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The Use of Public Interest Enforcement Orders by Securities Regulators in Canada

Mary G. Condon

Osgoode Hall Law School of York University, mcondon@osgoode.yorku.ca

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**The Use of Public Interest Enforcement Orders
by Securities Regulators in Canada**

Research Study Prepared for the
Wise Persons' Committee

Mary Condon

October 24, 2003

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Biography

Mary Condon has been a faculty member at Osgoode Hall Law School for ten years. She is also an adjunct faculty member at the Centre of Criminology, University of Toronto. Her areas of research and teaching expertise are securities law, economic regulation, corporate law, pensions policy and socio-legal studies. She is the Director of Osgoode Hall's part-time LLM program specializing in securities law. Her book entitled *Making Disclosure: Ideas and Interests in Ontario Securities Regulation* was published by University of Toronto Press, and she is also the author of a number of journal articles and book chapters.

She is currently the holder of a Social Sciences and Humanities Research Council research grant to examine the governance of pension funds and mutual funds, and a University of Toronto Centre for Innovation Law and Policy research grant on the regulation of alternative trading systems in securities markets.

Professor Condon received her law degree from Trinity College, Dublin, and her M.A. (Criminology), LLM and S.J.D. from the University of Toronto. She received the Alan Marks Medal from the Faculty of Law, University of Toronto for her doctoral thesis. She is a member of the Bar of Ontario.

The Use of Public Interest Enforcement Orders by Securities Regulators in Canada

Executive Summary

The purpose of this study is to examine the use of discretionary enforcement powers by securities regulators in Canada, in order to assess the implications of multiple regulators for the enforcement of securities law.

Regulatory enforcement decisions for the last three (and in some provinces, five) years were reviewed along the following parameters:

- nature of infraction;
- whether the respondent was previously known to enforcement personnel;
- connection between public interest analysis and goals of securities regulation;
- use of extra-provincial regulatory precedents in decision;
- articulation of distinct provincial interest in sanctioning respondent;
- nature of sanction imposed;
- use of regulatory precedents to structure discretion; and
- use of aggravating/mitigating factors to structure outcome.

The findings of the study are that:

- There was significant variation in emphasis across the provinces in relation to infractions pursued to an enforcement hearing. Some provinces focussed, for example, on illegal distributions of securities and others on acting as a broker or advisor without registration. There was more than a trivial number of instances where respondents had been the subject of enforcement proceedings in the past. Local regulators appear to play a significant role in the setting of enforcement priorities.
- There was notable consistency across the provinces in the articulation of the public interest that was the basis for making orders. It tended to be linked more to goals of maintaining public confidence in, and integrity of, capital markets than to those of market efficiency. There was almost no expression of unique provincial objectives in making public interest orders, suggesting a high degree of consistency in the philosophical underpinnings of regulatory intervention.
- On the other hand, there was some unevenness in the application of contextual sanctioning factors to individual respondents, in order to justify specific types and quantum of penalties. Some consistency did result from reliance on two regulatory precedents – one each from B.C. and Ontario – enumerating factors relevant to the individual sanctioning decision. The bigger provinces tended to make use of the multiple sanctions at their disposal in sanctioning respondents.

These findings suggest that:

- the status quo would be enhanced by additional transparency about the setting of provincial enforcement priorities and coordination among the provinces with respect to the mitigating/aggravating factors that structure sanctioning discretion.
- Similar attempts at coordination would be beneficial in relation to a passport system, which envisages a continued role for local enforcement, based on the jurisdiction of the investor making a complaint. If this model is adopted, care should be taken not to lose the benefit of local provincial knowledge about dubious market participants.
- Under a single regulator, a decentralized enforcement model – allowing for local enforcement offices across the country – would be preferable to a more centralized enforcement model. Local input into the setting of national enforcement priorities and the development of a consistent approach to dealing with the factors influencing the quantum and type of penalty should be preserved.

The Use of Public Interest Enforcement Orders by Securities Regulators in Canada¹

1. Purpose and Objectives of Study

This is a study of the use of discretionary administrative powers in relation to enforcement that are provided to securities regulators in all the provincial securities statutes. These powers allow the making of various kinds of orders affecting market participants such as registrants, issuers, or officers and directors of issuers. The study is a component of the research agenda established to assist the Wise Persons' Committee in its deliberations about a securities regulatory structure for Canada. The research agenda intended to support the Committee's work includes an examination of the enforcement of securities regulation. The mandate is to consider the extent to which, and how, the existence of multiple securities regulators has an impact on the enforcement of securities laws across the country.

A variety of techniques are available for the enforcement of securities law. As identified in Appendix 1, they include: criminal sanctions under the Criminal Code, penal sanctions under securities law (e.g. for insider trading, prospectus misrepresentations), and administrative sanctions (e.g. cease trading orders, denial of registration exemptions).²

The present study is exclusively concerned with the exercise of administrative sanctioning powers by regulators. There are a number of reasons why it is important to focus on this aspect of the enforcement of securities law:

1. These powers are particularly important to securities regulators because the regulators themselves control how and when they are used, in accordance with their governing legislation. Unlike penal sanctions or civil powers, courts are not involved at the decision stage.
2. These powers are used to sanction market participants more frequently than are penal sanctions in many provinces. They typically provide a quicker resolution of an issue and, for enforcement staff, a more manageable burden of proof. Enforcement staff may decide, if the results of an investigation do not provide adequate grounds for optimism that penal sanctions would result, to opt to seek an administrative order instead.
3. Although the orders that can be made by regulators are typically less severe than the sanctions that may be imposed by courts, significant reliance is placed on the regulatory expertise of securities commissions in making these decisions, and an amount of deference is accorded to them on judicial review.³

¹ Thanks are due to Gordon Boissonneault, Raymonde Crete, Prakash Narayanan, Lynne Fonseca and Eithne Condon for their assistance.

² There is also the possibility in some provinces of civil orders from a court, such as a compliance order.

³ See *Pezim v. British Columbia (Superintendent of Brokers)*, [1994] 2 S.C.R. 557; and *Committee for the Equal Treatment of Asbestos Minority Shareholders v. Ontario (Securities Commission)*, [2001] 2 S.C.R. 132.

4. Typically, securities law requires these orders to be made in the “public interest”, leaving it to the regulators to interpret what the public interest requires in any specific case.

It is necessary to consider the way in which this discretion is exercised by provincial regulators so as to understand the effects of multiple securities regulators on enforcement. Thus the issue is whether there any significant differences in the way discretionary public interest powers are exercised by provincial securities regulators. Is the “public interest” protected by the British Columbia Securities Commission (BCSC) differently interpreted from that in Ontario or Quebec? Knowing whether it appears that each province is engaged in a unique enforcement enterprise, or alternatively, that there is substantial convergence in the subject matter and approach of provincial enforcement efforts, will inform the Committee’s deliberations and proposals.

2. Scope of Study and Methodology

As the purpose of the study is to review the use made by regulators of the power to make administrative orders and the interpretation of the public interest contained in the statutory provisions providing the legal basis for that power, the focus was on those instances where regulators provided reasons for their decisions.⁴ Decisions were initially collected in each province dating from January 1, 2000 on. While this cutoff date provided a reasonable sample of decisions in British Columbia, Alberta, Ontario and Quebec, it yielded only a small number in other provinces. Accordingly in Saskatchewan, Manitoba, New Brunswick, Nova Scotia, and PEI, decisions were retrieved from January 1998 on.⁵ For each province therefore, the following number of decisions was reviewed⁶:

British Columbia	29
Alberta	11
Saskatchewan	2
Manitoba	4
Ontario	13
Quebec ⁷	17
New Brunswick	3
Nova Scotia	3
PEI	1
Total	83

Situations where, on the basis of the investigation conducted by enforcement staff, it was determined that penal sanctions should be sought, were also excluded.

In reviewing the sample of regulatory decisions, three parameters were identified as particularly important.

The first parameter related to the *subject matter* of the hearings. Was it possible to conclude that one province consistently placed an emphasis, in the use of administrative orders, on reprimanding registrants for giving improper advice, whereas another focused more on the failure of issuers to file financial statements? Of course, the question of which securities law infractions make it to the regulatory hearing stage in any particular province is a function of a number of variables, only one of which is the policy choices that might be made by the enforcement divisions of regulatory agencies.⁸ However, wide disparity in the subject matter of regulatory orders across the country might raise some issues about the relevance or otherwise of local autonomy or expertise in enforcement matters, or fragmentation of the regulatory effort. This issue will be taken up again in Section 4.

⁴ One issue that is raised by this approach to data gathering is the handling of matters that were resolved by settlement agreement (SA). While in some provinces there were only a moderate number of matters resolved in this fashion (Manitoba: 2; Quebec: 6; New Brunswick: 6; PEI: 1), in others there were a large number of SAs during the relevant period. For example in Ontario there were 80; in B.C., 98, and in Alberta, 20. Ultimately matters resolved by SA were excluded from the sample for reasons of substance and manageability. Substantively, SAs are typically approved by regulators without a discussion of the interpretation of the public interest leading to the imposition of a sanction, or extensive discussion of the factors influencing the choice and quantum of sanction. SAs also clearly raise different issues than contested hearings do in relation to the sanction imposed. For example, SAs will not typically emphasize specific deterrence, since they require the agreement of the respondent. Similarly general deterrence will play less of a role, since agreement is often reached by the imposition of a lesser sanction in return for the cooperation of the respondent. While the use of SAs does mean that a significant number of matters are diverted out of the securities enforcement system before an opportunity arises for regulatory consideration of issues related to the public interest and the goals of enforcement, the analogy of the plea bargain in criminal law is illuminating here. Although it is widely known that the vast majority of criminal infractions never make it to the trial stage, significant aspects of criminal law and practice are based on the pronouncements of courts. Having said this, some relevant information about the nature of infractions resolved by SA in the larger provinces is described in Section 4 of this study.

