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A DISCIPLINE IN SEARCH OF ITSELF? CONTEMPORARY CHALLENGES FOR SECURITIES LAW IN CANADA IVAN C RAND LECTURE, FACULTY OF LAW, UNIVERSITY OF NEW BRUNSWICK*

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INTRODUCTION

Thank you very much to the University of New Brunswick's Faculty of Law for the invitation to deliver this lecture, and for the warm hospitality I received. I am honoured to deliver this lecture named in memory of Ivan C Rand. I know Justice Rand had a varied and brilliant legal career, having been an Attorney General, a Supreme Court judge, and dean of law. For these reasons I hope he would have sympathized with the enterprise I embark on this evening. That enterprise is to reflect on the disconnect between the way securities law is taught in Canadian law schools and the evolving practice of securities regulation itself. I have taught securities law at Osgoode Hall Law School for 15 years and recently became a practising regulator. I find it puzzling that what I teach as part of the core securities curriculum bears relatively little relationship to the questions preoccupying regulators in real time. Throughout this talk I want to explore the nature of this disconnect and how we might begin to correct it.

I acknowledge that this existential puzzle might be of limited interest to a law school audience. I will therefore try to broaden the significance of this perceived disconnect by analyzing the approach to securities regulation taken in the recent Supreme Court of Canada (SCC) decision *Securities Reference*[1], released in December 2011. In this decision, the SCC commented on the content of Canadian securities law while considering the constitutionality of Parliament's draft securities act. At paragraph 41, the Court indicates that securities law encompasses the following topics: "[P]rospectus review and clearance; oversight of disclosure requirements; takeover bids and insider trading; registration and regulation of market intermediaries; enforcement of compliance with the regime; recognition and supervision of exchanges and other self-regulated organizations; and public education." This list of topics comprises the core curriculum of most securities law courses taught at Canadian law schools. In addition, when the SCC applied the

* The views expressed in these remarks are personal and do not reflect the views of any regulatory body. These remarks have not been substantively updated since they were delivered on February 21, 2013

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[1] *Reference Re Securities Act*, 2011 SCC 66, [2011] 3 SCR 837 [*Securities Reference*].

General Motors[2] factors to the draft securities act it made a number of references to the "day-to-day regulation of securities"[3] and to the "basic nature of securities regulation which, as shown, remains primarily focused on *local concerns* of protecting investors and ensuring the fairness of markets through regulation of participants."[4]

I hasten to assure you that I am not wading into the issue of whether securities regulation should be structurally organized around provincial or national lines. Many views have been expressed on this issue, both before and after the *Securities Reference*. Rather I want to argue that the framework for communicating and teaching securities law in Canada – as represented by the SCC in the quotes above – has not taken sufficient account of broad structural changes in the organization of the capital markets in Canada and elsewhere. This means that it provides an inadequate description and analysis of the legal and institutional questions being confronted by regulators today.

In particular, the pedagogical framework remains largely driven by the concerns of issuers and focuses on the needs of those issuers to raise capital. This emphasis may well be largely the product of history. For example, in Ontario the first comprehensive piece of securities legislation was enacted in 1945 following the recommendations of a Royal Commission on Mining. This Commission was created to consider how the mining industry could be enhanced in the province.[5]

The Canadian academic literature and the pedagogical approach do not, by and large, take an investor-centric approach to the analysis of securities regulation. I say this despite the fact that the SCC refers to the importance of investor protection in its decision and that investor protection is enumerated as a goal of all provincial securities statutes. Throughout this talk I consider whether – and to what extent – the emerging realities of 21st century capital markets and securities law could be better addressed if we really took an investor perspective seriously in our scholarship and teaching. I will address this by providing four examples of contemporary challenges in Canadian capital markets that are not captured by the traditional law school curriculum or the account of securities law provided by the SCC. They are: (i) the organization of financial services in Canada, (ii) the proliferation of financial products, (iii) the regulation of trading in the secondary markets, and (iv) the enforcement mechanisms to deal with securities law breaches.

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[2] *General Motors of Canada Ltd v City National Leasing*, [1989] 1 SCR 641.

[3] *Supra* note 1 at paras 116, 117.

[4] *Ibid* at para 128 [emphasis added].

