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VIA COURIER

WPC Committee to Review the Structure
of Securities Regulation in Canada
P.O. BOX 10026
700 West Georgia Street
Vancouver, BC
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Attention: Mr. Michael Phelps, Chairman

Dear Sirs:

Re: Consultation Paper

We understand that the WPC Committee has been asked by the Minister of Finance for Canada to make recommendations with respect to the structure of securities regulation in Canada. We appreciate the opportunity to provide comments to the Committee.

Your document dated May 8, 2003 entitled "Questions to the Canadian Capital Markets Community" has been circulated internally and the comments set out in this letter reflect discussions within our firm amongst experienced practitioners in British Columbia, Alberta, Ontario, Quebec, New York and London, England.

Our perspective is that of Canada's largest law firm, with a very busy capital markets practice. We regularly advise clients on the legal aspects of public and private financings in Canada and the United States, on take-over bids and other business combination transactions, on the preparation of public company disclosure documents, on corporate governance issues, on investment dealer and adviser registration issues and generally on securities law matters.

What, in your view, are the key strengths and weaknesses of the current structure?

Currently, Canada has thirteen different regulatory authorities across the country administering securities legislation that is different in each of the jurisdictions. It has been suggested that surely our capital markets would be more efficient if Canada had one set of rules, administered by one regulator.

July 14, 2003

- 2 - WPC Committee to Review the Structure

Our view on this is that one set of rules is clearly preferable to thirteen, but that the provincial securities commissions have done a good job of harmonizing the rules in the most important areas. For senior Canadian issuers, filing a short-form POP prospectus, or a shelf-prospectus for a debt financing, is a relatively straightforward and efficient process. The take-over bid rules are mostly the same across the country (although there continue to be differences in how Ontario and Quebec administer Rule 61-501 and Q-27). The MRRS system has simplified the process of applying for exemption orders. The requirements for an AIF, proxy circular or other public disclosure documents are basically the same in each of the provinces. The proposed NI 51-102 - Continuous Disclosure Obligations – is a national initiative. The Uniform Securities Legislation Proposal released earlier this year is a current initiative of the provincial commissions to achieve greater conformity in securities regulation among the provinces. The strength of our current system is that the commissions have, to a considerable extent, been able to co-ordinate and harmonize these rules.

The weakness of our system is that many rules continue to be different in different provinces and the regulators can, for good reason, often be divided on the fundamental approach to harmonization. The current debate about whether there should be a rules-based or principles-based system of regulation is one example. Another is the different approaches being taken with respect to the exempt distribution rules – all the provinces have now adopted MI 45-103, except Ontario and Quebec, each of which has different requirements. To the extent there are multiple sets of different rules, in the relatively small Canadian capital market, we have undesirable and unnecessary inefficiencies. Business people perceive the system as overly complex, professional advisers are required to spend too much time sorting out the rules, and the securities administrators are constantly striving to create regulatory harmony from confusion.

How well are enforcement activities related to capital markets carried out in Canada? Does the present securities regulatory structure enhance or diminish the effectiveness of enforcement? What are the key enforcement issues?

We believe there is merit in having the enforcement function conducted at the local level. One centralized regulator in, say, Toronto, probably cannot enforce securities regulation in British Columbia as well as a local regulator.

That, however, is not an argument against having one uniform set of securities law requirements across the country. Rather, it suggests that if we have one set of rules, and one omnibus securities commission, that commission may require offices in at least Vancouver, Calgary, Toronto and Montreal to ensure efficient enforcement of the rules.

Currently, enforcement initiatives are often complicated by the fact that securities trading will occur in more than one jurisdiction making it necessary to work out reciprocal arrangements between the enforcement branches of the various securities commissions in the different provinces. Virtually any enforcement action that relates to a continuous disclosure

July 14, 2003

- 3 - WPC Committee to Review the Structure

issue is likely to involve multiple jurisdictions. The effort that goes into co-ordinating the staff of several commissions would be better spent actually enforcing the rules.

The other problem with our current system is that securities fraud is often an international issue and we have no regulator to speak with authority on behalf of Canada to regulators in other jurisdictions. Ontario has tended to take the lead in this regard, probably to the irritation of the regulators in Quebec, Alberta, B.C. and elsewhere. One national regulator would solve this problem.

Our final point with respect to enforcement issues is to note that the Final Report dated March 21, 2003 of the Committee asked to review the *Securities Act* (Ontario), Chaired by Mr. Purdy Crawford, observed that the current multiple roles of the securities commission to make policy, enact rules, conduct investigations, prosecute alleged infractions and adjudicate those cases, can give rise to perceptions of potential for conflicts of interest. The Committee made no recommendation on this issue, but called for further thought and study on a priority basis. We agree.

How does Canada's regulatory structure affect the international competitiveness of Canadian Capital Markets and the Canadian economy?

Our belief is that Canadian capital markets are perceived internationally as currently being efficient and well regulated, but as being very small compared to the markets in New York or London.

With respect to raising capital, international issuers from outside of Canada will go directly to New York or London, without coming to Canada, simply because their deals can be entirely sold in the one jurisdiction and there is no need for them to incur the extra time and expense of complying with Canadian securities law requirements, both at the time of the financing and on an ongoing basis thereafter. This will remain true no matter what structure we have in Canada to regulate capital markets.