⁵ Many of the provincial securities commissions publish their enforcement decisions on their websites. Where this was not the case, provinces and territories were contacted to provide relevant material. No decisions were provided by Newfoundland, NWT or Yukon.

⁶ See Appendix 2 for a complete list of the decisions considered. Where a matter involved both findings and an ultimate decision about sanctions that were reported separately, they were treated as one decision.

⁷ The Quebec sample is an exception to the study’s operating principle of gathering only infraction decisions involving reasons issued by the regulator. This is because Quebec securities legislation allows some enforcement orders to be granted without a hearing, with the opportunity provided to the respondent to have a hearing at a later date. Thus it was routine, during the period examined, for cease trade orders to be granted on the basis of a brief order from the Commission, which typically annexed the statement of allegations from the Director of Enforcement. Only three of the seventeen decisions (excluding settlements) collected from the CVMQ involved a hearing dealing with the allegations and/or sanctions to be applied. One of those, *Bombardier*, dealt with the possibility of imposing an administrative penalty, which is only a recent sanctioning option in Quebec. It is included for that reason, despite being a request to approve a settlement agreement.

⁸ As the study prepared by Charles Rivers Associates indicates, some of these policy choices themselves are associated with broad socio-economic factors within provinces. Other variables influencing how matters end up being pursued to a regulatory hearing might be: the nature of complaints from members of the public from year to year; media attention to specific types of securities law infractions; the types of surveillance systems put in place by market regulators; matters being resolved by SA. See Charles River Associates. “Securities Enforcement in Canada: The Effect of Multiple Regulators” (WPC Research Study, 2003).

A related issue here is the extent to which regulatory orders have been directed at *repeat offenders*. The argument has been made that a fund of “local knowledge” about unscrupulous actors in the securities industry is an important contribution of provincially-based enforcement efforts.

The second parameter was how the concept of the “public interest” was operationalized by regulators in their decisions. To what extent were the *goals of securities legislation* – usually identified as investor protection, capital market efficiency and public confidence in capital markets – used as a guide to give content to the idea of the public interest? Here it should be noted that the recent Supreme Court of Canada decision in *Asbestos*⁹ reminded regulators that all of these goals, not just investor protection, should be taken into account in making regulatory enforcement orders. Thus Mr. Justice Iacobucci said that “...in considering an order in the public interest, it is an error to focus only on the fair treatment of investors. The effect of an intervention in the public interest on capital market efficiencies and public confidence in the capital markets should also be considered”.¹⁰

Was the concept of the public interest linked in any way to *specifically provincial interests*? As it is currently organized, securities law is provincial, so that the jurisdiction of regulators is taken to extend only to enforcement in that province. However, this is not a complete answer to the question of whether the substance of the provincial interests being addressed in securities enforcement matters differs from province to province. For example, do some provinces more than others make reference to supporting local entrepreneurial or market activity in the context of enforcement? Do some provinces distinguish between the protection of retail or institutional investors in the province? An indicator of convergence or divergence here might be to discover the extent to which regulatory decisions from other provinces were used approvingly in enforcement decision-making. Widespread use of *extra-provincial regulatory precedents* could be argued to have a “convergence effect” on provincial decision-making.

The third parameter was the specific *nature of the sanctions* imposed. The relevant legal provisions typically provide a number of alternative orders that might be applicable to any given infraction (such as cease trading securities, reprimanding actors, assigning costs). Was there consistency within and across provinces in relation to the severity and type of sanction imposed for comparable infractions? The ability to draw robust conclusions here, of course, is limited by the reality that sanctioning decisions are relatively fact-specific. Is it possible to compare the *factors* that were used to make determinations as to the appropriate type and severity of sanction? Again, the use of *sanctioning precedents* as a way of structuring the discretion of regulators is a relevant consideration here.

Section 3 of the study will describe the research findings, by province, under each of these parameters. Section 4 will analyze the findings, paying particular attention to conclusions that may be drawn about levels of convergence or divergence of regulatory effort in the enforcement area. Section 5 will consider the implications of the findings in the context of current reform proposals, that is, a “passport” system or a national regulator.

3. Findings

(a) Subject Matter

(i) British Columbia

As demonstrated by Chart 1, a variety of matters attracted enforcement orders by the BCSC over the three years considered.¹¹ Commissioners reserved some harsh criticism for those matters involving registrant shortcomings, describing such behaviours as particularly prejudicial to the public interest. The data indicate that the most striking recent trend in British Columbia was the frequency of hearings dealing with the distribution of securities without a prospectus. Eleven of the 29 decisions reviewed involved this infraction. Many involved complainants who were unsophisticated investors. For example, in the BCSC decision of *Dix*, the Commission noted that “the tragic element is that [the respondents] targeted an especially vulnerable group – the elderly and unsophisticated. Most were over 80 and had no knowledge of investment matters”.

With respect to the possible involvement of previous offenders, 4 of the hearings reviewed related to individuals previously sanctioned by the BCSC, one involved an individual previously sanctioned by the Vancouver Stock Exchange (VSE) and one by the U.S. Securities and Exchange Commission (SEC).¹²

⁹ *Supra* note 3.

¹⁰ *Ibid.*

¹¹ In each province, some decisions involved more than one infraction, and so the total number of cases reported in the charts may exceed the number of decisions.

¹² In addition, 3 hearings involved market participants involved in criminal proceedings in the same matter, and 1 involved concurrent proceedings by the VSE.

Chart 1: British Columbia

Subject matter	Number of cases
Fraud	7
Theft	2
Misrepresentation	4
Distribution of securities without prospectus / registration	11
Failure to file insider trading reports	5
Failure to fulfil directors' duties	3
Market manipulation	2
Operating a "boiler room"	2
Violating "know your client" rule	2
Failure to maintain working capital	1
Failure to establish proper procedures	1
Conduct unbecoming a registrant	1
Failure to comply with conflict of interest rules	1
Failure to comply with fair dealing rules	1

(ii) Alberta

Chart 2 shows that more types of infraction pursued to the hearing stage by enforcement staff in Alberta involved inappropriate behaviour by market intermediaries. However, by far the most common subject matter for a hearing was that of distributing securities without a prospectus or registration. This issue recurred 7 times in the 11 decisions, and was described by the Alberta Securities Commission (ASC) in the *Stuart Mutuals* decision as involving the "most serious category of violations".

In relation to "previously known" offenders, 3 of the 11 decisions involved individuals who had been the subject of previous regulatory orders by the ASC. One respondent had previously been sanctioned by the BCSC and one had a prior criminal conviction.

Chart 2: Alberta

Subject Matter	Number of cases
Misrepresentation	1
Distribution of securities without prospectus / registration	7
Failure to fulfil directors' duties	1
Trading without registration	1
Acting as adviser without registration	1
Carrying on business as exchange without approval	1
Violating "know your client" rule	1
Breach of undertaking	1

(iii) Saskatchewan

Only two public interest order hearings were identified between 1998 and 2003. One involved a mutual fund salesperson who traded in securities of a limited partnership, an activity for which he was not registered. In the course of this activity he advised clients to invest in securities which were unsuitable for them. The other also involved a mutual fund salesperson, who traded securities known as "prime bank instruments" that the Saskatchewan Securities Commission (SSC) found "closely resembles a notorious fraud". In neither case had the respondent been previously sanctioned by the Commission.

(iv) Manitoba

Three of the four instances reviewed concerned variations on the theme of breach of the "know your client" rule by registrants, with one of these also involving account churning. Thus there were recommendations of unsuitable investments and investment strategy, failures to record client information properly, improper projections of the future value of securities and unauthorized trading. The final case was one of trading securities without registration or a prospectus, along with representations as to the future value of the securities and future listing on an exchange. None of the respondents involved were previously known to the Manitoba Securities Commission (MSC).

(v) Ontario

The Ontario sample is weighted towards registrant-related issues, as demonstrated by Chart 3. This focus is consistent with a comment made in the Ontario Securities Commission's (OSC) *Arlington* decision from 2002 that "selling activities in such an environment [a securities

dealer selling to clients from a principal position] have become the focus of enforcement activity in recent years since unbridled business self-interest can conflict with the best interests of a firm's clients".

A minor but visible theme in the Ontario sample, however, is attention to corporate governance shortcomings. This is demonstrated by the specific instances of failure to fulfill corporate governance obligations, investment funds not used for proper corporate purposes, and prohibited representations about the refunding of the price of shares.

Two decisions in the sample involved respondents who had been the subject of regulatory action by the OSC in the past. Another involved a respondent who had given a previous undertaking to the SSC and a third involved an individual who had made previous settlement agreements with the CDNX and the TSE. Finally one respondent had been convicted in criminal proceedings in New York.