[5] Mary Condon, *Making Disclosure: Ideas and Interests in Ontario Securities Regulation* (Toronto: University of Toronto Press, 1998) ch 2.

THE ORGANIZATION OF FINANCIAL SERVICES IN CANADA

In the typical law school curriculum we pay little attention to financial services providers. These parties perform an intermediary role in financial markets and may be registered by securities regulators. There are almost 1,500 registered firms and 120,000 individuals who act in various intermediary capacities in our securities markets.[6] That number of financial services firms is about half the number of issuers on the Toronto Stock Exchange.[7] These numbers suggest the growing importance of the financial services sector in the Canadian economy.

In order to analyse the effectiveness of how financial services firms deal with investors and the adequacy of the legal framework, the first problem to be overcome is the confusing myriad of financial services provider titles. There are brokers, investment bankers, investment dealers, investment advisers, mutual fund dealers, prime brokers, scholarship plan dealers, financial planners, financial advisors, portfolio managers, and exempt market dealers. Some of these titles refer to categories of registration under securities law in various provinces, some do not. Some refer to individuals and some to firms. Sometimes, the name of the category provides a clue as to the limitations of the services that can be sold (e.g., mutual fund dealer). However, in other cases it does not (e.g., financial advisor). Even within the mutual fund dealer category, there is yet another distinction between those dealers who sell all brands of mutual funds and those who only sell the brands "manufactured" by their sponsoring company. It is understandable that an individual consumer of financial services might not appreciate these limitations and their implications for his or her choices among financial products. Further, investors may not appreciate the varying intensity of regulation as it pertains to certain categories of financial actors.

Several categories of financial service are primarily regulated by the provincial government regulator. Others are not. The frontline regulation of most investment firms is accomplished by the Investment Industry Regulatory Organization of Canada or the Mutual Fund Dealers Association. Each of these organizations has promulgated its own set of rules to guide the conduct of its members. These rules are very detailed, wide-ranging, and significant to the operations of financial services firms and registered individuals, yet receive very little attention in the law school classroom.

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[6] National Registration Database Information (14 February 2013), online: <http://www.nrd-info.ca/>.

[7] Ontario Securities Commission, *2012 OSC Annual Report*, online: <http://www.osc.gov.on.ca/static/_/AnnualReports/2012/pdf/08-OSC-AR2012-EN.pdf> at 23.

The analytic question becomes whether all these financial services titles and registration categories are justified in a contemporary context, or whether they represent accretions of historical decisions that made sense at the time but no longer do. Another question is whether there is a more rational way to organize these activities given the significant threshold and access problems they create for investors. My point is that legal scholars, lawyers, and students do not typically raise these questions or challenge regulators about them.

An issue that does preoccupy securities regulators is whether the standards of conduct that should be expected from some or all of these categories of intermediary are adequate. There is some confusion evident in the SCC's discussion of financial intermediaries. In the *Securities Reference* the Court points out that "individuals engaged in the securities business are still, for the most part, exercising a trade or occupation within the province."[8] Thus, the draft act put forward by the federal government descended "well into industry-specific regulation".[9] Other references are made throughout the SCC decision to the "securities industry."[10] Yet, in other places the SCC refers to the regulation of "professional competence" and the role of the provinces in regulating professions.[11] My purpose is not to assess whether it would be better for provincial or federal governments to regulate the practitioners of financial services. Rather, I ask whether those who provide such services are in an industry or practicing a profession. Does it matter? It might matter to investors. It likely matters to the legal analysis of the responsibilities service providers undertake to their clients. For example, the Chartered Financial Analyst Institute's *Global Market Sentiment Survey* for 2013 reports that over half its members cited a lack of "ethical culture within financial firms as the fact that has contributed most to the low level of industry trust [and that] the social contract that should exist between financial professionals and those they serve has been damaged, if not broken".[12] Meanwhile in various surveys of Canadian investors a critical mass believe that the legal relationship they have with their intermediaries *already* requires those intermediaries to act in investors' best interests.[13]

Despite the growing size of the intermediation function and its implications for investors, we lack both the vocabulary and securities-specific legal principles to

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[8] *Supra* note 1 at para 117.

