Securities Enforcement: 
An evaluation of recent legislative changes

By

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ABSTRACT

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Typically approached in terms of efficiency, accountability, deterrence, and the best interests of the public, recent research has attempted to determine whether public or private enforcement provides more investor protection and effective market discipline. Instead of pitting public and private enforcement against each other and suggesting that one offers a superior approach, this research work determines that each serves essential and complementary roles in protecting the interests of the investing public. Although a comparative approach between Canadian capital markets and those in the United States will be used, the principal objective is to analyze how the current financial context and recent legislative changes have influenced the Canadian securities landscape. Are recent developments in Canadian securities regulation (public enforcement) truly effective?
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CHAPTER 1: Introduction

This research work focuses on the evolution of both private and public enforcement in Canada following the recent financial crisis. Since 2008, academics and practitioners have addressed in a frantic way enforcement's issues but very little have shown interest in the evolution of the new enforcement tools put in place by Canadian regulators. It is, therefore, crucial to question about the current state of public and private enforcement in Canada as a result of recent changes. This research sheds light on how enforcement has evolved and provides a concrete picture of the Canadian situation - 10 years after the financial crisis.

Reaching the appropriate balance between public and private securities enforcement is essential for promoting investor confidence and solid capital markets. Accurately assessing the value of public and private enforcement has considerable implications both for the academic understanding of what strengthens financial markets and for the content of current development programs. The traditional debate pits public and private enforcement against each other in an attempt to propose that one offers an all-around superior approach. Some argue that civil enforcement remedies contribute more to the enhancement of securities markets than public enforcement efforts; among other things, regulatory agencies may lack both the resources and the incentives to enforce securities laws as effectively as investors themselves. Others argue that there is a critical complementarity between public and private enforcement regimes; that public enforcement is at least as important as private enforcement.

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3 Poonam Puri, supra note 1 at p. 1.
enforcement, and in some instances is irreplaceable. This research evaluates the value of public enforcement of securities law for the development of stock markets around the world, but the debate about the relative merits of both public and private enforcement of securities laws persists.

This research suggests that public and private enforcement serve complementary and major roles in protecting the interests of the investing public. Thus, it cannot be said that one is more important or capable than the other, but rather that they should be understood as part of a unified regime. Effective civil remedies for investors provide incentives—in addition to those created by public enforcement for issuers and other market participants—to comply with their statutory and regulatory obligations and, in particular, to provide complete and accurate disclosure of information to public markets. The effectiveness of Canadian securities law remedies—both public and private—cannot be considered in a vacuum but must be evaluated within the context of certain distinguishing characteristics of Canada’s capital markets, and the Canadian corporate law system in which they operate.

Both enforcement mechanisms have considerable weaknesses and strong advantages. On the defect side, a public enforcement system is degraded because public actors have mixed and often weak incentives to do their jobs well and because they often suffer from inadequate knowledge of both general market and specific firm conditions. But a private enforcement system is subject to collective action and free rider effects among dispersed investors, to slow and inept judiciaries, to

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6 Poonam Puri, supra note 1 at p.1.
7 Ibid at p. 4.
8 Howell E. Jackson & Mark J. Roe, supra note 5 at p. 6.
9 Cristie Ford, supra note 2 at p. 3.
lawyers’ rent-seeking, and to the potential inability of private enforcement to visit severe monetary penalties on wrongdoers\textsuperscript{11}. On the positive side, public enforcement could be run by public–regarding policymakers and invoke sharp criminal, financial, and reputational penalties that deter egregious wrongdoing, while private enforcement actions could be brought by well-informed actors with well-aligned incentives\textsuperscript{12}. There is no clear a priori winner.

The recent events of economic debacles and hardship for corporations, governments, and individuals alike serve as a proof that the state does have an interest in ensuring fair, stable, and efficient financial markets\textsuperscript{13}. Financial actors and securities regulation are both concerned with the soundness of the financial sector as a whole. Securities regulation in Canada, however, must be revisited in light of the current crisis. An effective securities regulator must be both equipped with adequate rules and able to enforce them\textsuperscript{14}. Problems related to regulatory enforcement and securing compliance are of the highest importance to a renewed effort in securities sector oversight\textsuperscript{15}. Indeed, the global economic crisis demands further action to stimulate securities regulation.

An important issue in Canadian financial market regulation is one that is common to all regulatory problems and often seen as the most critical stage of the regulatory process: enforcement. Efficient enforcement can remedy design defects in regulatory mechanisms, and ill-enforcement can undermine the most sophisticated

\textsuperscript{11} Poonam Puri, \textit{supra} note 1 at p. 1.
\textsuperscript{12} Anita I. Anand, \textit{supra} note 10 at p. 2.
\textsuperscript{15} Poonam Puri, \textit{supra} note 1 at p. 2.
designs of regulation. In this way, the regulator’s pursuit of compliance necessarily relies on good enforcement both for positive outcomes and also for the regulatory process itself. It is clear that sound enforcement is not only a requirement for improved securities regulation, but perhaps that it is the most critical element of it. However, before visiting issues of the present, it is important to understand the regulation in this area, its influences, and above all, its history.

The primary focus of this research work is to examine how recent legislative changes and market events have changed the Canadian securities landscape. By doing so, this research contributes to the ongoing debate on public and private enforcement by evaluating securities enforcement from the perspective of investors and of companies, focusing on the relationship between public and private enforcement and on the collaboration that exists in the Canadian environment. By analyzing recent movements and literature on securities enforcement in Canada, this research highlights the interrelationship between public and private enforcement in Canada and supports the conclusion that any legislative changes must consider the securities regulatory framework as a whole as opposed to effecting change on a piecemeal basis.

Chapter 2 introduces an overview of the Canadian capital markets by presenting a brief history of the securities industry in Canada. Following this preamble, the Provincial and Territorial System of Securities Regulation will be explained and analyzed. A comparison with the US markets will then be put forward to highlight

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17 Poonam Puri, “Capital Markets Institute, Enforcement Effectiveness” in Canadian Capital Markets (Dec. 1, 2005), online:<http://www.investorvoice.ca/Research/Puri_Enforcement_>
18 Ibid at p. 3.
19 Poonam Puri, supra note 1 at p. 3.
the main strengths and weaknesses of the Canadian markets. Canada’s corporate and securities law regime and its political and other institutions are sufficiently similar to the US to make inter-jurisdictional comparisons useful\(^\text{20}\). The last part of this chapter will focus on various Canadian issues such as the traditionally more conservative behavior of Canadian regulators in respect of enforcement\(^\text{21}\).

Chapter 3 discusses the effectiveness of public enforcement in Canada and present the major recent developments in Canadian securities regulation such as the introduction of no-contest settlements in Ontario and the public regulators’ initiative to provide compensation to investors\(^\text{22}\). The particular contours of Canadian securities law enforcement cannot be fully understood without some introduction to the basic modes or avenues of public enforcement: criminal prosecution; quasi-criminal prosecution; administrative proceedings; and civil action by securities regulators\(^\text{23}\). Comparisons with our American counterparts continues by analyzing the Canadian approach to securities regulation relative to the one adopted by the United States which is often qualified as less aggressive. The examination of this claim will lead us to the presentation of some data on securities enforcement in Canada, to better understand the Canadian philosophy on public enforcement.

Chapter 4 reviews the development of private enforcement in Canada. Canada’s private enforcement regime is relatively recent and less developed than that of the United States. Indeed, class action legislation was introduced in 1993 and secondary


\(^{21}\) Poonam Puri, supra note 1 at p. 3.


\(^{23}\) Christopher C. Nicholls, supra note 4 at p. 3.
market statutory liability came into force in 2005\textsuperscript{24}. This chapter will introduce the statutory framework of the private regime and detail the steps behind its coming into force, and a comparison with the more developed American regime will follow. Although Canada’s private enforcement regime is less litigious than its American counterpart, this appears to be changing now that Canadian securities legislation makes it easier for plaintiffs to bring private actions and the securities class action bar is becoming more developed\textsuperscript{25}. The most restrictive feature of this new statutory civil liability provisions is the inclusion of liability limits both for corporate and individual defendants\textsuperscript{26}. The impacts and the consequences of these limits will be analyzed regarding the most recent Canadian decisions in relation to the investor's reactions. Chapter 4 concludes with a review of Canada’s class action regime and the number of global class actions certified in Canada.

Chapter 5 focuses on the observations made in earlier paragraphs by attempting to address innovative solutions to the issues previously raised. As mentioned above, the objective is not to determine which of public and private enforcement is more effective, but rather, using the strengths and weaknesses of each, to establish new strategies that can contribute to the mandate of Canadian securities regulators. The effectiveness and especially the way the provinces cooperate with each other will be discussed and criticized\textsuperscript{27}. Chapter 5 concludes with an overview of how the efficiency of the Canadian capital markets compares to the American one, focusing on the efforts that have been put in place since the financial crisis of 2008\textsuperscript{28}.

\begin{footnotesize}
\begin{enumerate}
\item Howell E. Jackson & Mark J. Roe, \textit{supra} note 5 at p. 3.
\item Yann Leroy, "La notion d’effectivité du droit ", \textit{Droit et société}, 79 : 3 (March 2011) 715.
\item Poonam Puri, \textit{supra} note 1 at p. 4.
\end{enumerate}
\end{footnotesize}
The methodology used in this project can be divided into four distinct categories that alternate and evolve over the course of the research work. First, a historical approach is used to describe the chronology and evolution of some significant events such as the promulgation of new laws and new remedies. This approach occupies a significant place in this research work and is by far the most important methodology used in the whole project. Second, a comparative approach is used to highlight some similar and distinctive elements of Canadian law. Among other things, there are comparisons with the legal system of the UK and the United States. Third, a more traditional approach to the law is used throughout this project which consists mainly of demonstrating and explaining certain legislative concepts in order to better capture them. This more conventional approach is mainly used in the presentation of private and public enforcement tools. Finally, a critical approach is used to identify the relevance and effectiveness of certain laws and mechanisms. This approach is used throughout this project but takes more place especially in the conclusion.
CHAPTER 2: Canadian context

1. Canadian Capital Markets: Brief History

By the end of the nineteenth century, the securities sector was considered to be governed by Article 92(13) of *The Constitution Act of 1867*\(^{29}\). Article 92(13) gave the provinces the power to make laws regarding this very broad sector.

> 92. In each Province the Legislature may exclusively make Laws in relation to Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say, […]

> 13. Property and Civil Rights in the Province.\(^{30}\)

The Judicial Committee of the Private Council in the *Parsons*\(^{31}\) matter adopted for the first time an interpretation of traffic and commerce clause that has, up to now, permitted the provinces to govern the securities sector\(^{32}\). While provincial and territorial legislation is based on similar principles and objectives, there have been a number of discrepancies between the provincial and territorial schemes since confederation, which will be discussed later.

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\(^{29}\) *The Constitution Act*, 1867 (UK), 30 & 31 Victoria, c. 3.


\(^{31}\) *Citizens’ and The Queen Insurance Cos. v. Parsons*, 4 SCR 215.

\(^{32}\) Stéphane Rousseau, *supra* note 24 at p. 16.
According to many researchers, there was a securities market in the British colonies as early as the first half of the nineteenth century. The activities of this market initially originated in the financing operations of banks and railway companies, and those activities were fed by mandatory government funding for infrastructure projects. The existence of a securities market was also manifested by the presence of brokers who, from the 1830s, met in the cafes and taverns of Montreal and Toronto, before they began trading and even before they undertook the organization of stock exchanges. In 1854, the Toronto Stock Exchange was officially constituted. In 1872, the Montreal Stock Exchange was established, and in 1874, it was granted the status of a private corporation under private law.

The Canadian securities market of the nineteenth century already had an international dimension. Some authors point out that the securities markets existing at that time could not be considered in a strictly national perspective since the London and New York stock exchanges offered sources of competitive financing for governments and railway undertakings. Competition from the London and New York markets was felt by both issuers and investors who were attracted by these foreign exchanges. Despite this, Canadian stock markets developed rapidly in the second half of the nineteenth century; by 1907, the Montréal and Toronto stock exchanges were among the largest in the world.

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33 Stéphane Rousseau, supra note 24 at p. 16.
34 Ibid. at p. 18
35 Ibid.
36 Howell E. Jackson & Mark J. Roe, supra note 5 at p. 6.
37 Stéphane Rousseau, supra note 24 at p. 19.
38 Raymonde Crête & Stéphane Rousseau, Droit des sociétés par actions, 3d ed. (Montréal: Thémis, 2011).
39 Howell E. Jackson & Mark J. Roe, supra note 5 at p. 6.
40 Stéphane Rousseau, supra note 24 at p. 19.
This development was dependent on several factors, including the growing financing needs of governments and companies, the emergence of a critical mass of investors who were sufficiently fortunate to be interested in the stock market, and the fact that legislative activity laid the foundation for financing by issuing bonds, debentures, or shares\textsuperscript{41}. 

Various studies on pre-confederation laws reveal the existence of legislation governing public and private bodies that authorized these organizations to issue securities for financing purposes\textsuperscript{42}. On the side of public bodies, the laws gave the government or municipalities the power to issue securities such as bonds, debentures or other “public securities” to the public for financing\textsuperscript{43}. On the private side were special incorporation laws, the purpose of which was the formation of a particular corporation, and general laws of incorporation\textsuperscript{44}. Initially, the latter tended to target industries particularly deemed of public interest, such as the banking, construction, and transport industries\textsuperscript{45}. Thereafter, in 1850, is adopted the first general law of constitution aimed at any company, whatever its sector of activities\textsuperscript{46}.

Some researchers\textsuperscript{47} have noted that the laws relating to private companies governed in particular the legal structure of share capital, as well as the issuance of shares for financing purposes. The laws permitted the issuance of common shares—and, in some cases,
preferred shares—and some authorized the company to issue debt securities, such as bonds and debentures\textsuperscript{48}. These historical findings have lead researchers to conclude that securities were not unknown to the legislature before confederation, since they refer to them on numerous occasions, and that there was a Canadian securities market at the time of Confederation\textsuperscript{49}. That market was supported by a legal infrastructure rooted in the legislation on public bodies and private companies. There is no doubt that all these elements were part of the backdrop to the work that led to the \textit{British North America Act of 1867}\textsuperscript{50}, since the Fathers of Confederation, as legislators, had participated in the enactment of numerous laws of this nature\textsuperscript{51}. It is in this perspective that from 1867, the provinces have progressively developed the supervision of the securities sector with regard to the division of powers enacted in the Constitution\textsuperscript{52}.

As a result of Confederation and with influence from the British and American models, the management of the securities industry gradually developed in Canada. At the beginning of the twentieth century, with the legislative framework having been established, a model of supervision of the securities market from the United States influenced the approach of the Canadian provinces\textsuperscript{53}. This model, based on the strict control of the issuance of securities, was established at the state level during the 1910s\textsuperscript{54}. In 1911, the State of Kansas acted as

\footnotesize{
\textsuperscript{48} Keith Marquis, \textit{supra} note 41 at p. 6.
\textsuperscript{49} Raymonde Crête & Stéphane Rousseau, \textit{supra} note 38 at p. 26.
\textsuperscript{50} \textit{British North America Act}, 1867, 30-31 Vict., c. 3 (U.K.).
\textsuperscript{51} Stéphane Rousseau, \textit{supra} note 24 at p. 19.
\textsuperscript{52} \textit{Ibid.}
\textsuperscript{54} \textit{Ibid.}
}
a precursor in this respect by adopting the first Blue Sky Law\textsuperscript{55}, which was intended not only to ensure the disclosure of information but also to regulate the issuers and those responsible for the sale and distribution to the public\textsuperscript{56}.

In concrete terms, this legislation included a registration requirement for securities, issuers, and distributors; the application for registration was accompanied by a disclosure of information that allowed the regulatory authority to exercise a relative control\textsuperscript{57}. After analyzing the information, the authority granted the issuer a permit to invest the securities if it believed that the securities were sound and reasonable and that the issuer was in a good position on the market\textsuperscript{58}. Once the application was successful, however, the issuers and their underwriters remained subject to the control of the authority that had the power to revoke it with sufficient cause\textsuperscript{59}. The revocation could be decreed in particular when the authority considered that the investors could not profit from investments, or that it doubted the integrity and the reasonable character of the conduct of the license holders\textsuperscript{60}.

In sum, the Blue Sky legislation proposed a paternalistic framework for the securities market\textsuperscript{61}. This mode of supervision did not assure the investors of the quality of their investment but allowed them at least to rely on more than their own judgment, using the


\textsuperscript{57} Stéphane Rousseau, \textit{supra} note 24 at p. 5.

\textsuperscript{58} F.W. Wegenast, \textit{The law of Canadian Companies}, (Toronto: Carswell, 1979) at p. 692.

\textsuperscript{59} J. P. Williamson, \textit{Securities Regulation in Canada}, (Toronto: University of Toronto Press, 1960) at p. 11.

\textsuperscript{60} \textit{Ibid}.

experience and judgment of the commission as a reliable referent. After the adoption of the first Blue Sky Law by the State of Kansas, several American states followed suit. In Canada, the Blue Sky model was quickly dominated by provincial legislation. In 1912, Manitoba passed the Sale of Shares Act, which was largely inspired by the Kansas legislation, and in subsequent years, the provinces of Saskatchewan (1914), Alberta (1916) and New Brunswick (1923) did the same. The influence of the Blue Sky model in Canada was however limited to these four provinces; despite the interest generated, the model was not properly set up in other provinces that continue to rely more on disclosure than on strict control of emissions. During the 1920s, the laws designed to prevent fraud filled this void, by forming the foundation of contemporary securities legislation.

In 1928, Ontario passed The Security Fraud Prevention Act— for many, the first true securities law—the main purpose of which was to regulate the activities of individuals or companies who were trading in securities. It was not intended to regulate the issuance of securities, which continued to be governed by the disclosure requirements of the Companies Act and then the Companies Information Act. The crisis of 1929 challenged the models used to frame the securities markets in the United States and Canada; the provinces of Ontario, Québec, Manitoba, Saskatchewan, and British Columbia agreed to

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63 F.E. Labrie and E.E. Palmer, supra note 61.
64 Ibid.
67 Lance E. Davis and Robert Gallman, supra note 56 at p. 3.
68 The Security Fraud Prevention Act, S.O. 1928, c. 34.
70 See: David Johnston, Kathleen Rockwell & Cristie Ford, supra note 69 at p. 23.
strengthen Ontario’s model, and this agreement resulted in the adoption of uniform laws in eight of the nine provinces at that time71. In the years that followed, the model was refined to impose an obligation of communication of information, and Ontario changed the name of its law to the Securities Act72.

