it should be applied in Ontario.

Mr. David Wilson: It's not quite automatic, but it is close to. That's one thing we've asked for. We may have other things to talk to the minister about after the new fellow gets his feet on the ground.

Ms. Lisa MacLeod: Okay. I appreciate that. So just to be clear, then: With the new common securities regulator, will the OSC in its current capacity cease to exist?

Mr. David Wilson: If the Hockin recommendation for a national regulator is followed through in the form proposed, there will be a new single Canadian body of all participating provinces, so technically the entity of the OSC will be rolled into, in some way, this new body. So, technically it would cease to exist.

Another recommendation in the expert panel report is the separation of the adjudication function from the policy-making function. Every securities commission in Canada, except for Quebec, currently has a twin mandate, as Larry described it, where the adjudication is under the same umbrella but functions separately. So that would be a change too. If Hockin goes forward, there would be a national adjudication function and there would be a national commission that's a separate body, populated by the staff of the OSC and other regulators. But technically, the body would cease to exist, yes.

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Ms. Lisa MacLeod: Just finally, I understand that there have been a lot of changes with respect to the OSC and the discussion of the common securities regulator. One thing you should know is that your memorandum of understanding expired a year ago. It was last signed by Janet Ecker and your predecessor. So we've had two finance ministers since that time, and I think it might not be a bad idea for you to update that.

Now I'll cede my time to Mr. Hudak, but I would be entertained by any comments.

Mr. David Wilson: Just in response to the memorandum of understanding, it did expire in May, I think, of last year. We've had extensive discussions with ministry staff. My latest information from our staff is that the agreement has been reached and it's ready to be brought to Management Board.

Ms. Lisa MacLeod: That's great. Thank you.

The Chair (Mrs. Julia Munro): We'll move to Mr. Hudak.

Mr. Tim Hudak: Thanks, folks, for coming back to the committee.

Just following up on my colleague Ms. MacLeod's question: The MOU is ready to be signed?

Mr. David Wilson: Peggy, what's the latest on the status of the MOU, as far as we know it?

Ms. Peggy Dowdall-Logie: It's staff's understanding that the MOU is ready. It has been approved in form, I guess. So we are waiting to hear, probably tomorrow, from our Ministry of Finance colleagues as to what the next steps will be.

Mr. Tim Hudak: Are there any substantive changes in the MOU from what's currently on the books?

Ms. Peggy Dowdall-Logie: I'm just going to look behind me to one of my colleagues who is, in fact, responsible for managing the MOU process with Ministry of Finance colleagues, to confirm that there is one substantive change. I don't know that it would be considered substantive.

Interjection.

Ms. Peggy Dowdall-Logie: Sorry. This is Tula Alexopoulos.

Mr. David Wilson: Would you mind if we brought her up to the table?

Mr. Tim Hudak: Oh, please bring Tula back. We miss her. She hasn't aged a day since 1995.

The Chair (Mrs. Julia Munro): We would ask you to introduce yourself for Hansard.

Ms. Tula Alexopoulos: Tula Alexopoulos. I am the director of the office of domestic and international affairs at the Ontario Securities Commission.

Thank you very much for the lovely compliment.

As Peggy mentioned, for the past many months, we have been working with the ministry staff, and we have revised the memorandum of understanding. There are some amendments, but for the most part they reflect changes to be consistent with the agency accountability directive. So the OSC complies with that directive, and what we have done is we have pulled provisions from that and have inserted it into the MOU.

Mr. Tim Hudak: Otherwise, it's basically the same as the previous MOU.

Ms. Tula Alexopoulos: Yes.

Mr. Tim Hudak: Super. Tula, thank you very much. It's good to see you again.

Folks, again, thank you for coming back. Last time, I had centred on the issue of lax enforcement at the OSC, and I had spoken about a number of high-profile cases where it seemed like the prosecution took place in the States or in the press before the OSC acted, if it did: Conrad Black, Livent, Bre-X, YBM Magnex, Cowpland at Corel, Rankin, Nortel—a considerable number of cases that have led to, as you know, extensive debate about whether there exists a Canadian discount on investing in this country, and in this province as a result. As my colleague Ms. MacLeod noted, there have been some changes, which I take as positive news in addressing this concern on behalf of investors.

As noted, I commend Finance Minister Flaherty for bringing forth a single national regulator. You did note that what he is doing is separating the adjudicative function from the enforcement side. Your predecessor had Justice Coulter Osborne bring forward a report that had recommended the exact same thing here in Ontario in 2005. So, if it was a good thing to do, why didn't we act here four years ago?

Mr. David Wilson: That's really not a question for me, I don't think, with respect, Mr. Hudak; it's a question for the government. We wouldn't take the initiative on creating a separate tribunal in Ontario; the ministry would.

I can tell you that I had conversations with Minister Phillips, when I first became chair of the OSC, about this. As many of you will know or recollect, he was actively engaged in the cause that Mr. Flaherty has taken up, the creation of a national securities regulator. He put together a panel called the Crawford Panel, and a thing called the Crawford blueprint was produced, supported by Minister Phillips. What he had said to me about the question you've raised about the separation of the adjudication function from the policy-making function of OSC—Minister Phillips's view was, "Let's work toward the creation of a common regulator for Canada, and if the arguments in the creation of that new entity are that it should have a separate adjudicative panel, let's wait until that important event happens rather than restructuring the OSC while we're waiting for that big event." So that's been the thinking, I believe, of the Ministry of Finance on the Osborne report: "Let's wait until the right answer happens," which the Hockin panel has recommended. I believe it's the right answer, and it does contain a proposal to separate the adjudicative function on a national basis from a national basis.

Mr. Tim Hudak: You just said that in your view the best solution is to separate the two.

Mr. David Wilson: No, that's what Hockin said, I think is what I said. It's not a simple issue. There's been lots of debate about it. Larry, I think, has views on it. He's a former litigator who has dealt in front of the panel and in front of the courts, so you understand the difference. It's not a simple question, but Hockin's recommendation is that that structure has merit and should be considered when a national regulator is created. So you'd have a national adjudicative body and a national securities regulator—two national bodies staffed with the best possible people the country can come up with to do those jobs.

Mr. Tim Hudak: But surely, as chair of the OSC, you would have a strong viewpoint if that's the proper way to proceed on behalf of investors.

Mr. David Wilson: No. On that issue, I take instruction from the ministry. I wouldn't take the initiative to restructure the OSC along the lines of the Osborne report without direction from the minister.

Mr. Tim Hudak: But take us back to 2004, when you sat down with then-minister Phillips. What was your advice to him in following that recommendation—

Mr. David Wilson: It was his advice to me. He said, "We're going to work on this common regulator proposal. I've got Purdy Crawford and a bunch of other wise people from across the country to come up with a plan. Pending the outcome of that worthwhile work, the government is not turning its attention to fracturing the OSC into two pieces." So I took that as instructions from him.

Mr. Tim Hudak: Was that the right decision?

Mr. David Wilson: Was it the right decision to—

Mr. Tim Hudak: Not take up Osborne's recommendation and leave the OSC together.

Mr. David Wilson: I can tell you that the OSC functions, I believe, as its CEO, very effectively in its current structure. We are very thorough in our conduct to make sure that the adjudicative function of our commissioners—and I have one sitting here on my right—and the policy-making function of our commissioners are kept very separate and are handled in a hermetically sealed way, if you like. So we manage the process of the existing structure very thoroughly and carefully. Larry, you might want to add to that.

Mr. Lawrence Ritchie: The only thing I want to say for Mr. Hudak's benefit is my impression that the debate about whether to separate the adjudicative function from the policy function is not driven by an investor-protection, tough-enforcement point of view. In fact, I don't want to say it's the opposite, but the Osborne commission report, as you know, was a fairness committee, and the concern was the optics that respondents who are accused of wrongdoing are given the most fair hearing. So it is a complicated issue. The sides of the debate, as I know you're well aware of, are that whether a divided, separate adjudicative function would give the adjudicative panel the opportunity to have the policy expertise that is embedded in an integrated model. So that's the flip side of the equation.

Mr. Tim Hudak: Osborne spoke about—he didn't find bias, if I recall. He felt there was a strong perception of bias, and I think that relates to confidence in the system. It underlines some main concerns that I expressed at committee the last time around. To the Chair, maybe he can characterize. The reaction to Hockin's recommendation in this respect, though, has been largely positive?

Mr. David Wilson: It depends what province you're in.

Mr. Tim Hudak: But specifically on separation of the functions. Those that have commented on that aspect of Hockin.

Mr. David Wilson: Frankly, there hasn't been a lot of conversation about that part of the Hockin report. Most of the conversation has been about how many provinces will participate; will the constitutional challenge of the federal government's ability under the Constitution to bring about this structure be supported if challenged in the Supreme Court? But that's what's been talked about. Maybe you, Larry, have a different view, but I haven't had conversation about the separation.

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Mr. Tim Hudak: No. I'll move on to another issue. If I could ask you, Chair, for research. There were some strong concerns raised by Osborne, more than four years ago now, on perception of bias. Maybe through research we could find out why successive ministers responsible for the OSC didn't act for four or five years.

Biovail: You had fined, similarly for Biovail, a $5-million fine very recently, and similarly an agreement with the SEC for a similar type of settlement, I believe around the same period of time. You were given enhanced powers, I think, back in 2002 or 2003 for stiffer financial penalties which are in use in a case like this. Are the penalty levels that you can assess appropriate or should there be greater scope to enlarge those?

Mr. David Wilson: I'd ask Peggy to add her opinion on this. She was quite involved in the Biovail matter which you cite. But you're correct: The penalties were increased around the time period you mentioned where we had the power to issue or impose penalties of up to $1 million per infraction.

Peggy, do you have anything to add on the Biovail context or just generally on the question that Mr. Hudak has posed?

Ms. Peggy Dowdall-Logie: In response to the question, do we feel that the tool we have is adequate: I think we do feel that the tool we have is adequate with respect to financial penalty, and I think it's because of the way the provision in the statute is worded, where it talks about a maximum fine of $1 million per infraction or occurrence. That allows us to take into consideration a number of factors when identifying, at a staff level, what we believe to be the appropriate fine.

Mr. Tim Hudak: So the fine for Biovail at the end of the day was a $5-million settlement.

Ms. Peggy Dowdall-Logie: That's correct.

Mr. Tim Hudak: What aspect was the fine for infractions?

Mr. David Wilson: Failure to comply.

Mr. Tim Hudak: Was it all for failure to comply or were there costs that were assigned or was it—

Ms. Peggy Dowdall-Logie: There were costs. There were staff costs. So it's a $5-million fine, and then there was, I think, approximately $1.5 million in staff costs over and above that $5 million.

Mr. Tim Hudak: Then, a few weeks later you had the settlement with RIM.

Ms. Peggy Dowdall-Logie: That's correct.

Mr. Tim Hudak: A $68-million settlement. I note, though—unless something has changed, and please correct me if I'm wrong—that there has not been a similar settlement reached with the SEC as of yet.

Mr. David Wilson: There was.

Mr. Tim Hudak: There was? Okay. Was it in a similar line as the OSC?

Mr. David Wilson: February 12, the SEC settlement was reached. Peggy, could you characterize the SEC settlement? It was different, although we were in very, very regular and close dialogue with the SEC as our two

investigations marched forward. To say it was a co-ordinated effort would be going a bit too far, but it was highly co-operative.

Ms. Peggy Dowdall-Logie: Yes. The staff of the OSC's approach with respect to the RIM matter was to find, at a certain point of time in our investigation, that the SEC had their own views, so we shared views, of course, as David said. We were in extremely close contact with the staff of the SEC. Once it was determined that there was an opportunity to coordinate, and what I mean by that is that the OSC staff view was that it was important for us to make the shareholders whole, the SEC were comfortable with that approach. They agreed with that approach, that it was relatively straightforward for the two of us to identify, kind of in a balance sheet approach, which remedies were appropriate to use.

Mr. Tim Hudak: The Financial Post's coverage of the OSC settlement on February 6 is quoting—I believe I recall the article correctly—James Turner, who was the chairman of the panel that agreed to the settlement. Mr. Turner had a quote in the article: "'Our role is not to penalize,' the OSC commissioner said. "'Our role is to identify inappropriate conduct and that it will not be tolerated.'" Is that basically the approach of the OSC?

Mr. David Wilson: Yes. The OSC is intended to be preventive in its activities, not punitive. Therefore, on the big canvas of the regulatory structure, we do not have the power to pursue criminal activity. That's left to the Attorney General's department. Ours is an administrative function. So administrative tribunals typically are more interested in preventing wrong and removing convicted wrongdoers from the marketplace so they can do no further harm. That's kind of the statutory umbrella. Larry, you're the lawyer; have I got that right, as a non-lawyer?

Mr. Lawrence Ritchie: In my view, yes, and it's also a constitutional issue. Penalties are largely associated with criminal law, which is a federal jurisdiction. We act under, as you know, provincial legislation, which is administrative. So when we exercise, as a tribunal, our administrative functions, we have to act with regard to the objectives of the statute, which is to protect, and that has been interpreted in case law as being a proscriptive, preventive jurisdiction as opposed to a penal, remedial jurisdiction.

Mr. Tim Hudak: Is it expected that Hockin's new creation will follow a similar type of approach and you'll have a greater ability to impose sanctions?

Mr. David Wilson: There's a long discussion there. In the Hockin report—which we've all read carefully, of course—he has proposed, as phase two, after the creation of the new national securities commission and his new proposed national tribunal, that the structure of enforcement in this country be radically restructured and that both criminal and adjudicative securities enforcement matters be under the umbrella of the enforcement branch of this new Canadian securities commission. He recognizes that that's an extremely complex proposal, so it's put in an appendix of the report for further study and further consideration. So it's more of a musing that is in the Hockin report rather than a hard recommendation, but that's an area that he has recommended be explored further.

The Chair (Mrs. Julia Munro): Thank you very much. We'll move on to Mr. Prue for the second round.

Mr. Michael Prue: How long is this occasion?

Mr. Tim Hudak: It depends on the quality of the questions.

Mr. Michael Prue: How about the hours?

The Chair (Mrs. Julia Munro): The hours—no. You're at about eight minutes.

Mr. Michael Prue: Eight minutes. Okay.

I just want to get back to the Crawford report back in 2003. The CBC aired a documentary about securities law enforcement, or lack thereof, last November. A victim of securities fraud was interviewed and expressed his frustration with the Investment Industry Regulatory Organization of Canada. It took them a year to only begin looking at his case after he spent $50,000 of his own money collecting evidence.

IIROC is a self-regulating organization. It acts both as a trade association and as a regulator. This fact troubled the individual and he wondered who the organization really protects. The Crawford report made a similar comment, that "we remain concerned about an issue.... Investors must feel that when they have a complaint against an IDA member they receive fair and unbiased treatment from the IDA in addressing their complaint."

To what extent do you believe that Ontario's reliance on SROs contributes to our problems in cracking down on securities law violators?

Mr. David Wilson: Let me answer your question and, with respect, make one correction to what you've just said, Mr. Prue. The Crawford report you're referring to is the five-year committee report. I was on that committee in my former life, so I'm quite familiar with the recommendations of that Crawford report. The Crawford report, after much debate we had around the table, recommended that the Investment Dealers Association, as a self-regulatory organization, shed itself of its trade association activities. That was the recommendation the Crawford report made. I believe it came to this committee, or a similar standing committee, which endorsed that recommendation.

Shortly after, the then-IDA, the Investment Dealers Association, did shed its trade association activities. It fractured itself into two pieces. The IDA kept the old name, the SRO, the pure regulator, and a new organization was created called IIAC, Investment Industry Association of Canada. That organization exists now. So the correction in what you said, I think in your question, Mr. Prue, is that the IDA has shed and is no longer engaged in any activities that a trade association would be engaged in, so it's a pure SRO, but "SRO," of course, means that it's an industry self-regulatory body. It's a regulator, but it's funded by its members. Half of its board members are industry members and half are independent directors, but it no longer does have a trade association function.

Mr. Michael Prue: SROs, though, continue to exist?

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Mr. David Wilson: Yes. There are two important SROs in Canada. It's now called IIROC and MFDA, the mutual fund dealers. There are two large national SROs in Canada.

Mr. Michael Prue: And are there any complaints or difficulties with them as set out in the TV documentary of last November?

Mr. David Wilson: One of the SROs' main responsibilities is the oversight of investment advisers at the retail level, and there are complaints. Some investment advisers do not comply with the suitability requirements, the know-your-product requirements, the know-your-client requirements. So there are issues with investment advisers, and they are part of the responsibility of the SROs. So yes, there have been complaints directed to the SROs themselves, to OBSI and to us about the conduct of some members of the SROs, for sure.

Mr. Michael Prue: How many of those investigations are ongoing by the OSC?

Mr. David Wilson: Do we have any numbers on that? If not, we can certainly get them to you.

The SROs conduct their own investigations, but we work very closely with them on a number of investigatory matters.

Ms. Peggy Dowdall-Logie: For the period ended February 15, 2009, there are 13 investigations under way with respect to abuse of trading practices, but that might touch on what you're talking about and it may not. If you're looking for an actual number, yes—

Mr. David Wilson: We could get you the number. If your question is about investigations into the conduct of investment advisers by the OSC or IIROC, we can get you those numbers if you'd wish. We haven't got them at our fingertips today.

Mr. Michael Prue: Okay, but it is an ongoing problem with investor complaints and people upset about the process and thinking that the system isn't working. It's ongoing, and that doesn't stop.

Mr. David Wilson: There are 28,000 investment advisers who are members of the IDA and about 75,000 investment advisers who are members of the MFDA, so that's 110,000 registered investment advisers who deal every day with retail investors in this country. Those are national numbers. Among those 110,000 investment advisers, I have no doubt that some of them, a small minority, do not give proper advice to their clients in line with their suitability obligations or their obligations to know their products or know their clients' needs. That's where the complaints arise.

Do you have anything to add to that, Larry? You're quite involved in this area too.

Mr. Lawrence Ritchie: One of the things that the registration reform project that was referred to by Mr. Flynn—one of the major components is to have a consistent standard of registrant adviser conduct, whether they're members of each individual SRO or not. One of the things that registration reform is working on is a consistent, unified complaint-handling process as well as a process of minimum standards in terms of what's required when opening an account and dealing with your customer. So that's one of the ways that the OSC is helping, along with its other CSA partners, working with the SROs to have a consistent standard.