[9] *Ibid*. While it is of course true that an individual registrant may be geographically located in a specific place, local registrants may well be organized into national firms.

[10] See for example, *ibid* at paras 34, 112, 127.

[11] *Ibid* at para 122.

[12] Chartered Financial Analyst Institute, *Global Market Sentiment Survey* (2013), online: <www.cfainstitute.org/Survey/global_market_sentiment_survey_2013_full.pdf > at 5.

[13] See e.g., Ontario Securities Commission, *Strengthen Investor Protection in Ontario – Speaking with Ontarians*, Prepared by Ascentum Inc (31 January 2013), online: <www.osc.gov.on.ca/documents/en/Investors/iap_20130318_strengthening-investor-protection.pdf> at v.

determine an appropriate framework for the future.[14] The Canadian Securities Administrators is currently working on this. They recently issued a discussion paper regarding whether – or how – a fiduciary duty should be imposed on dealers with respect to their investors.[15]

Canadian law schools can contribute to an evidence-based discussion of the advantages and disadvantages of changing the legal regime in the manner proposed by regulators. Behavioural economics might assist in the analysis. This empirical approach pursues an understanding of how people make decisions, especially in contexts where they rely on others. For example, one study purports to show that when a financial services provider discloses a conflict of interest this leads investors to accept the provider's recommendations more readily.[16] The researchers interpreted this finding to mean that people do not want to be perceived to mistrust others' advice. Dan Ariely's work provides another example. Ariely found that people are more inclined to steal non-monetary things than they are to steal money.[17] He suggests that this could be a problem in the cashless environment of financial services. The question for lawyers – and law students – is how best to incorporate these insights into a workable legal framework which will govern the relationship between investors and financial service providers.

THE PROLIFERATION OF FINANCIAL PRODUCTS

In the *Securities Reference* the SCC depicted securities as instruments that companies issue when they are seeking financing for business enterprise. Various paragraphs of the decision wrestle with the question of whether this should be provincially or a nationally regulated, but the decision does not address the variety and complexity of the types of financial products that investors can buy or the implications of that diversity for securities regulation. For instance, some $824 billion has been channelled by Canadian investors into mutual funds.[18] This product, by definition, interposes another set of intermediaries between the investor and a company seeking capital – assuming the pooled mutual fund invests in the securities of commercial businesses. Other investment funds increasingly invest in many and

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[14] George Loewenstein, Daylian Cain & Don Moore, "When Sunlight Fails to Disinfect: Understanding the Perverse Effects of Disclosing Conflicts of Interests" (2010-11) 37:5 Journal of Consumer Research 836.

[15] Ontario Securities Commission, "The Standard of Conduct for Advisers and Dealers: Exploring the Appropriateness of Introducing a Statutory Best Interest Duty When Advice is Provided to Retail Clients," CSA Consultation Paper 33-403 (25 October 2012), online: <www.osc.gov.on.ca/en/3738.htm>.

[16] *Strengthen Investor Protection in Ontario – Speaking with Ontarians*, *supra* note 13.

[17] Dan Ariely, *The Honest Truth about Dishonesty* (New York: Harper Perennial, 2012).

[18] Ontario Securities Commission, *OSC Staff Notice 81-718: Summary Report for Investment Fund Issuers 2012*, online: <http://www.osc.gov.on.ca/en/SecuritiesLaw_sn_20130124_81-718_summary-rpt-if-issuers-2012.htm>.

varied types of assets, including commodities, mortgages, corporate debt, and real estate. Exchange traded funds have become another popular vehicle for investment. For example, in October 2012 there were 260 exchange traded funds in Canada with assets of approximately $54 billion.[19] The law school curriculum tends not to address the regulation of these products despite their increasing significance to Canadians.

The Ontario Securities Commission recently gathered data on exempt market activity in the province. The Commission found that 68% of the capital raised in Ontario in 2011 in the exempt market was raised by investment funds as opposed to capital-seeking companies.[20] The legal framework for issuing securities in Canada distinguishes between capital raised in the public market and that raised in the exempt market and there are fewer disclosure requirements in the exempt market.