In 1933, the Ontario Securities Commission was created by a legislative amendment73. During the same period, the US Congress adopted, as part of an in-depth reform of the regime, the two flagship laws governing the securities industry: Securities Act of 193374 and Securities and Exchange Act of 193475. In 1945 Ontario, largely inspired by this reform, carried out a significant revision of its legislation76. The Securities Act77 passed at this time laid the groundwork for contemporary securities legislation. The Act included the new power to terminate trading on the Toronto Stock Exchange (TSE) and also imposed stricter auditing requirements78. The Broker-Dealer’s Act79 also forced self-regulation onto mining promoters in Ontario; the method of self-regulation grew in popularity in other provinces thereafter80.

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71 Stéphane Rousseau, supra note 24 at p. 13.
73 Stéphane Rousseau, supra note 24 at p. 13.
77 Securities Act, supra note 72.
78 Stéphane Rousseau, supra note 24 at p. 15.
79 Broker-Dealer’s Act, 1947 (Ont.), c. 8.
80 Stéphane Rousseau, supra note 24 at p. 16.
However, this regime would soon be affected by a new wave of reform in securities regulation. The 1965 *Kimber Report*, commissioned by the Ontario government, was a response to some recurring problems regulators faced such as the extent and consistency of disclosure to shareholders, and insider trading. A major driving force for the report was the suspicious purchase of Canadian Oil shares by certain people just before the announcement that Shell Oil would be taking over the company. Many of the report’s recommendations were later adopted in the amended *Ontario Securities Act of 1966*, to be followed by Western Canada. To build on these new fortifications, the influential 1970 *Merger Report*, commissioned by the Ontario Securities Commission (OSC), led to the adoption of a closed system of secondary market trading designed specifically for insiders, who were presumed not to require the protection of extensive disclosure rules. Any trading done outside of this system would, of course, be subject to all normal regulations. This change, like many others in the evolution of Canadian securities regulation, was later similarly adopted in other provinces.

During this period of big changes, a major concern was the Canadian constitutional reality of having multiple securities regulators. As mentioned before, provincial and territorial

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83 *Ibid*.
87 *Ibid*.
governments drew their authority to regulate securities markets through section 92(13) of the Constitution Act under the heading of “Property and Civil Rights in the Province.” These concerns could already be seen in the Report of the Royal Commission on Price Spreads\(^9\) of 1945, which recommended the establishment of a federal organization to supervise the securities being issued by Crown corporations in different provinces, as there were considerable discrepancies in the regimes at the time\(^90\).

This recommendation led the provincial and territorial securities regulators to form the Canadian Securities Authority (CSA) with a mandate of inter alia implementing a harmonized process for regulating securities across the country\(^91\). As a result, a very large part of securities regulation in Canada today is based on regulations, standards, or general directives that are developed jointly with the CSA\(^92\). The provincial and territorial laws governing securities have, for the past few years, taken the form of a framework law, setting out the rights, powers, and obligations of the authorities, whereas the corresponding regulations and general guidelines stipulate the specific requirements applicable to financial market stakeholders\(^93\).

Due to the impressive powers that allow securities regulators to penalize abuse or misconduct in the name of the “public interest,” even in the absence of a specific infraction affecting the regulation, it is important to understand the philosophy of the regulation

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\(^9\) Canada Royal Commission on Price Spreads, (Ottawa: J.O. Patenaude, printer to the King’s Most Excellent Majesty, 1937).

\(^90\) Stéphane Rousseau, supra note 24 at p. 16.

\(^91\) Louis Loss & Joel Seligman, supra note 65 at p. 6.

\(^92\) Ibid.

\(^93\) David Johnston, Kathleen Rockwell & Cristie Ford, supra note 69 at p. 24.
governing securities in Canada. It is likewise essential to define the objectives underlying the application of the regulation in this area. Generally, and as it is recognized by the Canadian Securities Authority, the application of the regulation must strive to protect investors while promoting the proper functioning of the market; therein lies the fundamental aim of the laws and regulations governing securities\textsuperscript{94}. More specifically, the mandate of the Act is also, on the one hand, to discourage reprehensible behaviors and, on the other, to promote compliance with the regulations\textsuperscript{95}.

2. Canadian Capital Markets: An eventful evolution

Effective securities regulation is essential to the protection of investors and is a guarantee of efficiency, dynamism, and competitiveness of the Canadian capital markets\textsuperscript{96}. Many have questioned and criticized the ability of the Canadian regulatory regime to keep pace with change and to maintain a certain level of competitiveness\textsuperscript{97}. In recent years, Canadian provinces and territories and their securities regulators have made considerable progress in harmonizing securities regulatory regime; indeed, over the past few decades, the financial sector underwent a notable transformation driven by the international competition to attract investment and capital for economic growth and the advances in information technology\textsuperscript{98}.

\textsuperscript{95} Ibid.
\textsuperscript{96} Howell E. Jackson & Mark J. Roe, supra note 5 at p. 6.
\textsuperscript{97} Anita Anand, What's next for Canada?: Securities Regulation after the Reference (Toronto : Irwin Law, 2012).
\textsuperscript{98} Poonam Puri, supra note 1 at p. 4.
Regulators, securities industry representatives and many practitioners have argued that the securities regulatory regime then in place should likely to improve particularly by removing barriers to issuers and registrants wishing to access Canadian securities markets. As a result, the country's securities regulators have embarked on major reforms aimed at harmonizing and simplifying securities regulation and administrative procedures. In the late 1990s, the Concerted Review Regime (CER) and the System for Electronic Document Analysis and Retrieval (SEDAR) were developed and adopted, and National Registration Database (NRD) and the Electronic Insider Reporting System (SEDI) were also implemented. In addition, the Canadian Securities Administrators (CSA) embarked on the Uniform Securities Legislation Project, a major effort to recast provincial and territorial securities laws and regulations to eliminate most of the discrepancies.

While progress and efforts on regulatory harmonization are far from insignificant, many capital market participants called for comprehensive reform of Canada's securities regulatory regime. In mid-February 2003, the ministers responsible for securities from Québec, Ontario, Alberta, and British Columbia met to discuss the possibility of the provinces and territories undertaking such a reform. After several meetings, all provincial and territorial ministers made a personal commitment to fundamentally reform the existing securities regulatory regime by building on the work of their regulators. They

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101 Christopher C. Nicholls, supra note 4 at p. 6.
102 Stéphane Rousseau, supra note 24 at p. 23.
103 Ibid.
104 Ibid at p. 24.
set themselves an ambitious timetable, aiming to develop a concrete plan of action for the implementation of a provincial-territorial approach by September 2003\textsuperscript{105}.

The federal government, on the other hand, established the Wise Persons' Committee, a seven persons committee to identify improvements to Canada's securities regulatory regime and report to the federal Minister of Finance by the end of November 2003\textsuperscript{106}. While the work of the Wise Persons' Committee might be a source of inspiration for the interprovincial project for the reform of the securities regulatory regime, it should not be forgotten that the initiative for reform had to come from the provinces and territories since the field of securities was under provincial jurisdiction\textsuperscript{107}.

Over the last decades, Canadian and world investors have been witnesses to many agitations and disconcerting events in the marketplace. From the Bre-X mining fraud in 1997 to the Enron scandal in 2001 and through to the economic crisis in the United States, the need for stronger securities regulation was clear\textsuperscript{108}. Regulators and law enforcement officials were and still are under constant pressure to maintain and build investor confidence in Canadian markets, but they operate in a very difficult environment with many challenges. After the 2008 financial crisis, most securities regulators in Canada, the US, and elsewhere have adhered to a set of broad objectives in regulating financial

\textsuperscript{105} Stéphane Rousseau, supra note 24 at p. 23.
\textsuperscript{106} Wise Person’s Committee to Review the Structure of Securities Regulation in Canada, It’s Time (Ottawa, Finance Canada, 2003).
\textsuperscript{107} Howell E. Jackson & Mark J. Roe, supra note 5 at p. 6.
markets. These objectives include protecting investors from unethical market conduct, inspiring confidence in financial markets, and working to improve market efficiency. However, the practical challenges that have arisen from these basic commitments are not insignificant.

The pursuit of objectives such as ensuring investor protection and market efficiency requires an enforcement regime that is well-resourced, coherent, and politically viable. Indeed, the core of these objectives is based on public and private enforcement which are the only way for the hoped-for modifications would be efficient and respected. Market efficiency relies on regulators and lawmakers enacting rules that do not encumber trading of securities while acting to curb market failures; rules that are at once neither too narrow nor too broad in their scope and, again, that have an impact while not being too intrusive. Thus, the mission that Canadian regulators set themselves was far from simple, and another dilemma surfaced while regulators were working on collaboration.

It is not something new that the existence of multiple regulators in Canada is criticized and questioned. Indeed, this situation is often seen to create unnecessary complexity and overlap in rules, higher regulatory costs to government and the regulated industry and general inconsistency and ineffective enforcement from province to province. The

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110 Ibid.
111 Poonam Puri, supra note 108 at p. 6.
112 Keith Marquis, supra note 41 at p. 4.
113 Pierre Lortie, supra note 100 at p. 7.
114 Howell E. Jackson & Mark J. Roe, supra note 5 at p. 6.
Investment Industry Association of Canada (IIAC), in its submission to the federal government’s Expert Panel on securities regulation, claimed that market participants must deal with thirteen jurisdictions, creating significant costs both in terms of fees charged by regulators, and the administrative, legal and compliance costs of navigating multiple systems\(^{116}\). Internationally, Canada is represented by four of its provincial regulators at the International Organization of Securities Commissions (IOSCO)\(^ {117}\). While the Ontario Securities Commission (OSC) and the Québec Autorité des Marchés Financiers (AMF) are ordinary voting members, Alberta and British Columbia also sit as associate members\(^ {118}\). This situation is exceptional, and not in a manner that is flattering to Canada’s reputation as an otherwise strong leader in financial market governance\(^ {119}\).

In response to these and other concerns with the current system, a number of panels, studies, and papers have attempted to explain and provide policy solutions for governments\(^ {120}\). Many researchers believe that the real question is starker than the extent of the federal government’s involvement with the provinces\(^ {121}\). The debate, which will be further discuss, is whether harmonization can be achieved through cooperation by provincial regulators or whether a more radical solution—the imposition of a single national securities regulator by the federal government—is necessary\(^ {122}\). While the latter proposal is less probable, it is certain that greater intergovernmental participation, however

\(^{116}\) Keith Marquis, *supra* note 41 at p. 4.
\(^{117}\) *Ibid.*
\(^{118}\) Pierre Lortie, *supra* note 100 at p. 7.
\(^{119}\) *Ibid.*
\(^{121}\) Christopher C. Nicholls, *supra* note 4 at p.4.
\(^{122}\) *Ibid.*
it is achieved, will continue to be a prominent issue in the debate on securities regulation reform. The debate over a single securities regulator for Canada has endured for decades and it will resurface as a theme for discussion later in this research work.

Another important debate that Canadian financial market regulation has experienced over its beginnings is one that is common to all regulatory problems: Enforcement. Certainly, enforcement has been written about extensively, notably because it is often seen as the most critical stage of the regulatory process. The regulator’s pursuit for compliance relies on astute enforcement not only for positive outcomes, but also for the regulatory process itself. The imperative for good enforcement in the securities realm, in particular, is notably evidenced in the WPC Report which identified effective enforcement as one of the central criteria for a reformed system. Similarly, the Le Pan Report confirmed the importance of criminal enforcement of capital markets offences. The 2006 Cory-Pilkington Study further reinforces the imperative for good enforcement by concluding that if the system of enforcement is ineffective—or perceived to be ineffective—the confidence of investors is undermined, the reputation of Canada in global markets suffers, and

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125 Poonam Puri, _supra_ note 1 at p. 7.  
127 Keith Marquis, _supra_ note 41 at p. 5.  
129 Keith Marquis, _supra_ note 41 at p. 5.
Canadian securities are devalued. It is clear, given these considerations, that sound enforcement is not only a requirement for improved securities regulation, but perhaps that it is the most critical element of it.

Although very theoretical and historical, this previous section will allow us to have a better understanding of the Canadian's enforcement current situation. Indeed, it is by understanding what has forged and influenced this area of law in the course of history, that we can identify where certain trends and philosophies come from. Before tackling the heart of the subject, mechanics as well as the structure of securities law will be presented and then compared with that of the United States to highlight their biggest strengths and weaknesses.

3. Provincial and Territorial System of Securities Regulation

Securities regulation is concerned with the regulation of public issuers of securities, secondary markets, asset management products, and market intermediaries. Regulation is built to address asymmetries of information between investors and issuers, financial intermediaries and clients, and between counterparties to transactions, and to ensure the

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smooth functioning of trading and clearing and settlement mechanisms that will prevent market disruption and foster investor confidence\textsuperscript{132}.

Regulation of public issuers is based on the principle of full, timely, and accurate disclosure of relevant information to investors\textsuperscript{133}. Over the past few years, securities regulators have moved away from merit-based regimes to disclosure-based regimes\textsuperscript{134}. By doing so, the regulator does not take on the role of determining whether or not an offer is too uncertain for investors—that is a decision to be made by the investor\textsuperscript{135}. Rather, the regulator’s role is to ensure that investors are given full, timely, and accurate information to enable them to make informed decisions\textsuperscript{136}. For that purpose, disclosure obligations are imposed on issuers both at the moment of authorization for public offering and on a continuous basis\textsuperscript{137}. Mechanisms are also put in place to ensure the reliability of the information provided by issuers\textsuperscript{138}. More recently, the regulation of issuers has highlighted the need for adequate corporate governance to ensure effective accountability of management and board members to shareholders\textsuperscript{139}.

\textsuperscript{138} Frank H. Easternbrook & Daniel R. Fischell, \textit{supra} note 133 at p. 4.
\textsuperscript{139} Pierre Lortie, \textit{supra} note 100 at p. 7.
Regulation of market intermediaries seeks to ensure that intermediaries, such as brokers, dealers, and advisers, enter and exit the market without disruption, conduct their business with their clients with due care, and trade fairly in the markets. The primary tools for the regulation of intermediaries are licensing requirements—including prudential requirements—and market and business conduct obligations.

The regulation of asset management aims to ensure professional management and adequate disclosure of investments to the investors. Most regulatory systems focus on collective investment schemes, usually in the form of mutual funds or unit trust funds. Because units of collective investment schemes are investment instruments, they are bound by the same principle of full, timely, and accurate disclosure applicable to issuers. In addition, the operator and investment manager of the collective investment schemes are financial intermediaries and are regulated like other intermediaries.

Secondary markets are regulated to safeguard their smooth functioning. Regulation of market conduct and trading seeks to ensure fair access and adequate price formation, thus preserving the market’s efficiency and reputation. Regulation also aims to limit the disruptive effects that the failure of an intermediary could have on the market; the focus is

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140 Pierre Lortie, *supra* note 100 at p. 7.
142 Pierre Lortie, *supra* note 100 at p. 10.
143 *Ibid*.
145 *Ibid* at p. 2.
146 Ana Carvajal and Jennifer Elliott, *supra* note 132 at p. 6.
147 *Ibid* at p. 7.
on ensuring that market participants settle their trading obligations in an orderly and timely manner, through regulation of the clearing and settlement and the setting of standards for risk management\textsuperscript{148}.

Regulating all these parties is not an easy task. To fully understand how the Canadian regulatory system is supposed to work in practice, a theoretical reference point is required. The field of securities regulation in Canada is currently a heterogeneous mixture of self-regulatory organizations (SROs) and traditional "command and control" bodies in the form of state-mandated provincial securities commissions with multiple industry stakeholder groups, and an effective regulatory model must recognize this multi-layered community\textsuperscript{149}.

It is important to remember that a great deal of any successful regulatory strategy relies on effective enforcement, which will be further discussed in chapters 3 and 4. Before tackling public and private enforcement, the fundamental principles of the Canadian regulatory system will be present to allow a better understanding of regulation across Canada (and in Ontario in particular).

### 3.1 Sources of Law

Canada does not have a national securities regulator. Canada’s provinces and territories have enacted securities laws and regulations and established provincial securities regulators who are tasked with the enforcement of those laws and regulations\textsuperscript{150}. While

\textsuperscript{148} Ana Carvajal and Jennifer Elliott, \textit{supra} note 132 at p. 7.
\textsuperscript{149} Keith Marquis, \textit{supra} note 41 at p. 5.
\textsuperscript{150} Pierre Lortie, \textit{supra} note 100 at p. 10.
there is a great degree of harmonization across the provinces, there can be important differences. Securities regulation in Canada, therefore, is a patchwork of legislation, regulations, rules, instruments, and policies.\(^1\)

Capital markets are also regulated by stock exchanges—the most notable of which is the Toronto Stock Exchange (TSX)—and self-regulatory organizations such as the Investment Industry Regulatory Organization of Canada (IIROC) and the Mutual Fund Dealers Association of Canada, all of which are subject to the oversight of the provincial securities commissions.\(^2\) These stock exchanges and self-regulatory organizations typically have by-laws, procedures and other rules to regulate the capital markets activity that falls within the scope of their jurisdiction.\(^3\) The Criminal Code of Canada contains some offences that relate to securities and capital market matters, including general offences such as fraud that can apply in the securities context, and those particular to securities, such as manipulation of a stock exchange and insider trading.\(^4\)

However, provincial securities legislation also contains quasi-criminal provisions, and it is worth noting that Business corporation statutes, also have a bearing on securities regulation.\(^5\) For instance, this legislation addresses aspects of corporate governance and conditions for issuance of securities.