Is there work to be done? Absolutely. The point that we're trying to make is that we are doing it.

Mr. Michael Prue: Do you have any kind of licensing regime? If you get complaints and if you find the complaints to be justified, do you either remove people or make them take courses or what do you do? Or do they just go back to business as usual?

Mr. David Wilson: We could ask one of our experts to come up and answer that. It's a very good question, and let's get the best possible expert at the table to answer it. Susan Silma, would you mind coming back up to the table?

Do you know the question that was posed, as you were sitting in row 1 back there?

Ms. Susan Silma: Yes. "Is there anything we can do from a licensing perspective?"

Mr. Michael Prue: Yes. If you find someone who has not acted in the best interests of his or her client, has been found to be negligent or wilfully doing wrong things, do they just go back to work?

Ms. Susan Silma: Hopefully not. One of the things that we can do is impose what are called terms and conditions on their licensing. As a result, that would limit the activities or, depending on what the issue was, they would have to report to us on a more frequent basis and make us comfortable that they were, in fact, improving their standards and being responsive to their clients' needs before we would let them go away without our increased supervision. If that doesn't work, we actually have kicked cases like this over to the enforcement area, and in some cases it has resulted in a ban of that individual from the securities industry.

Mr. Michael Prue: In Toronto, if you go to a restaurant, on the front window you'll see the green thing saying that everything's checked out and what happened the last time and whether there's been any complaints and whether there's been any action in the last year. Do you make these investment advisers who are under complaint or who have been found to be negligent post-anything so that a would-be investor coming in would know that there have been complaints in the past?

Ms. Susan Silma: Actually, it hadn't occurred to me to put the green symbol on it, but I think that's an interesting idea. What we do have on our website is a listing if someone is under terms and conditions or under some kind of review. Peggy just pointed out to me that we in fact have terms and conditions attached to 742 firms and 1,020 individuals, just for the most recent six months. This does happen fairly frequently, and results in increased monitoring of those people.

Mr. Michael Prue: That seems to be an awful lot of firms and people in the last six months. Is that what you said—six months?

Ms. Susan Silma: Yes, it is.

Mr. David Wilson: We're very busy at the OSC.

Mr. Michael Prue: I understand you're busy, but it seems to me that that's an awful lot of people who are unhappy with the services they're getting.

Ms. Susan Silma: Just to be clear, not all of those are responding to someone's complaints about how they've been treated. Not all of those would be suitability issues or if someone didn't give me the right advice. Some of that would be something as simple as someone who didn't file their financial statements on time. Again, we take these obligations pretty seriously, so that's probably a very broad array of terms and conditions that are attached.

The Vice-Chair (Ms. Lisa MacLeod): Okay, thank you very much. We appreciate the NDP's opportunity, and now we'll go to the Liberal Party. Mrs. Sandals?

Mrs. Liz Sandals: Yes, thank you. I wonder if we could go back to the conversation that you were having with Mr. Hudak, where you were exploring the fact that criminal prosecution would be with the AG. I just wonder if you could comment on whether, if there were to be one national securities commission and given that the federal law does sit at that level, it would in fact facilitate the pursuit when you get to the level of criminal activity.

Mr. David Wilson: The Hockin committee, in its deliberations—it was out about nine months having consultations. One of the papers that it had submitted, and it's on the website of the Hockin expert panel, was by a professor at Osgoode, Poonam Puri, and she explored the separation from Canada's criminal justice system of securities criminal activity and putting it together with the administrative. That's really your question. That paper was studied pretty carefully by a number of us, including Larry Ritchie. It was clearly considered by the Hockin panel.

In their final report, they did not recommend the structure that Poonam Puri had outlined in that research paper of hers. They modified it somewhat and proposed that it be considered at a later time. It had some interesting elements, is essentially what it said.

You've asked a question about a very complex area of reordering criminal justice in Canada, reorganizing it. It's federal authority with delegation to the provinces. Larry knows a lot more about it than I do. Could you have a more pointed response to Mrs. Sandals's question, Larry?

Mr. Lawrence Ritchie: I'm sorry I missed all of your question, but is the question if—

Mrs. Liz Sandals: I was wondering, if there was one national regulator, if this would in any way facilitate criminal prosecutions when there is a suspicion that there has been criminal wrongdoing as opposed to administrative wrongdoing.

Mr. Lawrence Ritchie: Again, this is just speculation because it's something that may happen in the future. If you think of the world now, where you have 13 securities regulators, each of the provinces have Attorneys General, you have variations in law, and then you have the criminal law system, I think that the rationale underlying the Hockin recommendations on the enforcement side is that the more consolidation, the easier it is to facilitate coordination and co-operation among the branches. We mentioned before that we do an awful lot of work in terms of co-operating with various regulators across the jurisdictions and different agencies including the offices of Attorneys General, but if there are fewer parties, then perhaps it would be more efficient. From that point of view, the Hockin committee clearly says that greater consolidation would make it more efficient.

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Mrs. Liz Sandals: I just wondered if there was any possibility that not only would there be greater efficiency, but there might be an opportunity to build an investigative body with greater expertise in actually investigating criminal matters related to securities. I wouldn't begin to have a clue where to start, and I'm sure it's often the case with law enforcement agencies that they don't have a clue where to start in what are very often matters that are beyond your average layperson.

Mr. David Wilson: The attempt to do what you're proposing occurred after the US scandals of Enron and WorldCom. The federal government stepped up and created a new police force called IMETs, focusing on exactly what you're describing: securities fraud and the criminal elements of securities fraud. There has been a lot of controversy about the effectiveness of the new federal government IMETs. They recently had a report done, and they're reforming some of their activities, and there are signs that there may be some greater momentum in the IMETs initiative. So that piece of the criminal investigation puzzle that you referred to is a work in progress, I think it would be fair to say.

Mrs. Liz Sandals: So the jury is out on that discussion at this point.

In your opening remarks related to the asset-backed commercial paper issue, you mentioned the need to have a closer look at credit rating agencies and the role that they play and more oversight of credit rating agencies. I wonder if you could, first of all, give us some rationale for why that seems to be necessary in these circumstances, and then secondly, what you would see that tighter control and oversight looking like.

Mr. David Wilson: The credit rating agencies were a part of the financial crisis we're in, not just in Canada but around the world. They rated a number of structured instruments, and with the benefit of hindsight, the ratings were erroneous. So there's a huge spotlight on the rating agencies, their function, their conflicts, how they conduct themselves, how useful their ratings are, should they be referred to in legislation, and so on. I guess it was Mr. Flynn who said earlier that the Europeans are proposing legislation dealing with rating agencies, almost all of which are based in either the US or Canada. So, yes, there's a lot of focus on rating agencies.

In our consultation paper, we propose some ideas to give much greater regulatory oversight of rating agencies and their compliance with a code of conduct that would

eliminate their conflicts and make sure that they were not unduly influenced by who was paying for the ratings.

Larry, you've done a bit of thinking about this as well. Do you want to add to my answer?

Mr. Lawrence Ritchie: Sure. The one point that I wanted to emphasize, and I think David did in his opening comments, is that this is an international issue as well. All of the securities regulators across the world are looking at the role of credit rating agencies. Certainly, Ontario and other jurisdictions in Canada do not want to go it alone. Like anything else, good regulation is co-ordinated regulation. So we're very much involved in IOSCO, the international securities commission, and their approach to credit rating agencies. One of the things that they did last summer, I think, was come out with a code of conduct for credit rating agencies. One of the things that the proposed regulation-enhanced proposals in the ABCP working presentation—was to sort of loop into that process and to have a requirement where credit rating agencies in this country would be required to comply, or explain why they're not complying, with the IOSCO code of conduct, which, as David said, would go through the process of explaining conflicts of interest, to explaining transparency in why they're taking certain steps and certain—

Mrs. Liz Sandals: And this is something where there's an international template that we would be able to use here in Ontario.

Mr. Lawrence Ritchie: Exactly. That's being dealt with right now. That template is something that's the subject of a lot of international work in advance of the G20 meetings.

Mrs. Liz Sandals: So, again, a work in progress.

Mr. Lawrence Ritchie: Right.

The Vice-Chair (Ms. Lisa MacLeod): Thank you very much. We'll now move to the official opposition.

Mr. Tim Hudak: Just to finalize the conversation we're having—I think you described putting in an appendix about whether to bring in the criminal aspect of a charge. Do you care, as chair, to offer an opinion? Do you think that's the proper place for a national regulator to go?

Mr. David Wilson: To combine criminal enforcement and administrative enforcement in the new national regulator, is that the question?

Mr. Tim Hudak: Yes.

Mr. David Wilson: It's a complicated question. Larry and I have had debates about this. To take each province's Attorney General's department and take their responsibility for the criminal activity in securities only and pull it out to put it in a securities regulator—it's not a crazy idea, but it's got a lot of complications in terms of execution and politics. That would be my fast take on it. Larry?

Mr. Lawrence Ritchie: Well, that's precisely my view. It's very complicated. It's worth studying. There are different functions and terms. We talked about the different roles of an administrative body in terms of prevention and protecting investors as opposed to the criminal side of things, penalizing and general deterrents. It's very complicated when you merge those two quite distinct functions into one body. My own view is that there should be an incremental approach as opposed to just dropping a box down.

Mr. Tim Hudak: I appreciate the complexity and I appreciate the way you've described it, but investors would react positively to that, would they not? There's a perception—I think, a reality—that white collar crimes are far too often simply a slap on the wrist for the amount of value that's been defrauded from retail investors. Wouldn't investors' groups react quite strongly to this?

Mr. David Wilson: Yes, I made a speech a month or so ago about that very point, that there should be recognition—I was really speaking to the criminal justice system—of the harm done by white collar crime to people's health, their lifestyle, their mental health, their physical health. The impacts of white collar crime can be just as severe on citizens as violent crime, but traditionally the criminal justice system hasn't imposed the same kind of resourcing and sanctions on that kind of conduct. Anyway, I'm just repeating what I said in a speech not too long ago. I think there should be a positive reaction to greater emphasis on the pursuit of criminal activity in the white collar area, because it has a huge impact on people when they are defrauded of their savings. It's a tragic, tragic thing.

Mr. Tim Hudak: A serious failure in our criminal justice system.

Mr. David Wilson: If it could be made better, every attempt should be made to make it better, because these are serious crimes.

Mr. Tim Hudak: One of the concerns expressed as well about the OSC is the rapid rate of turnover in folks that are employed, particularly on the prosecution side—

Mr. David Wilson: At the OSC?

Mr. Tim Hudak: At the OSC. Sorry if I wasn't clear. Is that accurate?

Mr. David Wilson: Peggy, I don't know if you have at your fingertips our—I know I can give our overall turnover numbers, and Peggy may have the enforcement numbers. The turnover at the OSC in the last little while has been quite low: 4% annual turnover; very low.

Ms. Peggy Dowdall-Logie: It's under 4%, actually. In the enforcement area, I'm just going to turn around to look at another colleague, but I don't believe it's anywhere close—I don't believe it's above 5%.

Mr. Tim Hudak: This is an improvement?

Ms. Peggy Dowdall-Logie: It really has not shifted over the course of about the last three years. I think the highest rate of turnover that we've had in three years is—

Mr. Ken Gibson: About 8%.

The Vice-Chair (Ms. Lisa MacLeod): Could you state your name for the record, please.

Mr. Ken Gibson: Yes, hi. I'm Ken Gibson. I'm the director of corporate services at the OSC.

We have a balanced scorecard, and one of our things in that is to have a measure that we want our turnover to be less than a certain amount. The target is to have it less

than 8%; it hasn't been close to that for quite some time. Right now, as we've said, it's running about 4%. That means, on average, people are staying with us 25 years.

Mr. Tim Hudak: Concerns have been expressed to us that investigators and prosecutors have rapid turnover. You say it's not historic. Is it at senior levels, or are you saying it's a concern without foundation?

Ms. Peggy Dowdall-Logie: It just has not been an issue at the OSC for certainly the period that I'm aware of, that I've been overseeing the area. That's about two and a half years. It just hasn't been an issue.

Mr. Tim Hudak: Okay. You mentioned earlier on that you brought Tom Atkinson on—a former assistant crown with TSX enforcement experience. What particular changes do you see Mr. Atkinson bringing to his job?

Mr. David Wilson: Do you want to take a shot at that, Peggy?

Mr. Tim Hudak: Let me ask it a different way. What goals have you set? If we see you again in a couple of years' time, what difference will Atkinson have made?

Laughter.

Mr. David Wilson: Excuse me. I'm laughing because before we came over here and had lunch, Peggy and I met with Tom Atkinson. He's been around for two weeks, and he said, "I want to meet with you guys in the next couple of weeks so we can sit down and set some goals and talk about what you guys expect of me, because it's time to put it down on paper." That's why I'm chuckling at your question.

Mr. Tim Hudak: Perfect.

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Ms. Peggy Dowdall-Logie: Right. As David just said, Tom is on day 11 with us, so as he has said, he has spent the last 10 days really walking around, meeting people. There are just under 140 people in the enforcement branch. He's got a team of six senior managers. So he has been focused on that for the last 10 days. He's also getting up to speed on the various cases that we have. As we are talking, we are focusing on getting Tom into the branch and aware of its structure.

Of course, the next step for anyone coming into a role like that is sitting down with David and myself and saying, "Okay, so what are we going to be looking at over the course of the next 12 months? Over and above what we normally focus on"—which I'd mentioned earlier, which is intake investigations litigation—"what are the special projects, special initiatives?"

Mr. Tim Hudak: So targets haven't been set as of yet.

Ms. Peggy Dowdall-Logie: Not yet.

Mr. Tim Hudak: Pretty good milestones.

The Vice-Chair (Ms. Lisa MacLeod): Thank you very much, Mr. Wilson and your colleagues. The committee appreciates your attendance here today.

PAMELA REEVE

The Vice-Chair (Ms. Lisa MacLeod): Next we have stakeholder presentations. Pamela J. Reeve is invited to speak to the committee.

Welcome to the Standing Committee on Government Agencies. You will have 30 minutes in which you are able to make a statement. With the remaining time, committee members will be able to ask questions for your response. For the purpose of Hansard I would ask you to identify yourself. You may begin.

Dr. Pamela Reeve: My name is Pamela Reeve. I'm an associate professor of philosophy at St. Augustine's Seminary, a member college of the Toronto School of Theology.

I'm pleased to have the opportunity to address the Standing Committee on Government Agencies in the context of your review of the Ontario Securities Commission. I've been engaged in pro bono investor advocacy for the past four and a half years. This involvement arose from my personal experience of a financial setback at the time of the last downturn in the markets. This was followed by a four-year complaint process. During this time and subsequently, I made several submissions on retail investor issues to government and regulatory bodies, including most recently the expert panel on securities regulation.

I'm a member of the advisory committee of the Small Investor Protection Association and previously was a member of the OSC's investor advisory committee. This committee met from January 2006 to December 2007.

The two main issues that I would like to focus on in my comments today will be, first of all, the OSC's investor advisory committee, which was disbanded in December 2007, and second of all, oversight and accountability issues relating to the OSC itself. I noted that one aspect of the mandate of this standing committee involves consideration of how to improve the accountability of agencies.

There's a need for retail investors to have their interests represented by a dedicated body or panel. Investor protection is, after all, a main focus of securities regulation. This is expressly stated in the mandate of the OSC: "To provide protection to investors from unfair, improper or fraudulent practices."

One problem that arises here, however, concerns the representation of the interests of retail investors in the formation of regulatory policy which impacts their interests. How do retail investors make their needs, concerns, views, known to securities regulators? One venue where this occurred was the OSC investor town hall, which was held in May 2005. This was attended by about 400 people. Following this event, it was decided that there needed to be a mechanism for the commission to receive input from investors on a regular basis. The OSC decided to establish an investor advisory committee as one of its existing consultative committees, and I believe there were about 13 of these committees at the time.

The rationale for these committees is framed as follows at the OSC website: "We believe that effective communications with the stakeholders who are affected by our actions is an essential part of the regulatory process, and helps us ensure we achieve the appropriate balance between protecting investors and fostering efficient

capital markets." One purpose of the consultative committees is "to improve our understanding of the concerns and issues faced by a particular stakeholder group on an ongoing basis."

There was a lot of public interest in serving on the committee; the OSC received over 140 applications for the 10 positions. The committee members who were selected had a very significant depth of experience and expertise. They included a lawyer, a chartered financial analyst, a member of the press who writes on personal finance issues, a forensic financial auditor, a law professor with expertise in securities regulation and a member of the Consumer Council of Canada and so on.

In its announcement of the committee, the OSC recognized the importance of consulting with investors. In the press release announcing the committee members, the OSC chair, David Wilson, stated, "We believe that direct investor input is critical to the health of Ontario's capital markets and we are looking to the IAC to play a key role in our efforts to address issues of importance to retail investors."

In January 2006, at a quarterly meeting of the Investment Dealers Association, Mr. Wilson introduced the IAC with the comment, "We're making it a priority to bring retail investors inside the circle of policy development."

I want to mention at this point in time that there was a comment previously, I believe by Mr. Wilson, that one of the inherent deficiencies of this committee related to the fact that it was strictly sponsored by the OSC, and are the IIROC people listening, and so on. In fact, there was a plan from the beginning to bring observers and participants from these organizations to be present at IAC meetings. I would estimate that 40% to 50% of the meetings we held were attended by members from the IDA, the MFDA and OBSI. Mr. Wilson stated in January 2006, "As I mentioned, partnership is crucial, which is why both the IDA and the Mutual Fund Dealers Association have been invited to send observers to future committee meetings."

The committee met five times a year for about half a day and we discussed a wide range of topics, including the client/adviser relationship, the complaint process, restitution, disclosure and transparency issues. We also had the opportunity to review and comment on material that the OSC was preparing as part of its regulatory initiatives—for example, the point-of-sale document. The 10 people on the committee devoted a great deal of time, energy and attention to considering issues which had a direct bearing on the needs, interests and concerns of retail investors.

My sense at the end of the two-year term was not that the committee had completed its work, because we had a lot of issues that were still outstanding that potentially could have been addressed in the following year or two by the committee. Nevertheless, following the final meeting in December 2007, the committee members received a letter thanking us for our work. There was, however, no mention in the letter of whether the committee would be continued or not. The next we heard about the committee occurred in a trade publication, Investment Executive, in May 2008, where the comment was made that the investor advisory committee had "run its course." I believe Mr. Prue quoted that passage.