Chart 3: Ontario

Subject Matter	Number of cases
Insider trading	1
Distribution of securities without prospectus / registration	1
Failure to file insider trading reports	1
Failure to make full, true and plain disclosure of material facts	1
Failure to disclose material changes	1
Failure to fulfil corporate governance obligations	1
Improper use of investment funds	1
Making prohibited representations re refunding share price	1
Trading without registration	4
Acting as adviser without registration	2
Breach of obligation to act in client's best interests	2
Failure to deal fairly and honestly with clients	1
Conduct unbecoming a registrant	1
Excessive markups by securities dealer	1
Failure to disclose financial interests	1
Breach of settlement agreement	1

(vi) Quebec

Chart 4 shows that the infractions dealt with in the Quebec sample are widely dispersed over a number of issues, but again are clearly weighted towards a variety of registration-related issues, and specifically those of acting as a broker without registration, and acting as a financial advisor without registration.¹³

Two of the cases involved respondents who had previously been the subject of enforcement action: one whose registration had been cancelled, and the other who had been ordered to cease trading and engaging in financial advising.

Chart 4: Quebec

Subject Matter	Number of cases
Distribution of securities without prospectus / registration	2
Issuing securities in contravention of ME rules	1
Signing false prospectus	1
Abuse of exemptions	1
Inadequate disclosure in financial statements	1
Failure to abide by issuers policy on information disclosure	1
Failure to file insider trading reports	2
Trading without registration	6
Acting as adviser without registration	5
Acting as portfolio manager without registration	1
Failure of underwriter to act with diligence, competence and probity	1
Failure to consider clients' interests	1
Appropriation of client funds	1
Failure to maintain sufficient risk adjusted capital	1
Making prohibited undertakings re listing of securities	2

¹³ There was some overlap in these two categories.

(vii) New Brunswick¹⁴

All three cases involved an assessment of whether it is in the public interest to suspend or cancel a registration. The impugned behaviour of two of the registrants involved, respectively, trading securities without a certificate (prospectus), and assisting a non-registrant to process securities trades. The third registrant proceeded against had engaged in a wide variety of inappropriate behaviour.¹⁵

In the latter case, enforcement staff had been concerned about the individual's suitability for registration in 1991, because of his failure to disclose his second bankruptcy within six years. At that time, registration had been reinstated subject to specific conditions of registration and a requirement for close supervision by the employer.

(viii) Nova Scotia

All of the decisions involved hearings to approve settlement agreements, all involved the same type of matter and the reasons were crafted in almost identical terms in all three cases. The three respondents involved were investment funds which offered securities pursuant to the *Community Economic-Development Corporation Regulations*. Each contravened the provisions of these regulations by failing to provide the required information circulars to their security holders and by failing to obtain majority approval for various investments.

(ix) PEI¹⁶

In determining whether a registrant (*Morse*) would be eligible for re-registration, the Director of Corporations uncovered examples of breach of fiduciary duties to clients (by way of taking loans from clients) as well as trading securities to clients without a prospectus.

(b) Concept of the Public Interest

(i) British Columbia

Here the most common interpretation of the public interest, as it relates to the overall goals of securities law, was that of the need to maintain the "integrity of the capital markets". Almost all of the decisions reviewed used that formulation as a way of describing the purpose of public interest orders or the need to impose a sanction in the specific case, and in some instances the suggestion was made that this was significant above and beyond harm to specific investors.

¹⁴ The public interest orders that can be made by securities regulators in New Brunswick extend only to registration issues. A registration may be suspended or cancelled in the public interest.

¹⁵ This behaviour included: taking loans from clients; failure to disclose material facts about investments to clients; failure to disclose status as bankrupt to securities regulators; failure to ensure client's interests paramount; intent to deceive client; failure to report securities violations; violation of special conditions of registration; and committing fraudulent acts.

¹⁶ The power of securities regulators to make public interest orders in PEI is likewise more circumscribed than in other provinces. The regulator has the discretion to remove exemptions in the public interest, and may also grant or suspend a registration. An application for registration may be refused "where on reasonable grounds the Director considers the order to be necessary".

Only four of the decisions linked the public interest to all three of the typical legislative goals (investor protection, capital market efficiency, and public confidence). While two decisions considered the importance of striking a balance between investor protection and facilitating capital raising, no decision singled out capital market efficiency as a predominant way of characterizing the public interest. Some of the decisions noted that the purpose of making public interest orders was to be preventive and prospective, in other words, to avoid future harm rather than to remedy past infractions.

In terms of whether the making of public interest orders was linked to specifically provincial concerns, the evidence here is limited. Only two decisions addressed this in any way. In *Cartaway*, the BCSC noted that although the issuer was a reporting issuer in Alberta and its securities were traded only on the Alberta Stock Exchange, "there was a national market for Cartaway shares" and residents of British Columbia were trading the shares in the secondary market. Furthermore the registrants whose conduct was impugned in the decision were employed in Vancouver. Thus "it is within this context that we will exercise our public interest jurisdiction". On the other hand, in *Fairtide* the Commission noted that "unregistered trading and advising are serious problems in our capital markets and pose a significant threat to investors, whether or not they reside in our province".

None of the BCSC decisions referred to precedents derived from other provincial regulatory agencies, and only one made reference to an SEC decision.¹⁷

(ii) Alberta

Several of the recent Alberta enforcement decisions did not place their analysis of the public interest in the context of the overall goals of securities law. However, earlier decisions tended to focus on the need to make public interest orders for investor protection purposes and to maintain the integrity of the capital markets. Again, there was no attention paid to the goal of achieving efficiencies in the markets, though one decision quoted approvingly the reminder from Mr Justice Iacobucci in *Asbestos* that the public interest encompassed all three goals of securities regulation. Thus, typical comments were those of the ASC in the *Stuart Mutuals* decision, to the effect that "we cannot protect the public interest and the integrity of the capital markets if we tolerate deliberate violations of securities law..." or, in *Lamoureux* that "The Commission and other securities regulatory authorities in Canada have also expressed their view that, when making orders under s.198 or 199... to protect the public, we consider a broad range of factors...."

There was even more uniformity in the Alberta decisions about the requirement that public interest orders are "preventive in nature and prospective in orientation", that is, oriented towards the prevention of future harm rather than the punishment of infractions.¹⁸

¹⁷ In the *Noram Capital Management* case, reference was made to an OSC decision in the same matter.

¹⁸ A frequently-quoted formulation of this is to be found in the ASC's 1991 decision of *Matheson*, that "protecting the public interest encompasses a broad range of considerations. These include protecting the public from the future conduct of a particular respondent who has engaged in inappropriate conduct in the past: alerting others that inappropriate conduct will be halted by the Board and informing others that offending persons will not be allowed to participate in the industry; prescribing public confidence in the capital markets: as well as adjudicating on other factors which may be specific to individual cases".

The *World Stock Exchange* decision noted that "it is impossible to precisely define the public interest in the context of innovative or evolving exchange activity. While the public interest remains relatively constant, and is quite clearly reflected in the regulatory requirements imposed upon the actual activities of recognized exchanges, exchange activities are almost infinitely variable". Thus for the ASC "the most important distinguishing characteristic of the WSE [World Stock Exchange] is its general lack of regulation, manifested in business practices that are contrary to the public interest". Two decisions emphasized the special role of registrants in the protection of the public interest.

One striking feature of the Alberta sample is the resort to regulatory precedent in outlining the general principles to be used to guide discretionary sanctioning. These precedents encompassed decisions of the ASC itself, such as *Matheson*, occasionally the BCSC's *Eron* and *Orr* decisions (see below), but in five decisions included precedents from the OSC. The two OSC decisions most frequently cited were *Mithras Management* and *Belteco*.

In terms of our inquiry as to whether the public interest being protected was composed of distinctly provincial concerns, only two of the decisions are noteworthy. *World Stock Exchange* concerned an "Internet stock exchange" which solicited a number of Albertans and Alberta companies to raise money on the WSE. In response to the claim that WSE was not carrying on business in Alberta, the ASC concluded that it had "legitimate interest in applying Alberta law to the WSE merely because its activities have unlawful consequences here". Furthermore "the WSE's potential victims include anyone with Internet access so, in this situation, comity encourages us to apply Alberta law because the WSE's links to Alberta allow us to act and because we would want other jurisdictions to take a similar approach".

The *Morrison Williams* decision concerned an investment portfolio manager based in Toronto who provided advice to a single client in Alberta, while unregistered under the Alberta statute. The ASC noted that "local registration has always been a fundamental tenet of securities regulation". This "does not imply that we have less faith in other regulators regarding registration and prospectus requirements.... Rather, it reflects one of the objectives of the Act, namely protection of local public investors". The ASC must "look to the effect of the activity in Alberta and the consequences for Alberta investors".

(iii) Saskatchewan

Relatively little attention was paid in either of these decisions to expanding on the meaning of the public interest in applying enforcement orders. However, it was noted in the application of sanctions in the *Bergen* case that "as the conduct involved a significant number of people and attendant publicity it constituted a significant setback to confidence in the Saskatchewan capital markets". *Bergen's* conduct was contrary to the public interest because he "had not demonstrated the knowledge and attitudes necessary to fulfil his duties as a registrant". No extra-provincial precedents were cited to clarify the requirements of the public interest, nor was any uniquely provincial definition of the public interest identified.