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4. Christopher C. Nicholls, supra note 4 at p. 9.
the exercise of shareholder rights such as voting and proxy solicitation and includes robust statutory protections of minority shareholders in the form of the oppression remedy. The common law also plays a role in the private enforcement of breaches of applicable securities law—for example, the common law tort of negligent misrepresentation is often relied on in proceedings concerning the adequacy of an issuer’s public disclosure.

3.2 Regulatory Authorities

The primary regulators responsible for enforcement of securities law in Canada are the provincial securities commissions. To avoid repetition and simplify the presentation of Canadian features, this research work focuses on the provisions of the *Ontario Securities Act* and the Ontario Securities Commission, since Ontario is Canada’s most populous province and is the home of the Toronto Stock Exchange. Nevertheless, as the province of Québec presents some important differences compared to the common law provinces, a special attention will be paid to those specificities when they appear to be relevant.

The OSC has large powers to investigate the conduct of capital market participants in Ontario. Where the Commission comes to the conclusion that an enforcement proceeding is authorized, it usually proceeds in one of the two forums. The Commissions’ staff can bring administrative enforcement proceedings before a panel of commissioners who

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156 Raymonde Crête & Stéphane Rousseau, *supra* note 38 at p. 25.
constitute an independent branch of the Commission\textsuperscript{160}. These proceedings are aimed to prevent future harm to—and to protect investor confidence in—Ontario’s capital markets under Section 127 of the Ontario Securities Act\textsuperscript{161}.

Enforcement proceedings usually take the form of a public hearing before a panel composed of three commissioners\textsuperscript{162}. These commissioners have the power to make findings concerning whether there has been conduct contrary to the public interest or whether a breach of the Securities Act has occurred\textsuperscript{163}. The panel also has the power to impose a large diversity of sanctions including fines and limiting a respondent’s ability to participate in the capital markets in Ontario\textsuperscript{164}. The staff of the Commission can also initiate and prosecute quasi-criminal proceedings in the Ontario Court of Justice under the Ontario Provincial Offences Act\textsuperscript{165}.

It is not to be forgotten that although these proceedings are often considered regulatory, they carry penal consequences. Indeed, these proceedings include the possibility of imprisonment for individuals and important monetary penalties\textsuperscript{166}. As the practitioner Allan D. Coleman points out, market participants can themselves invoke proceedings before the Commission that resemble enforcement proceedings by seeking relief from the

\textsuperscript{160}William Savitt, supra note 159 at p. 2.
\textsuperscript{161}Ibid.
\textsuperscript{162}Ibid at p. 3.
\textsuperscript{163}Ibid at p. 4.
\textsuperscript{164}Ibid.
\textsuperscript{165}Ibid at p. 4.
Commission such as a cease-trade order in the context of an unsolicited takeover bid\textsuperscript{167}. Self-regulatory organizations can bring enforcement proceedings to regulate the conduct of market participants within their sphere and protect the integrity of capital markets\textsuperscript{168}.

Part XXII of the \textit{Ontario Securities Act} deals especially with the enforcement tools, statutory and regulatory, accessible to the Commission and law enforcement officials\textsuperscript{169}. As Keith Marquis explained, these regulatory tools, including persuasion activities, notices, warnings, and bylaws for registrants can be understood as being relatively minor tools\textsuperscript{170}. Indeed, Marquis points out that these are typically exercised by the regulator and registered self-regulatory organizations (SROs) for the securities and investment industry, like the Investment Industry Regulatory Organization of Canada (IIROC)\textsuperscript{171}. However, the Act propose hybrid tools for the regulator and law enforcement\textsuperscript{172}. Being more severe, these instruments carry a bigger consequence for offending corporate directors, officers, dealers, and other registrants\textsuperscript{173}.

\textbf{3.3 Common securities claims}

Most of the securities claims in Canada are class actions based on allegations of misrepresentations in an issuer’s continuous disclosure or a failure to make timely

\textsuperscript{167} Mark A. Gelowitz, Allan D. Coleman and Robert Carson, \textit{supra} note 166 at p. 2.
\textsuperscript{168} Ibid at p. 5.
\textsuperscript{169} Ibid at p. 6.
\textsuperscript{170} Keith Marquis, \textit{supra} note 41 at p. 12.
\textsuperscript{171} Ibid.
\textsuperscript{172} Ibid at p. 13.
\textsuperscript{173} Mark A. Gelowitz, Allan D. Coleman and Robert Carson, \textit{supra} note 166 at p. 6.
disclosure of material changes in the issuer’s business. Securities Class Actions will be further discussed in the last section of this research paper. However, the Ontario Securities Act has a wide range of statutory private rights of action to investors depending on whether the alleged misrepresentation affected the primary market or the secondary market.

The applicable defences and the content of the right of action itself depend on whether the misrepresentation was included in a document or a public oral statement, and, if in a document, on the nature of that document. Besides these statutory rights of action, shareholders frequently tend to invoke the common law tort of negligent misrepresentation. It is important to note that under the common law, the investor must prove actual reliance on the alleged misrepresentation in buying or selling shares. The majority of misrepresentation claims are brought against the issuer and some or all of its directors and executive officers. As practitioner Mark A. Gelowitz points out, the statutory rights of action also allow investors to bring these claims against experts, underwriters, and others.

Furthermore, significant defenses—including due diligence defenses and a defense for reliance on an expert—are available in specific circumstances depending on the case. As practitioner Robert Carson noted, although the Ontario Securities Act provides a right of

174 Mark A. Gelowitz, Allan D. Coleman and Robert Carson, supra note 166 at p. 2.
175 See: Securities Act, Part XXIII and XXIII.1.
176 Mark A. Gelowitz, Allan D. Coleman and Robert Carson, supra note 166 at p. 2.
177 Ibid at p. 3.
178 Ibid.
180 Mark A. Gelowitz, Allan D. Coleman and Robert Carson, supra note 166 at p. 3.
181 Ibid.
action to seek damages for insider trading, private proceedings in this respect are not particularly common\textsuperscript{182}. According to him, this is likely due in large part to the fact that the \textit{Ontario Securities Act} only provides for the party who suffered damages in a trade to seek damages against the counter-party to that trade, and therefore does not facilitate class actions\textsuperscript{183}. That being said, it is interesting to note that there are also a large variety of potential claims against an issuer or its directors and officers that may be available under business corporation statutes in Canada, including:

\begin{quote}
A. Oppression claims alleging that the conduct of a corporation was oppressive, unfairly prejudicial to, or unfairly disregarded the interests of shareholders or other potential complainants.

B. Derivative actions that allow shareholders (typically minority shareholders) and other complainants to apply to the court for leave to bring an action on behalf of a corporation to redress harm to the corporation.

C. The exercise of dissent and appraisal remedies in connection with certain corporate transactions, including amalgamations and going-private transactions. \textsuperscript{184}
\end{quote}

Several annual reports as shown that over the past few years, Canada has also experienced an increase in litigation arising from shareholder activism, including proxy fights in both the courts and the provincial securities commissions\textsuperscript{185}.

\begin{flushright}
\textsuperscript{182} Mark A. Gelowitz, Allan D. Coleman and Robert Carson, \textit{supra} note 166 at p. 3.
\textsuperscript{183} Ibid.
\textsuperscript{184} See: \textit{Canada Business Corporations Act}, RSC 1985, c C-44 at Section 190.
\textsuperscript{185} William Savitt, \textit{supra} note 154 at p. 4.
\end{flushright}
3.4 General Offences

Section 122 (1) of the *Ontario Securities Act* outlines general offences. The legislation provides for either a maximum fine not exceeding $5 million or a term of not more than five years in prison less a day, or both, for any person who offers misleading or untrue information in required statements, filings or other duties (or any omission therein), or who otherwise contravenes Ontario securities law\(^{186}\).

**122 (1)** Every person or company that,

(a) makes a statement in any material, evidence or information submitted to the Commission, a Director, any person acting under the authority of the Commission or the Executive Director or any person appointed to make an investigation or examination under this Act that, in a material respect and at the time and in the light of the circumstances under which it is made, is misleading or untrue or does not state a fact that is required to be stated or that is necessary to make the statement not misleading;

(b) makes a statement in any application, release, report, preliminary prospectus, prospectus, return, financial statement, information circular, takeover bid circular, issuer bid circular or other document required to be filed or furnished under Ontario securities law that, in a material respect and at the time and in the light of the circumstances under which it is made, is misleading or untrue or does not state a fact that is required to be stated or that is necessary to make the statement not misleading; or

(c) contravenes Ontario securities law, is guilty of an offence and on conviction is liable to a fine of not more than $5 million or to imprisonment for a term of not more than five years less a day, or to both. 1994, c. 11, s. 373; 2002, c. 22, s. 181 (1). […]

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In the distinct case of insider trading—trading with material knowledge not generally disclosed and tipping of said knowledge (S. 76)—the sanctions are quite singular\textsuperscript{187}. Indeed, for these offences, persons are liable to pay a minimum fine that is equal to the profit made or loss avoided in transgression\textsuperscript{188}. The maximum applicable fine is $5 million or an amount equal to triple the value of profit made or loss avoided by the offender, whichever is greater\textsuperscript{189}.

76 (1) No person or company in a special relationship with an issuer shall purchase or sell securities of the issuer with the knowledge of a material fact or material change with respect to the issuer that has not been generally disclosed. […]

The tools contained in this category, Section 127(1), are strictly regulatory and are enforced by the Ontario Securities Commission\textsuperscript{190}. That being said, a number of the orders can easily be considered the most severe instruments in the regulator's arsenal\textsuperscript{191}. These orders notably include the following:

127 (1) The Commission may make one or more of the following orders if in its opinion it is in the public interest to make the order or orders:

1. An order that the registration or recognition granted to a person or company under Ontario securities law be suspended or restricted for such period as is specified in the order or be terminated, or that terms and conditions be imposed on the registration or recognition.

2. An order that trading in any securities by or of a person or company or that trading in any derivatives by a person or company cease permanently or for such period as is specified in the order.

\textsuperscript{188}Ibid.
\textsuperscript{189}Ibid.
\textsuperscript{190}Ibid.
\textsuperscript{191}Ibid.
2.1 An order that the acquisition of any securities by a particular person or company is prohibited permanently or for the period specified in the order.

3. An order that any exemptions contained in Ontario securities law do not apply to a person or company permanently or for such period as is specified in the order. [...] 

Beyond these offences, the Act contains additional provisions under Section 130(1) for civil liability and action for damages:

130 (1) Where a prospectus, together with any amendment to the prospectus, contains a misrepresentation, a purchaser who purchases a security offered by the prospectus during the period of distribution or during distribution to the public has, without regard to whether the purchaser relied on the misrepresentation, a right of action for damages against,

(a) the issuer or a selling security holder on whose behalf the distribution is made;
(b) each underwriter of the securities who is required to sign the certificate required by section 59;
(c) every director of the issuer at the time the prospectus or the amendment to the prospectus was filed;
(d) every person or company whose consent to disclosure of information in the prospectus has been filed pursuant to a requirement of the regulations but only with respect to reports, opinions or statements that have been made by them; and
(e) every person or company who signed the prospectus or the amendment to the prospectus other than the persons or companies included in clauses (a) to (d) [...] 

3.5 Statistics

It is well known that the OSC is generally considered as the Canada's largest securities regulator compared to the other provinces\textsuperscript{192}. Efficient and sound regulatory enterprise is

\textsuperscript{192} Stéphane Rousseau, supra note 24 at p. 17.
always dependent on effective enforcement\textsuperscript{193}. In order to assess a regulator’s level of achievement in enforcement measures, it is crucial that one understand the distinctions previously mentioned between criminal offences and administrative or strictly regulatory offences and actions\textsuperscript{194}. The former refers to those actions prohibited under the Criminal Code of Canada and, in Ontario, sections of the \textit{Ontario Securities Act}\textsuperscript{195}. About administrative or regulatory offences, they are considered as residual, less serious non-criminal actions that tend to be related more specifically to practices of the securities industry\textsuperscript{196}. In order to have a more concrete picture of the Canadian landscape on securities regulation, the following statistics relating to enforcement by securities regulators in 2016 across Canada provide a clearer portrait of the current situation:

“A. In 2016, a total of 56 proceedings were commenced involving, in aggregate, 72 individuals and 72 companies.

B. More than half of the respondents were alleged to have engaged in wrongdoing related to illegal distributions (82 of 144 respondents). Other common categories included fraud (23 respondents), illegal insider trading (12 respondents), and market manipulation (8 respondents).

C. Matters were concluded against 262 respondents. More than half of the matters proceeded through a contested hearing before a tribunal. Approximately 21 per cent of the matters were concluded by way of settlement agreement.

D. Approximately CAN$62 million was ordered in fines and administrative penalties, and approximately CAN$350 million in restitution, compensation, and disgorgement. The majority of fines were laid in cases of illegal distributions and fraud.”\textsuperscript{197}

\textsuperscript{193} Mark A. Gelowitz, Allan D. Coleman and Robert Carson, \textit{supra} note 166 at p. 3.
\textsuperscript{194} Keith Marquis, \textit{supra} note 41 at p. 14.
\textsuperscript{195} See: \textit{Ibid} at p. 14.
\textsuperscript{196} \textit{Ibid} at p. 15.
Although these statistics provided by IIROC are not exhaustive, they provide a better understanding of the Canadian securities structure. In the following sections, the deficiencies as well as the positive elements of the system currently in place will be further analyzed. Now that the Canadian securities history and its current structure have been briefly introduced, the Canadian and US systems can be compared notably by highlighting the strengths and weaknesses of the current system. Emphasis will be placed on enforcement and especially how Canada reacted to the 2008 financial crisis. By analyzing the significant factors to consider when comparing these two systems, preconceived and often ill-founded ideas about Canadian capital markets will be precisely rectified. It should be kept in mind that although Canada and the United States share similarities, their systems are still very different\(^{198}\). It is crucial to establish what makes the Canadian capital markets philosophy the one it is today, and why Canada's continue to stick with it.

### 4. Influences and Proximities with the United States

Canadian capital markets are often compared to the US markets; indeed, they are closely integrated with the United States and have followed its lead and initiatives on important legislative reforms\(^{199}\). When comparing both systems, one must keep in mind that the Canadian capital markets are, in fact, more similar to the regulated markets in the American


\(^{199}\) Ibid at p. 17.
4.1 The securities framework in the United States

The United States has a centralized securities commission. However, the American securities market remains a market whose supervision is very complex. Each of the US states has adopted its own securities law; in general, each state has jurisdiction over the solicitation and transactions that take place on its territory. These laws may differ from each other, but they have the following common objectives:

- Fighting fraud
- Controlling the financial stakeholders
- Requiring the registration of the offered securities

Since the states have different securities laws, it is necessary to consult them individually, despite their harmonization within the framework of the North American Securities

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201 Ibid at p. 3.
202 Pierre Lortie, supra note 100 at p. 10.
203 William E. White, Kurt Wolfe, Usman M. Sheikh, Heyla Vettyvel and Alex Zavaglia, supra note198.
204 Ibid at p. 3.
Administrator Association. There is also a securities commission, the Securities and Exchange Commission (SEC), and a securities law at the US federal level. The purpose of this law is to regulate interstate commerce as defined in Section 2 (a) 7 of the Securities Act of 1933:

“The term "interstate commerce" means trade or commerce in securities or any transportation or communication relating thereto among the several States or between the District of Columbia or any Territory of the United States and any State or other Territory, or between any foreign country and any State, Territory, or the District of Columbia, or within the District of Columbia.”

Moreover, Section 5 of the same law states that it is illegal to offer or sell securities using any means of transport or communication without first having filed a registration dossier concerning the titles to be placed and approved by the SEC. In 1996, the federal government passed the National Securities Markets Improvement Act (NSMIA). This new legislation has been a major overhaul of US securities law. NSMIA introduces the concept of covered securities; these may include securities listed on the New York Stock Exchange or the National Market System of the NASDAQ, but not listed on the NASDAQ Small Cap Market. With NSMIA, the federal government exercises all the powers regarding the registration of covered securities, which means that states can no longer

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206 James D. Cox, Randall S. Thomas & Dana Kiku, supra note 205 at p. 7.
207 Securities Act of 1933, supra note 74.
208 Ibid at (S. 2(a)7).
209 See: Securities Act of 1933, supra note 74 at (S.5)
212 Ibid.
exercise a judgment on an issuer or the sale or offer for sale of covered securities. States still retain certain powers, such as the ability to:

- Undertake appropriate legal procedures to combat fraud.
- Initiate proceedings against illegal conduct by brokers or representatives.
- Require the filing of written notices when securities are placed on their territory.
- Require the payment of fees, at least for the three years following the adoption of the NSMIA.\(^{213}\)

Shortly after the adoption of the NSMIA, some states subscribed to a new registration dossier review standard, known as the Coordinated Equity Review\(^{214}\). Under these new standardization rules, when a small issuer files a registration record with the SEC, he also files—in each of the states having jurisdiction—a registration application, a copy of the registration paperwork filed with the SEC, and a cheque for the required fees\(^{215}\). At the same time, he notifies each state concerned that he wishes to avail himself of this new regime\(^{216}\). In addition, a similar opinion is given to the State of Arizona, even if no title is placed there, since this state is the manager of the scheme\(^{217}\). Once the file is seized, the Arizona Securities Division appoints two securities commissions as lead regulators: A first that studies the information disclosed and a second that studies the file on its merit\(^{218}\). There are 38 states participating in this system. Among the non-participants, nine states

\(^{213}\) Erinn B. Broshko & Kai Li, supra note 200 at p. 8.

\(^{214}\) James D. Cox, Randall S. Thomas & Dana Kiku, supra note 205 at p. 5.


\(^{216}\) Ibid.

\(^{217}\) Linda M. Stevens, supra note 211 at p. 6.

\(^{218}\) Ibid.
have allocated a registration exemption for certain investments that have been registered with the SEC\textsuperscript{219}.