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This was the only public comment that the OSC ever made about the committee following the final meeting in December. There has been significant concern since then about the abrupt termination of the committee—although I know the OSC doesn't want to use that language of "termination." Nevertheless, as I said before, there wasn't a sense that we had come to the end of our discussion about the issues that we had identified as being relevant to retail investor concerns.

One thing that was notably lacking at the end of the two-year term was any kind of self-report or self-assessment, which is a standard institutional practice if you are ending a term in a committee of that nature. This was especially needed in this case because the committee had just completed its initial two-year term. I think it was problematic that the committee was just dropped, in a way, without an effort having been made to assess its effectiveness or consider how it could have been improved.

In fact, there was guidance that could have been of value in this respect. In 2006, Professor Julia Black of the London School of Economics published her study, Involving Consumers in Securities Regulation. This report was part of the task force on modernizing securities regulation in Canada. It compared different consultative frameworks in the UK, Australia and Canada. Professor Black reviewed the IAC and made specific recommendations which could have been used to improve its operation. In fact, I understand that the OSC studied the UK's Financial Services Consumer Panel prior to setting up the IAC and even interviewed members of the panel.

Nevertheless, the investor advisory committee was a rather weak version of the UK model: The allotment of time for meetings was much less than the Financial Services Consumer Panel in the UK; there was no research budget, unlike both the UK and Australia; there was never a public report, although one was promised at one point; and there was no way for the committee to receive input from the investing public. There were deficiencies with the committee in the way it was set up, but these could have been rectified.

Following my experience with the committee and its abandonment by the OSC, I made a submission to the expert panel on securities regulation, recommending that they consider the establishment of an investor consultation body modelled on the UK consumer panel as part of a new Canadian securities regulator. As it happens, it was decided that this recommendation should be adopted.

I'd like to read a passage from the final report of the Hockin panel relating to this committee: "Our consultation process revealed that investors are not always adequately engaged and consulted in the development of securities regulatory policy. Securities commissions in

Canada provide fewer opportunities for investor advocacy and engagement than other key capital markets jurisdictions. This is to the detriment of securities regulation in Canada and diminishes public confidence in regulatory accountability, integrity and efficiency." The outcome of the expert panel study of this particular issue is that they felt that a Canadian securities regulator should include an independent investor advisory panel.

The problem in the present case is that it could take some time, perhaps several years, before a national securities regulator is established. However, in the meantime, I believe that a consultative body modelled along the lines of the UK Financial Services Consumer Panel should be implemented in Ontario or should be considered for implementation as a forum where issues of concern to retail investors may be discussed with securities regulators.

I would describe this committee or panel as a necessary structural remedy for the present imbalance resulting from the fact that retail investor interests are not represented either on the commission itself—at least not by a dedicated member of the commission who is specifically there to represent investor interests—or by a dedicated consultative committee. The OSC currently has eight consultative committees, and all of these committees consist of lawyers and representatives from the industry and listed issuers; there is no representation from retail investors on any of these committees.

Another issue relates to the Legislature's oversight of the OSC. As I said before, the reason why I am raising this issue is because it does say, in the mandate of this committee, that consideration will be given to improving the accountability of agencies. In fact, there seems to be an outstanding issue in this regard. You may be aware that in 2004, the all-party Standing Committee on Finance and Economic Affairs conducted its five-year review of the Securities Act. Public hearings were held in August and the committee published its report with 14 recommendations in October. Recommendation 4 of this report considers oversight and accountability issues relating to the Ontario Securities Commission.

The preceding Crawford report had compared the Ontario Legislature's oversight of the OSC with the oversight of the Securities and Exchange Commission in the US and had noted a significant deficiency in the Canadian context. Because the Securities and Exchange Commission in the US has the oversight of two congressional committees, one in the House of Representatives and the other in the Senate, they receive substantial support from the Government Accountability Office. In addition, the Securities and Exchange Commission has a dedicated Office of the Inspector General. This office makes semi-annual reports to Congress on SEC operations and programs.

In contrast, the OSC has no internal oversight by a body equivalent to the OIG. It lacks adequate oversight by the Ontario Legislature. This was according to a report of the Standing Committee on Finance and Economic Affairs four years ago, which endorsed the view of former OSC commissioner Glorianne Stromberg in her testimony to the committee. Ms. Stromberg recommended that, as a first step towards providing better oversight of the commission and the other financial regulators for which the OSC is responsible, the Legislature should "establish a standing committee with a mandate to consider not only the five-year review reports, but also the effectiveness of securities laws, the operations of the commission, and financial services generally."

In its formal recommendation, the standing committee acknowledged that "the status quo is unacceptable" and recommended, as an initial step towards strengthening the oversight of the OSC, that, "Any new oversight mechanism should include a requirement that the annual reports of the commission be automatically referred to a committee of the Legislature and should ensure that the committee has the ability to compel witnesses to appear before it, including the responsible minister."

Nevertheless, it appears that this recommendation has not been implemented. In December 2005, there was an amendment to section 3.10 of the Securities Act mandating the empowerment of a standing or select committee of the Legislature to review the OSC's annual report and to report the committee's opinions and recommendations to the Legislature. Nevertheless, to the best of my knowledge, that hasn't been implemented.

So it seems there are two issues here: the need to reestablish a properly resourced investor advisory panel and the creation of a standing or select committee of the Legislature to review the OSC's annual report. If one goes back to the original recommendation, the standing committee would also consider the effectiveness of securities laws and the operation of the commission.

I believe it would be of significant value if the reconstituted investor advisory panel could meet from time to time with the legislative standing committee to discuss investor protection issues directly with the committee members. One thing that led me to think of this was that there was a query brought forward at the previous session in December by Mr. Flynn, where he states: "Where the rubber hits the road for the average investor in Canada, it's probably the relationship that they have with their own financial adviser. That's probably what they see this is all about."

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I very much appreciated that perspective because, in fact, the investor advisory committee did have a dedicated session specifically focused on that topic—the client-adviser relationship. I recall that we touched on issues such as: Are the current proficiency standards adequate to protect client assets from undue depletion? Are the rules being followed and adequately enforced with regard to the management of conflict of interest? There are many issues such as those that the committee, with its members with in-depth experience of retail-investor-dealing-with-retail-investor issues, the forensic financial auditor, the lawyer and so on, were acutely aware of that are occurring in the context of the client-adviser relationship. I think it would be very interesting if

there was a structural upgrading of the Legislature's oversight of the OSC involving a standing committee as well as a reconstituted, strengthened investor advisory panel, if at some point in time this strengthened legislative oversight of the OSC might be in a position to call this panel to attest to current issues and problems that are affecting retail investors and the kinds of issues involved not only with investments but also with the complaint process and the many systemic issues that affect large numbers of retail investors, especially in the current markets.

I'd like to thank you for your time and attention. I'd be happy to answer any questions you might have.

The Chair (Mrs. Julia Munro): We have almost run out of time, but I'm going to ask for one quick question for each caucus. We'll begin with Mr. Flynn.

Mr. Kevin Daniel Flynn: Thank you for the presentation. It was very thorough.

You were talking about the UK consumer panel and talking about the investor advisory panel. As you were talking, I was thinking, "What sort of person would sit on that panel?" What do you see as being the skill sets of that particular person, who, I think you were trying to say, would represent the interests of the average person?

Dr. Pamela Reeve: As I say, there were 140 applications to sit on the original OSC investor advisory committee. I think that many of the individuals who were chosen had past experience in representing investor interests. For example, there was a litigator. Obviously he represented the interests of his clients, but he also made a very interesting submission to the Standing Committee on Finance and Economic Affairs in August 2004 regarding his perspective on the level of proficiency of investment advisers, which he considered to be seriously inadequate. That kind of professional background is very relevant and helpful in this kind of committee structure.

Mr. Kevin Daniel Flynn: So you'd need a combination of someone who's a layperson but has a technical background, has the interest and has the time?

Dr. Pamela Reeve: In the consumer panel in the UK, they do receive a salary. This kind of engagement usually would require a fair time commitment. I think they meet in the UK at least one day a month, if not more.

Mr. Kevin Daniel Flynn: Thank you.

The Chair (Mrs. Julia Munro): We'll move on to Mr. Hudak.

Mr. Tim Hudak: Thank you very much for the presentation. There was a lot of detail.

Given the recent move of the federal government to bring forward a national securities regulator, how many of your recommendations do you think would still apply to the OSC or to the national level? Secondly, you were in the audience during some of the responses with respect to the pursuit of white-collar crime. How can we strengthen that?

Dr. Pamela Reeve: I've seen a proposal for strengthening the intake process on white-collar crime. I believe that is going to be discussed later today by Ms. Diane Urquhart.

The proposal has been brought forward by former Detective Sergeant Gary Logan of the Metro Toronto police force. I think that his proposal is an important initiative that could go a long way toward strengthening white-collar crime enforcement.

Mr. Tim Hudak: Thank you.

The Chair (Mrs. Julia Munro): Mr. Prue?

Mr. Michael Prue: You were in the audience when I was questioning members of the OSC about the 13 members on the panel and the advertisement and nobody coming forward from the investor community. Do you have any comment on what they said? Because I found it was rather exclusionary, if I might put it in those words.

Dr. Pamela Reeve: Sorry, the 13 members—

Mr. Michael Prue: Let me get it exactly right. Every one of the OSC's existing 13 commissioners has the experience for which they're advertising. I asked why they couldn't have a retail investor representative, and they started talking about the necessity of having a set of job skills that were, perhaps, exclusionary of everyone but the group they already had, and I—

Dr. Pamela Reeve: It's interesting that you should ask that, because I did see the ad, and I've actually been thinking about that somewhat more theoretically, in terms of what's called "corporatism." Corporatism occurs where the members of a regulated industry are in some sense incorporated into the regulator. The argument that is often made in that particular case is that in order to regulate the industry, you need to have people who have certain skill sets and a background from that particular industry.

I think there's an important need for a perspective on retail investor issues. There's a sensitivity to those issues. The discernment of conflict of interest, which I think is an important skill set, would make an important contribution to the commission. So I certainly believe that having at least one member on the commission staff as a retail investor, someone who has knowledge of financial matters—it would have to be someone who is aware of the kinds of issues that the OSC deals with and has a certain skill to think about those issues, to reason about them and make judgments about them. That's necessary as well. I certainly think there should be someone there representing the retail investor.

Mr. Michael Prue: Thank you.

The Chair (Mrs. Julia Munro): Thank you very much for being here today.

CANADIAN COALITION FOR GOOD GOVERNANCE

The Chair (Mrs. Julia Munro): I'd like to call now on the Canadian Coalition for Good Governance. Stephen Griggs is the executive director.

Good afternoon, and welcome to the committee.

Mr. Stephen Griggs: Good afternoon, and thank you for having me. I appreciate the opportunity to speak to you.

The Chair (Mrs. Julia Munro): I know from your observations that you know we have 30 minutes in total.

Mr. Stephen Griggs: Yes.

The Chair (Mrs. Julia Munro): The time will be divided among the committee members. You are free to then make your submission and we'll use the time left.

Mr. Stephen Griggs: All right. Thank you very much. You should have in front of you a brief presentation on the views of the Canadian Coalition for Good Governance.

First, you may not be familiar with the coalition necessarily. The coalition was founded just about six years ago by Canada's largest institutional investors—the buy side. We represent over 40 of Canada's largest institutional money managers, including most major pension plans in Canada, many of the largest mutual fund groups, as well as institutional managers. Together, our members manage—at least, at last public count—$1.4 trillion, which represents a very large percentage of the invested assets of Canadians. To give you a sense of the scale of our members, on average our members control between 25% and 45% of the common equity of every major public company in this country.

The foundation of the coalition is our mission, which is to improve the governance of Canadian public companies, to ensure that they're run in the best interests of shareholders as opposed to other stakeholders, and also to improve the regulatory environment in which they operate, which is the purpose for me being here today.

Moving on to slide 3, what I'd like to do is focus on two issues that are before the Ontario Securities Commission today. The first is the regulatory changes that are needed to create good governance and shareholder democracy in Ontario and Canada. Then the second is to touch briefly, because it's a very complex issue, on the credit crisis and the regulatory concerns that are coming out of that and whether we are in fact regulating the right areas and the right market participants.

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Moving to slide 4: "Good governance of public companies" is a very standard term that is bandied around. What we believe is very important is that directors understand their roles. Directors are the cornerstone of good governance of public companies. Shareholders are not there to run the business. Shareholders are not generally there to, at least in public companies, identify and debate corporate strategy, hire senior executives—or fire them if they don't do a good job. Shareholders are not there for risk management or crisis management; those are roles that the board is engaged to do. We feel what is absolutely critical is to ensure that there is very strong shareholder democracy. In other words, we want to ensure that shareholders have the true right to elect directors or to terminate directors to ensure that the right directors are in place and that they're focused on enhancing shareholder value.

Turning to slide 5: What we feel to be important from a shareholder democracy perspective are really the following four things: First is a practical ability for shareholders to remove a director; in other words, a credible threat that a director will be or can be removed. The second is that the voting system must reflect the actual shareholder votes and allow shareholders the same proxy access as management has in their management information circular. Third, directors and shareholders must meet regularly to discuss the business and any shareholder concerns. Finally, something that's been in the press recently is that directors should obtain shareholder approval for fundamental changes to the company. I'll go through each of these quickly and try to relate them to some recent initiatives of the Ontario Securities Commission and its fellow regulators at the CSA.

Slide 6: We believe the time has come for the CSA to address shareholder concerns. We have requested in writing to the CSA, the Canadian Securities Administrators, that they move forward very quickly with a number of important and very basic shareholder democracy issues. The first is that there should be a right to actually vote for each director. In other words, the regulator should eliminate the ability for companies to use slate votes where they can propose six or 10, or whatever the number is they want to propose, and you either vote for all of those individuals or you withhold your vote for each of them.

Secondly, you may have heard of the term "majority voting." Under corporate law, shareholders do not actually have the right to vote against a director. They have the right to withhold their vote, which means that you can have one vote for a director and a million votes withheld from the director, and that director is duly elected as a director, which many of you actually might quite like as a process. We feel that in fact we've come up with a policy, which was prepared by a leading corporate lawyer in Canada, which allows a board to adopt a policy that effectively says that if a director receives more votes withheld than votes for, he or she will voluntarily resign and the board will be expected to accept that resignation.

The third point: There are many transformational transactions for which, under current rules, the board of directors does not require shareholder approval, things like very large acquisitions or highly dilutive share issuances, which are clearly, in our view, things that shareholders should be given the right to vote for or against.

The fourth item is access to the management proxy circular. This may seem trivial, but if a shareholder actually wants to, for example, try to change the directors and issue a dissident proxy circular, they are required to pay for that themselves, which can cost anywhere in the range of $250,000 to $500,000 to start and can actually run into millions of dollars. So we think that there's a requirement that the regulators permit shareholders to have the same rights as management does by using corporate assets to pay for the proxy circular.

The final point is that the proxy voting system itself actually doesn't work very well. Usually there are more votes cast than shares exist. There is a whole series of issues which I won't get into, but it clearly is an area that requires regulation and enforcement by the securities regulators.

Turning to slide 8: Where are the regulators on these issues? The CSA has requested for comment a replacement for several national policies and national instruments.

The proposed regulatory approach, we fundamentally disagree with, which is essentially to let boards and management decide what level of shareholder democracy is appropriate for their company. After all, it is not their company; it is the shareholders' company, and we think it is fundamentally wrong to be giving this kind of power to boards and to management. This is all under the rubric of proportionate regulation, which essentially is designed to allow small companies to take public capital, as do big companies, and do the right things only if it's convenient for management and cost-free to the company.

Turning to slide 9: We feel quite strongly that implementing basic shareholder democracy concerns will not happen voluntarily at most companies, as it is fundamentally against the self-interests of many boards and management. That being said, over 100 leading companies in Canada have voluntarily adopted our recommendations on giving their shareholders meaningful rights and shareholder democracy privileges. The common refrain we hear from large companies is that they're quite happy to do these things because they're not afraid of their shareholders, they don't mind having votes for or against and are quite happy to live with ordinary democracy.

The other point to keep in mind is that it's quite common for companies to say, "This is all just bureaucratic regulatory mumbo-jumbo and we shouldn't have to do this," and on and on and on. But the reality is, these initiatives that we're talking about don't have to cost anything. Everything has been written. All they have to do is go to ccgg.ca, download the policy, put it into their board minutes and they're done. This is not something that requires a great deal of time and energy or certainly any money on the part of companies.

Turning to slide 10: I thought I would share with you, just to give you a sense of what we are dealing with, some of the reasons that we have been given by companies and boards to avoid shareholder input. We put it into three or four different areas.

One is that many boards believe that they know best, and how could a shareholder possibly understand the kind of board that should be put in place? There's a constant theme that boards should be well balanced and collegial and everyone should get along. My guess is, this particular room would be a good example of effective democracy from time to time, particularly when there are actually real, live disputes that go on. That is not actually something that is often encouraged within corporate boardrooms.

The second point is the usual: "This hasn't been done before. It's untested. We can't possibly adopt this kind of thing."

The third is: "Everything is working just fine. Why do we need to change anything? These kinds of majority director election issues are of questionable interest in Canada." That's kind of ignoring the fact that the largest investors in the country are insisting on these things.

The final is my favourite one as a lawyer. That is somehow that the concept of majority voting is contrary to natural justice, that it would be a "fundamental abuse of the principles of natural justice and contrary to our entire Judeo-Christian system of law" to allow people to vote against their individual directors. I'm trying to give you a flavour. These are real live quotes. We have been out there pushing and pushing and pushing to have large companies in Canada adopt very basic principles.

On to slide 12: Where are the regulators with all of these things? We've identified six or seven key things that relate to shareholder democracy. I'll just run through these relatively quickly. The first is that you need to have competent and knowledgeable directors. That's not something that can be easily regulated, and we're not suggesting that the OSC regulate this particular matter. We do note, however, that in England the FSA is proposing to pre-screen directors for necessary skills, experience and integrity.

The second is that boards should be independent. We believe that boards should be at least two thirds independent directors; in other words, people who are independent of management and are quite comfortable confronting management. There is a proposed definition in the regulatory CSA release, which is an improvement, but it's certainly not perfect.

Moving to slide 13, number 3: there should be a practical ability for a director to be removed by a majority of shareholders. or at least a credible threat. My guess is if each of you had the ability to decide if you wanted to have an election and, if so, you would actually have someone running against you, you would perhaps behave slightly differently than you do today, having real democracy in your ridings.