It was recently reported in the US that, "the money retail investors have in alternative investments in the US, ranging from baskets of commodities to mutual funds that employ sophisticated trading, more than doubled from 2008 to 2012, to $712 billion from $312 billion."[21] At the same time, the number of initial public offerings has been declining in Canada since 2005.[22] Finally, almost one million Canadians are members of defined contribution pension plans.[23] Defined contribution pension plans typically offer a number of investment options to their members – usually including mutual fund investments. In other words, working Canadians who might have had very little direct contact with the capital markets a couple of decades ago are now more dependent on the financial markets for retirement support. This is especially true for the many millions of Canadians who have no formal pension plan coverage.[24]

A number of pressing regulatory issues arise from this proliferation of products and points of contact with the financial markets. They include questions such as whether investors understand the risks of the novel products they are investing in, whether the products are too complicated for retail investors, whether

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[19] *Ibid*.

[20] Ontario Securities Commission, *Annual Report 2013*, online: <http://www.osc.gov.on.ca/documents/en/Publications/rpt_2013_osc-annual-rpt_en.pdf>.

[21] Nathaniel Popper, "Speculative Bets Prove Risky as Savers Chase Payoff", *The New York Times* (10 February 2013) online: <www.nytimes.com/2013/02/11/business/wave-of-investor-fraud-extends-to-ordinary-retirement-servers.html?_r=0>.

[22] Pricewaterhouse Coopers "The Canadian IPO Market: Decade in Review 2000-2009."

[23] Neil Faba, "Top 50 DC Plans Report: A Road Map for the Future" *Benefits Canada* (26 September 2011) online: <http://www.benefitscanada.com/pensions/cap/top-50-dc-plans-report-a-road-map-for-the-future-20962>.

[24] Mary Condon, "Privatizing Pension Risk: Gender, Law and Financial Markets" in B Cossman and J Fudge, *Privatization, Law and the Challenge to Feminism* (Toronto: University of Toronto Press, 2002) 128.

those selling them or the regulators themselves understand them, or whether the trading strategies engaged in by investment funds are appropriate. While I do not presume to provide the answers to these questions in this talk, it is clear that the markets have moved a long way from the relatively simple scenario depicted by the SCC of retail investors investing in shares of blue-chip Canadian companies.

Equally, a contemporary discussion about investment products must include derivatives, the subject of much regulatory debate since the global financial crisis. Interestingly, this type of financial product warranted mention in the SCC's decision as one that might legitimately attract federal regulation. But the basis for this was not particularly well elaborated beyond a general link made to systemic risk.[25] Canadian derivatives trading only accounts for 2% of global derivatives trading, however there is wide variation in the size of the notional amounts of derivatives trading that is attributed to Canadian traders. These notional amounts range from just over $10 trillion[26] to $37 trillion[27]. The most frequent types of derivatives traded by Canadian financial institutions are interest rate swaps, followed by currency swaps. The Group of Twenty has targeted the regulation of derivatives trading as a high priority in the wake of the financial crisis, and domestic regulators are responding accordingly.

There are at least two significant implications of these developments in the sophistication of financial products for securities regulators in Canada. One is the question of the adequacy of the institutional architecture of financial product regulation. Banks in Canada have become highly integrated organizations, trading a wide variety of financial products (both for themselves and on behalf of clients). Yet, these products are subject to different legal regimes and governing regulators depending on whether they are classified as banking, securities or insurance products. One historical example of this problem is the product known as a "principal protected note". There was a vigorous debate in Canada a decade ago about whether the sale of this type of instrument was within "the business of banking" rather than subject to regulation as a security. More recently, provincial securities regulators have embarked on the task of developing a scheme of regulation for derivative products.[28] Banks are the dominant players in the derivatives trading

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[25] *Securities Reference*, *supra* note 1 at para 103.

[26] OTC Derivatives Working Group, *Reform of Over-the-Counter Derivatives Markets in Canada: Discussion Paper from the Canadian OTC Derivatives Working Group* (26 October 2010) online: <http://www.bankofcanada.ca/wp-content/uploads/2010/10/reform.pdf>.

[27] TMX Group, "TMX Group Inc Declares Dividend of $0.40 per Common Share" *TMX Press Release* (5 April 2011) online: <http://www.tmx.com/en/pdf/Q22011_TMXGroup_Dividend.pdf>.