The US securities regulatory framework shows that despite the existence of a federal securities commission, the US system is more complicated than it appears at first glance\textsuperscript{220}. There is a central body, but the regulated entities must still comply with the regulations of the states which continue to play a role in the American supervisory structure\textsuperscript{221}. This brief overview of the American system provides a better understanding of the functioning of a complex system that may seem for some more efficient or even preferable to its Canadian counterpart\textsuperscript{222}. One must be aware of the main discrepancies between both regulation systems and above all, of the differences between philosophies before making such a judgment. To get a clearer picture, a brief presentation of the main disparities and influences between the American and the Canadian models will follow in the next section.

### 4.2 An enlightened comparison

Although in recent years several lessons have been learned from our American neighbors, the Canadian and US markets have significant differences and one must be very careful when comparing them. Indeed, comparing the two systems, when foundations and philosophies of both are poorly understood, can be dangerous and unwise\textsuperscript{223}. By

\textsuperscript{219} Linda M. Stevens, \textit{supra} note 211 at p. 6.
\textsuperscript{220} Poonam Puri, \textit{supra} note 1 at p. 5.
\textsuperscript{221} Linda M. Stevens, \textit{supra} note 211 at p. 10.
\textsuperscript{222} \textit{Ibid.}
establishing the main characteristics that distinguish the Canadian system from the American one, it will be easier to understand the influence of the latter on the former.

First, Canadian capital markets are quite modest compared to the international equity markets. As of 2016, the size of Canadian markets was approximately CAN$1.994 trillion, comprising about 3% of world-wide market capitalization which was, in 2016, CAN$64.854 trillion. In blunt comparison, the combination of the market capitalization of the New York Stock Exchange (NYSE), the American Stock Exchange, and the NASDAQ Stock Market was approximately 42%. As Poonam Puri pointed out, since Canada’s total market capitalization is not very large, it hosts a disproportionate number of public companies, which means that there is a high number of smaller companies. In 2016, there were approximately 3,368 listed domestic companies in Canada; a notable difference when compared to the 4,331 in the United States at that time.

A study lead by Price Waterhouse Cooper shows that in the period 2010–2014, there were 243 IPOs on all Canadian exchanges with a value of $15.5 billion. This compares to 419 IPOs with a total value of $18.8 billion in 2005–2009 in which the market saw both a

224 Christopher C. Nicholls, supra note 4 at p. 12.
226 Ibid.
227 Poonam Puri, supra note 1 at p. 5.
decade high in 2005 and low in 2008\textsuperscript{230}. The study also shows that Canadian IPOs are mostly small (more than 40\% of the 243 IPOs were less than $5 million)\textsuperscript{231}.

Another important characteristic of the Canadian public company sector is that it has a very small number of big issuers. As Poonam Puri noted, the 100 largest companies on the Toronto Stock Exchange (TSX) account for over 70\% of the market capitalization of all TSX-listed companies. By contrast, the 1,000 smallest issuers on the TSX account for less than 5\% of its total market capitalization\textsuperscript{232}.

It is important to understand that in the United States, the financing of small businesses is framed by governments and not by the SEC\textsuperscript{233}. Each state has its own program—the Small Corporate Offering Registration (SCOR) program—which allows small-cap companies to raise funds more easily and cheaply than a traditional IPO\textsuperscript{234}. That being said, the Canadian securities industry is comprised primarily of small capitalization companies and is thus more similar to the US-regulated securities market\textsuperscript{235}.

Another important element to understand when comparing both systems is that there is a disparity between the United States and Canada’s perspectives as to what characteristics define a “small” or “large” company, with Canada’s small issuers being significantly

\textsuperscript{230} Price Waterhouse Cooper, supra note 229.  
\textsuperscript{231} Ibid.  
\textsuperscript{232} Poonam Puri, supra note 1 at p. 6.  
\textsuperscript{233} Linda M. Stevens, supra note 211 at p. 9.  
\textsuperscript{234} Poonam Puri, supra note 1 at p. 6.  
\textsuperscript{235} Ibid.
smaller than those in the United States\textsuperscript{236}. As Stéphane Rousseau mentioned, this results in a bifurcation in Canada’s issuer base, which might suggest that Canada needs, in some instances, different policies and enforcement strategies to accommodate the specific range of issuers\textsuperscript{237}. Poonam Puri and other academics suggest that some Canadian companies go public too early, that the venture capital market is underdeveloped, and that there are opportunities for consolidation\textsuperscript{238}.

Another important point raised by Poonam Puri is that many of the largest issuers, representing over 50\% of the TSX’s market capitalization, are cross-listed on American exchanges\textsuperscript{239}. Puri shows that 174 issuers on the TSX were also listed on the American stock markets, with a large number of the largest issuers falling into this category\textsuperscript{240}. Given those results, it is crucial to understand that cross-listed companies are subject to the rules and regulations of both Canada and the United States, with possible enforcement oversight by both the SEC and Canadian securities regulators\textsuperscript{241}. According to Poonam Puri, this “double oversight” causes concerns about the potential for confusion in accountability between Canadian and US regulators and duplication of regulatory actions and raises the broader question of whether both jurisdictions should be involved in enforcement activities\textsuperscript{242}. Many experts consider that Canada should maintain its focus only on Canadian companies and leave the oversight of enforcement activities for cross-listed issuers to the

\textsuperscript{236} Ray Ball, supra note 123 at p. 12.
\textsuperscript{238} See: Poonam Puri, supra note 1 at p. 6.
\textsuperscript{239} Poonam Puri, supra note 1 at p. 7.
\textsuperscript{240} Ibid at p. 7.
\textsuperscript{241} Pierre Lortie, supra note 100 at p. 10.
\textsuperscript{242} Poonam Puri, supra note 1 at p. 6.
SEC\textsuperscript{243}. If this position had to move forward, Puri noted that many of the larger issuers in Canada would be excluded from Canadian oversight, even though an important number of their investors would likely be Canadian\textsuperscript{244}. From our perspective, by considering this avenue, it would be unavoidable that the independence of Canadian regulators would be enormously impaired and undermined\textsuperscript{245}. This aspect will be discussed in Chapter three.

In Canada, unlike in the United States, the financial market is very concentrated\textsuperscript{246}. The six largest Canadian banks control most of the banking business (90\% of Canadian banking assets) and, through their subsidiaries, nearly two-thirds of the securities brokerage business\textsuperscript{247}. The concentration extends beyond banking and securities brokerage activities\textsuperscript{248}. Firstly, as Christopher C. Nichols pointed out, the major banks, their associated brokers, and other brokers have both direct and indirect control over a number of Canadian self-regulatory organizations\textsuperscript{249}. Nichols noted, that brokers, via the Investment Dealers Association of Canada (IDA), are shareholders, with TSX Group, of Market Regulation Services Inc. which frames the markets\textsuperscript{250}. They are also co-owners, through the IDA, of the Canadian Depository for Securities Ltd., which is the only Canadian organization offering deposit and equity clearing services\textsuperscript{251}. The other co-owners are the major Canadian banks and the Toronto Stock Exchange\textsuperscript{252}. Secondly, as

\begin{flushleft}
\textsuperscript{243} Poonam Puri, \textit{supra} note 1 at p. 6.
\textsuperscript{244} Erinn B. Broshko & Kai Li, \textit{supra} note 200 at p. 5.
\textsuperscript{245} Pierre Lortie, \textit{supra} note 100 at p. 10.
\textsuperscript{246} \textit{Ibid.}
\textsuperscript{247} Gouvernement du Québec, \textit{supra} note 215.
\textsuperscript{248} \textit{Ibid.}
\textsuperscript{249} Christopher C. Nicholls, \textit{supra} note 4 at p. 4.
\textsuperscript{250} \textit{Ibid.}
\textsuperscript{251} Gouvernement du Québec, \textit{supra} note 215.
\textsuperscript{252} \textit{Ibid.}
\end{flushleft}
many experts mentioned, the major banks, their associated brokers, and other brokers have
direct and indirect control over trading activities in Canada\textsuperscript{253}. With all these facts takes
into account, the Canadian financial market, concentrated as it is, can hardly be compared
to the US, which is way much more competitive\textsuperscript{254}.

4.3 America’s influence

The United States has an unquestionable impact on Canadian capital markets and securities
regulation\textsuperscript{255}. Despite the fact that the Canadian and the US regimes are quite different,
there is absolutely no doubt that the geographical proximity and cultural, political,
metallic, and legal developments in the United States influence Canadian practices\textsuperscript{256}. In
the first place, the geographic proximity of the United States and the size of its markets
makes American legislation relevant to Canadian companies that are cross-listed on US
exchanges and to those that plan to be in the future\textsuperscript{257}. In the second place, the proximity
and resulting similarities in terms of cultural, political, and economic norms have created
interdependencies between the two jurisdictions with regard to trading and many other
facets of business\textsuperscript{258}. Considering this and since Canadian independence will always be a
concern, the relative sizes of the Canadian and US markets alone significantly influence

\textsuperscript{253} Gouvernement du Québec, supra note 215.
\textsuperscript{254} Samantha Horn, “U.S. and Canadian Law: Six Key Differences for Investors” (2013), Stikeman Elliott
(blog), online: <www.stikeman.com/en-ca/kh/canadian-ma-law/us-and-canadian-law-six-key-differences-
for-investors>.
\textsuperscript{255} Poonam Puri, supra note 1 at p. 7.
\textsuperscript{256} Erinn B. Broshko & Kai Li, “Corporate Governance Requirements in Canada and the United States: A
Legal Empirical Comparison of the Principles-Based and Rules-Based Approaches” (Sauder Sch. of Bus.
\textsuperscript{257} Poonam Puri, supra note 1 at p. 7.
\textsuperscript{258} Cristie Ford, “Systemic Risk Regulation in Comparative Perspective” (May 4, 2016).
how autonomous Canada can truly be knowing that Canada has approximately 3.2% of worldwide market capitalization\textsuperscript{259}.

Canada’s adoption of new strengthened corporate governance rules following the enactment of the \textit{Sarbanes-Oxley Act of 2002} \textsuperscript{260} (SOX) also known as the \textit{Public Company Accounting Reform and Investor Protection Act} is a perfect example of its alignment with US policies and practices\textsuperscript{261}. Following the numerous corporate debacles who made their way through North America, the United States implemented the SOX legislation to tighten up their corporate governance rules and address concerns such as accounting fraud and top-level mismanagement\textsuperscript{262}.

Soon after these significant changes, Canada felt the pressure to adopt the same kind of measures. Then, Canada implemented \textit{National Instrument 58-101}\textsuperscript{263}, \textit{National Policy 58-201}\textsuperscript{264}, and \textit{National Instrument 52-110}\textsuperscript{265}, all of which addressed the need for stricter and more rigorous corporate governance guidelines\textsuperscript{266}. As part of a Canadian legislative response to the US \textit{Sarbanes-Oxley Act}\textsuperscript{267}, provinces then introduced a statutory civil

\textsuperscript{259} See: Cristie Ford, \textit{supra} note 158.
\textsuperscript{267} \textit{Sarbanes–Oxley Act of 2002}, \textit{supra} note 260.
liability for secondary market disclosure\textsuperscript{268}. These provisions came into force first in Ontario, on 31 December 2005, and by July 2008, the Ontario initiative had been followed by every Canadian province and one territory\textsuperscript{269}. In the two remaining territories, Nunavut and the Northwest Territories, legislation providing for a similar remedy has received Royal Assent but has not yet come into effect\textsuperscript{270}.

The major reason why Canada has adopted these new measures is because regulators felt compelled by the situation following the adoption of the \textit{Sarbanes-Oxley Act}\textsuperscript{271} in the United States\textsuperscript{272}. Indeed, as Christopher C. Nichols noted, many Canadian companies were forced to comply with the SOX requirements given the high proportion of companies cross-listed on US exchanges\textsuperscript{273}. From this perspective, US rules and legislation became just as relevant as Canadian laws\textsuperscript{274}. As Poonam Puri mentioned, Canadian corporate governance policy may converge with US rules and regulations even when they are only listed in Canada because of global competition\textsuperscript{275}. That being said, Canadian companies may feel tremendous pressure to implement US guidelines to match what most of their competitors have already done\textsuperscript{276}.

\textsuperscript{268} Tara Gray, \textit{supra} note 261 at p. 10.
\textsuperscript{269} Stéphane Rousseau, \textit{supra} note 24 at p. 19.
\textsuperscript{270} Christopher C. Nicholls, \textit{supra} note 4 at p. 17.
\textsuperscript{271} \textit{Sarbanes–Oxley Act of 2002}, \textit{supra} note 260.
\textsuperscript{272} Poonam Puri, \textit{supra} note 1 at p. 7.
\textsuperscript{273} Christopher C. Nicholls, \textit{supra} note 4 at p. 18.
\textsuperscript{274} \textit{Ibid}.
\textsuperscript{275} Poonam Puri, \textit{supra} note 1 at p. 8.
\textsuperscript{276} \textit{Ibid}.
It should be noted that the current system favors the emergence of various opinions on issues that affect securities regulation\textsuperscript{277}. The mixed response of some jurisdictions to the adoption of the Sarbanes-Oxley Act\textsuperscript{278} in the United States is an excellent example\textsuperscript{279}. Mr. Pierre Godin, Acting President of the Québec Securities Commission, stressed that small and medium-sized businesses could be vulnerable if measures as rigorous as those introduced in the United States were adopted here\textsuperscript{280}. He was quoted as saying:

“C’est une loi qui est essentiellement pour les grandes sociétés cotées à la Bourse, lesquelles sont d’énormes sociétés comparativement à la vaste majorité des sociétés canadiennes.”\textsuperscript{281}

David Brown, Chair of the Ontario Securities Commission, contacted key Bay Street stakeholders to ask for their opinion, while stressing the importance of harmonizing US and Canadian standards\textsuperscript{282}. He wrote:

"There is no reason to believe that Canada is immune to the governance failure that has hit companies like Enron Corp. and WorldCom Inc. in the last year. We have exactly the same pressures and market forces here in Canada."\textsuperscript{283}

Douglas Hyndman, chairman of the British Columbia Securities Commission, said:

"Instead of harmonizing regulation with that of the United States, we should see this as an opportunity to differentiate our market. We know we can regulate our markets at a lower regulatory cost than the US."\textsuperscript{284}

\textsuperscript{277} Stéphane Rousseau, supra note 24 at p. 19.
\textsuperscript{278} Sarbanes-Oxley Act of 2002, supra note 260.
\textsuperscript{279} Stéphane Rousseau, supra note 24 at p. 19.
\textsuperscript{280} Gouvernement du Québec, Les valeurs mobilières : une réglementation efficace et appropriée des provinces, (Québec ; Bibliothèque nationale du Québec, 2002).
\textsuperscript{281} Gouvernement du Québec, supra note 280.
\textsuperscript{282} Ibid.
\textsuperscript{283} Ibid.
\textsuperscript{284} See: D. Hyndman, supra note 132 at p. 7.
These disparities of opinion between Ontario, Quebec, and British Columbia certainly show that each regulator has its own philosophies and opinions, but above all, it demonstrates that the influence of the United States on the Canadian markets is relative in regard to each province\(^\text{285}\).

Over the past few years, the closeness and resemblance to the bigger—and arguably more sophisticated—US market has aroused criticism of Canada’s comparatively lax securities enforcement efforts\(^\text{286}\). Since there are a lot of elements to take into consideration when evaluating the comparative effectiveness of the two, including the types of remedies available to regulators and the timing of the development of each regime, many assert the relative effectiveness of the US regime over the Canadian one\(^\text{287}\). As many experts pointed out, one reason for this perception that the United States is a more effective enforcer is the SEC’s aggressive pursuit of high-profile cases\(^\text{288}\). The convergence toward US policies is a discernable trend and will be further discussed in subsequent chapters by analyzing the most recent influences United States have had on Canadian enforcement strategies.

**CHAPTER 3: PUBLIC ENFORCEMENT**

In any jurisdiction, private enforcement of securities laws must be analyzed within the context of that jurisdiction’s arrangements of public enforcement\(^\text{289}\). Public enforcement in

\(^{285}\text{Stéphane Rousseau, supra note 24 at p. 19.}\)

\(^{286}\text{See: Cristie Ford, supra note 158.}\)

\(^{287}\text{Ibid.}\)

\(^{288}\text{Ibid at p. 10.}\)

\(^{289}\text{Stéphane Rousseau, supra note 24 at p. 20.}\)
the Canadian securities markets is the responsibility of provincial regulators, with the federal government’s involvement limited to investigating and prosecuting criminal offences\textsuperscript{290}. This disjointed approach to securities regulation in Canada offers a considerable contrast to the United States, which administers securities regulation nationally through the SEC\textsuperscript{291}.

There are four basic avenues of public securities law enforcement in Canada\textsuperscript{292}. To understand fully the public enforcement of Canadian securities law—and the frequent critiques of the Canadian regulators, for being too passive in their enforcement activities—it requires a brief analysis of technical features of these avenues of enforcement, as well as a review of historical and political considerations\textsuperscript{293}. The securities sector, being an area of the law that moves and evolves very rapidly and which is shaped by court decisions from different jurisdictions across Canada, needs to be analyzed in light of its particular context and historical background\textsuperscript{294}. A descriptive analysis such as this one is thus necessary for a good understanding of the current structure and, above all, essential to draw up the evolution experienced by public enforcement in recent years.

As a first step, this chapter begins by presenting the four avenues of public enforcement\textsuperscript{295} of Canadian securities laws and as a second, a discussion about the political and historical considerations that must be taken into account in the Canadian context will take place. By

\textsuperscript{290} Christopher C. Nicholls, \textit{supra} note 22 at p. 6  
\textsuperscript{291} Erinn B. Broshko & Kai Li, \textit{supra} note 200 at p. 9.  
\textsuperscript{292} Christopher C. Nicholls, \textit{supra} note 4 at p. 14.  
\textsuperscript{293} Poonam Puri, \textit{supra} note 16 at p. 2.  
\textsuperscript{294} Howell E. Jackson & Mark J. Roe, \textit{supra} note 5 at p. 8.  
\textsuperscript{295} See: Christopher C. Nicholls, \textit{supra} note 4 at p. 6.
doing so, this chapter also examines the effectiveness of public securities regulation in Canada by discussing, on one hand, the actual regulatory framework, and on the second hand, the enforcement data in the CSA “Canadian Securities Administrators” 2016 report. This chapter also discuss the new public enforcement strategies such as the introduction of the no-contest settlement in Ontario as well as other approaches followed by the regulators over the past few years. By analyzing the OSC’s most recent decisions, the last section of this chapter assesses how these new strategies impact the balance between public and private enforcement in Ontario.