(iv) Manitoba

Little attention was paid to expanding on the meaning of the public interest in the course of determining sanctions in these cases. *Max Systems*, which involved trading securities without a prospectus, enumerated a number of "public interest factors" which removed the matter from "being simply a technical breach". These included factors such as the sale of securities to the estate of a seriously injured minor, undertakings as to the future price of the securities, and false and misleading statements made to investors and to staff of the MSC. The Commission in the same case noted that its actions "must appear to punish fault and protect any future investors", echoing the future-oriented nature of the reasoning in other enforcement decisions. No extra-provincial precedents were cited to clarify the requirements of the public interest, nor was any uniquely provincial definition of the public interest identified.

(v) Ontario

Several of the decisions in the Ontario sample linked the idea of the public interest to the achievement of the goals of securities law. Thus in *Lydia Diamond*, the OSC noted that it was "required to exercise [its] jurisdiction under ss. 127 and 127.1 of the Act by making orders in the public interest, taking into account the purpose of the Act in s.1.1 and the principles set out in s. 2.1". Looking across the span of the decisions however, it is possible to see that more attention tended to be paid to the idea of protecting the integrity of the capital markets and confidence in those markets than the other purposes. For example in *Banks*, the OSC said that "if we do not restrain *Banks* properly, confidence in our markets would be weakened".

The *Donnini* case did allude to the goal of capital market efficiency, in the specific context of the payment of costs as an aspect of public interest sanctioning. Thus, the commission considered that "cost recovery is fair to other participants in the capital markets. In *Asbestos*, Justice Iacobucci emphasized the importance of the Commission considering the efficiency of the capital markets when exercising its public interest discretion". Eight of the Ontario decisions declared that public interest orders were required to be preventative and prospective rather than oriented towards punishing respondents.

One unique feature of the Ontario sample is the linking of the OSC's public interest jurisdiction to maintaining appropriate standards of corporate governance. For example in *Banks*, it was decided that "...where a respondent has egregiously failed to adhere to existing standards or principles of corporate governance, and a respondent's past conduct has convinced us that without one or more orders, future harm is likely to occur, it is appropriate for us to make an order in the public interest". A similar concern is evident in *Meridian Resources*.

In *Lydia Diamond*, the OSC described its order as "designed to strike a balance between the interests of the respondents and the interests of the public". In *Prydz*, it was concluded that breach of a settlement agreement was "itself an action contrary to the public interest".

There is very little evidence in the Ontario sample of the use of extra-provincial precedent to interpret the concept of the public interest. Only the *Valentine* matter used a securities

regulation decision from the B.C. Court of Appeal to ground the OSC's analysis of the basis for extending a temporary cease trading and suspension of registration order. The OSC's own *Mithras Management* decision was cited several times, as was *Asbestos*.

(vi) Quebec

It has been noted already that only three of the Quebec sample involved a hearing by the CVMQ. The emphasis in two decisions was on the goal of investor protection. In *Shedleur*, involving an underwriter who participated in an underwriting where only a fraction of the funds raised was retained for the objectives listed in the prospectus, and who signed off on a prospectus containing false information, the Commission noted that one of the objectives of the law was to frame the behaviour of professionals in the marketplace in order to protect investors. A comment from *Pezim* concerning the protective role of securities regulators was also quoted approvingly in the decision.

In *Laliberté*, which specifically addressed the power of the CVMQ to render an enforcement decision without a hearing, it was noted that decisions were made in the public interest, and more generally to avoid serious prejudice to the functioning of the markets, to protect investors against underhand, abusive and fraudulent practices and to promote the disclosure of adequate information to the market.

In *Bombardier* the Commission said that in defining the public interest, it generally referred to its mission, defined in s. 276 of the Quebec statute as the promotion of efficiency, the protection of investors, the regulation of information disclosure and the definition of a framework for the activities of professionals. The same case also noted that despite its obligation to achieve these goals, it also had the obligation to treat fairly those subject to its authority. All three decisions asserted that the objective was not to punish individuals. In *Exploration Malartic-Sud*, the Director of Enforcement's application to the Commission for sanctions against the officers and directors of the company noted that it was in the public interest that those who authorized the issuing of company securities in contravention of MSE rules should not be allowed to trade those securities until the company conformed with the rules.

In *Shedleur*, the Commission referred to the Supreme Court of Canada decisions of *Pezim*, *Asbestos* and *Global Securities*, as well as the OSC precedent of *Ames*, a decision also involving the responsibilities of underwriters. However there was no articulation of a uniquely Quebecois definition of the public interest in these decisions.

(vii) New Brunswick

Given the specific nature of the public interest power in New Brunswick, it is not surprising that the meaning of the public interest was articulated in the context of registrant responsibilities. Thus, in *Arsenault*, it was noted that "(T)he privilege of registration under the *Securities Act* imposes on individuals important standards in order to protect the investing public and ensure that overall public interest is maintained". Here it is also suggested that the ethical standards required of registrants have become more onerous because of "the increasing number

of investors and the importance the investing process has become (sic) for most citizens". *Bond* stated that "(B)reach of industry codes of ethics ... are equated by regulators as being contrary to the public interest".

More generally, *Bond* referred to the goals of securities regulation articulated in the Ontario statute as a possible guide to the public interest. The Administrator continued that "...the public interest ... must encompass ... all investors resident in New Brunswick and the regulatory system itself which the legislature has put in place to protect them. The integrity of this system can be jeopardized even if there is no evidence of immediate, substantial or individual harm". Other than this reference to investors resident in New Brunswick, no specific provincial definition of the public interest was articulated.

(viii) Nova Scotia

Most of the Commissions reasons were taken up with discussion of the appropriateness or otherwise of the sanctions sought by enforcement staff. No reference was made in the decisions to the goals of securities law, though the decision was clearly grounded in concern for "harm to security holders" and specifically the exposure of their investment to "greater risks" by the lack of disclosure and opportunity to debate the merits of specific investments. No regulatory precedents were cited.

In so far as these decisions turned on the failure to abide by the provisions of a specific program which offered an "abbreviated public offering process designed to provide the Respondent with a cost effective means of accessing a community based capital market", there is a specific provincial interest articulated here. This is an interest in the existence of this program and its appropriate use by investment entities, in order to further local investment goals, while minimizing risks to investors.

(ix) PEI

It was noted in *Morse* that "ethical conduct is vital to ensuring the integrity of markets" and that "the industry consistently puts forth requirements of high ethical conduct for the protection of the public and the industry... Business conduct which is detrimental and uncaring of the public interest will not be tolerated". No precedents were cited, and no specifically provincial public interest was articulated.

(c) Sanctions Imposed

(i) British Columbia

One consistent feature of sanctioning decisions in B.C. was that multiple sanctions were almost always employed. Thus an individual or issuer typically attracted a cease trading order, a denial of exemptions order, an administrative penalty, and sometimes a costs order. A prohibition on acting as a director or officer of an issuer was another very common sanction employed, and where registrants were involved, a prohibition on investor relations activities was often included.

We have noted that the largest category of infraction in this sample was that of distributing securities without a prospectus. In terms of the time periods for which the multiplicity of sanctions noted above were imposed, on two occasions exemptions were denied for five years and a low administrative penalty was imposed (\$5,000). However in the majority of instances the time periods involved ranged from 10 years up to a permanent cease trading or denial of exemptions order, and administrative penalties ranged from \$25,000 to \$100,000. In the case of the most serious types of infractions, such as fraud or market manipulation, time periods began at eight years and administrative penalties at \$10,000. One fraud case involved an administrative penalty of \$200,000. At the lower end of the seriousness spectrum, for example infractions of insider reporting rules, there was again some fluctuation in the time periods and penalties involved. Here, the range was between six months and five years and penalties were between \$3,000 and \$10,000.

Some attempt to structure the exercise of sanctioning discretion was evident, by means of the employment of specific BCSC precedents which enumerated a list of relevant factors to assist in decision-making. Two decisions were consistently cited: *Orr*, an insider reporting case, and *Eron Mortgage*, a February 2000 decision which involved distributing securities without a prospectus and misrepresentation. As *Orr* itself cited the factors listed in *Eron*, it is fair to say that the latter is the current benchmark in B.C. for enumeration of the factors to be considered in making various types of sanctioning decisions. These factors are:

- the seriousness of respondent's conduct;
- the harm suffered by investors as a result of the respondent's conduct;
- the damage done to the integrity of the capital markets in British Columbia by the respondent's conduct;
- the extent to which the respondent was enriched;
- factors that might mitigate the respondent's conduct;
- the respondent's past conduct;
- the risk to investor and the capital markets posed by the respondent's continued participation in the capital markets of British Columbia;
- the respondent's fitness to be a registrant or to bear the responsibilities associated with being a director, officer or adviser to issuers;
- the need to demonstrate the consequences of inappropriate conduct to those who enjoy the benefits of access to the capital markets;
- the need to deter those who participate in the capital markets from engaging in inappropriate conduct; and
- orders made by the Commission in similar circumstances in the past.

It should be noted that there is currently some legal controversy in relation to the "general deterrence" factors enumerated as relevant in *Eron*. A majority of the B.C. Court of Appeal has ruled in *Cartaway*¹⁹ that the SCC decision in *Asbestos* should be interpreted as holding that securities regulators' public interest function allows them only to consider specific deterrence in fixing the amount of administrative penalties.

¹⁹ (2002) BCCA 461.