[28] Canadian Securities Administrators, "Consultation Paper 91-401 on Over-the-Counter Derivatives Regulation in Canada" (2 November 2010); "Consultation Paper 91-402 on Derivatives: Trade Repositories" (23 June 2011); "Consultation Paper 91-403 on Derivatives: Surveillance and Enforcement" (25 November 2011); "Consultation Paper 91-404 on Derivatives: Segregation and Portability in OTC Derivative Clearing" (10 February 2012); "Consultation Paper 91-405 on Derivative: End-User Exemption" (20 April 2012); "Consultation Paper 91-406 on Derivatives: OTC Central Counterparty

area in Canada. This raises the question of whether the regulatory scheme for derivatives trading should be administered by banking or securities regulators. From an investor's perspective, the functional differentiation between securities law and banking law may make little sense especially if there is a possibility of regulatory gaps arising as a result. An example of such a gap would be the absence of a requirement to conduct a "suitability" analysis accompanying the sale of a sophisticated financial product. This is an analysis of whether the product is suitable for the investor in the context of their overall financial situation and risk tolerance. This issue recently arose in other jurisdictions with respect to, for example, the mis-selling of interest rate swaps to small businesses in conjunction with conventional bank loans.[29] It has not historically been part of the mandate of prudential banking regulators in Canada to focus on questions of the suitability of products sold to end-user clients.

Other countries are in the midst of experimenting with changes to financial regulation architecture. For example, the UK is moving to divide a previously integrated financial regulator – the Financial Services Authority – into several separate organizations, namely the Financial Conduct Authority and the Prudential Regulatory Authority. However, in this so-called "twin peaks" model, the Financial Conduct Authority will be responsible for regulating retail as well as wholesale financial markets irrespective of the type of product being sold to retail or institutional customers. Such a model was suggested for Canada during the research phase of the Expert Panel on Securities Regulation in 2009, but has not been pursued publicly since then.[30]

The second implication of the proliferation of complex financial products concerns the philosophical architecture of securities regulation. Here I am referring in particular to the iconic status of disclosure of information as the regulatory solution to all ills. Many of those who commented in the aftermath of the financial crisis argued that it was very difficult, even for sophisticated investors, to actually understand the hundreds of pages of disclosures about the assets underlying securitized products (e.g., collateralized debt obligations).[31] Regulators are now required to confront the limitations of information disclosure as the default regulatory tool. One step that has been taken in Canada is the introduction of a summary document accompanying the sale of mutual fund products known as "Fund Facts." This two-page document is intended to highlight only the most salient

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Clearing" (20 June 2012); "Consultation Paper 91-407 on Derivatives: Registration" (18 April 2013), Ontario Securities Commission, online: <www.osc.gov.on.ca>.

[29] James Hurley, "Compensation fears for mis-selling victims", *Daily Telegraph* (28 January 2013) 3.

[30] Eric Pan, "Structural Reform of Financial Regulation in Canada" (Research Study Prepared for the Expert Panel on Securities Regulation, 2009), online: <http://www.expertpanel.ca/documents/research-studies/Structural%20Reform%20of%20Financial%20Regulation%20-%20Pan.English.pdf>.

[31] Mary Condon, "Canadian Securities Regulation and the Global Financial Crisis" (2010) 42:2 UBC L Rev 473.

features of a mutual fund investment. Regulators engaged in testing with members of the investing public to determine what information to include in this brief document. The question that flows from this example is whether the approach is something that could be generalized to, for example, prospectus documents. The challenge is to assess how our current teaching and analysis of securities regulation would have to change if disclosure of information was no longer the default regulatory solution to emerging securities-related problems. In short, what would an expanded regulatory toolbox look like?

CHALLENGES FOR THE REGULATION OF TRADING IN SECONDARY MARKETS

In the classic economic paradigm, secondary trading markets such as the Toronto Stock Exchange exist to enhance the attractiveness of primary markets. The assumption is that investors would be reluctant to invest in the primary markets if there was not an opportunity to sell the investment to a third party whenever desired. The reality of the activities in secondary markets belies this rationale for their existence. Currently, the size of secondary markets far outstrips the value of primary financings. Yet, relatively little attention is paid to analysing the activity of trading in those markets, and those who engage in it, some of whom are market intermediaries and some of whom are not.