1. The Four Avenues of Public Enforcement

Enforcement actions cover a very large continuum, from regulatory enforcement to criminal enforcement. As civil enforcement agencies, the only recourse available for Canadian securities commissions is to impose administrative, civil, and penal sanctions. That being said, the particular characteristics of Canadian securities law enforcement cannot be fully understood without some introduction to the basic modes or avenues of public enforcement. There are four avenues of public enforcement of Canadian securities laws: criminal prosecution; quasi-criminal prosecution; administrative proceedings; and civil action by securities regulators. The presentation of these four distinct avenues is fundamental in order to evaluate their implementation subsequently. A brief description of

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297 Poonam Puri, supra note 1 at p. 9.
298 Christopher C. Nicholls, supra note 4 at p. 6.
299 Ibid.
each of these four avenues will, therefore, take place in this section. It is not intended as an exhaustive study but rather a brief introduction aiming to give a better understanding of how public enforcement is shaped.

1.1 Criminal Enforcement

Constitutionally, criminal law is a matter of exclusive federal legislative authority in Canada\textsuperscript{300}. The most serious securities law fraud and market manipulation offenses form an integral part of Canada's federal Criminal Code\textsuperscript{301}. Major securities fraud offenses are, accordingly, investigated by criminal law enforcement agencies and are prosecuted in the courts, rather than by and before securities regulators\textsuperscript{302}. The Criminal Code features both specific securities-related criminal offenses and more general economic crimes that could also comprise some securities-related misconduct\textsuperscript{303}. Penalties for perpetrating these offenses consist of a term of imprisonment, a fine, or both under the Criminal Code\textsuperscript{304}. The pursuit of an offense under the Criminal Code requires charges to be laid by law enforcement or the Crown; the prosecution is then pursued by Crown Counsel\textsuperscript{305}.

CSA members work in concert with law enforcement agencies on a regular basis\textsuperscript{306}. Members from high qualified teams provide specific expertise—such as forensic accounting and knowledge of the capital markets—and collaborate with the police on

\textsuperscript{300} See: Mary G. Condon, Anita I. Anand and Janis P. Sarra, \textit{supra} note 186.

\textsuperscript{301} Mark A. Gelowitz, Allan D. Coleman and Robert Carson, \textit{supra} note 166. at p. 12.

\textsuperscript{302} See: Mary G. Condon, Anita I. Anand and Janis P. Sarra, \textit{supra} note 186.

\textsuperscript{303} Mark A. Gelowitz, Allan D. Coleman and Robert Carson, \textit{supra} note 166 at p. 13.

\textsuperscript{304} \textit{Ibid}.

\textsuperscript{305} \textit{Ibid}.

\textsuperscript{306} \textit{Ibid}.
investigations into alleged violations of the Criminal Code. Collaborative investigations can lead to convictions under the Criminal Code and court-imposed sanctions, including jail terms. Several of these partnerships exist between police and securities commissions facilitating and speeding up the investigation work. Indeed, Québec’s AMF has enforcement partnerships with the Sûreté du Québec’s Financial Crime Market Unit and the Royal Canadian Mounted Police (RCMP). The Joint Serious Offences Team of the OSC is a partnership among the OSC, the RCMP’s Financial Crime program, and the Ontario Provincial Police Anti-Rackets Branch (ARB) to conduct joint investigations using provisions of the Ontario Securities Act and/or the Criminal Code.

Looking at recent statistics, 2016 saw an increase in both the number of criminal proceedings commenced and concluded, as compared to previous years. Indeed, 10 Criminal Code proceedings were commenced in 2016, up from 6 Criminal Code proceedings in 2015. In addition, jail terms were handed down to 15 individuals under the applicable Securities Acts and 9 individuals under the Criminal Code in 2016, as compared to 15 individuals under the applicable Securities Acts and four individuals under the Criminal Code in 2015. This increase can be notably explained by the fact that CSA members’ have made great efforts, in recent years, to collaborate more closely with law enforcement organizations.

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308 Ibid.
309 Mark A. Gelowitz, Allan D. Coleman and Robert Carson, supra note 166 at p. 13.
310 Christopher C. Nicholls, supra note 4 at p. 12.
311 Mark A. Gelowitz, Allan D. Coleman and Robert Carson, supra note 166 at p. 13.
314 Ibid.
enforcement agencies. These statistics will be further explored in the last section of this chapter.

1.2 “Quasi-Criminal” Prosecution

Most Canadian securities statutes contain what are often referred to as “quasi-criminal” offences. As many academics expressed, the term “quasi-criminal” is a greeting to the fact that under Canadian constitutional law only the federal government may enact legislation in relation to criminal law. However, provincial governments do have legislative authority to make laws in relation to “the imposition of punishment by fine, penalty or imprisonment, for enforcing any law of the province,” and it is pursuant to this power that provincial legislatures have enacted penalties for the violation of provincial securities laws.

The Ontario Securities Act, for instance, provides that anyone who is convicted of certain offences, including the general offence of contravening Ontario securities law, is liable to a fine of up to $5 million or to imprisonment for a term of up to five years less a day, or both. Provision 122 of the Ontario Securities Act provides a good example of quasi-criminal prosecution:

122 (1) Every person or company that,

(a) makes a statement in any material, evidence or information submitted to the Commission, a Director, any person acting under the authority of the

See: Poonam Puri, supra note 1 at p. 9.
Christopher C. Nicholls, supra note 4 at p. 6.
Ibid.
Mark A. Gelowitz, Allan D. Coleman and Robert Carson, supra note 166.
Ibid.
Commission or the Executive Director or any person appointed to make an investigation or examination under this Act that, in a material respect and at the time and in the light of the circumstances under which it is made, is misleading or untrue or does not state a fact that is required to be stated or that is necessary to make the statement not misleading; [...] 320

Where a defendant is convicted of committing multiple offences, it is possible for the court to aggregate sentences such that a convicted offender could be subject to imprisonment for more than the five years single offence maximum 321. As Christopher C. Nicholls pointed out, extended sentences of this sort are not common. Nevertheless, in 2008, a Québec court did sentence a person convicted of multiple violations of the Securities Act to a combined 12 years in prison and a $255,000 fine 322. The sentence was afterward appealed and reduced to 8 years 323. In some jurisdictions, staff prosecute right away such cases in court 324. In others, securities regulators investigate and then assign cases of quasi-criminal offences to Crown Counsel for prosecution 325. It is important to note that CSA members have absolutely no authority to order a term of imprisonment; this can only be done by a judge 326.

Despite the fact that prosecutions for such offences are not undertaken before the securities regulators but instead in the courts, securities regulators may however perform a critical gatekeeping function 327. For instance, absolutely no quasi-criminal proceeding under the Ontario Securities Act may be commenced in Ontario except with the consent of the

320 Securities Act, Section 122.
321 Christopher C. Nicholls, supra note 4 at p. 12.
323 Ibid.
324 Mark A. Gelowitz, Allan D. Coleman and Robert Carson, supra note 166.
326 Ibid.
327 Christopher C. Nicholls, supra note 4 at p. 14.
Securities Commission\(^{328}\). About Québec, penal proceedings may be instituted by the securities regulatory authority – Autorité des Marchés Financiers\(^{329}\).

### 1.3 Regulatory Enforcement in the Public Interest

One of the most flexible and largest enforcement powers that most Canadian securities regulators have at their disposal is the power to make orders “in the public interest”\(^{330}\). In Ontario or elsewhere in Canada, as Christopher C. Nicholls explained, members of the Commission, sitting as a tribunal, make such orders following an administrative hearing\(^{331}\).

There was a time in Canada where the available options and the range of possible orders were quite limited\(^{332}\). At this time, the Commission had the power to abolish or suspend the registration of registrants such as brokers and securities dealers\(^{333}\). Nevertheless, when it came to issuers and other market participants, the Commission’s powers were much more delineated and restricted\(^{334}\).

The Commission has had two available remedies at his disposal which were the power to deny statutory exemptions to an offending party or to “cease trade” the securities of an offending issuer\(^{335}\). However, Ontario and most of Canadian provinces have, in the past few years, enlarged their public interest powers which now include the power to prohibit a person from becoming or continuing to act as an officer or director, as well as the power

\(^{328}\) See: \textit{Securities Act}, supra note 137 S. 122(7).

\(^{329}\) See: \textit{Loi sur les valeurs mobilières}, RLRQ, c. V-1.1. (208.1).

\(^{330}\) Christopher C. Nicholls, \textit{supra} note 4 at p. 14 par. 3.

\(^{331}\) \textit{Ibid.}

\(^{332}\) \textit{Ibid} at par. 4.

\(^{333}\) \textit{Ibid} at par. 5.

\(^{334}\) \textit{Ibid} at par. 6.

\(^{335}\) \textit{Ibid.}\
to order a person or company to pay an “administrative penalty” of up to $1 million\textsuperscript{336}. These matters come often before the Commission following complaints received by Commission staff from members of the public or investors and if it’s not the case, they are initiated following investigation by Commission staff\textsuperscript{337}.

According to Anita Anand and many other experts, there are several factors and reasons why Commission enforcement staff might prefer to pursue regulatory proceedings before a commission tribunal instead of quasi-criminal proceedings before a court\textsuperscript{338}. First, a regulatory proceeding can be commenced much faster – a significant consideration knowing that there is a need to deal with suspected wrongdoing promptly and prevent dissipation of assets or further investor losses\textsuperscript{339}. Additionally, and by no means least, the standard of proof in administrative proceedings is the civil standard, instead of the criminal standard that applies in quasi-criminal proceedings which is much more onerous\textsuperscript{340}.

The last point to be considered when evaluating the public interest remedy is the fact that when no remedy would be a possibility in a quasi-criminal prosecution, a public interest remedy may be a viable option\textsuperscript{341}. That being said, securities regulators, unlike the courts, have the power to issue remedial orders even where there has been no specific breach of provincial securities laws\textsuperscript{342}. As Anita Anand pointed out, the Ontario Securities

\textsuperscript{336} Stéphane Rousseau, supra note 24 at p. 19.
\textsuperscript{337} Ibid.
\textsuperscript{339} Ibid.
\textsuperscript{340} Ibid.
\textsuperscript{341} Christopher C. Nicholls, supra note 4 at p. 15 par. 2.
\textsuperscript{342} Ibid.
Commission must first determine that there has been a breach of Ontario securities law before it may use its most intrusive powers, such as the power to impose a monetary administrative penalty. It should be however pointed out that even if there has been no actual breach of securities law, a large number of other, less onerous orders may be made by the Commission acting in the public interest. In other words, technical compliance with the letter of securities law will not protect market participants from regulatory action in the case where the “animating principles” of the law have been violated.

On another front, it should be noted that distinction between the sanctions administered by the Securities Commission pursuant to its public interest powers and fines and other penalties ordered by a court show significant theoretical distinction. Coming from its role as a market regulator, the Securities Commission’s public interest powers may only be used for remedial, not punitive, purposes. In other words, the Securities Commission cannot impose sanctions for the purpose of punishing violators for past infractions, but only to prevent future violations that might adversely affect the capital markets.

Although significant on a theoretical view, this distinction can turn evasive in practice. Indeed, following a holding of the Supreme Court of Canada in which the court stated that the Securities Commission should consider the general deterrent effect of an administrative

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343 Anita Anand, supra note 338.
344 Ibid.
345 Ibid.
346 Ibid.
347 Ibid.
348 Christopher C. Nicholls, supra note 4 at p. 15 par. 2.
349 Ibid.
penalty since consideration of general deterrence constituted a forward looking, remedial consideration. Several experts and academics have debated whether this mitigated nuance raised by the Supreme Court of Canada is a positive step or rather a mistake creating another grey zone but it is not our goal, in this research work, to investigate further this concern.

Although the use of regulatory enforcement in the public interest has been criticized, its use has proven to be growing. Indeed, this growth can be explained not only by the benefits that have been mentioned above but mostly by the great latitude that this remedy offered. Whether at the level of sanctions or the way to proceed, the case law of recent years definitely has shown that the use of regulatory enforcement in the public interest is very effective and must be considered.

1.4 Civil Enforcement by Securities Regulators

This last avenue, although its use has been very rare in recent years and only a few examples can be counted, remains significant. Provincial securities statutes usually allow securities regulators to apply to the courts for a declaration that a person or company has not complied with securities law. Where a court makes such a declaration, it may proceed

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350 *Cartaway Resources Inc.*, Re, [2004] 1 SCR 672.
352 *Ibid*.
354 Christopher C. Nicholls, *supra* note 4 at p. 16 par. 3.
355 *Ibid*. 
to make any additional order it sees fit\textsuperscript{356}. Canadian securities legislation typically includes a non-exhaustive list of possible orders, including, among other things, orders for compensation or restitution and orders for the payment of general or punitive damages\textsuperscript{357}.

The presentation of these four avenues allows a better understanding of how public enforcement is concretely implemented in Canada and especially in Ontario. This brief introduction provides the opportunity to have a better lightening on the next section where the reasons why public enforcement is the target of heavy criticisms will be analyzed in detail.

2. Public Enforcement's stigma

As mentioned in Chapter 1, comparisons with the United States are common. Many have called the Canadian regime “deficient” in matters of enforcement and pointed to the SEC and the United States as examples to emulate\textsuperscript{358}. The \textit{Crawford Report}\textsuperscript{359} captures the stimulus for this extensive stigma:

“Securities law enforcement in the United States has been highly visible on both sides of the border due to press coverage, due to the size and impact of the market abuses in question, and due perhaps to the search for profile by some involved…The high visibility of securities law enforcement action in the United States has led many Canadian investors to conclude that Canadian regulators are failing in this area.” \textsuperscript{360}

\begin{flushleft}
\textsuperscript{356} Mary G. Condon, Anita I. Anand, Janis P. Sarra, \textit{supra} note 186.  \\
\textsuperscript{357} \textit{Ibid.}  \\
\textsuperscript{358} Howell E. Jackson & Mark J. Roe, \textit{supra} note 5 at p. 6.  \\
\textsuperscript{360} \textit{Ibid.}
\end{flushleft}
In any society, the social and economic impact of fraud and misconduct is costly\textsuperscript{361}. Even when prosecuted in justice courts, the prevention of fraud and misconduct is a far superior outcome\textsuperscript{362}. Unfortunately, no society is immune to toxic behavior and the idea that every fraudulent behavior can be uncovered beforehand is a complete illusion\textsuperscript{363}. Therefore, as many financial analysts mentioned, the performance of the Canadian securities regulatory regime must be compared to that of other systems considered to have a superior track record and not against an ideal of perfection that has no relevance whatsoever to human behavior and proclivities\textsuperscript{364}.

Despite the fact that Canadian securities and criminal laws provide for several avenues of public enforcement, enforcement has been considerably less intense in Canada than in the US—the jurisdiction to which Canada’s regulators and law enforcement agencies are most frequently compared by the Canadian media and investor protection groups\textsuperscript{365}. Indeed, although the avenues of public enforcement are varied, the number of enforcement actions by Canadian securities regulators has been relatively low\textsuperscript{366}.

The CSA, the organization to which all of Canada’s provincial and territorial securities regulators belong, reported in its 2016 Enforcement Report\textsuperscript{367} that a total of 109


\textsuperscript{362}Ibid.


\textsuperscript{365}D. Hyndman, supra note 132 at p. 8.

\textsuperscript{366}Ibid.

\textsuperscript{367}See: Canadian Securities Administrators, supra note 296.
enforcement cases had been concluded nationwide. Of those, 62 had involved matters contested before a securities regulatory tribunal, 23 had been concluded by way of settlement agreement, and 24 had been the subject of court proceedings under securities legislation. As many experts pointed out, public enforcement activity may be increasing, there are still strong reasons to believe that there is a major role for private enforcement of Canadian securities law to play in incentivizing market participants to comply with their disclosure obligations. The relative infrequency of public enforcement actions cannot be explained by the existence of a correspondingly more robust level of Canadian private enforcement. In fact, both public and private securities law enforcement have been less vigorous in Canada than in the US.

That being said, Canadian securities regulators have always assumed a low profile in their securities enforcement activities and focused on deterrence over punitive sanctions. This has fostered a strong belief that enforcement in Canada is lax in comparison to the United States, and consequently is less effective. Canadian political, social and economic policies are frequently evaluated by comparison with their US counterparts. An analysis of the effectiveness of public enforcement of Canadian securities laws raises complex questions and before addressing the laxity of Canadian securities law enforcement, several factors must be taken into consideration.

368 See: Canadian Securities Administrators, supra note 296.
369 Christopher C. Nicholls, supra note 4 at p. 17.
370 Howell E. Jackson & Mark J. Roe, supra note 5 at p. 6.
371 See: Cristie Ford, "Systemic Risk Regulation in Comparative Perspective" (May 4, 2016).
372 Ibid.
374 Ibid.
Christopher C. Nicholls noted that the general pattern of public enforcement actions in Canada diverge from the US enforcement experience\textsuperscript{375}. Nicholls remarked that there are not only distinctions in terms of frequency of enforcement actions, but also in terms of the types of activities that have generated the largest number of enforcement cases\textsuperscript{376}. Provincial regulators have been unwilling or unable to optimally exercise the quasi-criminal powers available to them, possibly because of institutional and financial constraints\textsuperscript{377}. Fines and other civil sanctions are used infrequently and tend to be far less than the damages sustained by investors\textsuperscript{378}.

Nevertheless, regulators have begun, over the past few years, exploring alternative approaches, such as regulatory fines and no-contest settlements to provide partial compensation for losses suffered by investors\textsuperscript{379}. Some academics noted that although these strategies will surely help regulators in maximizing the utility of their scarce resources, a more efficient and rigorous cooperation between federal and provincial regulators would definitely play a major role in reducing duplicative costs\textsuperscript{380}. Further, the continued development of private enforcement mechanisms would help ensure that investors are adequately protected and compensated for losses\textsuperscript{381}.