The *Orr* decision in November 2001 added to this list another set of factors specifically relevant to the situation of failure to file insider trading reports. This list was gleaned from earlier BCSC decisions and settlements involving the reporting of insider trades. This list consists of the following factors:

- the volume of shares in the unreported trades compared to total trading in the stock;
- the number of unreported trades;
- the duration of the non-compliance;
- whether the respondent disclosed and rectified the deficiencies voluntarily;
- the respondent's subsequent conduct;
- the respondent's previous disciplinary history;
- the respondent's cooperation with the Commission staff investigation; and
- the presence of any aggravating factors.

Many of the decisions reviewed can be seen to be applying the various factors identified in *Eron*, such as the risk to investors if the respondent continues to be present in the markets, the respondent's lack of prior regulatory problems, or the extent to which the respondent received payment for his/her efforts. A few additional mitigating factors also appear in some decisions, such as the respondent's acknowledgment of his responsibilities as a registrant, whether or not the respondent cooperated with commission staff in the investigation, or a last minute restitution payment. Finally the issue of whether or not to take into account the consequences of the sanction to the respondent seems to cause some controversy. A couple of decisions show a willingness to reduce the administrative penalty based on ability to pay, while another notes that it would not "serve the public interest to permanently deprive [the respondent] of career opportunities". Yet another decision notes that the consequences to the respondent of the sanction to be imposed is not a relevant factor.

(ii) Alberta

In relation to the most commonly found infraction – distributing securities without a prospectus – there was significant variation in the sanctions imposed in different cases, ranging from a case where multiple sanctions (denial of exemptions, cease trading and a prohibition on acting as a director or officer) were imposed for one year to one where the multiple sanctions were imposed for 20 years along with an administrative penalty of \$25,000. The difference appears to reflect the presence of "aggravating factors" in the latter situation, such as the characterization of the illegal distribution by the ASC as a "deliberate and deceptive victimization of investors" as well as an "intentional breach of [an] undertaking" to the ASC. Similarly, as might be expected, multiple respondents in the same matter are treated differently according to the degree of culpability found by regulators.

We have seen that both ASC and other regulatory precedents are used in these decisions to guide the factors relevant to the sanctioning decision. The ASC's *Press* decision was twice cited for the proposition that there is a spectrum of circumstances relevant to a sanction for an illegal distribution, depending on whether there was an intention to comply with the Act or not. In another case the *Eron* decision from B.C. was mined for its list of factors to be considered in sanctioning. We have seen that one OSC decision – *Belteco* – was popular for the same reason.

The relevant passage from *Belteco* is as follows:

“we have been referred to decisions of this Commission which indicate that in determining both the nature of the sanctions to be imposed as well as the duration of such sanctions, we should consider the seriousness of the allegations proved; the respondent’s experience in the marketplace; the level of a respondent’s activity in the marketplace; whether or not there has been a recognition of the seriousness of the improprieties; and whether or not the sanctions imposed may serve to deter not only those involved in the case being considered, but any like-minded people from engaging in similar abuses of the capital markets”.

With respect to the deterrence factor, it should be noted that the needs of general deterrence were frequently cited as a relevant factor by the ASC.

Additional aggravating factors identified by the ASC included: deliberate violation of the Act, lack of understanding of the appropriate regulatory duties; incompetence and exaggeration of profits to be made in an investment opportunity; and violation of regulatory undertakings. Meanwhile mitigating factors referred to included: cooperating with enforcement staff and reliance on legal advice. The consequences of the sanction to the respondent were not to be considered, nor the respondent’s conduct at the hearing. In crafting appropriate sanctions, the ASC was twice careful to avoid imposing undue hardship on customers or “innocent employees” of an issuer and was prepared to limit a prohibition on acting as a director or officer of an issuer to holding these positions in a junior issuer only, on the basis that the latter provided limited oversight to compensate for the respondent’s lack of judgment.

(iii) Saskatchewan

Both of these cases involved mutual fund salesmen trading in high risk securities for which they were not registered. In *Singh*, the SSC considered that “any association by a registrant in any way with the provision of information of such a dubious proposal is, if not criminal, grossly negligent and cannot be condoned” However, multiple sanctions (denial of exemptions, cease trade order, no advising order, resign as director/officer, and future prohibitions on holding positions as director/officer or being employed by an issuer/registrant) were applied to *Singh* for three years, and to *Bergen* (denial of exemptions, cease trade order, no advising order, resign as director/officer, and future prohibition on holding position as director/officer, administrative penalty of \$50,000 and costs of \$5,000) for ten years.

The difference here seems to revolve around the amount of money lost and the personal circumstances of the respondents. In *Bergen* several million dollars were lost by investors, whereas in *Singh* it does not appear that any investor had yet actually invested any money. The SSC also noted that the personal circumstances of Mr. *Singh* required some consideration.²⁰ A lifetime of removal from the industry would be “extremely harsh”.

²⁰ These were the facts that he was young, relatively new to the business of securities sales, and had four children.

In both cases, some attention was paid to the goal of general deterrence. In *Bergen*, the Commission considered the need to “demonstrate the consequences of inappropriate conduct to those who enjoy the benefits of access to the capital markets” In *Singh*, it was noted that “too short a period [of exclusion from the markets] will do nothing to convince any registrant of the extreme concern” about similar schemes.

In *Bergen* mitigating factors included: his cooperation in the investigation; efforts made to assist customers in mitigating losses; and the fact that he was not as responsible as other actors to whom maximum penalties were applied.

Finally, in *Bergen*, there was some resort to precedent in determining the specific sanctions to be applied. The factors enumerated in the BCSC decision of *Eron Mortgage* were cited, as was another BCSC regulatory decision (*Connor Financial*), and finally, an earlier settlement with a principal actor in the same incident was used for comparative purposes as a guide to the sanction to be imposed.

(iv) Manitoba

Two of the three registrant-related cases involved the sanction of a reprimand, in one case together with the requirement to pass an examination and to pay costs of \$4,000. In the third case, a permanent denial of exemptions was assessed, along with costs of \$20,000. In *Max Systems*, the various individuals and entities received the denial of exemptions sanction for different periods of time, along with denial of registration and costs for the individuals, and an opportunity for the issuer itself to have access to exemptions on the approval of the MSC.

The *Finley* decision used the earlier registrant-related enforcement decision of *Tetrault* to guide its sanctioning decision, noting that although there were many similarities in the two cases, there was none in relation to the degree of fault involved. In *Max Systems*, the settlement agreement reached with another actor in the case was used to guide the sanctions imposed for the individual respondents.

In terms of factors relevant to individual sanctioning decisions, we have seen that the seriousness of the violation was an important consideration in determining outcomes. We have also noted the “public interest factors” identified in *Max Systems* as significant in reaching an appropriate sanction; including the sale of highly speculative shares to the estate of someone unable to look after their own interests and false and misleading statements made to MSC staff. The decision noted that the fact that securities were traded on the basis of deficient offering documents “knowingly and in disregard of Commission decisions only exacerbates the offense”. The impact on the respondent was considered, in the sense that the sanction imposed on the issuer itself in *Max Systems* was calibrated in order to allow it to continue to raise financing in a controlled fashion and thereby prevent harm to “innocent shareholders”.

(v) Ontario

Across similar infractions, e.g. trading without registration or advising without registration, variation can be observed in the specific orders made. This likely reflects the presence or absence of "aggravating factors". Multiple sanctions (such as, cease trade orders, denial of exemptions, reprimand) were a feature of these decisions. On the basis of one case it is hard to draw a conclusion as to whether infractions considered to be more serious, such as insider trading, attract higher sanctions, though this is the case in the *Donnini* example. As might be expected, the costs imposed on respondents in Ontario matters tend to be significantly higher than in the other provinces.

There is limited evidence of the use of regulatory precedents to guide specific sanctioning decisions. *Belteco* and the factors enumerated there makes an appearance in *YBM, Lydia Diamond* and *Donnini*. In *Arlington*, the OSC used settlements made in previous "high mark-up" cases as a guide in assessing appropriate sanctions.

Aside from the guiding factors listed in *Belteco*, a few others can be extracted from these decisions. Issues such as: whether the violations were isolated or recurring, whether there was reliance on legal advice, whether there was a breach of a previous undertaking to a regulator, lack of any "real intention" to be bound by a settlement agreement, all contributed to specific sanctioning outcomes. Several decisions noted the importance of considering issues of specific and general deterrence.

In *Donnini*, the OSC cited approvingly the passage from its decision in *M.C.J.C.* to the effect that the impact on the respondent was important in determining the appropriateness of public interest sanctions. In the same vein, the OSC tended to pay close attention to the connection between the impugned conduct and the actual sanction imposed. Thus a cease trading order and a prohibition on acting as a director or officer was not imposed in *Costello*, because the impugned conduct did not pertain to trading. In *Donnini* the commission noted that the respondent should not receive more severe sanctions than otherwise appropriate because he had not agreed to settle.

Finally the *Etherington* case identified some relevant mitigating factors, including the facts that the respondent was not aware that his financial planning activities might be in breach of registration provisions, that his website had no customers, he had attempted to acquire the relevant training, and there was no evidence of financial loss.

(vi) Quebec

The most common sanction imposed in the Quebec sample was the cease trade order, though it was sometimes combined with a ban on acting as a financial advisor, or a suspension of registration. There was one example of a requirement to issue a press release to explain a default in meeting disclosure requirements, and one freeze order. The cease trading orders imposed tended not to be time limited, though in at least one case (*Laliberte*), an order was lifted on demonstrating that the appropriate material had been filed with the Commission. In *Shedleur*, the underwriter involved was suspended for seven years.