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We have asked the CSA and, through them, the OSC to prohibit slate votes and to mandate majority voting. We've also asked that shareholders be given access to the proxy circular, much as management of a company has.

We've also, on slide 14, asked that the separation of chair of the board and CEO be mandated. This is now the norm for large companies in Canada, and we see no reason why that shouldn't also be required of all other reporting issuers.

Item five: The voting system should reflect actual shareholder votes. This is an area that is really a practical concern and one that the OSC from an enforcement perspective should be much more active in, as well as the CSA. In fact, just today I received a letter from the CSA on a request we had made in this area, and they said, "Thank you very much. We appreciate your comments, and when we look at a proxy voting system one day in the future, we might look at this issue," which is, in my perspective, clearly an inappropriate response.

Item six on slide 15: There should be regular meetings held between shareholders and directors. There are some technical things relating to full disclosure—FD—rules, which we feel the regulator should clarify.

Finally, as indicated, directors should be obtaining shareholder approval for fundamental changes. We do

have to commend the Ontario Securities Commission for an order that they released in the last month on the HudBay decision. We felt that was completely appropriate, and the TSX, in that particular situation, had made a very significant error in their previous decision, so the OSC really got it right on that decision, and we look forward to seeing the full reasons.

In conclusion, in terms of shareholder democracy, we urge you to urge the regulators to address these key issues. Without real shareholder rights, there really is no assurance that companies will be run in the best interests of their owners. This is relevant not just to big investors like us but to individual investors. In fact, in many respects it's more relevant to a small investor who can't necessarily bring to bear the resources of large institutional investors.

We also would like you to ask the OSC to use its regulatory powers to mandate key aspects of shareholder democracy for all public companies in Canada.

Moving on to the credit crisis—I'll be very brief on this. I'm sure you must be thinking about what the regulator should be doing in this area. We think there are a number of things from a regulatory perspective that went wrong. I apologize that I missed the OSC's presentation, but I gather you spoke a bit about enforcement, and we have some very strong views on that if you'd like to talk about that later.

First, we believe that there is fundamentally a lack of a credible threat of detection and quick prosecution of capital market offences in both our regulatory and our criminal system. The OSC has made some good strides in the last year or two on the regulatory side, but too often things that are really crimes—there are thefts from our capital markets—are not being addressed by the criminal justice system here in our province or really in any provinces across the country. The regulators end up using relatively weak regulatory tools to deal with people who are criminals and who should be run through the criminal justice system.

Secondly, a large part of our markets are not in fact regulated. If you think about the areas of real problems in the credit crisis, you hear things like asset-backed commercial paper, CDOs, mortgage-backed securities—they go on and on—and almost all of these are securities that are not in fact regulated under our current system. We think there should be a lot of consideration given here in Ontario, and probably more importantly with the new national securities regulator, to regulating the entire capital market, because the parts that are unregulated have clearly shown that they have a significant systematic risk to the capital markets of our country.

To give you a sense on that, just before I came, I was looking at Globe Investor. There was a release from Paris by the European Central Bank president calling for a coordinated international framework for regulating hedge funds and credit rating agencies, among other things. This is not an issue just for Ontario or Canada; this is a global issue, and one where I think our province needs to be at the forefront.

Finally, and somewhat related to that, is that regulators were nowhere as there were huge leverage and off-balance-sheet liabilities being created through things like credit default swaps, which are essentially ensuring that a company won't go bankrupt. That's one of the products that took, for example, the global insurance company AIG down.

So the way forward to deal with some of these very large and systematic problems is in really three areas that we think should be focused on by the securities commission. One is enforcement: First, they need to continue to push hard on enforcement. The single regulator should improve markets for investors and the enforcement activities, although creating any kind of new agency I expect will slow down regulatory movement for a period of time until the new organization is up and running. Secondly on enforcement, there needs to be significant improvement in the criminal enforcement of our capital markets. It seems ludicrous to me that you can walk into a bank with a gun and ask for $20 million and you will go to jail; if you do the same thing in our capital markets, somehow you just did a little something wrong, and maybe you'll get a bit of a punishment or you can't be a director of a public company again. There's a complete lack of proportionality in the way our criminal justice system is dealing with these things.

The second point is re-regulation. The structure and extent of securities regulation has to be rethought, in Canada and globally, in light of the lack of regulation of key parts of our markets. This has to be on a global basis.

Finally, leverage is what has gotten us into this problem to a great extent. There has to be a review of the regulations related to capital requirements for all capital market participants.

So I'll finish there and be pleased to take questions.

The Chair (Mrs. Julia Munro): All right. Thank you very much. We'll begin with the PCs. Ms. MacLeod?

Ms. Lisa MacLeod: Thank you very much. I was very fascinated with your slide number 17: "Credit crisis—what went wrong." You're right; it is on top of everyone's mind here and, in fact, sort of the reason why we decided to bring in the OSC at the beginning in December was the concern of the worldwide financial crisis with respect to credit.

Particularly fascinating was your point that regulators are allowed significant leverage in off-balance sheet liabilities such as credit default swaps. They're essentially insurance that a company will not go bankrupt. Then you go on to say, as one of your ways forward, that we "need to review regulation of capital requirements of capital markets participants." I'd like to know if you could expand a little bit more on that. I thought that was quite valuable, and I think it would be nice to have a little bit more information on that because we should address that at the committee when we begin—

Mr. Stephen Griggs: Sure. It's actually a very complex issue. There are provincial regulators and federal regulators around banking and insurance, which is where a lot of the problems have occurred. That being said, you also have to understand the structure of securities regu-

lation, which is essentially consumer protection legislation—that's what it's all about: investor protection. The act has been structured as the US 1933 act was structured, where, if you are considered to be an investor who is unsophisticated enough to require government's help, the Ontario Securities Commission is there to help you. If you're a sophisticated investor, or we use the term "accredited investor" here in Ontario, then the regulators do not have the power to actually do much.

What we really need to look at is a fundamental change to the structure of the act so that the securities regulators in fact have the power to regulate the entire securities market. That bifurcation of the market may well have made sense in the 1950s or the 1960s when the world was not very interdependent, and no one really would have thought that an accredited investor and an investment he or she would make could have a systematic impact on the entire capital market of our country.

Ms. Lisa MacLeod: If we move to a common regulator—I think we're acknowledging in the province now that Ontario would opt in—how would we as a province be impacted? Most consumer protection legislation is dealt with at the provincial level.

Mr. Stephen Griggs: Securities probably at one point were a provincial matter. Most companies were local. Our companies here in Canada are global businesses. It's a very strange bit of history that we regulate securities on a provincial basis; no one would start today, if you were starting to regulate with what we have. It really doesn't make any sense.

The national regulator is a great first step. The real leap forward is going to be to integrate the regulation of not just the securities industry but also the banking industry, the insurance industry and anyone else playing in the capital markets.

Ms. Lisa MacLeod: Do you think with a national regulator that it could still meet the needs—you're talking about global businesses, but we all around this table represent people who own small and medium-sized businesses as well. Would a national regulator still be able to address regional needs?

Mr. Stephen Griggs: I certainly believe that they can. The regional needs, I think, personally—I'm not necessarily speaking for the coalition. I think it's a bit of a red herring. If a company is going to take money from the public, I think that creates a duty to them to do the right thing on behalf of investors, and whether you are taking a million dollars or a hundred million or a billion, I really don't see why there needs to be much of a distinction made. Certainly, there is no reason in my mind why, for example, a small manufacturing company that goes public in Ontario is any different than a small drilling company that goes public in Alberta or a tech company in BC.

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Ms. Lisa MacLeod: May I ask this question, and it's hypothetical: At this point, we're not sure what provinces will opt in and which ones won't. Being that we are in such close proximity to the province of Quebec, which, I guess—there's speculation that they wouldn't opt in. Are there any challenges to any of our local markets? I represent an Ottawa-area riding, and of course we're just a bridge away from Quebec. So I guess I would ask you, as somebody who's an expert in the field: Are there any dangers?

Mr. Stephen Griggs: Certainly the strong preference of most market participants is that we have a national regulator. The idea of having a regulator for everyone except Quebec is not ideal. That being said, Quebec regulators in recent years have been very impressive. They've had a lot of foresight and they've been very aggressive on a number of enforcement actions. It's not ideal, but I think you could have a national regulator or a Canadian securities commission that represents seven or eight provinces, and then they would deal directly with the other provinces through some kind of a passport system, similar to what we have today.

The Chair (Mrs. Julia Munro): Thank you very much. We'll move on to Mr. Prue.

Mr. Michael Prue: You put down a whole bunch of stuff about shareholder democracy and expanding the roles of shareholders and giving shareholders the same kind of proxy rights as the board of directors, but you haven't dealt with one issue that intrigues me a lot. There's been a huge amount of debate recently about executive pay and executive pay packages. Should shareholders have a say on executive pay? Should shareholders be able to say to the board of directors, "I think that giving this guy"—or this woman, or whoever it is—"$5-million stock options and a car is going a little overboard"?

Mr. Stephen Griggs: Executive compensation is one of the main priorities of the Canadian Coalition for Good Governance. I personally spend a great deal of my time on that issue. I didn't mention it today because our view is that the details of executive compensation are not something that really can be regulated. What can be regulated is the disclosure of executive compensation. The CSA introduced new rules effective the end of last year which are a significant improvement—probably a 95% solution; they need to be tweaked a little bit here and there. This whole disclosure process started back with Bob Rae, if I recall, and has moved things quite a distance.

Our focus around executive compensation—I'll get to say-on-pay in a second—is to make sure that boards actually focus on principles of executive compensation. We have released for comment draft principles of executive compensation, which I don't think we have time to get into today, but they are available on our website, and we've been getting some very good comments.

On say-on-pay, it is an issue that is a global issue for large shareholders. The coalition is one of the few organizations globally that has not actively advocated for say-on-pay resolutions. What that means is, in some countries, boards are required to put a resolution for the annual meeting of shareholders as to whether shareholders agree or disagree with the executive compensation that was given in the previous year. In a few coun-

tries, that's a mandatory vote. In other words, the compensation actually has to be approved by shareholders. Very few countries have moved that way. I counted a couple in Europe, if I recall. There are a number of jurisdictions in the world that require boards to ask their shareholders, "Do you think we did a good job with our executive compensation?" Most large public companies in Canada have shareholder proposals in place to do that.

Our view, which is an emerging one as we move through our thought process, is that at this point in time, the regulators should not require that every company have a say-on-pay vote. That being said, we do urge our members, where there is a shareholder proposal, to look at it very closely and, where appropriate, to vote against the executive compensation. I think we will see, over the next few months, some shareholder proposals which actually get more than half of the votes. In other words, shareholders will be saying to the boards, "We disagree fundamentally with how you have compensated senior executives." Where we may evolve our policy is to have strong recommendations to boards that they actually be proactive and put voluntarily on their proxies a say-on-pay proposal. So we'll see where it goes.

The Chair (Mrs. Julia Munro): Thank you very much. We'll move on. Mr. Flynn?

Mr. Kevin Daniel Flynn: On slide 8 you talked about allowing companies to decide what level of shareholder democracy would be appropriate for them. That's the idea that's being put forward, as I understand it now. I think from your comments we should take that you would much prefer a prescriptive, that we tell companies what level of shareholder accountability you will have if you operate in Canada or in Ontario or whatever the jurisdiction is. Can you give us an example of a jurisdiction where that is in practice today?

Mr. Stephen Griggs: My understanding is that a number of European jurisdictions have these kind of provisions. In the United States, there is a movement toward this. The state of Delaware actually has amended its law to allow companies to have bylaws which effectively require majority voting. So it is a move forward.

Are there other places that are doing exactly what we're saying? I don't know exactly. Every country is a little bit different. Some countries, for example, have a vote for or against. Australia and the UK, I believe, have that kind of provision. North American corporate law seems to have—this is a very arcane area. Very few people pay much attention to this. It's been around for a long, long time. No one actually knows how we ended up where we ended up. It just is there.

Mr. Kevin Daniel Flynn: But there's no evidence from any of the jurisdictions that you're aware of that it's caused any sort of an investment chill or businesses avoiding those jurisdictions?

Mr. Stephen Griggs: No.

Mr. Kevin Daniel Flynn: Going back to slide 17, which Ms. MacLeod was talking about as well, I was intrigued by that. I guess in hindsight we all know what went wrong with AIG today. Could that have happened at the time in Ontario and could it happen in Ontario today? We had a discussion before you arrived as to what should be in the financial statement and what shouldn't, what's in the annual report. Obviously, in this case, the regulators decided that something could be kept off the balance sheet which in hindsight probably should have been included. Could that have happened in Ontario?

Mr. Stephen Griggs: I'm sure it could have happened in Ontario. One of the key functions of a board that is really just emerging in the minds of many boards is risk management, which is indirectly what you're getting at. If the board is not focused on risk management—in other words, what are the true risks in their business, whether it's balance sheet risk in financial services or other types of risks—it's not going to end up in the financial statements. We've been quite surprised as we talk to boards about, for example, the lack of integration of their compensation systems with risk management systems. You would think, for a financial services business—generally they're risk management machines. That's what a bank or insurance company or most other financial services businesses are. You'd think the boards would have been actively focused on the kinds of incentives they are creating for executives and others within the firm from a risk management perspective. That's an emerging issue, and it's true on a global basis, so I guess we shouldn't be too upset with Ontario companies.

Mr. Kevin Daniel Flynn: No, no. I suppose the question is: To offset that, to protect against that, do you need prescriptive legislation that prevents that or do you need very sharp regulators?

Mr. Stephen Griggs: I think you need a combination of both. You need to have some prescriptive rules. Even from an efficiency perspective, if you're a company and you have "principles," how do you figure out whether you're complying with a principle? If you have a simple rule, you can say, "Okay, yes. We're doing this," or not. If you have a principle, then you have to hire lawyers and accountants and you have to have experts to tell you whether you're following a principle or not.

The Chair (Mrs. Julia Munro): Thank you very much. That concludes the time that's available. We appreciate you coming here today.

ADVOCIS

The Chair (Mrs. Julia Munro): I'd like to call on the representatives from Advocis, if they would come forward.

Good afternoon, gentlemen.

Mr. Kris Birchard: Good afternoon.

Mr. Greg Pollock: Good afternoon.

The Chair (Mrs. Julia Munro): We certainly appreciate your being able to join us here today. As you would know from the previous presenters, we have 30 minutes for you. You may choose to make some comments and the time that remains will be divided equally among the members of the committee. For the purposes of Hansard, I need you to introduce each of you who is going to make any comments or answer any questions. Please begin when you're ready.

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Mr. Kris Birchard: Thank you, Madam Chair. Good afternoon. My name is Kris Birchard and I'm chair of the board of Advocis, the Financial Advisors Association of Canada. As chair of Advocis, I am actually a member and a volunteer of the association and, when not fulfilling my duties as the chair, I am serving clients in private practice as a financial adviser in Ottawa, Ontario.

With me today is Greg Pollock, on my left, who is Advocis's president and chief executive officer, and to my right, Peter Tzanetakis, the senior director of regulatory affairs.

I will speak briefly first, and Greg Pollock will follow next on some recommendations, and we hope to leave as much time as possible for your questions.

We'd like to thank the Standing Committee on Government Agencies for this opportunity to appear and to address the committee with regard to the review of the operations of the Ontario Securities Commission.

An important task of the standing committee is to consider the big picture regarding the OSC's role in regulating the capital markets and its intermediaries and protecting investors. Is the OSC effective in accomplishing those objectives? Does the OSC need more focused direction from the government in order to achieve its objectives?

At its roots, the purpose of the OSC and its role in overseeing subordinate self-regulatory organizations—the SROs, namely, the Mutual Fund Dealers Association of Canada, the MFDA, and the Investment Industry Regulatory Organization of Canada, IIROC—is to protect investors and ensure confidence in and the continued health of the capital markets. The role of the OSC is to ensure that Ontario and Canada have fair, efficient and competitive capital markets and provide a sound environment for savings and investment. This supports growth and efficiency in the Ontario economy.

I'd like to begin by briefly describing Advocis and its members. We are the largest and oldest voluntary professional membership association of financial advisers and planners in Canada. Our association was founded in 1906 as the Life Underwriters Association of Canada. We have more than 10,000 members across Canada, 5,000 of which are in Ontario. Our members are primarily independently contracted to provide financial products and services on a planning platform. Advocis members provide comprehensive financial planning and investment advice, retirement and estate planning, risk management, employee benefit plans, disability coverage, and long-term care and critical illness insurance to more than a million Ontario households and businesses. Our members are provincially licensed to sell life and health insurance, mutual funds and other securities. They are primarily owners and operators of their own small businesses who create thousands of jobs across the province.

Ordinary Ontarians in all walks of life need financial advice to help them to save, invest and plan for the future. Advocis financial advisers maintain lasting relationships with their clients, based on trust. They take a long-term-planning perspective and are helping to guide clients young and old, individuals, families and businesses, especially during these times of economic uncertainty and financial market turmoil.

The majority of Advocis members are regulated by provincial securities commissions. The OSC is the key regulatory body for securities intermediaries and dealers and oversees powers delegated to the Mutual Fund Dealers Association of Canada and IIROC. As such, the OSC's priorities, activities and operations directly affect most of our members.

Why are we here today? We submit that you should, in the course of your considerations of how the OSC is doing, consider the following propositions concerning securities regulation and the impact of the regulation on consumer access to financial advice.

First of all, Advocis believes that Ontarians should have ample access to professional financial advice, products and services and financial planning, and should be able to choose among a diverse range of financial service providers.

Secondly, small-business professional financial advisers provide valuable services to Ontarians in delivering financial advice, products and services, and have a significant place in the financial services sector.

Finally, we strongly believe that the current regulatory framework and the direction in which regulation is going does not favour a diverse range of choices for Ontarians and is limiting access to professional financial advisers.

Securities regulation at present is highly prescriptive and rules-based. Costly compliance burdens and prescriptive rules that suit the business model of the large financial institutions and are applied to small-business financial advisers make it increasingly difficult for smaller firms and small-scale professional financial advisers to serve the public.

Regulation has been an important factor in the increasing domination of the financial services sector by large, vertically integrated financial institutions that have an employee-employer business model. In our view, the currently regulatory structure favours these organizations by placing a disproportionately large regulatory burden on small professional financial advisers and small financial services firms.