\textsuperscript{375} Christopher C. Nicholls, supra note 4 at p. 17. \\
\textsuperscript{376} Ibid. \\
\textsuperscript{377} Poonam Puri, supra note 1 at p. 7. \\
\textsuperscript{378} Ibid. \\
Canadian enforcement patterns such has its reputation for being lax can also be understood and explained by history\textsuperscript{382}. It goes without saying that a number of high profile securities debacles have occurred in Canada, several of which have influenced and shaped the development of Canada securities law\textsuperscript{383}. All those scandals have contributed in different ways to establishing the relationship between public enforcement and private remedies—a relationship characterized by the relatively slow evolution of an effective Canadian civil enforcement regime\textsuperscript{384}.

A large number of Canadian securities scandals related to the resource sector in general, and the mining sector in particular took place in the early part of the twentieth century. Indeed, following this period, an important reexamine of Ontario securities legislation was suggested by pressures initiated by the failure of Canadian authorities to restraint what US regulators designated as the “Canadian Problem”—“the persistent high-pressure telephone sale of mining stock by Canadian brokers to American investors, in breach of US securities law”\textsuperscript{385}. That being said, the reinvention of the OSC in 1945 was, at this time, viewed as a critical part of the government’s attempt to react to American concerns and “clean up the securities business in Ontario.”\textsuperscript{386}

\textsuperscript{382} Christopher C. Nicholls, \textit{supra} note 4 at p. 17.
\textsuperscript{384} \textit{Ibid}.
\textsuperscript{385} Christopher C. Nicholls, \textit{supra} note 4 at p. 17.
\textsuperscript{386} \textit{Ibid}.
The path that led to such a reform was far from simple or without pitfalls. A 1944 report of the Royal Ontario Mining Commission\textsuperscript{387} widely recognized that “there is definite need of some governmental control over the sale of mining securities,” and indeed “fraudulent practice in the sale of securities has reached serious proportions.”\textsuperscript{388} “The Commission expressed concern over such practices as the inappropriate use of shareholder lists, the use of long-distance phone and telegraph messages to solicit prospective purchasers of securities, and the then-current practice of permitting those accused of engaging in fraudulent practices to “escape prosecution” by agreeing to make restitution to their victims”.\textsuperscript{389} Nevertheless, the Report of the Royal Ontario Mining Commission was not an absolute call for heavier regulatory measures to restraint aggressive sales practices; in fact, the Commission expressed concern about some instances of overregulation, and asserted that “the Ontario Securities Act has taken unto itself powers which this Commission believes were never intended in respect of regulating mine financing.”\textsuperscript{390}

In the Commission’s view, the impact of the exercise of these powers in some cases was “strangulation of new mining development.”\textsuperscript{391} As it can be observed in several documents and reports, concern about overly restrictive regulation was reflected in a number of the Commission’s recommendations. Accordingly, since deceptive practices had to be addressed, mining finance was viewed as an essential asset to Canadian economic

\textsuperscript{387} Report of the Royal Ontario Mining Commission, 1944 (Norman C. Urquhart, Chair).
\textsuperscript{388} Christopher C. Nicholls, supra note 4 at p. 18.
\textsuperscript{389} Ibid at p. 19.
\textsuperscript{391} See: Report of the Royal Ontario Mining Commission, 1944 (Norman C Urquhart, Chair) at part II.
development, and remedial rules were then not to become so weighty that Canadian brokers would be blocked from accessing the American market. Before the 1960s, then, only American—not Canadian—investors were undoubtedly the most numerous victims of suspicious securities sales practices by Canadian brokers. Indeed, as it can be observed in the 1964 Porter Commission, almost 75% of sales of speculative mining stock by members of the Canadian broker-dealers association prior to 1961 had come from the American market. As Christopher C. Nicholls has acknowledged, this fact may account, at least in part, for the relative lack of domestic pressure to improve the enforcement of Canadian securities laws and, in particular, to expand civil enforcement remedies for aggrieved investors.

These facts, although historical, demonstrate and especially testify to the legislative evolution of the public enforcement. By understanding and studying the way in which regulation has been forged, it becomes much easier to analyze the specific features it shows today. In the light of these facts and developments, there is a better understanding of the reasons which led to so many criticisms of the public enforcement and of the reasons why they were not all founded or justified.

392 See: Mary G. Condon, supra note 390.
393 Ibid.
394 Porter Commission Report, Royal Commission on Banking and Finance (Ottawa, Queen’s Printer, 1964), 348.
395 Christopher C. Nicholls, supra note 4 at p. 19.
3. The Effectiveness of Canadian Securities Regulation

In Canada, securities regulation is shaped on a “regulatory pyramid that grants considerable emphasis on proactive compliance and strategically allocates resources in areas such as enforcement to deter improper conduct”\textsuperscript{396}. One of the major challenges for Canadian regulators is the large number of public companies per capita; as mentioned previously, Canada has almost half as many publicly traded companies as the United States, but a market capitalization ten times smaller.\textsuperscript{397} The obstacles inherent in effectively sanctioning and monitoring smaller issuers bolsters the tendency of securities regulators to focus on proactive regulation to the disadvantage of their public enforcement mandate\textsuperscript{398}.

Nevertheless, the efficient use of a pyramid approach to regulate still requires the use of fines and other, more aggressive, penalties (such as quasi-criminal sanctions), in order to provide effective deterrence\textsuperscript{399}. The result is that Canadian securities regulators are not as aggressive as their American counterparts in enforcing violations against high profile individuals or in seeking highly punitive penalties to deter illegal conduct\textsuperscript{400}. As pointed out by Justice Peter de Cory and Marilyn Pilkington, focusing narrowly on the number or value of penalties does not disclose whether the right matters are being prosecuted, nor can it identify institutional barriers to effective securities enforcement\textsuperscript{401}. That being said, fines and other administrative sanctions should, under this pyramid approach to securities

\textsuperscript{396} Poonam Puri, \textit{supra} note 1 at p. 15.
\textsuperscript{398} \textit{Ibid}.
\textsuperscript{399} Poonam Puri, \textit{supra} note 1 at p. 16.
\textsuperscript{400} \textit{Ibid}.
\textsuperscript{401} Peder de Carteret Cory & Marilyn L. Pilkington, \textit{supra} note 132 at p. 9.
regulation, provide the basis for the Securities Commission’s enforcement activities. As Poonam Puri mentioned, jurisdictional barriers and the large number of public issuers in Canada present challenges for administrative enforcement.

As already mentioned several times, the incidence of public enforcement actions in Canada is significantly lower than that observed in the United States. Such facts are often presented as evidences that the Canadian securities regulatory regime is not achieving its enforcement role, “a shortcoming that according to advocates of a centralized model can only be corrected by the takeover of securities regulation by the federal government.”

Although this argument is powerful, it cannot be justified as the only necessary response to this conjuncture. A discussion on the pros and cons of establishing a national regulator will take place in the last part of this research work, but as a foretaste, this section will briefly present some points to demonstrate that this argument is flawed.

Firstly, the argument that centralizing the Canadian regulatory regime would improve the enforcement record is, from our perspective, a defective assumption. Critics of the Canadian securities regulatory regime argue that its structure does not carry the safeguards and mechanisms that would enhance consistency in regulatory decision making across all jurisdictions. However, as Pierre Lortie claimed, “the record as it stands is quite

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402 Poonam Puri, supra note 1 at p. 15.
403 Ibid.
404 Pierre Lortie, supra note 100 at p. 24.
405 Ibid.
406 Ibid.
407 Ibid at p. 25.
408 Ibid.
satisfactory and a far cry from the dismal situation some like to depict”. Mary G. Condon noted in her research study commissioned by the Wise Persons’ Committee, that as far as public interest enforcement orders by provincial securities were concerned, “there was a notable consistency across the provinces in the articulation of the public interest that was the basis for making orders.”\(^{409}\) In sum, a remarkable convergence has been shown by provincial securities regulators over time about enforcement rulings to assert “the goals of maintaining public confidence in, and integrity of capital markets,” rather than explode in myriad directions\(^{410}\).

Secondly, one of the most vociferous criticisms about the effectiveness of enforcement of securities regulation comes notably from the Canadian banking industry and several elements of the financial community\(^{411}\). By dominating the securities industry, banking institutions and financial industry leaders have a large influence on the performance of the self-regulatory organizations (SROs)\(^{412}\). Poonam Puri raised an important point considering the fact that unlike other regulatory contexts where regulators have comparable or greater resources than the parties being regulated, provincial securities commissions usually have far smaller annual budgets than the parties they regulate\(^{413}\). To maximize the limited resources of the securities commission, they recognized SROs as providing an additional layer of regulatory oversight\(^{414}\). In Canada, the three most important SROs are the

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\(^{409}\) Mary Condon, The Use of Public Interest Enforcement Orders by Securities Regulators in Canada, Research prepared for the Wise Persons’ Committee, (October 24, 2003), 415.

\(^{410}\) Ibid.

\(^{411}\) Pierre Lortie, supra note 100 at p. 24.

\(^{412}\) Ibid.

\(^{413}\) Poonam Puri, supra note 1 at p. 15.

\(^{414}\) Ibid.
Investment Industry Regulatory Organization of Canada (IIROC), the Mutual Fund Dealers Association of Canada, and the Chambre de la Sécurité Financière. IIROC is the result of the 2008 consolidation of the Investment Dealers Association of Canada (IDA) and Market Regulation Services Inc. As many academics pointed out, that current situation raises the following question: “If the lower level of regulatory enforcement intensity in Canada compared to the United States is an outcome of the current structure of the Canadian regulatory regime, why is it that the relative proportion of enforcement actions by the Canadian self-regulatory organizations they control is no different than that of the Canadian Securities Commissions?”

Thirdly, in leaning on the case of the United States, recognizing that State agencies are more attuned than the national regulator to the activities that occur in their jurisdiction, the *U.S. National Securities Markets Improvement Act of 1996* (NSMIA) provided that enforcement remains subject to concurrent federal and state regulations. Indeed, in the United States, the SEC accounts for only 17.6% of public enforcement actions compared to the state securities regulatory agencies, which account for 40.8% of total public enforcement actions. The jurisdiction of state securities commissions to examine and lead enforcement actions with respect to deceit, fraud or unlawful conduct relating to

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416 Ibid.
417 Pierre Lortie, supra note 100 at p. 24.
419 Linda M. Stevens, supra note 211 at p. 11.
420 Pierre Lortie, supra note 100 at p. 24.
securities transactions is explicitly preserved under the NSMIA\textsuperscript{421}. That being said, the \textit{Dodd-Frank Wall Street Reform and Consumer Protection Act}\textsuperscript{422} not only confirmed the jurisdiction of the States under NSMIA but enlarged the enforcement roles of state securities regulators and the investor protection\textsuperscript{423}.

“Academics who have engaged in international comparisons of enforcement intensity hold the view that the results of such comparisons are problematic in several ways”\textsuperscript{424}. Indeed, most of them argue that before making such a comparison, many factors must be taken into consideration in order to establish a valid judgment\textsuperscript{425}. As a blatant example, one can think of the fact that lawfulness of populations may vary\textsuperscript{426}. For instance, there are about 1.6 million adults incarcerated in the United States compared to 33,100 adults in Canada\textsuperscript{427}. Notwithstanding this difference, nobody can assert that Canada is a more law-abiding society or that our cities are less dangerous places to live\textsuperscript{428}. Indeed, countries may organize and structure their regulatory oversight in a great variety of ways: one emphasizing \textit{ex-ante} supervision while the other relies on \textit{ex-post} sanctioning and litigation\textsuperscript{429}.

From our perspective, it is essential, before making a hasty judgment by simple comparison, that one must go beyond the facts and figures, but should instead refer to the

\begin{footnotesize}
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\item \textsuperscript{421}Christopher C. Nicholls, “The Characteristics of Canada’s Capital Markets and the Illustrative Case of Canada’s Legislative Regulatory Response to Sarbanes-Oxley”, in 4 canada Steps Up, (June 15, 2006), online: <http://www.tfmsl.ca/docs/V4%283A%29%20Nicholls.pdf>.
\item \textsuperscript{422}\textit{Dodd-Frank Wall Street Reform and Consumer Protection Act}, 124 Stat. 1376–2223
\item \textsuperscript{423}Pierre Lortie, \textit{supra} note 100 at p. 24.
\item \textsuperscript{424}Ibid.
\item \textsuperscript{425}Rafael La Porta, Florencio Lopez de Silanes and Andrei Shleifer, \textit{supra} note 364.
\item \textsuperscript{426}Ibid.
\item \textsuperscript{427}Ibid.
\item \textsuperscript{428}Christopher C. Nicholls, \textit{supra} note 421.
\item \textsuperscript{429}Pierre Lortie, \textit{supra} note 100 at p. 25.
\end{itemize}
\end{footnotesize}
context, the background and the history of the element studied. In this way, many alarming comparisons and hasty conclusions would be avoided. Abundant academic literature argues that the U.S. securities regulation is excessively tilted toward enforcement actions while a better balance in oversight activities would be much more efficient\textsuperscript{430}. Why should Canada blindly follow the same road?

4. The Specific Characters of Criminal Enforcement

Over the past ten years, there has been a move to strengthen criminal and quasi-criminal legislation governing capital market offenses by increasing maximum sentences and adding a list of aggravating factors under the criminal code\textsuperscript{431}. However, judges are very much hesitant to pursue maximum sentences and, as a result, this greatly reduce the impact of these reforms\textsuperscript{432}. As Poonam Puri noted, “the limited use of criminal and quasi-criminal sanctions by federal and provincial regulators is notably attributable to the overlap in jurisdiction and complexities of seeking a conviction through the courts, as opposed to a regulatory sanction imposed by an administrative body”\textsuperscript{433}.

Due to constitutional protections, delays, an elevated burden of proof, and time spent educating judges who may not have capital markets expertise, judicial proceedings have a tendency to be more resource intensive than regulatory proceedings \textsuperscript{434}. Despite the fact that criminal and quasi-criminal sanctions should be reserved for the most extreme cases,

\textsuperscript{430} See: Poonam Puri, supra note 1 at p. 10.
\textsuperscript{431} Mark A. Gelowitz, Allan D. Coleman and Robert Carson, supra note 166 at p. 6.
\textsuperscript{432} Ibid.
\textsuperscript{433} Poonam Puri, supra note 1 at p. 17.
\textsuperscript{434} Ibid.
the court should be more willing to imposing the maximum sentence, where appropriate, in order to send a clear signal that white collar crimes will be treated similarly to other criminal offenses. White collar crime has traditionally been a low priority for law enforcement. Given the highly technical and specialized nature of capital market offenses, white collar crimes are generally perceived not to be career building for law enforcement officials.

In order to better understand how criminal enforcement is evolving and developing in Canada, a brief overview of the initiatives that have been undertaken in recent years will be presented. The results, as well as the opinions of experts, will be discussed to take the pulse of these latest advances and establish their real impact on the Canadian landscape.

4.1 Initiatives

Recognizing that efficiency in criminal enforcement requires a close, constructive and sustained cooperation between regulatory bodies and police forces, the United Kingdom was the first country to create the Serious Fraud Office (SFO) in 1987. The Corporate Fraud Task Force, in the United States, was created in 2002 as a committed unit that congregate, under the direction of the U.S. Department of Justice, representatives of several federal agencies and seven U.S. Attorneys.

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436 Ibid at p. 8.
437 Ibid.
As regards Canada, the government waited 2003 to announce the creation of the Integrated Market Enforcement Teams (IMET) and their branches in Calgary, Montreal, Toronto and Vancouver. Since March 31, 2004, these teams incorporated a quick-start capability, allowing them to respond promptly to major market irregularities and corporate frauds anywhere in Canada. This initiative shows that effective management and accountability mechanisms are a key feature in Canada’s Securities landscape. The IMET teams are jointly managed by the RCMP and Justice Canada\textsuperscript{440}. They are meant to work closely with securities regulators and other federal and provincial authorities\textsuperscript{441}. There are now nine IMET teams across Canada\textsuperscript{442}.

### 4.2 The results

Until today, the IMET program has not produced the anticipated results. Some will argue that the expectations were unrealistic, but this shows that the acerbic criticisms raised by Federal government authorities did not reflect a thorough understanding of the complexities involved in investigating and prosecuting securities crime in Canada\textsuperscript{443}. The implementation of the IMET program had its weak points\textsuperscript{444}. An evaluation of the RCMP program established that its management lacked the cohesion, leadership, coordination, flexibility and communication necessary to meet the task\textsuperscript{445}. On June 13, 2007, testimonies

\textsuperscript{440} Pierre-Christian Collins Hoffman and Guy Pinsonnault, supra note 435.

\textsuperscript{441} Ibid.

\textsuperscript{442} Ibid.

\textsuperscript{443} Pierre Lortie, supra note 100 at p. 24.

\textsuperscript{444} Ibid.


at hearings in front of the Senatorial Committee on Banking Trade and Finance confirmed that the funding for this significant Canadian enforcement initiative was not appropriate and that the teams were restricted in their activities by high staff changings.  

Following the evaluation, management of the program was criticized with significant organizational issues related to the chain of command: “The HQ Director of the IMET program had limited authority to actually direct or coordinate the Program, which was essentially run as four semi-independent units under the guidance of four criminal operations managers.” As Pierre Lortie explained, “the tendency to blame the RCMP for the implementation hiccups and for the gradual decentralization of authority over IMET activities contrary to the pre-ordained structure imposed at inception may well miss the fundamental lesson to be drawn from the experience: securities regulation and law are better enforced at the local/regional level.”

That being said, it must be understood that centralized authority at the Federal level provides no guarantee of speed of action or results. From our perspective, the solution to effective enforcement does not rest in attempts to emulate the United States. Even on a market-adjusted basis, the United States stands apart in terms of actual enforcement actions and sanctions levied. Unlike other jurisdictions, the United States systematically

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446 Pierre Lortie, supra note 100 at p. 25.
447 Nick Lepan, supra note 445.
448 Pierre Lortie, supra note 100 at p. 25.
449 Ibid.
451 Ibid.
prosecutes securities offences criminally\(^\text{452}\), “Since the legal framework governing criminal investigations and prosecutions in Canada is a fundamental reason for the low incidence of criminal prosecutions of fraud, deceit and unlawful conduct related to financial transactions, centralization of the securities regulatory apparatus will not change one iota to the limitations and constraints that govern enforcement activities in criminal matters”\(^\text{453}\).