In *Shedleur*, the gravity of the respondent's actions and his knowledge of the securities markets were cited as reasons for a severe sanction. In *Laliberte*, the insider reporting issue, relevant factors cited by the Director of Enforcement were that (i) his transactions represented an important volume of stock exchange transactions, and (ii) a sanction was "essential" to promote the well-being of the market and the protection of investors. In later addressing the question of lifting the cease trade order in the *Laliberte* matter, the CVMQ noted that his behaviour subsequent to the initial imposition of the order was relevant to its decision.

In *Bombardier*, the CVMQ remarked that had this matter involved action taken against the company by enforcement staff, the penalties assessed would have taken into account the harm to investors. Finally, no regulatory precedents were referred to in making these orders.

(vii) New Brunswick

In *Arsenault*, the respondent was suspended immediately, with the stipulation that no further application would be considered for 6 months, along with proof of successful completion of an IFIC course. In *Logan*, a reprimand was placed on the registrant's file. In *Bond*, the case involving the most serious infractions, the Administrator was convinced that the individual was unfit for registration. However, because he was not currently registered, it was resolved to place the decision in the respondent's file and on the public record, with the expectation that it would be given serious consideration should he reapply.

The decision on sanctions in the *Bond* case was guided by the OSC's *Mithras Management's* discussion of the need to restrain future conduct that is likely to be prejudicial to the public interest, along with the *Smith* decision of the NBCA concerning the need for fairness when assessing penalties. The decision also referred approvingly to the OSC's *Dornford* decision, in particular its recognition of the importance of general deterrence. Beyond this, earlier regulatory decisions, either of the Administrator himself or "other securities regulators" such as the IDA or the MSC, were considered less useful as a source of guidance. This was because penalties had become more severe over the decade.

There was no doubt in these cases that deterrence was an appropriate goal of the sanctioning decision. *Bond* pointed out that the Act's "public interest mandate necessitates both specific and general deterrence be consequences of administrative processes involving registrants", and that the latter was important to "maintain an effective regulatory system for the protection of the investing public". However in *Logan* the need to achieve deterrence "must always be balanced" with the "clear and cogent evidence of serious wrongdoing" required before a registrant is to be deprived of an opportunity to earn a living.

Aggravating factors enumerated here included: active involvement in the impugned distribution of securities, declarations of bankruptcy, "convictions, violations of other regulatory statutes, civil proceedings and other employment or business relationships which might lead to potential conflicts of interest" (*Bond*), as well as conduct that was "pervasive, deliberate and contrary to all standards of practice". Meanwhile, mitigating factors were the admission of the allegations, the lack of evidence of "intentional fraudulent conduct", cooperation in the investigation, and "being humbled by the experience".

(viii) Nova Scotia

In each of these cases an administrative penalty of \$2,500 was imposed, which was explicitly characterized as at the lower end of the range. Costs of \$500 were also assessed.²¹ No sanctioning precedents were cited. The violations involved were described as "substantive" as opposed to procedural. It was concluded that there was no need to consider issues of specific deterrence as the respondents had implemented the appropriate procedures; however it was determined that it is "in the public interest to impose an administrative penalty in an amount that will serve as a general deterrent to violations of the *Community Economic-Development Corporation Regulations* and other securities laws of Nova Scotia".

Mitigating factors cited included the absence of malice or an "intent of personal profit" on the part of the respondents, as well as the fact that they were "responsive and cooperative" throughout the investigation. Finally, an invalid factor to consider was that the regulatory requirements infringed upon had been "understated" by the administrators of the program.

(ix) PEI

The sanction imposed in *Morse* was that no application for registration would be entertained for six months, Morse was required to rewrite and successfully complete an examination before being registered, and he was required to pay \$2,000 towards the cost of the investigation.

The Director noted that in exercising his registration discretion, "the totality of the candidate's application must be considered". Relevant factors were that two of the clients to whom Morse had breached his fiduciary duty were "unsophisticated investors", and that he had not been truthful with the investigators dealing with this matter.

4. Analysis of Findings

(a) Subject Matter

The most striking area of variation in this comparative sample is that of the nature of the infractions that are the subject of public interest orders. All provinces are concerned to some extent about specific shortcomings in registrant behaviour, whether the issues are breach of the "know your client rule", failure to deal with clients fairly and honestly, or in the Atlantic provinces, taking loans from clients. But B.C. and Alberta both pay a significant amount of attention to sanctioning the distribution of securities without a prospectus, especially where this involves sales to retail investors. This issue has not rated much attention at all in Ontario or

²¹ The maximum allowable penalty is \$100,000. The regulations to the Nova Scotia *Securities Act* also prescribe costs of \$50 per hour for the time of the Director, or any Deputy Director or any lawyer, investigator or accountant employed by the Commission.

Quebec in the last few years, with these provinces having more of a focus on acting as a market participant (broker/advisor) without registration²². Some provinces pay attention to whether insiders report their trading adequately, some do not.

What are the implications of this difference in emphasis for analysing the impact of multiple regulators on enforcement? Some of the variation, of course, has to do with differences in the governing legal framework in relation to enforcement. We have seen that public interest orders in New Brunswick are only available in relation to registrants. In Quebec, cease trade orders can be made quickly, without a hearing; other sanctions cannot be applied in this way.

It might also be the case that local investors complain about different things in different provinces, leading provincial enforcement staff to respond accordingly. It is important to remember, however, that provincial enforcement divisions typically receive many more complaints than subsequently become the subject of enforcement orders. For a variety of reasons, some, if not all provinces clearly engage in some form of strategic planning or priority setting with respect to enforcement. This priority setting may affect not only the response to complaints from investors. The cases reviewed suggest that enforcement personnel are also willing to take proactive action, for example, targeting securities dealers, approaching websites offering investment services to verify registration status, or acting on information received from another division of the agency. It appears, for example, that while B.C. made significantly more public interest orders than other provinces over the last few years, Ontario is more willing to address novel enforcement issues, such as the adequacy of corporate governance among issuers²³ or

²² This picture is rendered somewhat more complex if settlement agreements are taken into account. We have seen that in larger provinces like BC and Ontario, more matters are resolved by SA than by contested hearing. It should be noted however that a focus on numbers of settlements as opposed to hearings may somewhat overstate the ratio of SAs to hearings. This is because some SAs in these provinces represent separate agreements with different respondents in the same matter, whereas a hearing is more likely to deal globally with a number of different respondents. A survey of concluded SAs in Ontario and BC during the relevant time period shows that 27 out of 80 SAs in Ontario involved the distribution of securities without a prospectus. This was the most common subject matter for an SA in Ontario. In BC, this infraction occurred 30 times out of 98 SAs, and was also the most common subject matter there. However, in Ontario, an infraction resolved by SA that occurred almost as frequently (on 24 occasions) was that of trading without registration. In BC this infraction emerged in 18 SAs. In BC, failure to file insider trading reports was resolved by SA on 13 occasions, whereas in Ontario this occurred only 3 times. Meanwhile, the next most common infractions to be noted in Ontario, failure to assess the suitability of an investment/sale of unsuitable investments (15) and inadequate supervision of traders (10) can be observed in BC SAs 5 (with an additional 5 involving failure to make "know your client" inquiries) and 6 times respectively.

Taken as a whole, this additional information concerning SAs does not undermine, and arguably supports, the points made above about variation in enforcement emphasis across the provinces. While the SA information from Ontario does show more attention to the issue of distributing securities without a prospectus than is visible from the hearings data, there still appears globally to be more of a focus on this problem in the BC context. It should be noted for example that 7 of the 27 SAs dealing with distributions without a prospectus in Ontario involved sales of the same securities by a number of different individuals. Further, the SA information supports the conclusion that Ontario is particularly concerned about trading without registration as well as shortcomings in registrant (broker/advisor/mutual fund sales personnel and their firms) behaviour.

²³ At least where issuer corporate governance practices have securities regulation implications, for example practices in relation to disclosure of information.

registrants, or excessive markups by securities dealers. Thus, the difference in subject matter emphasis across the country is, to a significant extent, a product of provincial enforcement policy-making.

A complete answer to the question of *why* the local generation of enforcement policy produces different emphases in enforcement outcomes is a broader question than can be adequately dealt with in the context of this study. However a few comments may be made. It has been noted that the Charles Rivers Associates study for the Wise Persons' Committee emphasizes broad socio-economic factors in provinces as relevant to the question of differences in provincial securities enforcement trends. It has also been suggested to this researcher in interviews with senior enforcement personnel in several provinces that enforcement policy-setting is reactive to the perceived reality that the nature of the local market is different, for example, as between B.C. and Ontario. Thus, for example, the B.C. securities market is considered to be dominated by promoters and junior resources companies attempting to raise financing in the most cost-effective manner. Similarly, the local financial services sector is considered to be different from that in Ontario, with respect to the size and scope of the registrants operating in it.

Another possible explanation relates to how specific provincial securities commissions are funded. Thus, for example, an agency such as the OSC, which is funded in large part by revenue generated from securities industry registrants might be more likely to concentrate its internal enforcement resources on matters of most concern to those registered with it, in a context where external enforcement resources, in the form of penal sanctions, are also available. This hypothesis suggests that the question of how regulators are funded to undertake their activities is an aspect to be considered in any proposals for change.