The increasing regulatory burden puts their businesses at risk due to high compliance costs. It makes professional financial advice less affordable and less accessible. It also creates barriers to entry for new financial advisers coming into the industry. All of this will negatively impact consumers.

We believe that in many instances, higher compliance costs and the increased regulatory burden imposed by regulatory requirements are not adequately justified. Often, when new regulatory requirements are proposed, there is no clear problem or risk to consumers, and the additional rules and compliance costs offer no real consumer protection benefits. This saddles compliant advisers with more and more regulatory compliance costs and increased costs for consumers but provides little benefit.

The net effect of the layering on of regulation, or regulatory creep, is a trend to increased concentration in the delivery of financial products and services by fewer, larger financial institutions and less choice and diversity in the marketplace for Ontario consumers.

I'd like to add a comment about investor education and financial literacy. We believe that the promotion of financial literacy is crucially important. Our members, as financial professionals, spend more time than almost anyone educating Canadians about their finances. A regulatory framework that drives out accredited professional financial advisers will leave investors less able to understand financial matters.

I'd like now to turn to Greg Pollock to highlight for the standing committee some of the more specific issues that we believe the government of Ontario should be considering when thinking about the performance and priorities of the Ontario Securities Commission. Greg?

Mr. Greg Pollock: Thank you, Kris. Regulatory budgets are growing to accommodate the ever-increasing reach of the regulators. Regulation and compliance are often needlessly and increasingly complex, as regulation comes from not only the OSC but through its proxies, the SROs. This is in addition to the regulatory requirements that our members must adhere to, coming from insurance regulators and from federal regulators.

We believe the OSC should place more emphasis on investigation and enforcement of regulatory policies and rules and on punishing bad behaviour, rather than imposing overly burdensome regulations on intermediaries, the vast majority of whom are compliant. Advocis believes that those who perpetrate crimes against consumers should be punished. Failure to deal effectively with massive fraud and to identify and deal effectively with bad actors jeopardizes confidence in our capital markets.

Advocis has, for the past several years, provided input to the OSC on its annual statement of priorities. This year, we also put in a pre-budget submission to the Standing Committee on Finance and Economic Affairs and to the Minister of Finance to make a number of important points and recommendations, many of which highlighted the real consumer and economic impacts of securities regulation. We have provided you with copies of both these documents for your consideration.

The OSC's 2008 statement of priorities states that market failures and other potentially adverse impacts need to be addressed without unduly impairing market efficiency through excessive regulation or costs of compliance. We agree. We believe it is particularly important for the OSC to regulate effectively. One of the most effective ways to protect the interests of consumers is to ensure that they continue to have ample access to professional financial advice. Therefore, we recommend that in providing guidance to the OSC, the government of Ontario should make it a priority to ensure that small-business professional financial advisers and planners continue to be a vital segment of the financial services sector. This will maintain diversity in the marketplace, providing ample choice for consumers and allowing consumers to have access to professional financial advice.

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The government, as well, should direct the OSC to ensure that regulatory initiatives do not place an unfair burden of regulation on small-business professional financial advisers and that regulation does not result in an uneven playing field that favours very large dealers and firms.

There are viable alternatives to the current regulatory approach. Layering more rules and regulations governing how advisers interact with their clients is placing unsustainable burdens on professional financial advisers. We believe that a principles-based approach should be considered. Principles-based regulation focuses on outcomes and offers more flexibility to deal with new circumstances and new products. We recommend that the OSC and the two SROs should consider a principles-based approach to regulation before imposing any new prescriptive rules-based regulation. In the United Kingdom, for example, principles-based regulation has been effectively introduced on the insurance side.

Financial advisers deal directly with consumers, and we strongly believe that any initiative that will change the way advisers are permitted to interact with their clients should have our input. We wish to be actively involved in developing, reviewing and commenting on proposals regarding major policy or rule changes that have a direct impact on our members and the entire adviser community. Getting the approach right in the early stages of policy development is crucial if regulators' objectives are to ensure that the industry embraces specific regulatory proposals being contemplated and the outcome of consumer protection is to be achieved in a balanced manner.

We also note that the Public Appointments Secretariat is currently advertising for candidates to fill three part-time commissioner positions with the OSC. For one position, the ad calls for candidates who have senior experience, such as a CEO or CFO, with a corporate issuer. For another position, the candidates should have significant leadership and management experience with an investment dealer. For the third opening, they want litigation or adjudication experience in securities, corporate or administrative law. What's missing here? Financial advisers.

If the primary priority of securities regulation is investor protection, financial advisers and consumers must be recognized as key, valuable stakeholders, yet the commission seems to have a narrow perspective on who should sit on the commission and what type of background and experience should inform its decisions. In fact, the commissioners come primarily from corporate issuers, investment dealers and securities lawyers from large law firms. Something similar occurs in the decision-making and regulation that is delegated by the OSC to the MFDA in IIROC. It is issuer- and dealer-centric, and in their policy development, financial advisers tend to be consulted as an afterthought.

We believe that financial advisers should be represented on the commission and SRO boards and on the investor education fund. Therefore, we recommend that

the government develop policies and procedures for the OSC and the SROs to ensure that all stakeholders that are likely to be directly affected by regulatory proposals are consulted at an early stage in the policy development process. Furthermore, the OSC should expand its criteria for appointing commissioners.

Effective public policy requires identifying the problem or issue correctly and then using appropriate methods to address it. In some cases, such as the IIROC financial planning rule, rules are being imposed to regulate activities even though no problem has been identified. Therefore, we recommend that the government impose requirements on the OSC and the SROs to ensure that, before implementing any new major regulatory requirement, it develop a clearly articulated statement of the problem that the regulation is meant to address.

The OSC should also conduct robust cost-benefit analyses to assess the likely investor protection benefits and the cost to market participants and consumers. Failure to identify problems that clearly require intervention and failure to assess the impact on market participants and consumers in relation to likely benefits has led to ill-conceived regulatory initiatives, such as IIROC's recently proposed financial planning rule. The details of the rule follow in the text; I'm not going to go there right now.

In conclusion, we believe that the OSC should change its approach and embrace smart, principles-based regulation that recognizes the value of financial advisers to Ontarians. It should recognize financial advisers appropriately as key stakeholders in the regulation of financial services.

We believe the government needs to take a more proactive role in managing the priorities of securities regulation in Ontario, which has a significant impact on intermediaries, consumers and the economy. Finally, we believe the government should offer ongoing direction to the regulators to ensure that Ontarians continue to have access to professional advice and choice in financial services.

Thank you once again for allowing us the opportunity to appear. Certainly, we would be pleased to answer questions through our chair.

The Chair (Mrs. Julia Munro): Thank you very much. I think we have about five minutes per caucus, so we're with the NDP in our rotation.

M^me^ France Gélinas: Thank you for your presentation. I caught some of it on TV and some of it live on location. In your pre-budget submission to the Minister of Finance, you asked for reduced regulatory requirements. I think you called it, at the time, streamlining of regulations. Given what we've seen in the US, I would say partly as a result of the laissez-faire approach in financial regulation, and the countless stories from retail investors here in Canada that have been burned by bad advice, do you really think that fewer regulations are in Ontarians' best interest?

Mr. Kris Birchard: Thank you for the question. That's an excellent one. I'm going to make some general comments and ask my colleagues to comment more substantively on the technical side, as they're the ones who produced that submission.

As an adviser, though, I would say to you that in our practice, when we continue to meet and deal with clients on whatever the issues are with regard to investments or risk management or any of the things that we do with clients, when we talk about streamlining, from my perspective there is much of what is provided today to the client by way of explanation—of their roles, conflict of interest, product suitability, how they can complain, where they can complain, how they can sue advisers—that is so burdensome that the client really doesn't get the message. There is so much to read and to go through and then to understand—what the various instruments are; the products, be they mutual funds or unlisted securities—that we're not doing what we want to do to educate the client properly and let them understand where the pitfalls may lie and what questions they should ask.

I'm going to guess that my colleagues will expand upon that for you, but from my perspective the streamlining will be to become more effective so that the consumers are actually better protected than they are today by being better educated and understanding what it is that's being explained, and not frustrated by more and more letters and explanations and forms that they have to read and perhaps not understand.

Mr. Peter Tzanetakis: I think what we're really calling for is smarter regulation, not necessarily less. So if you take a look at suitability of an investment, for example, we're not suggesting that that be eliminated from the regulatory framework. What we're suggesting is that the regulators should take a fresh look at possibly implementing a principles-based approach. If you compare the investment regulation in Ontario versus the insurance regulation, the insurance regulators have adopted a principles-based approach on product suitability. They've recently conducted a survey and are very pleased with how that's been implemented, not just in Ontario but across the country, with the support of industry groups in promoting the proper outcome for the consumer.

I think, in looking at regulation, what you also need to consider is where the greatest number of complaints are coming from. I think if you look at complaints on the insurance side versus those on the securities side on suitability or other things, you'll probably find that the number of complaints on the insurance side is significantly lower, and that regulatory framework is really principles-based to a larger degree than it is on the securities side. So what we're suggesting is, at a minimum, to look at a fresh perspective on how you regulate the industry with the view of not saddling compliant intermediaries with more and more burdensome regulation.

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Mr. Greg Pollock: Madam Chair, just a final point: Recently, the Hockin report addressed this issue and certainly spoke to the value that they see in moving in this direction with respect to securities regulation.

M^me^ France Gélinas: Just for my own interests and whoever is watching, Canada has the highest mutual fund fees of a lot of countries. A recent study found that the average expense as a percentage of the fund was 2.6% in Canada compared to 1.3% worldwide. In the US, the average is 1.1%. Are you able to explain this? Do you know?

Mr. Greg Pollock: First of all, maybe just to start on that, we haven't examined that study yet. I'm not suggesting that it's not correct, but at the same time, we haven't examined it. I'm sure there are different variables that are used in terms of measuring the MER in different countries.

But it does raise a question. I think it's a legitimate question. I think it's something as an industry we do need to look at.

M^me^ France Gélinas: So is there willingness to look at it and a process to do so?

Mr. Greg Pollock: There are a lot of organizations involved, of course, so I'm sure all of the organizations that will review that report will be looking at examining it. I wouldn't be surprised if there is some downward pressure to make some adjustments if in fact those statistics are correct. Statistics are funny things. You can read them different ways. We haven't examined it yet, but certainly we will be doing that.

The Chair (Mrs. Julia Munro): Thank you very much. We'll move on. Mr. Flynn?

Mr. Kevin Daniel Flynn: Thank you for the presentation. You're talking about investor education as being something that perhaps we should do a bit more of, and do it better. Do you support the role of a common securities regulator? I think your organization does. Is that true?

Mr. Kris Birchard: The short answer to that is yes. If allowed, I'll offer some qualifications.

Mr. Kevin Daniel Flynn: Okay. There's a lot of anger out there right now. In a previous meeting, I think I probably said—and the first delegation today reminded us of that. Where the rubber hits the road for a lot of what's happened in the past year is the relationship that an individual has with their financial adviser. Just anecdotally, in talking with friends and family, you get a sense that people are about 30% to 40% poorer than they were about a year ago, and you're hearing things like, "I wonder if I should have a financial adviser. I don't need to pay someone to lose money; I can do that myself." They wonder if their financial adviser made different moves than they made or than they were advised to make. They wonder if the typical portfolio of a financial adviser is the same as their client's.

You must be feeling the heat as an organization. You could go through a year and not have people start to wonder about the advice they got. Do you have any comments about that? Maybe you can stick up for your profession a little bit.

Mr. Kris Birchard: I think it's a great question. In fact, the first article I wrote in our publication, Forum magazine, was on that subject. In our firm, we have actually experienced downturns. Whether it's 40% across the board, I would say no. I don't think anybody in our firm has experienced that. But certainly everybody is off. The world is off everywhere, and we all know that.

I think the point is that investors who have chosen to deal with financial advisers who have put together a plan for them that's based upon objectives, that's based upon a mutual discovery of what the issues are, why we are investing, what is the purpose of it, what are the circumstances as we go along, what is the profile of the client, when will the investment have to be used and for what purposes—the investments can be appropriately structured to meet those goals. At the same, other types of comprehensive financial planning activities would lead to other financial instruments of insurance types, of risk management types, of alternative types of investments, so that as the client is proceeding through the life cycles, starting when they are just starting out a career, building a family, then sending children out, educating them, and folks seeing more in retirement, things are going to change. When you have a system that's based upon an objective-based plan, coupled with the fact that most of the people who are members of our association are dealing with their clients on a regular basis—in other words, they're in touch with them at the very minimum annually, if not quarterly, and when they do that, they're talking about how the plan is being readjusted. They are doing the projections that say, "Here's where we were, here's where we are now, and here's what we're going to do to make sure that we can continue to get there." The experience that we have in our firm, the experience that I have anecdotally in my travels in Ottawa and in speaking with other clients and with other advisers, is that the people who are working on that kind of a platform have no fear of the unknown, which is perhaps the greatest fear of all. They know where they are, they know why they're there in the first place, and all of this is helping and comforting these people to move forward with some kind of confidence and stay with the plan that's there as it's adjusted accordingly.

There's no doubt that people have lost income. That's certainly plain to everybody who's reading any kind of headlines anywhere, be they financial journals or not. But I think those who are working with financial advisers, as opposed to being on their own, are far more comfortable and confident as to what's going to happen to them in the future.

Mr. Kevin Daniel Flynn: Is there any more time left?

The Chair (Mrs. Julia Munro): Yes, you've got a minute.

Mr. Kevin Daniel Flynn: Thank you.

I guess what's on everybody's mind is that a lot of people hung on to their mutual funds during the downturn, and they're wondering if their financial advisers made different moves and didn't tell them to make the same moves. Is there any truth to that at all?

Mr. Kris Birchard: I cannot address what all the financial advisers are doing. I do not have that knowledge at my fingertips. I can tell you anecdotally that what

happens in our firm, quite often, is that when circumstances are similar, the investments that we are making for ourselves are the investments that our clients are making, or certainly in a similar class.

Certainly my daughter, who doesn't take advice from me but takes it from one of my colleagues in financial planning, is not investing the same way I am, because I'm 35 years older than she is, and I may have some different perspectives, and I may have some different risk tolerances etc. She has a long time to be able to come back. Some will tell you that this is the best buying opportunity of her lifetime, whereas in my case I'm a little bit closer to that retirement age and perhaps I'm wanting to be a little bit more conservative. So I think we have to say that I couldn't have identical investments to her, but where the circumstances are similar, in our firm that would be the case.

Mr. Kevin Daniel Flynn: I'm just trying to get free advice here, Madam Chair.

Mr. Kris Birchard: I'd be glad to speak to you any time you'd like.

The Chair (Mrs. Julia Munro): Thank you. We will move on now. Mr. Hudak.

Mr. Tim Hudak: Gentlemen, thank you very much. It's good seeing Advocis back at committee.

I certainly agree with an important principle in your argument, which is to give me, as an investor, or my constituents, choice in who we want to deal with and develop that long-lasting relationship of trust. If you are worried that your broker or your dealer had different stocks than you do—it's a trade-off, right? We want to have a competitive system. I also worry, if it's all the big institutions, that I might not be exposed to a variety of instruments, that they might push their own products particularly. So I appreciate those points.

What I'm going to ask you, though, is: Can you put this more in layman's terms? I know that in your presentation to the finance committee, you had a bit more detail in what you meant by the strict sorts of rules that they're putting in place, as opposed to being principles-based. Can you give some examples that would encumber my relationship with my broker, that may help large institutions but encumber the small business?

Mr. Kris Birchard: I can give you a very quick one, and then I can talk to you about one that has happened recently.

A colleague of mine, who's a former chair of this organization, has a book of business out west that is somewhere in the $600-million to $700-million range. He did an internal study of what the cost of compliance was in his practice, and he found it to be equal—this is six or seven years ago—to the trailer fees on an invested account of $60,000. That's the compliance cost. It hasn't opened up the doors. He has a small firm where there are five or six advisers and 10 staff, as opposed to a place that has 40 or 50 compliance officers and all the infrastructure that they can assemble. So in that particular instance, it makes it very difficult when you think that there have been several more proposals coming forward since that are going to raise the actual cost of compliance, never mind the thought that, dare we say, we pay ourselves and make a profit. So, if you ratchet that up, there comes a point in time when you're north of $100,000—and the average invested Canadian is well under that, in the seventy thousands someplace. So we're going to a place where we're making it difficult for average Canadians to get advice.

If we talk about how principles-based—and Peter referred to it—when the Financial Services Commission of Ontario was looking at the conflict of interest, product suitability, and they were starting on a prescriptive platform, it's a terrific example of how the industry worked together. In other words, our association and others in our industry worked with FSCO to come out with this principle-based solution for product suitability that said that an adviser has an obligation to talk about a conflict of interest. That's in every code of conduct that any organization that is accredited, certainly in our organization, would have for its members.

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Then it said that the adviser must explain to the client why this particular product is being recommended and why it's suitable. I'd suggest to you that if I didn't do that, I wouldn't have a job. That's exactly why I'm retained by people. The gentleman over here was asking Mr. Flynn these questions as to why that's the case. There's a perfect example of coming to something that makes sense.

Since then, the commission has surveyed in Ontario and found out that it's actually working for them on this principle for his platform, and it's working quite well. At no added cost to anybody, it's working effectively.

Mr. Tim Hudak: Recommendation 5 talks about making sure there's a clearly articulated statement of the problem the regulation is meant to address, and for OSC to conduct a robust cost-benefit analysis. Those seem to be very sensible pieces of advice. Then you have an example: IIROC's recently proposed financial planning rule. Could you describe to us in layman's terms again what concerns Advocis has with their new rule?

Mr. Kris Birchard: We have a multitude, and I'll do my best to be brief. The first concern we had is that there was no consultation, as we've talked about. It seemed to be an in-house thing and there wasn't anything there. The second one was that it's another attempt to put some burdensome—we refer to a regulatory creep that's going to have a cost. If a dealer is going to sit down and vet and make sure that a financial plan is appropriate and adequate according to whatever the rules are, then there's going to be a cost to that. Yet the dealers themselves aren't resourced to set up—they weren't formulated in the first place to be able to vet those kinds of financial plans. I, as a chartered life underwriter, chartered financial consultant, a CFP with 35 years of experience in the industry, have spent all my time learning how to be able to do that. I have accredited skills and I continue to follow professional development and continue education to ensure that that happens. It doesn't happen inside of

the dealer, so we question the competency of it. Then we would have to question: Is there a conflict of interest? The dealer has a platform of products and services they provide. If the financial plan isn't symmetrical and doesn't coincide in all those areas, have we met with some kind of conflict of interest?