### 4.3 The Future

The original mandate of IMET was to tackle “high-profile” criminal cases, but it has been argued that this mandate does not necessarily align with the issues or enforcement objectives in each provincial jurisdiction\(^\text{454}\). Thus, some recommend that either the IMET’s mandate be expanded or the capacity of other police forces be enhanced to tackle those cases that do not fit into the definition of “high-profile.”\(^\text{455}\) To address those issues, the federal government has devoted to pursue, in an more aggressive way, white collar crime and has made efforts to integrate securities enforcement among provincial and territorial regulators\(^\text{456}\). However, the Supreme Court’s decision that the federal government lacks jurisdiction to unilaterally create a national regulator means that the jurisdictional divide between federal and provincial enforcement will continue\(^\text{457}\).

A more thorough examination of what works in securities law suggests that, overall, Canada may well have achieved a more optimal approach in the regulation of our securities

\(^{452}\) Pierre Lortie, *supra* note 100 at p. 25.
\(^{454}\) Poonam Puri, *supra* note 1 at p. 17.
\(^{455}\) *Ibid*.
markets than what is often suggested in the public debate\textsuperscript{458}. This conclusion may be counterintuitive for many\textsuperscript{459}. It does not mean that more vigorous action or greater sanctions would not have been justified in certain cases, nor that there is no room for improvement in the enforcement machinery across the spectrum\textsuperscript{460}. The results, presented in the appendix section, suggest that what is required is a commitment to continuous improvements of our system and practices, not a structural overhaul\textsuperscript{461}.

Notwithstanding the warnings of the tougher enforcement proponents, improvements in the enforcement of securities laws in Canada will not be achieved by attempting to copy the U.S. approach, which is not compatible with Canadian constitutional and other values\textsuperscript{462}. From our perspective, the key is in decriminalizing most securities offences; strengthening efforts at the provincial and federal levels to investigate, prosecute and adjudicate securities offences; and giving securities commissions (or tribunal) and Courts greater authority to order restitution or compensation in appropriate circumstances\textsuperscript{463}.

5. Enforcement activities and sanctions

Enforcement activities and sanctions issued by Canadian securities commissions represent the basis of an efficient and of a healthy system\textsuperscript{464}. On February 2017, the umbrella organization of the Canadian provincial capital markets regulators in Canada, the CSA

\textsuperscript{458} Pierre Lortie, \textit{supra} note 100 at p. 25.
\textsuperscript{459} \textit{Ibid.}
\textsuperscript{460} \textit{Ibid.}
\textsuperscript{461} Mark A. Gelowitz, Allan D. Coleman and Robert Carson, \textit{supra} note 166 at p. 6.
\textsuperscript{462} Poonam Puri, \textit{supra} note 1 at p. 18.
\textsuperscript{463} Pierre-Christian Collins Hoffman and Guy Pinsonnault, \textit{supra} note 435.
\textsuperscript{464} \textit{Ibid.}
released its annual Enforcement Report that compiles the measures taken across Canada to prevent and sanction misconduct in capital markets\textsuperscript{465}. The CSA reported a year-over-year decrease in several of the CSA’s key enforcement statistics.

However, the report emphasized a number of other important indicators. These include an increase in the usage of non-traditional enforcement tools such as whistleblowing and no-contest settlements, and an increase in CSA members’ enforcement efforts in the criminal courts\textsuperscript{466}. That being said, the CSA’s report underlines that the results can vary considerably from year to year, due to the fact that cases differ in their complexity and in the number of respondents and victims involved\textsuperscript{467}. This section presents an overview of what has been done regarding enforcement activities and sanctions over the last two years.

\section*{5.1 Overview and Statistics}

Several changes in key enforcement statistics in 2016 are highlighted in the graphics presented in the appendix section. However, these statistics must be put into their proper context, as the CSA’s enforcement data has shown significant variations from year to year in the past\textsuperscript{468}. In 2016, CSA members began 56 proceedings involving 28 individuals and 28 companies\textsuperscript{469}. This compares to 108 total proceedings commenced in 2015\textsuperscript{470}. In 2016, under the 45 interim orders and asset freeze orders issued, trading and other restrictions

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\item\textsuperscript{465} See: Canadian Securities Administrators, \textit{supra} note 312.
\item\textsuperscript{466} \textit{Ibid.}
\item\textsuperscript{467} \textit{Ibid.}
\item\textsuperscript{468} Canadian Securities Administrators, \textit{supra} note 312 at p. 6.
\item\textsuperscript{469} \textit{Ibid.}
\item\textsuperscript{470} \textit{Ibid.}
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were placed on 120 individuals and 82 companies, according to the CSA report\textsuperscript{471}. In 2015, the number of interim orders and asset freeze orders was 52, and trading restrictions were placed on 64 individuals and 58 companies\textsuperscript{472}. The 109 proceedings concluded against 262 respondents in 2016 is more in line with the same figure from 2014, where 105 proceedings were concluded against 255 respondents\textsuperscript{473}. The $62.1 million figure for fines, penalties and voluntary payments in 2016 is more in line with the same figure from 2014: $58.2 millions\textsuperscript{474}.

On the other hand, the number of proceedings commenced (56) and the number of respondents with proceedings commenced against them (144) were the lowest annual figures in their respective categories since the CSA published its first annual enforcement report in 2008\textsuperscript{475}. Further, even though the figure for restitution, disgorgement, and compensation was $349.7 million in 2016—up from $111.7 million in 2015—the vast majority of this figure, $299.2 million, was paid pursuant to four separate no-contest settlements between registrants and the OSC (the corresponding sub-set for 2015 was $8.0 million)\textsuperscript{476}.

Restitution, disgorgement, and compensation figures for 2016 for the major types of offences—fraud, misconduct by registrants, and illegal distributions—were all down from

\textsuperscript{471} See: Canadian Securities Administrators, supra note 312 at p. 8.
\textsuperscript{472} Ibid.
\textsuperscript{473} Ibid.
\textsuperscript{474} Ibid.
\textsuperscript{475} Ibid.
\textsuperscript{476} Ibid.
2015\textsuperscript{477}. About $62.1 million was ordered in fines and administrative penalties. In addition to fines and administrative penalties, the regulators or courts frequently order respondents to pay some or all of the costs of the proceedings\textsuperscript{478}. Compares to $4.4 million in 2015, Canadian Securities Regulators members assigned total costs of $2 million to respondents in 2016\textsuperscript{479}. CSA member’s efforts to prosecute severe cases in the courts resulted in some several significant jail terms in 2016\textsuperscript{480}. For instance, in the \textit{Wallace}\textsuperscript{481} and \textit{Heward}\textsuperscript{482} cases in Ontario, the court ordered a four-year sentence\textsuperscript{483}. A three-year sentence in the \textit{Morin}\textsuperscript{484} case in Québec and a 27-month sentence in the \textit{Castano}\textsuperscript{485} case in B.C\textsuperscript{486}. Overall, 23 years of jail time was ordered to offenders in 2016 with sentences ranging from 75 days to four years\textsuperscript{487}.

From our perspective, the statistics traditionally touted by the CSA in their reports, while interesting when it comes to observing year over-year trends, have marginal utility for measuring enforcement effectiveness and activity\textsuperscript{488}. The more interesting story lies beyond the statistics; significantly, the data show that CSA members’ enforcement staff are shifting away from their traditional reliance on bringing enforcement proceedings in front of the securities commissions to a more diversified approach involving greater use of non-

\textsuperscript{477} See: Canadian Securities Administrators, \textit{supra} note 312.
\textsuperscript{478} \textit{Ibid.}
\textsuperscript{479} \textit{Ibid.}
\textsuperscript{480} \textit{Ibid.}
\textsuperscript{481} \textit{Ibid.}
\textsuperscript{482} \textit{Ibid.}
\textsuperscript{483} \textit{Ibid.}
\textsuperscript{484} \textit{Autorité des marchés financiers c. Morin}, 2015 QCBDR 112.
\textsuperscript{485} See: Canadian Securities Administrators, \textit{supra} note 312 at p. 8.
\textsuperscript{486} \textit{Ibid.}
\textsuperscript{487} \textit{Ibid.}
\textsuperscript{488} \textit{Ibid.}
traditional enforcement tools. Indicators of traditional enforcement efforts, such as proceedings brought and concluded, were down significantly in 2016, while indicators of non-traditional enforcement efforts, such as the number of no-contest settlements reached and the amount of voluntary payments and investor compensation paid pursuant to such settlements, were up significantly over the same period. At the same time, CSA members have ramped up their securities-related criminal law enforcement efforts, by both bringing and concluding more cases under the Criminal Code.

The graphs and the statistics presented in the appendix section certainly give a clear indication of precise data, but beyond the numbers, some interpretations can be drawn. Thus, in the light of these data, this research work has identified some main lines of the year 2016 with regard to the public enforcement. These lines allow a better understanding of what has been done in 2016 and what can be improved in the future.

5.2 Reciprocal orders

First, and perhaps most noteworthy, is the demonstrated commitment to coordination among provinces evidenced by the number of reciprocal orders issued. In the first place, it is important to know that orders issued by a court or other securities regulatory authorities may be reciprocated. Reciprocal orders allow securities regulators to apply orders issued in another jurisdiction or by another regulatory authority in their own jurisdiction. In

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489 See: Canadian Securities Administrators, supra note 312.
490 Criminal Code, RSC 1985, c C-46.
491 See: Canadian Securities Administrators, supra note 312.
492 Ibid.
493 Ibid.
2008, amendments were passed by provincial legislatures to expand the use of reciprocal orders which are used to prevent individuals or companies sanctioned by one jurisdiction—such as a cease trade order—from engaging in the prohibited conduct in the reciprocating jurisdiction\(^{494}\). The use of reciprocal orders shows the commitment of CSA members to reinforcing investor protection and enforcement coordination across Canada\(^{495}\).

Since 2015, statutory reciprocal order provisions have been adopted in four provinces\(^{496}\). Any order imposing sanctions, conditions, restrictions, or requirements—issued by another CSA regulator or securities administrative tribunal based on a finding or admission of a contravention of securities legislation—is now automatically reciprocated in Alberta, New Brunswick, Nova Scotia, and Québec\(^{497}\). The high number of reciprocal orders also illustrates the patchwork approach to securities regulation that exists among the Canadian provinces\(^{498}\). This well-known aspect of the Securities regime in Canada will be further discussed in the last chapter. Nevertheless, this advancement marks an incredible move toward national co-operation and suggests that such growth will only increase in the future\(^{499}\). The charts in the appendix show the number of reciprocal orders issued in each of the last three years, and the number of individual and company respondents affected by those reciprocal orders\(^{500}\).

\(^{494}\) See: Canadian Securities Administrators, *supra* note 312.

\(^{495}\) *Ibid.*

\(^{496}\) *Ibid.*

\(^{497}\) *Ibid.*

\(^{498}\) *Ibid.*

\(^{499}\) *Ibid.*

\(^{500}\) *Ibid.*


5.3 No-contest settlement

Second, although the OSC have moved towards the no-contest settlement program quite recently, the number and percentage of actions resolved through settlement agreements did not increase over the past years as expected\(^{501}\). Indeed, the percentage of cases concluded by settlement agreement went from 23% in 2012 to 21% in 2016\(^{502}\). The chart presented in the appendix section provides a breakdown of how matters against respondents were concluded in 2016, whether by a tribunal decision, a settlement agreement with a CSA member, or a court decision under securities legislation\(^{503}\). Matters were concluded against 149 respondents following contested hearings: 54 respondents by settlement agreements, and 59 respondents by court decision\(^{504}\).

In 2014, the OSC introduced no-contest settlements as a form of resolution of enforcement matters under which respondents may settle their cases without admissions of fact or liability\(^{505}\). The OSC started using no-contest settlements in 2014, around the same time the U.S. Securities and Exchange Commission reduced its use of them\(^{506}\). Since that time, the OSC arguably has concluded enforcement actions more efficiently\(^{507}\). When examining no-contest settlements, it is crucially important to determine if they further pertinent goals

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\(^{501}\) See: Canadian Securities Administrators, *supra* note 312.


\(^{503}\) *Ibid.*

\(^{504}\) *Ibid.*


\(^{507}\) *Ibid.*
of enforcement, such as deterrence\(^{508}\). OSC staff may recommend that an enforcement matter be resolved with a no-contest settlement after considering a number of factors\(^{509}\). Indeed, such cases must meet specific criteria, and settlement agreements must be approved by a panel of the OSC, resulting in an order\(^{510}\). The no-contest settlements will be further discussed at the end of this chapter, as recent trends and innovations in public enforcement will be presented and analyzed.

**5.4 Increased focus on prosecuting serious cases in the criminal courts**

CSA members seem to be trying to prosecute more cases in the criminal courts. Indeed, 2016 saw an increase in the number of criminal proceedings both commenced and concluded, as compared to 2015\(^{511}\). The annual CSA Report explains that this increase “follows CSA members’ efforts, in recent years, to collaborate more closely with law enforcement agencies.”\(^{512}\) Indeed, in 2016, the Alberta Securities Commission and the RCMP announced a Joint Serious Offences Team (“JJSOT”) to jointly investigate and prosecute serious violations of the *Alberta Securities Act*\(^{513}\) and the *Criminal Code*, being the third province (after Ontario and Québec) to do so\(^{514}\). The Ontario JSOT has produced positive results since its inception, and continued to do so in 2016, resulting in successful prosecutions with jail time\(^{515}\).

\(^{508}\) Anita Anand and Andrew James Green, *supra* note 506.


\(^{510}\) *Ibid.*

\(^{511}\) Ibid.

\(^{512}\) See: Canadian Securities Administrators, *supra* note 312.

\(^{513}\) *Ibid.*

\(^{514}\) *Securities Act*, RSA 2000, c S-4.

\(^{515}\) Ibid.
As mentioned earlier, the Wallace\textsuperscript{516} and Heward\textsuperscript{517} cases in Ontario resulted in significant periods of incarceration for breaches of the Ontario Securities Act\textsuperscript{518}. Wallace and Heward were each sentenced to four years in jail for fraud and ordered to pay $6.7 million in restitution\textsuperscript{519}. These sentences were the longest jail sentences handed down in Ontario for a breach of the Ontario Securities Act\textsuperscript{520}. Both respondent were also sentenced to 18 months each for unregistered trading and illegal distribution to be served concurrently with the four-year sentence for fraud.\textsuperscript{521} Another significant case is the Robert Morin decision\textsuperscript{522}. This case marked the second-longest prison term rendered to date by a Québec Court in a Securities Act quasi-criminal case\textsuperscript{523}. After taking into account the aggravating factors, the judge sentenced the respondent Morin to 36 months of prison and fined him over $900,000\textsuperscript{524}.

In 2015, the regulators collectively imposed the highest amount of monetary sanctions on market participants since 2009, the year their investigation into the crash of the asset-backed commercial paper market was settled\textsuperscript{525}. In 2016, regulators imposed $62.1 million in fines and administrative penalties ($138.3 million in 2015 and $58.2 million in 2014) and $349.7 million in restitution, compensation and disgorgement ($111.7 million in 2015

\begin{footnotesize}
\begin{itemize}
  \item[516] See: Canadian Securities Administrators, supra note 312.
  \item[517] Ibid.
  \item[518] Securities Act, supra note 72.
  \item[519] See: Canadian Securities Administrators, supra note 312.
  \item[520] Securities Act, supra note 72.
  \item[521] See: Canadian Securities Administrators, supra note 312.
  \item[522] Autorité des marchés financiers c. Morin, 2015 QCBDR 112.
  \item[523] See: Canadian Securities Administrators, supra note 312.
  \item[524] Ibid.
  \item[525] Ibid.
\end{itemize}
\end{footnotesize}
and $65.7 million in 2014). This represents a major overall increase in monetary sanctions year-over-year.

### 5.5 Proactive enforcement

As mentioned in section one, CSA members continue to use proactive enforcement measures such as interim and asset freeze orders, and reciprocal orders. Although the number of such orders made in 2016 (45) was roughly in line with such number in 2015 (52), 202 individuals and companies were made subject to such orders in 2016 as opposed to 122 individuals and companies in 2015. These figures are themselves up from the 35 orders made against 93 individuals and companies in 2014.

In the first place, asset freeze orders are used by securities regulators to avoid as much as possible the loss of assets pending completion of an investigation. In appropriate circumstances, regulators can also apply to the court to appoint a receiver to manage assets that have been frozen, to ease their orderly distribution back to investors. In 2016, 31 freeze orders were issued relating to 93 individuals and 56 companies, including a total of $3.8 million in bank accounts. The CSA Report highlighted measures that had been implemented in the last two years to increase collaboration between its members and boost their inter-jurisdictional reach, including:

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526 See: Canadian Securities Administrators, supra note 312.
527 Ibid.
528 Poonam Puri, supra note 1 at p. 18.
529 Ibid.
530 See: Canadian Securities Administrators, supra note 312.
531 Ibid.
532 Ibid.
533 Ibid.
- Federal legislation changes that allow FINTRAC to share information and work with the CSA.

- Amendments to Alberta’s Securities Act that provide for automatic effect in Alberta of most new orders and settlement agreements made by other CSA members.

- The launch of a Special Investigations Unit by the British Columbia Securities Commission to investigate complex misconduct and offshore trading activity.

- The co-location of the RCMP’s Integrated Market Enforcement Team on the premises of the OSC.  

### 5.6 Increased use of non-traditional enforcement tools

The year of 2016 also saw an increased use by CSA members of non-traditional enforcement tools, such as no-contest settlements and the introduction of whistleblowing initiatives. For instance, $13.9 million in voluntary payments and $299.2 million in investor compensation were made by several regulated entities pursuant to the four no-contest settlements described above. Prior to 2016, there had been only two other no-contest settlements with the OSC since the program’s inception in 2014.

