

PROPOSED CANADIAN SECURITIES ACT – A SUMMARY OF THE CRIMINAL AND REGULATORY OFFENCE PROVISIONS AND NEW INVESTIGATIVE POWERS

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On May 26, 2010, the government of Canada published a proposed Canadian Securities Act (the “Proposed Act”). In addition to creating a national securities regulator, the Proposed Act would significantly change the way in which securities laws are enforced in those jurisdictions which opt into the new regime.

The CSRA would have two distinct divisions: the Regulatory Division and the Canadian Securities Tribunal (the “Tribunal”). The Regulatory Division would be responsible for the regulation of capital markets in Canada, while the Tribunal would be responsible for the adjudication of securities regulatory matters. The separation of the regulatory and policy functions from the adjudicative functions would be unique amongst Canadian securities regulators and would address the perception of bias inherent in a consolidated securities regulator.

The CSRA would have a number of enforcement mechanisms available to it to redress apparent breaches of the Proposed Act. After investigating possible breaches, the CSRA could, among other things: refer administrative enforcement actions and reviews of regulatory decisions to the Tribunal; apply to the court for a civil order of non-compliance with the Proposed Act; assist the police in the investigation of criminal and regulatory breaches of the Proposed Act using sweeping new investigative tools; and/or refer breaches of the Act or the Criminal Code to the federal or provincial Crown Attorney’s office.

In addition to civil and administrative actions, the CSRA can prosecute breaches of the Proposed Act by instigating pure criminal or quasi-criminal/regulatory prosecutions.

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Regulatory Offences

Under the proposed legislation, the CSRA would have the power to undertake a number of regulatory enforcement actions for violations of the Proposed Act that could result in a range of sanctions. Notably, the sanctions for regulatory offences, which would be prosecuted in court by a provincial or federal Crown Attorney, can include fines of up to \$5 million or imprisonment for a term of not more than five years less a day. It may be somewhat counterintuitive to label an offence punishable by five years less a day as “regulatory” instead of “criminal”, but there are important differences between the two. First, the maximum term of imprisonment of five years less a day means the Crown can avoid jury trials for regulatory offences, as the constitutional right to a jury trial in Canada is not guaranteed unless an offence is punishable by 5 years or more in jail. Second, regulatory offences under the Proposed Act are meant to be strict liability offences, as opposed to full *mens rea* criminal offences, relaxing the evidentiary burden imposed on the prosecution.

Consistent with most provincial Securities Act, the Proposed Act imposes vicarious liability on officers or directors of corporations who authorized, permitted or acquiesced in the commission of a regulatory offence. Unlike a true criminal offence, once the prosecution has proved that the act constituting the regulatory offence occurred, the onus shifts to the defendant to establish that they are not guilty. For example, the Proposed Act provides that proof that an employee was acting within the scope of his or her employment while they committed an act that constituted an offence under the Proposed Act is sufficient proof of the offence to establish guilt against an officer or director on the basis of vicarious liability, unless the officer or director can establish that the offence was committed without their knowledge or consent or that they exercised all due diligence to prevent its commission.

The Proposed Act allows the Crown to elect to proceed by summary conviction or by indictment. If the Crown elects to proceed by summary conviction the maximum sentence is one year imprisonment and/or a fine of \$250,000. If, on the other hand, the Crown elects to proceed by indictment, the maximum sentence available is five years less a day and/or a fine of \$5 million. Fines may exceed \$5 million for the offences of market manipulation, insider trading, or making a prohibited recommendation to trade in a security. In such cases the minimum fine the court must impose is not less than the profit made or loss avoided by the accused as a result of the commission of the offence, even if that amount exceeds \$5 million. The maximum fine that the court can impose is an amount equal to triple the profit made or the loss avoided by all persons as a result of the contravention.

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The ability for the Crown to proceed summarily likely signals that the new federal regulator will be expected to institute a significant number of quasi-criminal or regulatory prosecutions for straightforward contraventions of the Proposed Act. The statute of limitation if the Crown elects to proceed summarily is six years. There is no statute of limitations if the Crown elects to proceed by way of Indictment. Regulatory and criminal proceedings in Ontario would be brought before the Superior Court of Justice.

Criminal Offences

The proposed legislation contains securities-related criminal offences, several of which are currently prescribed in the *Criminal Code*, including offences for securities fraud, market manipulation and insider trading. The Proposed Act contains important modifications and enhancements of *Criminal Code* offences. For example, the Proposed Act allows the court to infer that a person used inside information when trading in a security if it is established that the person knew a non-public material fact or material change at the time that the trade occurred. The Proposed Act also contains new criminal offences, such as making a misrepresentation about a security or making a recommendation that another person trade in the security of an issuer if the person that made the recommendation was in a special relationship with the issuer and in possession of material, non-public information.

These offences would apply to both participating and non-participating jurisdictions.

The proposed legislation also contains the aggravating circumstances, non-mitigating factors and maximum sentences that currently apply to securities-related criminal offences in the *Criminal Code* as well as the strengthened sentencing measures for fraud and victims of fraud that are part of recently tabled legislation in parliament to amend the *Criminal Code* sentencing provisions (Bill C-52). Of significance, the Proposed Act will impose a minimum sentence of two years imprisonment if the value of a fraud is in excess of one million dollars. This means that upon conviction an offender would not be eligible for a conditional sentence which, if granted, would have allowed them to serve the sentence in the community, normally as a form of house arrest. The court would also have the power upon conviction to ban an offender for life from having any employment or volunteer position that provides them with authority over the money or property of another person in any capacity.

The Attorney General of Canada and the Attorney General of a province or territory would continue to have concurrent jurisdiction over the prosecution of criminal offences, with the provinces and territories having

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right of first refusal under an administrative arrangement that currently applies to the prosecution of securities-related criminal offences.

Under the new regime, the CSRA would have a significant role in assisting with the enforcement of criminal offences, and would have a role in the investigation of securities-related crime in a manner that would be set out in an agreement with each province.

Orders for the Production of Information

The Proposed Act includes new evidence-gathering tools for the purpose of enhancing securities-related criminal investigations, including production orders that can be obtained on applications without notice. The proposed regime would allow criminal investigators to obtain a court order to compel a recognized entity to provide a list of registrants who purchased or traded a security during a specified period, and to compel a registrant to produce a document that contains the names of all persons on whose behalf the registrant purchased or traded a specified security during a specified period as well as the time and date of the purchase or trade. Criminal investigators could also obtain a court order to compel entities, such as publicly-traded companies or brokerage houses, to respond in writing to questions about certain aspects of alleged misconduct. Before making these types of orders, the court would have to be satisfied by affidavit evidence that an offence under the Proposed Act had been or will be committed and that the information is required to assist the investigation.

Whistleblower Provision

The Proposed Act also includes a whistleblower provision, which would provide immunity from civil action to persons who cooperate and disclose information to regulatory or criminal investigators that they reasonably believe is true.

Reference to Supreme Court of Canada

The Government has referred the Proposed Act to the Supreme Court of Canada for an opinion as to whether the Act is within the legislative authority of the Parliament of Canada. Should a favourable opinion be received from the Supreme Court of Canada, the Government has indicated that it intends to introduce the Proposed Act in Parliament as a bill. The CSRA is targeted to be established within the next three years.

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