Then there's of course the question of privacy. A client comes to me, shares their soul and all of their interest in where they want to go, and then I have to tell them that we're going to pass all this on to someone in a third party they don't know about, and are we now perhaps going outside of the tenets and the principles of privacy of the client?

Greg wants to make a point as well.

Mr. Greg Pollock: Just one other point: Fundamentally, IIROC is set up to deal with financial transactions, to oversee the proper regulatory oversight of financial transactions. This is about planning; it's not about transactions. You sit down with a client, you want to talk about their objectives and so on and what they hope to see over the next 10 years, or 60 years if you're sitting down with a 20-year-old. We don't see that the dealer should be overseeing the planning that the individual adviser is doing. The dealer may want to, in effect, sell their wares through that planner. That's the conflict that Kris is talking about.

The Chair (Mrs. Julia Munro): Thank you very much. That concludes the time we have available. We appreciate your coming here today.

CANADIAN FOUNDATION FOR ADVANCEMENT OF INVESTOR RIGHTS

The Chair (Mrs. Julia Munro): I would now ask the representative of the Canadian Foundation for Advancement of Investor Rights, Ermanno Pascutto, who is the executive director, to come forward.

Good afternoon, and welcome to the committee.

Mr. Ermanno Pascutto: Good afternoon.

The Chair (Mrs. Julia Munro): As you might know, we have 30 minutes set aside. You may wish to make comments, and the time remaining will be divided amongst the caucus. You may begin as soon as you're ready.

Mr. Ermanno Pascutto: Thank you. You may not have heard of the Canadian Foundation for Advancement of Investor Rights because it's a very new organization. It was established last year. It was an idea that came to me one day when the SROs were thinking of what to do with the fine money that they'd collected from disciplinary actions. I put forward a proposal to the IDA and market regulation services, and over a period of two years this proposal evolved and eventually the SROs, which are now merged to create IIROC, agreed to provide funding to start up this organization. In the second half of last year, we actually launched the Canadian foundation, which for short we call FAIR Canada. We want to make it clear that even though we received funding from IIROC, IIROC has no role whatsoever in the governance of our organization or in the positions that we take.

In terms of introducing myself, I have over 30 years' experience in securities regulation in Canada, in Hong Kong and in other parts of the world. I spent five years as head of staff of the Ontario Securities Commission, and that was at a time when the executive director was not only chief operating officer but effectively chief executive officer of the commission, which is quite different from the structure that we have in place today. I then spent five years as vice-chairman of a newly established securities commission in Hong Kong, and since then I've either been advising people on regulatory issues or advising stock exchanges and regulators. So I have a long experience in this, and the danger of that is that I have an opinion on just about everything.

The submission that we're making to you today came hot off the presses this afternoon, because we ended up changing it today. I will try to skip over some parts of our submission because they have been covered by some of the previous commentators, in particular Pamela Reeve, who spoke about OSC oversight and accountability. Our recommendation there is essentially the same as hers, that the Ontario Legislature should go back to the recommendations that were made some four or five years ago and should improve its oversight of the OSC. This oversight should include a requirement that the OSC table its annual report before a committee, which should have appropriate resources and powers, including the ability to compel witnesses.

I would go one step further and say that the commission should commission or, depending on who has the authority, that the Legislature should commission a regulatory audit of the OSC by securities regulation experts retained by the Legislature and should reconvene the committee once the experts have reported to the committee. I've seen oversight by Legislatures of securities commissions in Canada and in Hong Kong, and it's very, very difficult. The regulators are experts in a particular area; the overseers are not experts. The regulators have enormous resources, and it is very, very difficult to do effective oversight if you're not using the kinds of experts that the securities commissions themselves have. I would like you to consider that.

A couple of the commentators have talked about the lack of diversity in representation on the board of the commission or the commission. I think at least one person brought to the attention of the committee that the OSC, which doesn't have an investor representative on its commission, recently advertised for three vacancies. They wanted these vacancies to come from a listed issuer, a lawyer and an investment banker, with those backgrounds. Of the four senior management of the commission—right now the chair, the two vice-chairs and the executive director—two are investment bankers and two are Bay Street lawyers. I don't think they have a shortage of investment bankers and Bay Street lawyers. If you look at the various committees that they have you'll see

an endless list of investment bankers and Bay Street lawyers. They do not have representation from retail investors. I think that this is a good time for the committee to say that retail investors and shareholders should have adequate representation on the governing body of the commission, and, of the three current commissioners, at least one should be expressly allocated for a retail investor representative.

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Pamela Reeve, who was a member of Ontario's investor advisory committee, has given you a very good history of the advisory committee and how it was set up with great fanfare by the Ontario Securities Commission, which was aware of how the consumer panel had been set up in the UK, which was thought to be a very good model. The commission chose not to follow that model. They followed a much weaker model.

At the time they announced, as I said, with great fanfare, I think this quote may have been read out: "We believe that direct investor input is critical to the health of Ontario's capital markets and we're looking to the IAC to play a key role in our efforts to address issues of importance to retail investors." Well, two years later, the OSC's investor advisory committee was disbanded without explanation or any kind of public announcement.

The standard that the OSC gives to public companies is that you've got to give people the bad news as well as the good news. I think that's a standard that the OSC should be applying to itself: If you're going to make great fanfare about a wonderful thing you're doing, establishing this investor advisory committee, you should tell people that you've disbanded it and you should give an explanation.

So, our recommendation is that the OSC go back to the drawing board, that they implement an independent advisory committee as part of its consultative structure, along the lines of the UK consumer investor panel, and that they should give this committee adequate resources and support and that there should be compensation paid to the members of the committee.

I've discussed this issue with members of the commission, and they've said, "Why should we compensate retail investor members of our committee when we don't compensate the members of our other committees?" My response was, "Oh, you don't compensate the $800- to $1,000-an-hour lawyers who sit on your committee as part of their job, or the $1-million-a-year investment bankers who sit on your committee as part of their job as well; therefore, these volunteers who don't have the resources of an investment bank or a law firm and are not furthering their careers should be required to devote significant amounts of their time on a pro bono basis as they have been doing for many years?"

It's about time the commission started looking at this a little differently and saying: "Maybe we've got to look at retail investors a little differently from how we look at investment bankers and Bay Street lawyers."

We have made some recommendations with respect to restitution and redress for retail investors. Really, we have gone back to the expert panel, the Hockin report, which made a number of quite sensible recommendations about the OSC having the power to order compensation in a case of violation of securities law so that investors are not required to always resort to the courts; to establish an investor education fund funded by the industry; and to have mandatory participation by registrants in a dispute resolution process of a legislatively designated dispute resolution body.

These changes, because they require legislation, will take some time. In the interim, the committee should consider asking the OSC to follow up on recommendations that have already been made in the past: that IIROC review its arbitration procedures with a view to making them more helpful to retail investors, less costly to investors and more transparent, and that they raise the threshold for cases that can be heard under the arbitration system to a minimum of $350,000.

Turning to shareholder rights—and this is really what initially led me to propose the creation of this body—when I left Canada in 1989, I thought Canada was really at the forefront of securities regulation. At that point, Hong Kong was the wild, wild west of securities regulation. When I came back from Hong Kong, Hong Kong had become recognized as actually a pretty well-regulated market. I think there was a study recently that said that along with Singapore, it was one of the two top markets in terms of investor protection. In the meantime, while all these other markets have been improving their level of shareholder rights and investor protection, it appeared to me that in Canada we've gone backwards. One of the areas where we've gone backwards is in the area of shareholder rights, particularly in matters that are under the jurisdiction of the Toronto Stock Exchange. A couple of examples—and the reason I ran into these examples is because, on coming back to Canada, I became an investor and I saw the things that were going on with listed companies in Canada. The things I saw were abusive private placements that violated the spirit of the listing rules of the Toronto Stock Exchange but that the Toronto Stock Exchange did nothing about. I saw transactions where shareholder approval was not required, where companies issued shares that resulted in massive dilution and loss of value for public shareholders.

In Canada we have a structure where if two companies that are of comparable size are going to merge, the normal structure is that the shareholders of both companies have an opportunity to vote. But in Canada they've figured out a way where one company becomes the bidder and the other company becomes the target. Now, the target gets a premium for its shares. The shareholders get a premium for the shares and they have an opportunity to vote. The offeror company's shares lose a lot in value. They're not given an opportunity to vote. So only in Canada do we have this perverse result where the people who are given more money have a chance to approve a transaction and the people who have money taken away from them have no say. That, to me, is a pretty perverse result.

The Toronto Stock Exchange consulted the markets on the shareholder approval requirement back in 2007, following the Goldcorp-Glamis controversy in 2006. The consultation concluded long ago; nothing has happened. You have to ask yourself: Why has nothing happened in this area? I think the answer is that the Toronto Stock Exchange is both a regulator and a for-profit listed company. The Toronto Stock Exchange was allowed to regulate listed companies even after it demutualized and became a listed for-profit company itself. There is inherent conflict in the for-profit status of the Toronto Stock Exchange and its role as a regulator. The Toronto Stock Exchange views listed companies, or more accurately the management of listed companies, as its clients. Shareholders do not have any standing before the Toronto Stock Exchange.

In other markets, when stock exchanges demutualized and went public, they addressed these issues. In the UK, when the London Stock Exchange went public and became a listed company, the regulatory function for listing was transferred from the London Stock Exchange to the Financial Services Authority, or the equivalent of the OSC. In Hong Kong, where I have a fair bit of experience—and Hong Kong is not a Mickey Mouse market; in fact, it's larger than the Canadian market and its stock exchange is more valuable than the New York Stock Exchange, so it's a very significant market—when they demutualized and went public, they separated the business side from the regulatory side of the exchange. The regulatory side is overseen by a listing committee, which is a committee of market practitioners, including investor representatives, that's jointly selected by the securities commission and the stock exchange. It does a very effective job.

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It's our view that the regulatory function at the Toronto Stock Exchange should either operate as a separate entity within the Toronto Stock Exchange, with its own board of directors, or that, at the very least, there should be some kind of separation so that it operates independently of the for-profit business side of the exchange. Failing that, responsibility for the regulation of listed companies should be transferred to an independent SRO or to the securities commission.

If there's time, I'd be happy to give you a wonderful example of how for-profit initiatives get expedited and initiatives that involve shareholder rights, investor protection, get delayed and delayed constantly. I'd be happy to give you that example.

This morning, after we finalized our submission, I started reading the Globe and Mail and I saw that there was an article in the Report on Business saying, "Schools Have Failed on the Financial Literacy Front." It's written by the chair and president of the Investor Education Fund. It struck me as very important because it actually hits on some of the positions of FAIR Canada on the question of financial literacy, so we decided, at the very last moment, to add in our recommendations on financial literacy, even though we weren't sure they really fell within the mandate of this committee.

What's been happening up until now is that the regulators have been shifting responsibility onto investors. They've been shifting responsibility onto a financially illiterate group of people. They've been saying, "Take care of yourselves, but we'll help you, because we are going to do investor education. We're going to put up a website." I look at it and I ask myself: How is it possible that a financially illiterate person, whether a bus driver or a teacher or even a lawyer, who is busy, has a full-time job, has several kids, is driving the kids to hockey or to ballet practice, who is financially illiterate, is somehow going to become literate by spending a few minutes in front of these websites? I say: It's not going to happen. I think one of the first things that the regulator should do is find out whether all this money that they're spending on adult investor education is money that is effectively used or money down the drain.

The point that's made in this article is one that's very near and dear to my heart, and that is that in Canada we graduate people from our educational system as financial illiterates. We then set them loose and expect them to be able to deal with their own financial future. I think that's a great failing of our system.

I went through the educational system more than 30 years ago. I was not taught a thing about financial literacy. I was taught about trigonometry and calculus and I can tell you I don't remember a thing about those, because they don't come up every day—certainly not in my work; maybe they'll come up in your work. But the thing that would come up, and would be valuable for the rest of people's lives, is having a basic foundation in financial literacy.

Our recommendation is that the Ontario government should take a leadership role in financial literacy and develop and implement a provincial financial literacy strategy, and work with the other governments in Canada to develop a national strategy. This is something that's been done in other countries. The US and the UK both have national financial literacy strategies; we don't in Canada.

Ontario should make financial literacy mandatory in our high school system so that the next generation of Canadians that enters the workforce and enters the financial system has a basic level of financial literacy. And as I said, we should test the effectiveness of the current adult financial literacy, because I think we'd be surprised, or not surprised, by the results of that.

I'd like to leave the rest of the time for questioning.

The Chair (Mrs. Julia Munro): Thank you very much. We'll begin with the government member, Mr. Flynn. And just for your information, we have about three minutes for each caucus.

Mr. Kevin Daniel Flynn: Thank you for your presentation. It's good to see you. Thank you for coming today.

Just so I'm clear, your organization supports a single regulator in Canada. Is that accurate?

Mr. Ermanno Pascutto: I think our organization would support a provincial regulator but recognizes the difficulties of getting that done. I think we have to find a

pragmatic solution to that. If we were able to get seven of the 10 provinces to agree, I'd say we should proceed, and we should leave the remaining provinces to retain their provincial securities commissions and work with them. We have to remember: We talk about the United States having a national securities commission, but no one seems to mention that the United States also has 50 state securities regulators. So they have securities regulators both at the federal and state level.

It would not be the end of the world if we moved ahead with a national commission with most of the provinces and perhaps a provincial commission in Quebec and Alberta. I think the national commission could be much more effective at dealing with enforcement issues. I think that the provincial regulators are not that effective at dealing with enforcement issues.

Mr. Kevin Daniel Flynn: You've answered, I guess, the next question I had, then, which was going to be: If you thought we were going to move to a national system fairly quickly, would you still make the changes to the provincial system? You're saying that you think there's room for both and you would make those changes in any event.

Mr. Ermanno Pascutto: I absolutely think that we need to make the changes that we've recommended today to the provincial system. I think that the Hockin report very optimistically looked at the timetable and said "three years." That, I would think, is the earliest that anything could happen. More realistically, I think we're looking at a three- to five-year time frame. More realistically yet, we have to keep in mind that we've been at this for 50 years and we've failed every other time. So there's a very good chance that nothing will ever happen of a national securities commission.

I don't think we should wait three to five years. I don't think we should wait for something that should never happen. I think Ontario has to get on with it and has to improve the lot of Ontario investors right now. I think they have to deal with an investor advisory committee, with investor representation on the commission to improve the representation of a stakeholder that's simply missing from the regulatory system in Ontario.

Mr. Kevin Daniel Flynn: Thank you.

The Chair (Mrs. Julia Munro): We'll move on. Mr. Hudak.

Mr. Tim Hudak: Thanks for your presentation and the way you've organized it. I have some quick questions to get through. You mentioned the importance of the provincial financial literacy strategy, particularly in the era of the shrinking of defined benefit pension programs, right? How would you implement it on a practical basis—an economics course, as part of a business course that's mandatory?

Mr. Ermanno Pascutto: I'm not an education expert. What I think you could do is combine it and make it part of a number of different courses throughout the high school curriculum. But at the end of the day, you'll have taken all the different components so that you've achieved a mandatory level of financial literacy, so you understand mortgages, RSPs, credit cards, and credit and risk and all those things. So throughout your high school career, and perhaps even in grade school, you add components which at the end of the day will leave you with a basic level of financial literacy when you graduate high school.

Mr. Tim Hudak: You mentioned also redress and restitution for retail investors, and following up on the expert panel report's recommendations so they wouldn't have to resort to the courts. You mentioned the establishment of an investor compensation fund. Are there best practices in other commissions that you would recommend?

Mr. Ermanno Pascutto: The expert panel looked at some experimental things that were being done in other provinces, and some of these things are being experimented with in other provinces. So they're saying, "Why is it that we have a small experimentation in Nova Scotia with the regulator being able to compensate, but it doesn't seem to be happening across the country?"

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I'm involved with the Dubai International Financial Centre. When we drafted the rules for Dubai, we gave the regulator the authority to order compensation to be paid to investors where they found that there was wrongdoing. If the regulator finds that there is wrongdoing, why is it that the investor, without the resources, without the power to call for information with their statutory investigation powers, has to start the whole process one more time and has to prove yet again that the financial institution broke the rules in order to get compensated? These are things that are happening around the world. They're not earth-shattering ideas.

Mr. Tim Hudak: You have concerns about the IIROC's arbitration procedures. What are the shortcomings there?

Mr. Ermanno Pascutto: There are a number of shortcomings. This is an issue that I think has been addressed by the various committees that have looked at this in the past and by the five-year review that was led by Purdy Crawford. They indicated that there are a number of problems. One of the most basic ones is the $100,000 threshold. That's a very low threshold. They recommended years and years ago that that should be $350,000—probably today it should be $500,000.

A lot of investors don't have great confidence in the self-regulatory system because it's run by an SRO. If you're going to ask me a question about SROs, I actually have a different spin on SROs than, perhaps, some of the other investor advocates—but only if you ask that question.

Mr. Tim Hudak: I think I'm out of time.

The Chair (Mrs. Julia Munro): We're very close. Do you want—

Mr. Tim Hudak: Well, if he wanted to talk about the SROs briefly and—

The Chair (Mrs. Julia Munro): Yes.

Mr. Ermanno Pascutto: Everyone seems to want to criticize the self-regulatory system that we have in this

country. I have seen self-regulation work in London, I've seen self-regulation work in Hong Kong, and it can be made effective. I saw self-regulation operate in Ontario in the 1980s and it was completely hopeless. It was nothing more than an advocacy body for the industry. Times have changed. It has evolved. IIROC is a very different organization than the IDA was a few years ago. We have a self-regulatory system in place. Rather than constantly kicking it all the time, why don't we work to make it work more effectively? IIROC doesn't have powers of investigation like the securities commission has. Why don't we give it better powers of investigation? IIROC doesn't have the ability to collect fines. Members simply drop their memberships and walk away. Why don't we give them the power to collect fines? Why don't we help them become more effective? As long as we have a self-regulatory system in place, let's make it work better.

The Chair (Mrs. Julia Munro): Let's move on to Ms. Gélinas.

M^me^ France Gélinas: I liked your opening comment, when you said, "I have an opinion on just about anything." I'm about to test that.