The reason it is so important to maintain efficient and effective regulation in Canada is so that senior Canadian issuers, who have access to international markets, will continue to raise capital in Canada, allowing Canadians to invest in companies based here. It is, of course, also vitally important for smaller Canadian companies that are unable to tap international markets and need access to sophisticated capital markets at home in order to grow.

How does the current regulatory structure affect your costs of complying with securities regulation? How have recent initiatives by the Canadian Securities Administrators affected these costs? Are there other significant efficiency issues?

As noted above, for large Canadian POP issuers undertaking a short-form prospectus financing, the current regulatory structure in Canada works well. Filing a prospectus across the country on SEDAR is straightforward and the provincial commissions have a very

July 14, 2003

- 4 - WPC Committee to Review the Structure

efficient system for providing comments and clearing the prospectus. Our experience has been that the current system in Canada is faster, cheaper and more efficient than the system in the U.S.

Similarly, the current Canadian requirements for preparing annual and periodic disclosure documents work well. Having thirteen securities regulatory authorities does not get in the way because the rules have been standardized.

The current system is not so efficient when it comes to the exemption distribution rules and the resale requirements. We now have MI 45-103 in all of the provinces except Ontario and Quebec, each of which has somewhat different requirements. One set of rules would be so much more efficient.

With respect to the revised fee structure recently adopted by some Canadian securities administrators, we have clients who are pleased, and others who are not. Under the new system, POP issuers in Ontario pay annual fees based on their market capitalization, and nominal fees when they undertake transactions in the capital markets. We have some clients with a relatively large market capitalization, who rarely undertake financings, who have seen the fees they must pay to the Ontario Commission annually jump from a few thousand dollars to over \$30,000. They are not in favour of this new system. Other securities commissions in other provinces still charge a fee when a POP prospectus is filed based on the size of the distribution in their province. Quebec assumes that every financing is 25% sold in that province and they charge a fee based on 25% of the deal size regardless of where the securities are sold. There is, of course, no credit in the other provinces for the overpayment usually required in Quebec. Some harmonization here would be helpful.

Are there unique regional and local characteristics of capital markets across Canada that affect you? What regional and local requirements are met by the current structure and how? In particular, do small- and medium-sized growth companies have unique needs and how does the current regulatory structure accommodate these needs?

To state the obvious, there is sensitivity in many regions of Canada to being regulated by a distant authority in central Canada. In B.C. and Alberta, there is a feeling that having a provincial regulator has served them well in that those provinces have been more receptive than Ontario and Quebec to junior issuers raising capital at an earlier stage of their corporate development. If it means giving up the flexibility to respond to local conditions with appropriate regulation, there are many people in the west who will oppose a national commission in Canada.

We agree that some rules should operate differently for small to medium size companies, compared to larger established issuers. The current debate with respect to corporate governance requirements is a good example. We believe, however, that these concerns should be capable of being addressed within the structure of a national securities commission

July 14, 2003

- 5 - WPC Committee to Review the Structure

and that if different rules with respect to raising seed capital or corporate governance are to apply depending upon the size of the company, these rules should be the same across Canada and not different merely because of the province in which an investor resides or where the issuer's head office is located.

How do you perceive the timeliness, responsiveness and flexibility of the current system in developing policies, rules and regulations and, where necessary, in revising or simplifying them to meet new circumstances?

Currently, any significant revision to the rules requires a negotiation with thirteen regulators so that no jurisdiction is significantly out of step. As evident from the current state of the private placement rules, agreement is not always achievable. Having only one regulator would make this process far easier and more efficient.

What is your assessment of regulatory structures in other countries? Are there lessons to be learned from other countries' experiences?

Securities regulation in the U.S. is not inherently better than the structure we currently have in Canada. They have one federal SEC, but the states have their "blue sky" laws and our experience has been that complying with U.S. requirements is more time consuming and expensive than the process here, without better results from a regulatory perspective. Just the same, the U.S. market is right next door and it is 20 times larger than the market in Canada. Like it or not, for our markets to be efficient for issuers and investors, we need to have rules that are integrated not only between the provinces, but between Canada and the U.S.

What would be the best securities regulatory system for Canada?

At McCarthy Tétrault, we believe a system of national regulation of securities markets would be best for Canada. It would eliminate the inefficiencies currently caused by having different rules in different provinces and allow more focus on harmonizing the rules internationally, instead of domestically within Canada. Capital flows through our markets without regard for political boundaries and securities regulation should operate the same way.

If a national system is not achievable for political or other reasons, we believe the current structure can continue to deliver efficient and fair capital markets in Canada, but ongoing efforts will be necessary by the regulators to further harmonize the rules as much as possible in a effort to create a "virtual" cross-Canada system. We believe the initiative of the provincial securities administrators for Uniform Securities Legislation has merit.

July 14, 2003

- 6 - WPC Committee to Review the Structure


Conclusion

Thank you again for the opportunity to provide our comments. If you have questions or would like to discuss any of these points, please contact the undersigned or any other member of our firm.

Yours very truly,

McCarthy Tétrault LLP

Per:

A handwritten signature in cursive script, appearing to read "Graham Gow".

Graham P.C. Gow
Partner

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