Meanwhile, the topic of high frequency trading is a subject of global concern. Organizations such as the International Organization of Securities Commissions are currently developing policy positions about their role in secondary trading markets. High frequency trading refers to the use of sophisticated technology and algorithms to move in and out of positions in securities in fractions of a second. Here in Canada, the Investment Industry Regulatory Organization of Canada recently issued the first phase of a study intended to provide policy recommendations for dealing with high frequency trading.[32] The first phase identifies the extent to which this activity occurs in Canadian markets. The second phase will wrestle with questions pertaining to whether high frequency traders exacerbate volatility in the market and thereby create market instability (systemic risk). It will also examine the extent to which the practice manipulates markets or otherwise exacts an unfair advantage over retail investors.[33]

[32] Investment Industry Regulatory Organization of Canada, "The HOT Study: Phases 1 and 2 of IIROC's Study of High Frequency Trading Activity on Canadian Equity Marketplaces" (December 2012) online: <http://www.iiroc.ca/Documents/2012/c03dbb44-9032-4c6b-946e-6f2bd6cf4e23_en.pdf>.

[33] See e.g. Ken Little, *High Frequency Trading Puts Stock Investors at Disadvantage*, online: About <http://stocks.about.com/od/advancedtrading/a/051010highfrequency.htm >.

Increasingly, trading technology facilitates rapid price changes irrespective of any changes disclosed by the issuing company. This activity may make the underlying logic of the securities law disclosure framework less relevant. We need to begin a policy debate about the consequences of the drive to trading efficiency that could undermine the very integrity of the markets to the detriment of all investors.

ENFORCEMENT MECHANISMS FOR SECURITIES LAW BREACHES

Discussions about the effectiveness of enforcement in the securities field are endemic in Canada. Investor advocates feel strongly that not enough attention is paid to enforcement in Canada, in comparison to the US. This is one of the major reasons for advocating a national system of securities regulation, as evidenced by various expert considerations of the provincial model of securities law in Canada.[34] It is also true that the legal framework for enforcement is more familiar terrain for both the securities law curriculum and academic commentary in Canada.[35] We analyse enforcement in the law school curriculum, but we may not sufficiently confront the role that enforcement plays in the achievement of policy goals. We also need to examine the way different enforcement arenas and remedies interact.

With respect to civil remedies exercisable by investors, there is growing interest in their viability. All Canadian provinces now include in their statutes remedies for misrepresentations in the continuous disclosure documents required under securities law such as annual financial statements or material change reports. These provisions also grant remedies when responsible issuers fail to disclose material changes in a timely manner. Similar remedies have been available for decades with respect to misrepresentations in prospectus documents, but they were infrequently deployed by investors. What seems to be happening now is the development of a plaintiff-side bar in Canada that is willing to organize and manage classes of litigants. National Economic Research Associates Incorporated reports that since 2008 on average 12 cases start each year, with a record of 15 claims issued in 2011.[36] Further, there were 51 active cases in total as of the end of 2012.[37] The academic literature compares and contrasts this landscape with that of the US,

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[34] Wise Persons Committee, "Wise Persons' Committee Calls for Single Securities Regulator Built on Joint Federal-Provincial Model" (17 December 2003) *WPC Press Release*, online: < http://www.wise-averties.ca/about_press_121703_en.html>; Robert D Chapman & Edward P Kerwin, *Canada's Expert Panel on Securities Regulation – Final Report* (27 February 2009), online: McCarthy Tetrault <http://www.mccarthy.ca/article_detail.aspx?id=4394>.

[35] Mary Condon, "Rethinking Enforcement and Litigation in Ontario Securities Regulation" (2006) 32 Queens LJ 1; Christopher C. Nicholls "Civil Enforcement in Canadian Securities Law" (2009) 9:2 Journal of Corporate Law Studies 367; Poonam Puri "Securities Litigation and Enforcement: The Canadian Perspective" (2012) 37:3 Brooklyn Journal of International Law 967.