There have been a lot of reports over the last five or six years: the 2004 standing committee report, the Osborne fairness committee report, and the Crawford report that I think you referred to a few minutes ago. Those reports recommended substantial changes to the OSC and securities laws, but most were not implemented.

Here comes the part about wanting your opinion. In your opinion, what do you figure the roadblocks to change are?

Mr. Ermanno Pascutto: It depends on where the changes are. One of the roadblocks, I think, is that you don't have representation by all the stakeholders on the commission.

One of the major issues that has been discussed is the creation of an independent adjudicative tribunal. I think people have always said, "Well, it's way too hard for us to set up an independent tribunal." Every time someone suggests a federal commission, it's, "We can hold off doing anything," even though everyone says that the current system is perceived to be highly unfair. The OSC is being challenged right now in court on that issue. I helped write the letter to the commission that started this debate a number of years ago.

A very, very simple solution, to my mind, is one that was raised, I think, by the Canadian coalition: Separate the chairman and the CEO functions. The separate tribunal raises difficult issues. Separating the chairman and the CEO functions is very simple. It would reflect the way the OSC operated in the 1980s. In the 1980s, the staff reported only to the executive director. So the executive director was in charge of enforcement, of corporate finance, of registration, of capital markets. The chairman was not involved in live cases. That is the big difference with the situation today. Today, enforcement reports to the chairman; takeovers and mergers, at the end of everything, reports to the chairman. That's what creates the perception of bias. In the 1980s, when the executive director was effectively the chief executive officer—because all the staff reported to that individual—no one was raising questions about perception of bias, because we were running a two-tiered organization and there was a healthy tension between the staff and the commission. Now, the chairman runs the staff and runs the commission. It's not surprising that people say, "We're not convinced that the system is fair."

The Chair (Mrs. Julia Munro): That concludes the time that we have available. We certainly appreciate you coming here today.

ANITA ANAND AND MICHAEL CODE

The Chair (Mrs. Julia Munro): I'd like now to call on Anita Anand and Michael Code as our next presenters.

Good afternoon, and welcome to the committee.

Mr. Michael Code: Professor Anand just stepped out to go to the washroom. I'm happy to wait for her or to get started, whatever you wish.

The Chair (Mrs. Julia Munro): I think the committee would appreciate you starting, if that's all right with you.

Mr. Michael Code: As you wish.

We come from different backgrounds. I'm a criminal prosecutor and criminal defence lawyer. I've prosecuted cases for the OSC. So my expertise is on the enforcement side. Professor Anand is a securities law expert, so her expertise is on the regulatory side. We thought it would be helpful if we presented jointly so that I can cover the enforcement side and she can cover the regulatory side.

We were invited to attend—we received a phone call from the clerk's office asking us to come—so we don't have a formal presentation to make to you. We're here, at your request, to simply answer your questions and deal with any issues you might have. We haven't been told what it is that you're concerned about or interested in, so I'm going to keep my remarks very brief, and I believe Professor Anand will as well, and leave as much time as possible for you to ask questions of us so that we can be of assistance to you in any matters that are concerning you.

On the enforcement side, the simple point I would make that has concerned me consistently over the last couple of years—and I've spoken out about this many times at public forums and in submissions to the Hockin committee; I assume this is why I was invited—is that capital markets misconduct has both a criminal form to it and a regulatory form to it. The OSC has powers that are regulatory. It does not possess criminal law powers. Criminal law powers are possessed by the police and the Attorney General to prosecute Criminal Code offences. What has happened progressively over the last 20 to 30 years is a slow shift away from the criminal justice system, so that capital markets misconduct now is increasingly treated as the responsibility of the OSC. The

OSC simply is not a criminal prosecutor, and it's unfair to tarnish the OSC with the perception that Canada is soft on capital markets crime and that somehow the OSC is at fault for this. They simply do not have that jurisdiction. That is a police/Attorney General jurisdiction, and we need to reinvigorate the criminal side of the prosecution business when capital markets frauds take place.

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If you talk to people in the enforcement business, in the regulators across this country in the 13-odd regulators we've got, they will all tell you that increasingly the cases that are being referred to them are out-and-out frauds and they should be investigated by the police and charged as criminal frauds. Yet our regulatory system is picking up the slack from the criminal law side of enforcement and being forced to treat these straight-ahead frauds as if they were regulatory problems. So the OSC is being cast in a role that's not appropriate for it, as are the other regulators across the country. We need to reinvigorate the criminal side of the enforcement business.

I think the reason this has happened is because over the last 20 years, particularly in the 1990s, when we were getting our budgets in order in the public service both at the federal and provincial levels, there were cuts to police budgets. Whenever there are cuts to police budgets, the way they react is by emphasizing violent crime as opposed to consensual crime. Fraud is very much seen as a consensual crime, where the victim is blamed for the fraud as much as the fraudsman is blamed for the fraud. The police got out of the fraud business and never really got back into it as forcefully as they once had been. In the 1970s and 1980 we had very vigorous criminal prosecution of capital markets frauds, and slowly the police got out of the business because of loss of expertise, loss of budget and just a reprioritizing, that guns and gangs are more important that fraud.

At the same time, capital markets frauds were getting more complex and more difficult to investigate and prosecute, and the securities commissions were perceived as having expertise. They had in-house forensic accountants—these cases all require real accounting expertise—and the regulatory commissions were well-budgeted; they had lots of funds to investigate these cases—and they were very expensive to investigate—and their penalties; the Legislature was consistently jacking up the regulatory penalties.

We now have quite significant regulatory penalties. The fines are up to $1 million for every violation of securities law in a purely regulatory prosecution. Similarly, if the OSC chose to prosecute the matter under the Provincial Offences Act in provincial court, they could get jail penalties of up to five years less a day and a $5-million fine. So you can understand why the police got out of the business of prosecuting and investigating criminal frauds, because the securities commissions were there as these very attractive expert bodies with lots of funding and with not-bad penal sanctions available to them through sections 122 and 127.

So we've ended up in this unfortunate situation where we are perceived in Canada as being soft on criminal fraud compared to the Americans because we've set up a reasonably attractive regulatory system to which the police have simply delegated the whole matter of criminal law enforcement. The recent talk in committee, as you know, has recommended that one of the ways to turn back the clock to the system that existed in the 1970s and 1980s, where there was vigorous criminal law enforcement, would be through a national securities regulator, where you would have the criminal enforcement unit, which is a federal power, the federal criminal law power and the federal police forces and federal prosecutors housed in the national securities regulator together with the administrative enforcement people. They would look at cases in a much more holistic manner and decide that, when it was truly a criminal fraud and should be prosecuted as such, the criminal people would prosecute it, and when it was truly a regulatory matter that could be properly dealt with by civil sanctions such as licensing and regulatory fines and officer and director bans, you'd let the civil side, the administrative side, handle it.

Those are the broad areas in which I'd be happy to discuss with you any concerns you have about current enforcement practices.

The Chair (Mrs. Julia Munro): Professor Anand, did you have some comments to make too?

Ms. Anita Anand: Sure. Thanks so much for having us today. Let me just give you a bit of background. I practised corporate and securities law before I entered academia in 1997. I've been on faculty at Queen's University in Kingston and here at the University of Toronto. I'm now the associate dean of the JD program and an associate professor teaching in the area of corporate and securities law, bankruptcy law and advanced corporate and securities.

I set out that brief background because I think my take on these issues is from the standpoint of one step back. I like to, when I'm teaching, paint the entire regulatory regime for my students, which means that when we're thinking about financial markets and when we're thinking about capital markets, we can't simply look at one regulatory agency, because these markets are comprised of a number of stakeholders, domestic and international, and a number of regulatory agencies and SROs, as we've already heard today. Some of these regulatory agencies have the ability to make mandatory rules; some make and issue guidance. So we're dealing with numerous stakeholders as well as numerous different types of law, what some theorists refer to as "hard law," being mandatory law, and "soft law," which is guidance etc.

What's really important is that, firstly, we can't disentangle securities markets from financial markets more generally. It's important for us to take a look at the regulatory landscape as a whole and try not to simply focus on how to make the system better by focusing on one regulatory agency alone.

Secondly, I think what we've seen from the credit crisis, for example, in the US and in Canada is that we're dealing with complex securities but, unlike previous market downturns in the past, these complex securities

implicate a number of different stakeholders—banks, other financial institutions, and retail investors, not simply retail investors of securities alone but also in terms of their household mortgages. This is a situation that we haven't seen in the past. I think the economic issues and the regulatory issues that we're being confronted with and that you are considering are somewhat unprecedented.

In terms of enforcement, I have also spoken out in the past about the importance of heightening the federal presence through their criminal law powers and the provincial Attorney General's powers in this area. What I mean by that is that the actual legal powers already exist, but I tend to agree with my colleague in analyzing this as an enforcement—that is, as a situation in which there are a number of different types of quasi-criminal and criminal issues that are coming to the fore and not all of them are appropriately dealt with by the Ontario Securities Commission.

It's very important for us to consider that we actually have legal and regulatory infrastructure in place on the criminal side and that that infrastructure isn't wholly being used. Even without the Hockin recommendations going into place, there is room for a heightened federal and provincial Attorney General's presence in the enforcement of criminal fraud.

Those are my basic comments. I can take questions on anything relating to corporate and securities law.

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The Chair (Mrs. Julia Munro): Thank you very much. We'll begin with Ms. MacLeod.

Ms. Lisa MacLeod: Thanks to you both for coming. I have a question for each of you.

Dr. Anand, you just mentioned that there could be a heightened Attorney General response at the provincial level. I'm wondering if you can expand on that. In one of the articles that I had read, our current Attorney General said that he would like to get more aggressive, yet we have been consistently told that many of these matters of a criminal nature are dealt with through federal jurisdiction. So I'd like your take on that.

Ms. Anita Anand: It's a complicated question, and I have to admit that I don't have a lot of information that I would like to have, just from a pure research standpoint. What I think needs to happen is that when a matter comes before the commission or the federal or provincial government, as it were, there is some discussion between these two bodies about what type of situation this is, how the investigation is going to proceed and who's going to bear the responsibility of it. If it is a matter that is definitely of a fraudulent nature, then that is not something that the Ontario Securities Commission, or securities commissions generally, should be taking on. That is not what their legislative power entitles them to do. Their powers in the statute are quasi-criminal in nature only, and the fines and the penalties that are contained in the statute are there with that in mind.

Ms. Lisa MacLeod: Professor Code, when you spoke—and I'll leave it to both of you to answer—you had mentioned that police today don't focus as much on consensual crimes.

Mr. Michael Code: Consensual crimes, in the sense that an investor hands over his or her money to a fraudsman. The old-fashioned idea in the 19th century was that the victim was a fool; they were responsible for the crime themselves by consensually handing over their money. So there's this old attitude in the law of fraud that fraud is a consensual crime where the victim is as much responsible as the fraudsman. If you're making priorities in a police force as to whether to investigate somebody who has been shot on the street by a gangster or somebody who has given all their money to a fraudulent—

Ms. Lisa MacLeod: Actually, one of the previous deputants made a similar comment: Somebody could go in and rob a bank at gunpoint and they could go and do some hard time, but somebody at a major company could lift a lot more money and just get a slap on the wrist. So it's an interesting point.

But in terms of enforcement, I think that—

Mr. Michael Code: I don't share that view. I think fraud is extremely serious. I'm simply saying that police forces, when prioritizing, will give higher priority to a crime of violence than to a fraud.

Ms. Lisa MacLeod: Right. I just want to extend it, in terms of enforcement because, as we all know, a lot of this is criminal in nature. We've had issues like Bre-X and other, I think, just egregious examples in this province where the OSC has been a little bit slow to respond. But you are right: It would be much better to see some of those cases tried in a criminal court, rather than in the same place where people are getting parking tickets.

Having said that, with a federal regulator, do you see enforcement being improved? I ask both of you this, in light of your comments on policing and, Dr. Anand, your comments with respect to the Attorney General and the federal government needing to get more involved.

Mr. Michael Code: It all depends—if you want me to go first—on there being a properly structured and properly resourced investigative agency.

One of the difficulties right now is that police forces are general police forces. They've got a homicide squad, they've got a fraud squad, they've got a holdup squad, they've got a sexual assault squad, and officers get moved around and transferred. We need to have a special, dedicated policing unit that makes a career of enforcing fraud.

Ms. Lisa MacLeod: Does the RCMP have a similar—I'm just asking.

Mr. Michael Code: Absolutely. Very much so.

Ms. Lisa MacLeod: Do you think that if we move to a federal regulator, it may improve enforcement?

Mr. Michael Code: It could, yes, if you set up a good enforcement agency with a dedicated staff. It would have to be a multidisciplinary staff of police officers, forensic accountants and lawyers, because these crimes are very complex and they need multidisciplinary staffs. You can't have the old-fashioned general service police force investigating major capital markets frauds. You need a

dedicated unit with a number of disciplines, and you need to properly resource it and give them their mandate to go after criminal fraud. Don't be sending them off to guard the dignitaries at the G7 summit or at the Olympics when police officers are needed somewhere else. They should be solely dedicated to capital markets enforcement.

The Chair (Mrs. Julia Munro): Thank you very much. We'll move on to Ms. Gélinas.

M^me^ France Gélinas: It has been suggested that the OSC moves too slowly in bringing cases forward; I guess some are large and complex. There have been instances of the Ontario Securities Commission announcing allegations and then waiting for years before they move ahead. What do you think of those delays? What should be done to prevent those delays?

Ms. Anita Anand: I think it really depends on the case you're examining. It happens that in the recent past there have been some high-profile cases in which the facts might bear out your story. But I point to the recent settlement that the OSC reached with the executives of Research in Motion quite quickly, from the time at which there was an announcement of the matter and the actual settlement. In fact, the OSC reached a settlement more quickly than the US Securities and Exchange Commission, and the settlement reached was at a higher amount in the Ontario context. So I don't think that, across the board, the facts in all cases would underpin the statements that you're making.

Mr. Michael Code: It generally depends on whether there's a criminal prosecution going on at the same time. In the example that Professor Anand gave, there were no criminal proceedings extant at the same time, so the OSC could move quickly and deal with the matter as a purely regulatory matter under section 127.

If there are criminal proceedings going on in the criminal courts, then it is customary for the OSC to take certain interim steps, like cease-trading orders, to make sure that an alleged fraudster is not engaged in further activity in the market. You can put some interim remedies in place before the OSC under section 127.

The actual regulatory penalties will generally await the outcome of the criminal case. In cases like Hollinger, where there's a criminal prosecution in the United States, or cases like Livent, where there's a criminal prosecution here in Ontario, or Nortel, where there's a criminal prosecution here in Ontario, the OSC is simply awaiting the outcome of the criminal proceedings, and then they will step in and complete their regulatory proceedings. But they've got interim measures in place. There are officer and director bans and trading bans in place as interim measures while we await the outcome of the criminal proceedings.

Ms. Anita Anand: I might just add that you might counter that and say, "Well, even in the criminal or the quasi-criminal matters, the proceedings seem to be very extended." What's at issue there in large measure is a question of evidence, and what evidence needs to be gathered in order to support the particular elements of the quasi-crime at issue.

For example in the Felderhof case, which has been called an extended litigation, one of the issues was that this material fact, material change and materiality standard had to be proved. That's extremely difficult: to actually meet the elements of whether the information at issue was material within the definition of the act. So, unlike other crimes, where sometimes the evidence can be DNA or forensic and perfectly matched to the point you're trying to prove, you don't have that type of certainty in the securities legislation or prosecution stages.

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M^me^ France Gélinas: So if I hear you well, you feel satisfied that if there is no criminal prosecution going on at the same time, the process works and it is expeditious.

Mr. Michael Code: If there's no criminal prosecution going on at the same time, there's no excuse for delay; that's my point. The proceedings should proceed expeditiously. Even if there is a criminal prosecution going on, the criminal prosecution should proceed expeditiously.

Former Chief Justice LeSage and I just wrote a lengthy report for the Attorney General on long, complex criminal trials, in which we condemn the culture of delay that exists in our courts. I don't want to leave the impression that I'm somehow complacent about delay. I think delay is appalling, and we've got to change the culture of delay that exists in our courts in criminal matters. Certainly, if there is evidence of delay in OSC proceedings when they're not awaiting criminal prosecutions, that's wrong and it should change. I don't have any evidence of that or examples of that. The example Professor Anand gave, the recent case, is a good example of the OSC proceeding quite expeditiously.

Ms. Anita Anand: I guess I would add that we're talking primarily about section 122 versus 127 matters here, but there's a whole other area of securities regulation in the mergers and acquisitions and takeover bids area where the OSC has been known to act extremely expeditiously on the day or on the week of the issue arising—for example, on poison pill cases.

The Chair (Mrs. Julia Munro): We need to move on. Mr. Flynn.

Mr. Kevin Daniel Flynn: Thank you for the presentation. It was a great combination of practical and academic information that I think we all needed.

The expert panel came back and I guess it said that our country endures or enjoys a reputation as being fairly soft on white-collar crime. Yet the World Bank has come back and said we're ranked number 5 in the world when it comes to things like transparency and investor protection. People point out some high-profile cases that they feel were prosecuted in the United States because they couldn't be prosecuted in Canada or they wouldn't be prosecuted in Canada. The previous speaker was talking about the markets in Dubai and Hong Kong. From what you know, from your extensive experience in the field, obviously, is there anybody in the world who has it right? And if there is, who is it?

Ms. Anita Anand: That's a real toughie.

Mr. Michael Code: I should be clear that I'm not one of these people who embraces the American system. I think the American system is very different from ours, and this invidious comparison that's always made as to how tough the Americans are and how weak we are, has never impressed me because I think the Americans do a lot of things wrong in their justice system. I wouldn't want their justice system in this country.

Having said that, there's lots of room for improvement in our justice system. As I said, our Attorney General here in Ontario has just recently commissioned a report as a result of his concerns about there being too much delay in our justice system. He's very committed to making our justice system speedier. If our justice system were speedier, I think the penalties are fine. I think our penalties are much more proportional than American penalties. I think American penalties are generally too harsh, and I don't like the excessively punitive nature of their system. But our system is too slow. We need to fix the delay problem in our courts. We've created a bit of a monster in the criminal justice system right now. There's lots that I've said about that in the recent report to Minister Bentley.