More generally, in terms of the mandate of the Wise Persons' Committee, the question then becomes whether it is optimal for local regulators to set enforcement policy. On the one hand, the argument, again, is that local regulators are closer to the local market, and in the best position to develop a sense of how and when dubious market participants might be operating in that market. Presumably they develop that sense in part from reacting to investor complaints and in part from engaging in other forms of surveillance or information gathering. On the other hand, it is the case that very few of the types of infraction pursued by provincial regulators are *by definition* local, although some are pursued with greater intensity in some provinces more than others. The fact that different inappropriate behaviours are targeted for attention in different provinces may result in a lack of overall coordination with respect to the focus of enforcement efforts, which may have an impact on the overall use of enforcement resources. It might also suggest that the chances of being sanctioned for specific infractions, for example distributing securities without a prospectus, are lesser in some provinces than others.

Apart from the issue of establishing enforcement priorities, what do the findings of this study suggest about the argument that enforcement needs to be local because local enforcement personnel know who the "bad actors" are? It is apparent that, certainly in the bigger provinces, there were more than a few occasions where the respondents who were the subject of public interest hearings had previously come to the attention of that provincial agency. The proportions

are slightly more pronounced, in provinces like B.C. and Ontario, if enforcement action by the local stock exchange is also included. While this may be something of a self-fulfilling prophecy, in the sense that enforcement staff might be quicker to act on a situation involving someone they are aware has been previously investigated, it does suggest that it is relevant to have a base of local expertise in relation to market participants and their activities.

(b) *Concept of the Public Interest*

What is the effect of multiple regulators on the meaning of the "public interest" that is the basis for making discretionary enforcement orders? Here there is more consistency across the country. There was considerable agreement that the predominant purpose of making these orders was to protect the integrity of the provincial capital market, and to engage in a future-oriented analysis of the respondent's likely behaviour, with sanctions being applied if necessary to achieve the goal of maintaining public confidence in the market's ongoing integrity.

This uniform sense of the purpose of the enterprise no doubt has a lot to do with the convergence effect of Supreme Court decisions like *Asbestos*, though consensus could be observed even before that decision was handed down. It is noteworthy too that even since the *Asbestos* decision's stricture to consider market efficiency issues in making enforcement orders, this aspect has been largely ignored to date. On the other hand, the convergence effect of citing extra-provincial regulatory precedents to ground a public interest analysis is quite limited, as only the Alberta sample features this practice to any significant degree.

It is also quite clear that in most provinces there is no robust articulation of a provincial public interest that can be distinguished from any existing in other provinces. While the issue is raised in provinces like B.C. and Alberta, it is addressed there only in the context of the jurisdiction of regulators to act. Since regulators' jurisdiction currently extends only to the well-being of investors in their province, a connection to those investors typically needs to be established for an order to be made.

In the sample reviewed, only Nova Scotia and Ontario could be said to have articulated a provincial public interest that is substantively unique: the former with reference to maintaining the integrity of a local investment program and the latter identifying elevated standards of corporate governance with the public interest in a couple of decisions.

(c) *Sanctions Imposed*

In attempting to generalize about the specific sanctions that are applied across the provinces, it must be acknowledged that decisions here are quite fact-specific. However it can be seen that the bigger provinces tended to make use of all the sanctions at their disposal in structuring specific outcomes, so that respondents were subject to multiple sanctions.²⁴ The exception to this is Quebec, which is likely a function of the fact that the application of some sanctions requires a hearing and others do not.

²⁴ Appendix 1 indicates the penalties which may be applied in each province, according to the relevant governing legislation.

In B.C., Alberta, Saskatchewan, Ontario and New Brunswick, there were attempts to structure the discretion to apply sanctions by resorting to regulatory precedents which enumerated factors relevant to decision-making. In terms of the precedents used, the provinces were ranged around two poles consisting of the *Eron* decision from B.C., and the *Belteco* decision from Ontario. Although there is quite an amount of overlap in the factors enumerated in both precedents (such as the seriousness of the conduct, the respondent's past conduct, and the need for deterrence), the *Eron* list includes a broader set of issues to be taken into account.

All the provincial regulators, whether or not they subscribed to *Eron* or *Belteco*, also attempted to justify the use of their discretion to sanction by articulating mitigating or aggravating circumstances that helped produce specific outcomes. Chart 5 below attempts to capture a sense of the extent to which there was convergence around the use of these sanctioning factors to guide outcomes. The chart shows a large array of factors used in different provinces, with quite a number being subscribed to by only one or two provinces. There was most agreement about the relevance of (i) the respondent's level of cooperation with enforcement/investigation staff, and (ii) the degree of culpability for the harm caused, as among a number of respondents in the same matter.

In at least one instance – the issue of whether to consider the consequences to the respondent in crafting the sanction – there is outright disagreement among provinces. At least one decision each in B.C. and Alberta take the view that the consequences to the respondent should not be considered in choosing the sanction, while decisions in B.C. (again), Saskatchewan, Manitoba, Ontario, and New Brunswick are prepared to give some weight to this issue in determining the outcome.

Also, there is an amount of enthusiasm across the provinces for paying attention to general deterrence in deciding on a regulatory sanction. However recent decisions in B.C. have noted that the province's Court of Appeal takes a different view of the ability of securities regulators to do this, so that enforcement practices here may be influenced in the future by a Supreme Court pronouncement on the matter.

Thus, while employment of regulatory precedents in sanctioning practices in some provinces suggest attempts at harmonization, the use of a wide range of additional parameters for decision-making across the country indicates that much diversity remains. In terms of the preoccupations of the present study, the issue again is whether the ability to craft an appropriate sanction is inherently a local issue. It has been argued that it is appropriate for different provinces to have different penalties for infractions. The CSA's "Blueprint for Uniform Securities Laws for Canada"²⁵ posits that "(L)ocal differences in amounts of penalties are appropriate and reflect the

fact that jurisdictions with larger markets and issuers may need a higher penalty in order for their enforcement powers to be meaningful".²⁶ However it is somewhat more difficult to make this argument in relation to the *rationale* used for an enforcement outcome. It is unclear why, for example, reliance on legal advice should be a mitigating factor in Alberta and Ontario, but not in B.C.. None of the decisions reviewed articulate a rational basis for why particular mitigating or aggravating factors are popular in some provinces but not others. Without such a rational basis for variation, the effect of local autonomy in relation to the factors influencing sanctioning outcomes seems to be to produce unevenness and fragmentation of enforcement efforts.

²⁵ (2003) 26 OSCB 943.

²⁶ However the CSA does argue that the types of enforcement orders available to regulators should be harmonized. *Ibid* at 979.

Chart 5: Sanctioning Factors

Aggravating / Mitigating Circumstances	BC	AB	SK	MB	ON	QC	NB	NS	PEI
Deliberate / unintentional violation of Act		✓			✓		✓	✓	
Violations isolated / recurring					✓		✓		
Breach of undertaking		✓			✓				
Knowing violation of Commission decision				✓	✓				
Co-operation / lack of co-operation with staff	✓	✓	✓	✓			✓	✓	✓
Acknowledgement of registrant responsibility	✓	✓							
Reliance on legal advice		✓			✓				
Incompetence		✓							
Degree of culpability		✓	✓	✓		✓	✓		
Harm to investors						✓			
Making good on client losses	✓		✓						
Amount of money lost			✓						✓
Involvement of unsophisticated investors				✓					
Knowledge of securities markets						✓			
Proportion of overall transactions involved (insider trading)						✓			
Declaration of bankruptcy							✓		
Previous legal proceedings							✓		
Admission of allegations / humbled by experience							✓		

5. Implications of the Findings for Reform Proposals

This section considers the implications of the research findings about the use of public interest orders for a variety of possible reform proposals that might be made by the Wise Persons' Committee, such as (i) an enhanced version of the status quo; (ii) a passport system, as proposed in the provincial ministers' June 2003 discussion paper²⁷; and (iii) a single regulator.

(a) Status Quo

If the emphasis on local autonomy in relation to enforcement is to be maintained, the findings above suggest that it would be beneficial to have more transparency about, and stakeholder input into, the development of provincial regulatory priorities in this area. This might help to reduce somewhat the risk of uneven enforcement coverage across the provinces in relation to infractions of securities law.

With respect to the factors that influence sanctioning outcomes, greater coordination among the provinces would likewise be helpful in order to increase consistency, with specific attention paid to resolving emerging disagreements about the relevance of factors like the consequences of the sanction for the respondent. Some effort should be devoted to developing a template of appropriate factors for provincial regulators to consider in choosing the quantum and type of penalty.

(b) Passport System

As it is currently described, it does not appear that the implementation of a passport system would change much about the way enforcement is currently organized. The passport document assumes that "local regulators are in the best position to assess investor complaints".²⁸ Accordingly it proposes that relations between investors and market participants would be governed by regulators in the investors' jurisdiction, and the local laws of the investor's jurisdiction would apply. Such a system would maintain a high degree of local autonomy in relation to how investor complaints are ultimately dealt with in accordance with provincial enforcement priorities.