[36] Bradley A Heys & Mark L Berenblut, "Trends in Canadian Securities Class Actions: 2012 Update" (13 February 2013) online: NERA Economic Consulting <www.nera.com>.

[37] Drew Hasselback, "Canadian securities class actions dipped in 2012" *The Financial Post* (14 February 2013) online: <business.financialpost.com>.

usually pointing to express limitations on suits in Canada that do not exist in the US. But it should be noted that these statute-based civil remedies are available only against issuers and their "gatekeepers". Private remedies against registrants (if they exist) are left to be developed by the common law in a piecemeal fashion. In other words, as I argued earlier with respect to the proliferation of financial services titles and products in Canada, the legal framework has not kept pace with the various ways in which investors interact with securities markets and financial services. The specific question raised by the growing involvement of different investors in the markets is whether we should promote the development of statutory remedies for investors in their dealings with registrants.

With respect to enforcement of securities law norms by regulators, there is the possibility for both federal and provincial jurisdiction to be exercised as recognized by the SCC. An important question for regulators is in what circumstances the criminal law power should be used, as opposed to the exercise of regulatory authority by way of the application of sanctions following an administrative hearing. This issue should include analysis of the ability of different enforcement tools to change behaviour. Specifically, it is clear that much of Canada's securities enforcement resources are spent on the problem of illegal distributions. These are situations where unsophisticated investors are sold securities in the absence of regulator-sanctioned disclosure, and which in many cases are fraudulent distributions. The Canadian Securities Administrators' 2011 Enforcement Report[38] shows the trend here. Between 2009 and 2011, illegal distributions were the largest category of concluded case.

This focus on harm to individual investors shows that an investor-centric approach is embraced here. But do we have a basis for judging how much of Canada's enforcement resources should be devoted to illegal distributions as compared to secondary market-related breaches? If there is symbolic or deterrent value in public enforcement activity, should it be deployed with respect to small numbers of harmed investors in fraud-type distributions or larger numbers of investors active in the secondary markets? In addressing this dilemma, some academic commentators focus on attempting to determine the cost of pursuing different categories of legal breaches.[39] We have not, however, been able to measure the differential deterrent effects of one or another form of public enforcement action.

Finally, the focus on illegal distributions has other consequences. A consistent theme of the Canadian Securities Administrators' enforcement reports is

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[38] Canadian Securities Administrators, "2011 Enforcement Report", online: <http://www.securities-administrators.ca/uploadedFiles/General/pdfs/CSA_2011_English.pdf?n=2239>.

[39] Howell Jackson & Mark Roe, "Public Enforcement of Securities Laws: Resource Based Evidence" (2009) 93 Journal of Financial Economics 207.

that the second and smaller category of legal breaches involves "misconduct" by registrants. Regulators and academics should analyse closely what this misconduct actually involves and the extent to which it should influence future policy-making with respect to registration requirements.

CONCLUSION

Canadian securities markets have been subject to both delegation up and delegation down in the allocation of responsibility for policy-making. The delegation up has given authority to the Group of Twenty to set domestic regulatory agendas. The delegation down has allocated responsibility to self-regulatory organizations for front-line regulation of financial services in Canada. The law school curriculum has not kept up with these developments. Nor has it taken sufficient account of market innovations in products and trading methodologies. Throughout this talk I argued that if we took a more investor-centric approach to the study of securities law, we would have to change the focus of what we teach and how we teach it. We would focus more on the delivery of financial intermediation services and the legal framework that should support it. In particular we would take a more sceptical approach to the value of disclosure as our core orienting principle and begin discussing a wider array of tools to accomplish regulatory goals. Taking a more investor-centric approach might also require us to ask hard questions about the architecture of our financial regulation itself and whether it continues to be "fit for purpose."

If taking an investor-oriented perspective requires us to study different things in a law school curriculum, it also requires lawyers to think beyond the private practice of securities law, which is largely issuer-focused. I think lawyers should further consider bringing skills of legal analysis and problem-solving to bear on a wider variety of concerns across the spectrum of modern financial markets regulation. An investor-centric perspective would be invaluable to the fulfilment of roles such as those of banking regulator, compliance officer in financial services firms, or plaintiff-side securities lawyer. I hope some of you in the audience will take up this challenge.

Thank you for listening to these remarks.