Ms. Anita Anand: But I don't think it's just the question of delay; I think we actually have infrastructure—as I was mentioning, legal provisions in the Criminal Code that can address many of the crimes that Canada is criticized for not pursuing. So I think, to echo what Professor Code has said, that in a sense the Ontario Securities Commission gets penalized and criticized for not pursuing those matters when, if they're true, fraudulent crimes, those crimes should not be in the jurisdiction of the Ontario Securities Commission. That body is not equipped legislatively to deal with that magnitude of criminal action.

If we're being criticized by the IMF and the World Bank etc., we've got to look at our entire regulatory system. We also have to look at our statutes. We have 13 different or separate securities acts, we know that, but we also have separate legislation in each province relating to corporations and a federal corporations statute. Some of the issues that we've been discussing today, for example shareholder approvals and the lack thereof in the securities statute in some instances, aren't just regulated under the securities legislation; there's also corporate legislation that governs shareholder approvals in a variety of transactions, arrangements, private transactions. Anything that requires a fundamental or monumental change in the corporation requires shareholder approval.

I think you've got to look at the regulatory regimes at issue, the regulators themselves and the numerous different, kind of fractured ways in which we regulate corporations in Canada.

Mr. Kevin Daniel Flynn: Thank you, Madam Chair.

The Chair (Mrs. Julia Munro): All right. Well, thank you very much. That completes the time that we have today. We appreciate your being here.

Mr. Michael Code: Thank you very much.

DIANE URQUHART AND GARY LOGAN

The Chair (Mrs. Julia Munro): I'd now like to ask Diane Urquhart to come forward. Members of the committee, I just draw your attention to the fact that you did receive earlier in the day, in your package, two separate pieces from Ms. Urquhart as well as one that was just handed out.

Good afternoon, and welcome to the committee. We appreciate your being able to join us here today. As you know from observation, you have 30 minutes in which you may make remarks, and if there's time remaining, we will take questions from the committee. Please begin.

Ms. Diane Urquhart: Thank you very much, Madam Chair. I'm Diane Urquhart. I'm an independent financial analyst. I'm also working as financial adviser to the ABCP retail note holders under a rep counsel order by Justice Colin Campbell of the Ontario Superior Court of Justice. I've worked 30 years in the investment field in the capacity of research director and analyst, whose primary function is to act on the interests of investors. I have made an extensive submission which you have before you, which is full of facts and figures, but in light of the shortage of time, please take those facts and figures to support the key points of my remarks.

The Ontario members of Parliament have to fulfill the government's public safety mandate. This is to protect life and to protect the money needed to live. As MPPs, you serve your constituents under this public safety mandate.

I have evidence that the Ontario Securities Commission and the investment industry self-regulatory organizations have been facilitating systemic misconduct in the investment industry. As a consequence, the duty before you as members of provincial Parliament is that we must restructure both the securities regulation enforcement system, i.e. the national securities commission, and we must also reform how securities crime policing is done in the province and throughout the country.

The world, and Canada, is suffering the worst economic crisis since the Depression. This economic crisis is a consequence of a financial crisis that has been caused by severe abuses in the credit derivatives markets and in the mortgage markets. A few people in the mortgage and banking and investment industries have made millions of dollars for themselves in a variety of schemes that have mauled investors throughout the world. The schemes have put the financial industry itself in peril. The world economies are being brought down by the financial industry's negligence, by their failure to meet their duties to their customers and even widespread, systemic fraud.

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Today, the representatives of the Ontario Securities Commission have been telling us that they have amongst the best investor protection in the world and that all is well. Everyone in the province knows that this is not the case. There is widespread fear amongst Ontarians, not only amongst those who lost all their life savings or substantial portions in ABCP but also those who are

participants in pension funds, due to the grave deficits that this market crisis has caused, depleted personal retirement savings and, even now, the economic crisis affecting our jobs.

The Ontario pension benefits guarantee fund and the Ontario government are going to be asked to fund billions of dollars of pension fund deficits at companies in trouble. Nortel has a $2.3-billion pension fund deficit; it's a company that has entered CCAA proceedings. Air Canada has a $3.2-billion pension fund deficit, and it's suspected that it will enter CCAA proceedings in the coming weeks.

Nortel is not even paying the severance of its terminated employees. These employees, without work and without severance to pay for their families' bills while they look for new jobs, are treated as unsecured creditors in CCAA proceedings.

These filings for CCAA have a lot to do with the financial crisis and the subsequent economic crisis caused by the abuses in the credit derivative markets and mortgage markets.

I can tell you, in working as a financial adviser to the 1,800 families that were hung up in the ABCP crisis, that the CCAA court is a format of protracted negotiations between senior management and very large creditors. It's a very precarious place for retired workers, terminated employees and small investors whose life fate is being dictated in the negotiations occurring within that court setting.

Canada has had two of its own very significant systemic security frauds: income trusts and non-bank asset-backed commercial paper. These two toxic income products have created losses of close to $60 billion throughout the country. Unfortunately, most of these losses are borne by our pension funds and by our personal retirement savings in seniors' portfolios—people over the age of 50. There have been no sanctions by the Ontario Securities Commission, no actions taken by the self-regulatory organizations in either the income trust or the non-bank ABCP field. I said that I believe there was systemic security fraud in these two products. There have been no criminal securities investigations taken either on the subject of income trusts and asset-backed commercial paper.

Income trusts were found to have been marketed in the United States on a deceptive cash yield. The US Department of Justice introduced a criminal prosecution agreement with a major dealer in America for the same deceptive cash yield that the Canadian marketplace promoted throughout the 2000s. We have $31 billion of losses in business income trusts in a product that the US found to be criminally marketed, and it's marketed in our country on the same basis.

ABCP: We heard from the Ontario Securities Commission people this afternoon that the matter is settled, that we have a CCAA restructuring that has been executed successfully. Well, how much success is it to have a $32-billion product that trades in the market—if it trades at all—at 15 cents on the dollar? That's $27 billion of losses if people were to try to realize on the value of their asset-backed commercial paper.

In Ontario itself, in all of its entities, if you use the loss estimate based on a longer-term measure of 45 cents on the dollar, the Ontario government and its related municipal and crown agencies have a half-billion-dollar long-term loss on their hands as a result of systemic fraud in the asset-backed commercial paper market.

Earlier today, Mr. Wilson said that the retail market had been cash-settled. Some $4 billion of the toxic ABCP got into the retail market. Most of the investment banks realized that they had a problem quite quickly and did voluntarily settle—up to $4 billion of the ABCP that they put into retail accounts and into money market mutual funds. Canaccord and Prudential refused to settle, and I helped them in my capacity as a financial adviser under the Ontario Superior Court of Justice, working with them under a name-and-shame program to get their money back out of Canaccord and Prudential. I'm proud to say that on the basis of the hard work of these people who had had their life savings taken, and through no effort by the Ontario Securities Commission or the Investment Industry Regulatory Organization of Canada, these people got their money back.

I have, in the audience today, a representative of people who owned more than $1 million, and I'm very sad to say that we have 36 families in the country, over $400 million of their life savings, in many cases a very high proportion of everything they own, which have not received full cash settlements. They have been hung out to dry as collateral damage. They've lost their rights to sue in the courts. What democracy takes away the right to sue of a family who's had their money expropriated in a toxic product that involves systemic fraud? They're told to chin it up, take the notes, take the 15 cents and take this on behalf of the country that seeks to have this settlement as a form of financial stability for the banks. Why do our 36 families have to lose the vast majority of their life savings so that our banks can show strong balance sheets?

I'm sorry; I'm taking up perhaps too much of the time. But I do want to say that I strongly agree that there is a problem in securities crime policing, and I agree that it's not the Ontario Securities Commission that can be held to account for the problems in securities crime policing. However, I would argue that they need significant improvements within the regulatory environment as well as securities crime policing, and I'm very concerned about the degree to which there is an effort in the past six years to control how securities crime policing has been done in the country.

The top priority for structural change in Ontario, in my opinion, is to support the new independent Canadian securities crime unit to deter both rogue fraudsters and systemic fraud in the investment industry. We have a securities crime unit proposal that has been developed by Gary Logan, who's the former detective sergeant of the Toronto Police Service's fraud squad. Gary, I'd like you to stand up to identify yourself. Gary has 32 years with the Toronto Police Services, with approximately the last

20 years in senior management and senior investigation for the Toronto Police Service's fraud squad, with a specialty in securities crime policing.

Mr. Logan developed a similar system when Ontario had a significant problem with mortgage fraud. He developed a system for the intake and assessment of complaints from people who are defrauded by securities crime—in this case, preparing the preliminary assessment files and determining the protocols by which the investigations would take place by all of the police forces in Canada, not just the RCMP IMET.

We don't have time to get into the details of the problem, but suffice to say that the RCMP IMET was a failure in terms of the initiatives that were taken post-Enron and that part of the reason for the failure, in our opinion, is that they took exclusive jurisdiction and they shut out the investigative capabilities of all of the other police forces in the country: the Ontario Provincial Police anti-rackets, the Toronto Police Service's fraud squad, the Montreal fraud squad, and the Vancouver fraud squad. Mr. Code said they walked away because they thought the regulators were doing the job. Essentially what happened is that the RCMP IMET came in, took exclusive jurisdiction, they stopped phoning and all of the committees that were interactive amongst the police in country stopped.

Let me say that the Investment Industry Association of Canada and the Canadian Coalition for Good Governance, and Mr. Code today, have indicated that they want to have a single national enforcement agency in Ottawa. We are strongly opposed to that. We believe that there must be a complete and independent securities crime system in Canada, it must not be integrated with the securities regulators, and to do so is a model that is designed to fail.

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We believe that Ontario cannot choose the investment industry's path this time. Even the investment industry cannot afford to control securities regulation and securities crime policing any more. The industry has imploded on itself outside of our country, and while it's said that the banks are strong and we've had a better-regulated market, we have devastation amongst our pension funds and amongst our retail customers and our seniors who were sold toxic products for which there is no policing investigation, no regulatory sanction and no obligation—in fact, immunity given to the industry—to pay for the damages that have been caused.

So I'd like to stop there and take questions.

The Chair (Mrs. Julia Munro): Thank you very much. We'll begin with Ms. Gélinas.

M^me^ France Gélinas: Thank you for your presentation and thanks for coming. You mentioned a few seconds ago that the national enforcement agency as a division of the new national security commission is a model designed to fail. What is your rationale to say that?

Ms. Diane Urquhart: Gary, do you want to comment on what the problem is with integrating regulatory enforcement with securities crime policing?

Mr. Gary Logan: Thank you for—

The Chair (Mrs. Julia Munro): I would just—

Ms. Diane Urquhart: Oh, he can't?

The Chair (Mrs. Julia Munro): No, no; you can, but I'd just ask you to introduce yourself.

Mr. Gary Logan: Certainly. My name is Gary Logan. I'm a retired former member of the Toronto Police Service fraud squad.

To answer your question, in all the years in investigative functions and responsibilities I've had, to have a successful investigation there must be independent and complete separation of investigative authorities as it pertains to evidence, statements, and Charter of Rights and Freedoms on the criminal side. To have a meshing or a blending of regulatory authority or power, or even the perception, in a criminal investigative capacity under the same roof—and I have seen this in court. At the end of the day there is a stronger likelihood, where there is a crossing or a migration of evidence, that it may be obtained improperly or inaccurately. Then again, there also could be the suppression or the misdirection of an investigation based on investigative authorities and the priorities set on the other side.

So the only way that I've ever seen—and I've done investigations years ago at the Toronto Stock Exchange and I've had a number of successful large investigations, Michael Holoday being one of them, where he was sentenced to seven years. Going into the investigation with the Toronto Stock Exchange, we had a proper document in place at the front end, but over the entire investigation there was never a collaborative operation between the Toronto Stock Exchange and the Toronto Police Service with respect to the overall investigation, and there could not have been. That was tested in court at the end as well, as to how evidence was obtained, how it was used. They follow it, and it's tracked all the way back.

So in answer to your question, to have one overseeing authority controlling both sides of it, the perception alone is terrible and it is wrong.

The other thing is, police should be allowed to do the job that they do. They are independent. They work under the Criminal Code. There's a separate set of rules that they must abide by and follow, as do the regulators. For that purpose, the police should go back to the way they did do business and they've always done business. They have been successful in the business that they have done, and as far as criminal investigations go, police are still open for business. And I can speak—I only left last year. The Toronto Police Service was actively engaged in complex investigations, some of which—very few—seemed to die off after 2003—complex securities investigations. We've never had a problem and we were receiving convictions.

M^me^ France Gélinas: I think we've heard from other speakers that there may not be the resources in the criminal justice system to do the work asked of them, but that's for another time.

I know that you have been critical of the integrated market enforcement team at the level of the RCMP. Is it for the same reason you've just said now?

Ms. Diane Urquhart: I can comment on that, because police usually don't like to comment on other police forces.

I think, in essence, the problem we have with the integrated market enforcement team is that it's a national police service only; it's exclusive jurisdiction. It's the only police agency in the country that does not have a civilian oversight agency in the form of a police board. The Toronto Police Service has the Toronto Police Services Board. Every other municipality that has a police force has a police board. The Ontario Provincial Police has its own board as well.

The RCMP works without a board. Therein lies the lack of public accountability of the RCMP IMET itself. Shut out the rest of the police forces, and you're not using the talent and the expertise. You're also shutting out the capacity for victims to go to their local police in order to lodge complaints. So that's the main criticism.

The securities crime unit: The big attribute in that is that we propose to have 20 expert fraud officers working full-time for the crime unit. Their job is to receive the criminal complaints, to interview the victims, to prepare the assessment files and then to deliver the files for investigation and prosecution to the jurisdictional police force that deserves to do the investigation and prosecution based on whatever is the prior established protocol.

So we're bringing back into the police fold for securities crime work all of the major fraud squads in Canada. I think Mr. Code said that they reduced their resources. We need to build their resources back up and put in place a public safety system that's going to protect the money in pension funds and personal retirement savings.

I know you'll be saying, "You can't protect against market collapses." We have a market collapse that has been caused by systemic fraud throughout the world and also in our own country, so you can have better-operating markets if you can deter systemic fraud.

It's incumbent on us to move forward to this proposal for an independent securities crime system, and that the OPP and the public safety minister and the community services minister basically engage, as necessary, to support the securities crime unit, which we think is required urgently due to the economic crisis and the loss of confidence in the markets.

More importantly, we don't see who's opposed to it. We can't see Quebec opposed, we can't see Alberta and Manitoba opposed, we can't see police forces being opposed, and most certainly your constituents will want to see justice brought to bear against perpetrators of security frauds.

The Chair (Mrs. Julia Munro): Thank you. We'll move on. Mr. Flynn?

Mr. Kevin Daniel Flynn: How much time do we have, Madam Chair?

The Chair (Mrs. Julia Munro): We have four minutes each.

Mr. Kevin Daniel Flynn: Okay, wonderful. Thank you.

Thank you both for your presentations. Just so I'm clear on this, do you agree with a single, national—with a common regulator?

Ms. Diane Urquhart: Yes.

Mr. Kevin Daniel Flynn: Okay. But you don't agree with a common enforcement arm of that regulator?

Ms. Diane Urquhart: That's correct. We think that the new national securities commission should have a strong national regulatory enforcement division, and we think the national securities commission should have proper public accountability mechanisms and audit of the integrity of their regulatory enforcement work, and then police—we want the securities crime unit independent.

Mr. Kevin Daniel Flynn: Okay. That's what I'm getting to next. You've got the regulator in place. Let's look three or four years in the future. They come and say, "Ms. Urquhart, Mr. Logan, you design the enforcement." What would you do?

Ms. Diane Urquhart: A securities crime unit.

Mr. Gary Logan: A securities crime unit.

Ms. Diane Urquhart: We don't want to wait; we want to do it now.

Mr. Kevin Daniel Flynn: But is it the feds and the province and the local police forces?

Mr. Gary Logan: That's correct, and the regional services. The way I look at it is, why are we working strictly with the federal—I mean, after 2003, when IMET came along—and I have great respect for the RCMP; don't get me wrong. What happened after that—and even when Justice Cory spoke to me as well when he was doing his review. I couldn't understand why, when they came along, they actually shut out additional resources that would enhance their ability to do their job.

Section 380 of the Criminal Code, which is fraud—and the Criminal Code is the same book that the RCMP use—is a standardized process across the country. It is the same book, the same criminal book, that every police officer who does investigations has knowledge of and has the ability to enforce. Fraud is no different in that industry than it is with a cheque or than it is with a credit card. So what I want to do is I want to get back what we lost, and that is using the resources that are currently there. People are talking about dwindling resources in fraud units. Well, if the crime's not being reported—like any good businessman, if it's not coming in, then why do we have the additional resources here? Let's allocate. But if the crimes that are occurring are being reported and are being done, then you know something? We will maintain what we have or we may have to bolster it, because police services and the command officers and the boards understand that the money that's obtained through fraud is going through organized crime to other areas. So I won't go there, but—

Mr. Kevin Daniel Flynn: Okay. That's a good answer.

We talked about the RCMP, and you worked for Metro for a number of years. Does the OPP have a role in this?

Mr. Gary Logan: The OPP would have a role in this; Durham; all of the regional police—

Mr. Kevin Daniel Flynn: And what would that role be?

Mr. Gary Logan: Ideally, what we want to do is, we want to, depending on the jurisdictional authority for the crime and where it's to be investigated, each one of the police services, within their operating fraud units, would receive any investigative package for an offence occurring within that area. So what you're doing is you're bringing everybody back to the table, all of the investigators and the criminal CIBs, you're looking at the offences that have occurred, and then a decision is made as to the jurisdictional authority for investigation and prosecution. So what you've just done is, rather than going to a centralized focal point with one agency investigating everything, you've now opened it back up to include everybody who has the same qualifications, the same ability and the same resources to do the job that the single one is doing right now.

Mr. Kevin Daniel Flynn: Very good. Thank you.

The Chair (Mrs. Julia Munro): Thank you very much. Ms. MacLeod.

Ms. Lisa MacLeod: I just wanted to thank Ms. Urquhart and Mr. Logan. I just have one comment, and it is that I really enjoyed your exchange with Mr. Flynn, your answers. I think that is going to help us as we begin our report writing. I just want to thank you one more time.

Mr. Gary Logan: Certainly.

The Chair (Mrs. Julia Munro): Thank you very much. That concludes our business for today. We certainly appreciate the time you took to come here and participate in the process.

Mr. Gary Logan: Thanks a lot.

The Chair (Mrs. Julia Munro): Seeing no other business, this committee stands adjourned. Thank you.

The committee adjourned at 1802.

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