In so far as it is reactive to investor complaints, it would assist only to a limited extent in the overall rationalization of enforcement policy, priority setting or the consistent use of discretionary factors in sanction decisions. Consideration should be given to whether it might actually inhibit enforcement personnel from taking proactive action that is not triggered by investor complaints. The focus on where the investor is as opposed to where the market participant is means there might in some circumstances be less ability to capitalize on local knowledge about market participants who have come to the attention of regulators in the past. As at present, it would also require coordination among regulatory authorities where market participants target investors in more than one province.

²⁷ *Securities Regulation in Canada: An Inter-provincial Securities Framework* (2003).

²⁸ *Ibid* at 11.

(c) *Single Regulator*

There are various ways in which the move to a single regulator model could be achieved. Scenarios involving both centralized or decentralized enforcement could be envisaged. In other words, the model could involve a single enforcement division which would send teams of investigators around the country, or alternatively that the single regulator would maintain local enforcement offices in the larger provinces.

The findings of the present study suggest that the latter option might be more effective at capitalizing on the local information gathering and surveillance connected to enforcement efforts. It would be obviously important to preserve local input into the setting of enforcement priorities in a national context, as well as into the rationalizing of the discretionary factors influencing sanction outcomes.

One key issue would be whether or not there would be a single decision-maker applying a uniform set of administrative enforcement powers. Fewer decision-makers might enhance efforts at a consistent approach to the use of these discretionary factors. The present uniformity around the definition of the public interest suggests no particular obstacles to developing an articulation of a national public interest to be protected by securities enforcement efforts.

**Appendix 1
Penalties**

Penal Sanctions under Criminal Code, 1985	
Nature of Offence	Maximum Years of Imprisonment
Fraud	10
Fraudulent manipulation of stock exchange	5
Spreading false news	2
False pretences or statements	10
Gaming	5
Conspiracy	10
Short sales	5
Breach of trust by public officials	5

Maximum Punishment by Province

Regulatory Offence	BC	AB	SK	MB	ON	QC	NB	NS	PEI	NF	YK	NWT
Misleading / untrue statements / omissions		\$1M and/or 5 years jail	\$1M and/or 2 years jail	\$1M and/or 2 years jail	\$5M and/or 5 years jail	\$20K (ind) \$50K (co) and/or 5 years jail		\$1M and/or 2 years jail		\$1M and/or 2 years jail	\$2K and/or 1 year jail (ind) \$25K (co)	\$2K and/or 1 year jail (ind) \$25K (co)
Failure to file record	\$1M and/or 3 years jail	As above				As above						
Failure to obey decision / undertaking	As above	As above	\$1M and/or 2 years jail	\$1M and/or 2 years jail		As above		\$1M and/or 2 years jail		\$1M and/or 2 years jail	\$2K and/or 1 year jail (ind) \$25K (co)	\$2K and/or 1 year jail (ind) \$25K (co)
Contravention of securities law	As above (if listed section)	As above (if listed section)	As above	As above	\$5M and/or 5 years jail	As above (if listed section)	\$2K or 6 mo jail (ind) \$5K (co) (if listed as offence)	As above	\$1M and/or 2 years jail	As above	As above	As above
Unfair or fraudulent practices						As above			As above			
Hindering investigation						As above						
Permitting offences by directors / officers	\$1M and/or 3 years jail	\$1M and/or 5 years jail	\$1M and/or 2 years jail	\$1M and/or 2 years jail	\$5M and/or 5 years jail	\$20K (ind) \$50K (co) and/or 5 years jail		\$1M and/or 2 years jail	\$1M and/or 2 years jail	\$1M and/or 2 years jail	\$2K and/or 1 year jail (ind) \$25K (co)	\$2K and/or 1 year jail (ind) \$25K (co)
Insider trading	\$1M or triple profit made / loss avoided	\$1M or triple profit made	\$1M or triple profit made	\$1M or triple profit made	\$5M or triple profit made / loss avoided and/or 5 years jail	\$1M or 4x profit made / loss avoided and/or 5 years jail		\$1M or triple profit made	\$1M or triple profit made	\$1M or triple profit made		

Notes:

- ind = individuals / co = companies / mo = months
- Fines are for both individuals and companies unless otherwise noted.

Orders Available by Province

Nature of Administrative Order	BC	AB	SK	MB	ON	QC	NB	NS	PEI	NF	YK	NWT
Comply / cease contravening	✓		✓		✓	✓		✓		✓	✓	✓
Cease trading	✓	✓		✓								
Suspension / imposition of conditions on registration			✓		✓		✓		✓			
Denial of exemptions	✓	✓	✓	✓	✓			✓		✓		
Resignation of officers / directors	✓	✓	✓		✓			✓		✓		
Prohibition from becoming officer / director	✓	✓	✓		✓			✓		✓		
Prohibited / required to disseminate / amend information	✓	✓	✓		✓			✓		✓		
Reprimand	✓				✓					✓		
Freezing disposition of funds, securities, assets							✓					
Notice of fraud to public												
Cease advising			✓									
Disgorge profits made					✓							
Review practices					✓							
Costs	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
Penalty	\$250K (ind) / \$500K (co)	\$100K (ind) / \$500K (co)	\$100 K	\$1M (ind) / \$5M (co)	\$1M	\$1M		\$100 K				

Notes:

- ind = individuals / co = companies / mo = months
- Fines are for both individuals and companies unless otherwise noted.

Appendix 2
Securities Commission Decisions

British Columbia (2003-2000)

1. Robert Pierre Lamblin et al
2. American Gold Mining Corporation
3. Robert Douglas McLean
4. Carl Glenn Anderson and Douglas Victor Montaldi
5. Fairtide Capital Corp et al
6. Danny Francis Bilinski
7. Specialized Surgical Services Inc. et al
8. Jesse J. Hogan
9. Malcolm Stevenson
10. Andrew Rutherford Prowse
11. Adamo Guerrini
12. Frederick George Orr
13. Tri-West Investment Club et al
14. Randall Kane Garrod
15. Gordon Dix Jr. et al
16. Robert A. Diiannii
17. Cartaway Resources Corporation et al
18. Gill Financial Corporation and Nirbhia Singh Gill
19. George Stephen Slightham et al
20. Paul Schiller an Betty Schiller
21. Jack Weatherell
22. Noram Capital Management Inc.
23. Andrew Willman
24. Jean B Claude Hauchercome
25. TAC International Ltd. And Craig Southwood
26. John Terrance Pyper
27. Dean Ward Bishoprick
28. Excel Asset Management Inc. et al
29. Eron Mortgage Corporation et al

Alberta (2003-2000)

1. David John Del Bianco et al
2. Gordon Hunte
3. Christopher Peter Agagnier
4. Marc Lamoureux
5. Cartaway Resources Corporation et al
6. National Gaming Corporation et al
7. Group Athletic Services Corp. et al
8. Valiant Place Inc. et al
9. World Stock Exchange et al
10. Morrison Williams Investment Management Ltd.
11. W.H. Stuart Mutuals Ltd. et al

Saskatchewan (2003-1998)

1. Darcy Lee Bergen
2. Canadian Residents' Umbrella Plan and Sanjeeva Ranjan Singh

Manitoba (2003-1998)

1. David Wayne Finley
2. Max Systems Inc. et al
3. Roland Emile Terault
4. Michael Sidiropolous

Ontario (2003-2000)

1. YBM Magnex International Inc. et al
2. Stephen Duthie
3. Meridian Resources Inc. and Steven Baran
4. Brian K. Costello
5. Jack Banks
6. Lydia Diamond Exploration of Canada Ltd. et al
7. Terry G. Dodsley
8. Ronald Etherington and Create-A-Fund Incorporated
9. Mark Edward Valentine
10. Arlington Securities Inc. and Samuel Arthur Brian Milne
11. Piergiorgio Donnini
12. Richard Thomas Slipetz
13. Mikael Prydz

List of Additional Cases Cited

Quebec (2003-2000)

1. Stevens Demers and Marie-Claude Coulombe
2. Coop Services et Recherches Santé 3E Millénaire (S3M) et Denis Roy
3. Enviromondial Inc.
4. Fonds de Croissance Emerging 3rd Millennium Inc. et al
5. Daniel Bélanger et al
6. Exploration Malartic-Sud Inc. et al
7. Rampart Securities Inc.
8. Elias Zilkha et al
9. Jean Dussault (Interdiction de Prononcer)
10. Guy Shedleur
11. Première État Finance Inc. et al
12. Benoît Laliberté
13. Jitec Inc. and Benoît Laliberté
14. Roger Gagnon and 2645-8083 Québec Inc. Corporation Cinar
15. Jacques Quirion et al
16. Bombardier Inc.

New Brunswick (2003-1998)

1. Emile Arsenault
2. Gordon Arthur Bond
3. Bruce R.H. Logan

Nova Scotia (2003-1998)

1. Baie Chedebucto Bay Investment Fund Ltd.
2. Evangeline Wind Field Inc.
3. Northeastern Community Investment Incorporated

Prince Edward Island (2003-1998)

1. David Emery Morse

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Cartaway Resources Corporation, [2002] BCCA 461.
Committee for the Equal Treatment of Asbestos Minority Shareholders v. Ontario (Securities Commission), [2001] 2 S.C.R. 132.
Global Securities Corp. v. British Columbia (Securities Commission), [2000] 1 S.C.R. 494.
Pezim v. British Columbia (Superintendent of Brokers), [1994] 2 S.C.R. 557.
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