In addition, two CSA members—the OSC and the Québec Autorité des marchés financiers (“AMF”)—also implemented whistleblowing initiatives in 2016, whereby individuals may come forward with tips on possible violations of securities law in exchange for anti-reprisal

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534 See: Canadian Securities Administrators, supra note 312.
535 Ibid.
536 Ibid.
537 Ibid.
protections (and, in the case of Ontario, in exchange for a potential financial reward).\textsuperscript{538} Alberta has recently announced that it is considering implementing its own whistleblower program.\textsuperscript{539} While no statistics were provided in the Report, the Report does note that “the whistleblower programs have already shown signs of early success, attracting several credible tips.”\textsuperscript{540}

Having first been introduced as an initiative in Alberta in 2015, New Brunswick, Nova Scotia, and Québec have also implemented a legislation for the automatic reciprocation of other securities regulatory authorities’ decisions in 2016.\textsuperscript{541} Such legislation provides that where any order imposing sanctions, conditions, restrictions, or requirements is issued by another securities regulatory authority in Canada, the CSA member of the legislation’s jurisdiction is deemed to have made the same order, with any necessary modifications.\textsuperscript{542}

As Christopher C. Nicholls explained in his most recent article, for jurisdictions without such legislation, the CSA member enforcement staff in such jurisdictions must bring a reciprocal proceeding in front of its securities regulatory tribunal to seek a reciprocal order.\textsuperscript{543} The passing of such legislation in these jurisdictions is at least partially responsible for a year-over-year decrease in the CSA’s reported statistics on the number of reciprocal orders made (63 in 2016 as opposed to 96 in 2015).\textsuperscript{544} Given that reciprocal orders are

\begin{itemize}
\item \textsuperscript{538} See: Canadian Securities Administrators, \textit{supra} note 312.
\item \textsuperscript{539} \textit{Ibid}.
\item \textsuperscript{540} \textit{Ibid}.
\item \textsuperscript{541} \textit{Ibid}.
\item \textsuperscript{542} \textit{Ibid}.
\item \textsuperscript{543} Christopher C. Nicholls, \textit{supra} note 421 at p. 14.
\item \textsuperscript{544} \textit{Ibid}.
\end{itemize}
rarely, if ever, not made when sought, Christopher C. Nicholls and many experts believe the passing of such legislation to improve administrative efficiency is a positive development\(^{545}\).

The securities enforcement status in Canada is displaying some manifestations of change, creativity and, perhaps, maturity\(^{546}\). Canadian regulators are seeking increased cooperation between CSA members, the Royal Canadian Mounted Police and Crown prosecutors\(^{547}\). Canadian regulators try to reach this objective notably by using the securities-related provisions of the *Criminal Code* to prosecute serious cases in front of the criminal courts\(^{548}\). Their approaches appear to be favorable by showing success with more creative techniques\(^{549}\).

### 6. New Public Enforcement Strategies

Despite the fact that Canadian securities regulators have been traditionally regarded as more modest than their American counterparts, recent experiences have shown their enthusiasm and willingness to adopt new enforcement and investor protection strategies. Indeed, this can be observed by referring to the words of Maureen Jensen, Chair and CEO of the OSC:

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\(^{545}\) Christopher C. Nicholls, *supra* note 421 at p. 14.

\(^{546}\) Canadian Securities Administrators, *supra* note 312.


\(^{548}\) Ibid.

\(^{549}\) Ibid.
“Ontario investors can be confident that our enforcement team is working hard to safeguard their interests - Using innovative enforcement tools to increase our reach and effectiveness, we are protecting investors and Ontario’s capital markets.”

Over the past few years, the OSC has introduced innovative tools that encourage market participants to self-report violations, provide information to OSC investigators and return funds to harmed investors. Along with partnerships with other enforcement agencies and jurisdictions, these tools are improving enforcement results. As Tom Atkinson, the Director of Enforcement at the OSC said:

“The OSC’s vigilant and responsive approach to enforcement promotes a culture of integrity and compliance in Ontario’s capital markets - Our active, innovative enforcement program is helping to protect investors from financial harm, and sending a clear message to potential wrongdoers.”

This section presents the main innovations and the most recent strategies that have been put forward in Canada—particularly in Ontario—in recent years, in order to give a more comprehensive picture of the year 2015-2016.

6.1 No-contest settlements

Over the past two years, an increasing number of no-contest settlements have been set with financial institutions under which approximately $354-million in aggregate to be paid to clients. In November 2015, the OSC approved a no-contest settlement agreement who

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551 See: Canadian Securities Administrators, supra note 312.
553 See: Anita I. Anand, supra note 505.
turned out to be one of the first in a much larger series\(^{554}\). This agreement was in relation to excess fees that one of the largest mutual fund dealer in Canada - Quadrus Investment Services Ltd. - discovered and self-reported to the OSC. The mutual fund dealer agreed to compensate clients approximately $8 millions\(^{555}\).

The latest in a group of settlements reached with Canada's most important financial institutions regarding the overcharging of clients, the OSC's recent no-contest settlements with RBC Dominion Securities Inc. and Manulife Securities Inc. are another great example of the increase of the use of these innovative new tools\(^{556}\). These settlements send a firm message about the seriousness of treating clients fairly with respect to fees\(^{557}\). The OSC will surely continue to use this tool where respondents qualify under applicable criteria\(^{558}\).

It is essential to understand that an enforcement matter may be resolved with a no-contest settlement only after the OSC have considered a number of factors, such as the extent of the respondent's cooperation during the investigation, the degree and timeliness of self-reporting, remedial steps taken by the respondent (such as providing compensation to investors), and any disgorging of the amounts obtained\(^{559}\). It is important to note that eligibility for a settlement will not be restricted if the respondent has previously been subjected to enforcement activity\(^{560}\). Although the use of this new tool begets mixed

\(^{554}\) See: Anita Anand and Andrew James Green, supra note 506.


\(^{556}\) See: Anita I. Anand, supra note 505.

\(^{557}\) Ibid.

\(^{558}\) Ibid.

\(^{559}\) Anita Anand and Andrew James Green, supra note 506.

\(^{560}\) Wendy Berman, Kate Byers and Stephanie Voudouris, supra note 555 at p. 4.
feelings among the legal community, some of its effects are notable and according to the
tangent taken by the OSC, its use is expected to continue in the coming years\textsuperscript{561}.

6.2 Mediation

In May 2015, the OSC introduced a Pilot Mediation Program, giving the possibility for respondents to work with an independent third-party mediator to resolve enforcement issues\textsuperscript{562}. Indeed, the launching of this new Program provide respondents who are involved in enforcement proceedings before the Commission and staff with the option of participating in a mediation with a third-party mediator independent of the Commission for the purpose of resolving the proceeding or any outstanding issues\textsuperscript{563}. It is important to note that mediations only occur with the consent of staff and the participating respondents, who must be represented by counsel\textsuperscript{564}. The chair of the OSC, Maureen Jensen, words define very well the reasons that motivated the OSC to implement such a measure and demonstrates the characteristics of this new innovation:

\begin{quote}
“Recognizing the importance to all parties in an enforcement matter of early resolution of issues arising in enforcement investigations and proceedings, OSC Staff are prepared to participate with respondents in a confidential and privileged mediation at any time following the delivery of an Enforcement Notice or the issuance of a Notice of Hearing, so long as the dispute resolution process does not delay the fulfilment by the parties of their respective
\end{quote}

\textsuperscript{561} Anita Anand and Andrew James Green, \textit{supra} note 506.
\textsuperscript{563} Ontario Securities Commission, \textit{supra} note 562.
obligations nor the hearing of the matter. In the event of agreement by the parties to mediate, the parties shall enter into a mediation agreement.” 565

6.3 Proposed whistleblower program

In 2016, the OSC has adopted OSC Policy 15-601 Whistleblower Program to encourage individuals to report information on serious securities-or derivatives-related misconduct to the Commission or, where appropriate in the circumstances, through an internal compliance and reporting mechanism567. Under this program – which is the first of its kind for securities regulators in Canada - the OSC provide a financial incentive of up to $5 million for high quality, original information that leads to an enforcement outcome with sanctions of $1 million or more568. The Commission believes that the program may assist in preventing or limiting harm to investors that may result from such misconduct569.

This program is established in furtherance of the Commission’s mandate to provide protection to investors from unfair, improper, or fraudulent practices and to foster fair and efficient capital markets and confidence in capital markets570. It is also consistent with the principle under which effective and responsive securities regulation requires timely, open, and efficient administration and enforcement of the Ontario Securities Act571.

565 Wendy Berman, Kate Byers and Stephanie Voudouris, supra note 555 at p. 6.
566 See: Securities Act, supra note 72 (S. 143.8).
568 Cassels Brocks, supra note 564.
569 Ibid.
570 See: Canadian Securities Administrators, supra note 312.
571 Ibid.
Furthermore, under this program, individuals who meet certain criteria and who submit information in a voluntarily way to Commission Staff regarding a breach of Ontario securities law may be eligible for a whistleblower award. Indeed, if it is determined that the information was of meaningful assistance to Commission Staff in investigating the matter and obtaining a decision of the Commission that results in a final order imposing monetary sanctions and/or the making of a voluntary payment of $1,000,000 or more.

In sum, the implementation of this program help generates guidance on complex securities law matters, such as insider trading, accounting and disclosure violations, and market manipulation that may otherwise be difficult to detect. Above all, this program also provides an incentive for reporting issuers and registrants to enhance their compliance systems and foster an environment where internal reporting of misconduct is encouraged.

6.4 Strengthening partnerships

Over the past few years, the OSC is working more closely than ever with provincial and federal law enforcement agencies to investigate malpractice in securities-related market activity. The Joint Serious Offences Team (JSOT), a partnership between the OSC, the RCMP Financial Crime program, and the OPP’s Anti-Rackets Branch, continues to make good progress in fighting financial crime.

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572 See: Ontario Securities Commission, supra note 564.
573 Ibid.
574 Ibid.
575 Ibid.
576 See: Canadian Securities Administrators, supra note 312.
577 Ibid.
In 2015, JSOT executed 49 search warrants and laid charges against 20 respondents.578 “In support of the Joint Securities Intelligence Unit (JSIU), a partnership that targets criminal syndicates involved in illegal market activity, the RCMP relocated its financial crime unit to the OSC’s Toronto office in 2015579. Recent assistance from the Competition Bureau and the Investment Industry Regulatory Organization of Canada (IIROC) have further broadened the JSIU’s capabilities and enhanced its ability to protect investors.580 “In June 2015, the OSC was recognized by Canada’s Financial Transactions and Reports Analysis Centre (FINTRAC) as a law enforcement power.581 The OSC now receives extensive financial disclosure reports from FINTRAC, providing valuable intelligence for investigators.582

Being a dynamic participant in the CSA Enforcement Group, the OSC works with other jurisdictions across Canada to coordinate efforts to target areas of concern, consolidate learnings on key areas, partner on various initiatives, and coordinate work.583 On an international level, the OSC is also strongly involved on two committees of the International Organization of Securities Commissions (IOSCO): The Screening Group and Committee.584 The Screening Group works to help the 106 signatories—representing 95 per cent of the world's capital markets—to achieve compliance with the IOSCO

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578 Ontario Securities Commission, supra note 564.
579 Ibid.
580 Ibid.
581 Ibid.
582 Ibid.
583 Ibid.
584 Ibid.
Multilateral Memorandum of Understanding. Committee reviews and makes recommendations on enforcement and information exchange issues that affect the international securities regulatory community.

6.5 IIROC Strategic Plan

The Investment Industry Regulatory Organization of Canada (IIROC) is the national, self-regulatory organization (SRO) who is in charge for the oversight of Canada’s investment dealers, as well as trading activities in Canada. Canadian securities regulatory framework consists of 10 provincial and three territorial securities regulators including SROs - whose activities are overseen by CSA members - such as IIROC and the Mutual Fund Dealers Association (MFDA). IIROC’s regulatory mandate is to set and enforce high-quality regulatory and investment industry standards, protect investors and strengthen market integrity while supporting healthy capital markets. Under a vision of integrity, transparency, fairness, and balance, IIROC pursues his mandate by developing, testing for compliance with and enforcing a broad spectrum of member and market proficiency, conduct, and prudential rules.

IIROC’s Enforcement plays an important role in protecting investors and supporting healthy capital markets across Canada. Enforcement works in concert with IIROC’s

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585 Ontario Securities Commission, supra note 564.
586 Ibid.
587 Stéphane Rousseau, supra note 24 at p. 22.
588 Ibid.
590 Ibid.
591 Stéphane Rousseau, supra note 24 at p. 22.
other departments to ensure timely identification, investigation, and prosecution of regulatory misconduct, as well as the detection and pre-emptive disruption of potential misconduct. In May 2016, IIROC published its three-year Strategic Plan which serves as the blueprint to achieve its mission to protect investors and support healthy capital markets. One of the main focus of IIROC’s Strategic Plan is enforcement. Indeed, pursuing credible enforcement action in a timely, responsible, and robust manner using a variety of tools and remedies is the leitmotiv of this plan. IIROC’s staff want to achieve this notably by:

1. Increasing fine collection through expanded legal authority.
2. Developing alternative forms of disciplinary action.
3. Strengthening the process of compliance referrals to Enforcement.

IIROC is also pursuing two additional legislative amendments to strengthen its effectiveness:

1. Statutory immunity for IIROC and its personnel when acting in the public interest.
2. Additional powers to strengthen evidence collection.

6.6 Engaging with investors

Being established already for a couple of years, the contact center has modernized and revamped its approach to promote its mandate which takes its full meaning in this context.

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592 See: Canadian Securities Administrators, supra note 312.
593 Investment Industry Regulatory Organization of Canada, supra note 589.
594 Ibid.
595 Ontario Securities Commission, supra note 564.
of big changes following past years: investor protection. The OSC’s Contact Centre answers to questions from investors and, when it’s needed, passes on complaints to the OSC’s Enforcement Branch. In 2015, the Contact Centre referred more than 360 complaints to Enforcement for further investigation.

In 2015, the OSC’s Investor Office has been modernizing and expanding its efforts to help Ontarians invest wisely and confidently. In addition to investor alerts and the participation of the Enforcement Branch in OSC in the community events across the province, the Investor Office is improving awareness of fraud among investors through its Investor News, which has 6,000 subscribers. Efforts will continue to expand in 2018, targeting those most at risk of becoming victims of fraud.

These examples only represent an overview of all the innovations and strategies that have been introduced over the past two years and for which, as already mentioned, opinions are sometimes very mixed. It is important to keep in mind that these new advances should not be analyzed in terms of immediate failure or success, but rather from a long-term perspective. In other words, it is a question of analyzing what has been put in place as well as the initiatives that have been introduced, and of taking into account the efforts made by the regulators to improve the present system.

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596 Ontario Securities Commission, supra note 564.
597 Investment Industry Regulatory Organization of Canada, supra note 589.
598 Ontario Securities Commission, supra note 564.
599 Ibid.
600 Ontario Securities Commission, supra note 564.
601 Ibid.
602 Poonam Puri, supra note 1 at p. 18.
603 Anita I. Anand, supra note 505.
604 Poonam Puri, supra note 1 at p. 18.
7. Public Enforcement’s overview

After gaining an understanding of these statistics as well as these recent strategies adopted by the various provincial and Canadian authorities, an essential element must be kept in mind; public enforcement in Canada gains strength\textsuperscript{605}. Public enforcement in Canada has seen many improvements over the years and regulatory authorities are making more than remarkable efforts to improve the existing regime. However, although there is still work to be done regarding public enforcement, the objective of this research work is not to determine whether public enforcement can be self-sufficient or if the efforts made reach the objectives hoped for by investors, but rather to present an inventory and to become aware of the work that has been done following the most recent financial crisis\textsuperscript{606}. Indeed, far from giving a thorough and in-depth analysis of the public enforcement and the latest trends, this Chapter is intended to be an inventory of where Canada, particularly Ontario and Québec, situated now and how they have evolved in terms of public enforcement\textsuperscript{607}. To have a full portrait, the next Chapter will focus on private enforcement and will particularly try to shed light on the statutory right of action as well as the Canadian class action regime.

\textsuperscript{605} Investment Industry Regulatory Organization of Canada, \textit{supra} note 589.
\textsuperscript{606} Poonam Puri, \textit{supra} note 1 at p. 18.
\textsuperscript{607} See: Anita I. Anand, \textit{supra} note 505.
CHAPTER 4: Private Enforcement

Since the late 1970s in Canada, investors in public offerings have had a statutory cause of action for misrepresentation and failure to disclose material changes\(^\text{608}\). Unlike the United States, which came up with a secondary market liability in the 1930s and achieved a well-established class action legislation by the 1960s, Canada’s private enforcement regime is a relatively recent development\(^\text{609}\). In order to incorporate a private statutory right of action for misrepresentations in an issuer’s prospectus, Canadian securities laws were amended in the 1970s\(^\text{610}\). Following the adoption of class action legislation in Ontario in 1993, and later by all other provinces, the capacity for private parties to initiate civil actions was enhanced thus making easier and more cost-effective for investors to bring actions against issuers and market intermediaries\(^\text{611}\).

Canada’s private enforcement regime took its present form in 2005 when securities laws were amended by the provinces to provide statutory liability for secondary market misrepresentations\(^\text{612}\). Well before that, a large number of American research works have already called for a reevaluation of secondary market liability, calling it a major factor undermining the competitiveness of the U.S. capital markets\(^\text{613}\). These concerns about the U.S. system eventually came to Canada\(^\text{614}\). The Canadian regime was then developed

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\(^{609}\) Ibid.

\(^{610}\) Stéphane Rousseau, supra note 24 at p. 22.

\(^{611}\) Janis P. Sarra and Adam C. Pritchard, supra note 608 at p. 2.

\(^{612}\) Stéphane Rousseau, supra note 24 at p. 23.

\(^{613}\) Janis P. Sarra and Adam C. Pritchard, supra note 608.

\(^{614}\) Poonam Puri, supra note 1 at p. 33.
following the 1994 Report of the Toronto Stock Exchange Committee on Corporate Disclosure (“Allen Committee”)\(^{615}\). The Allen Committee recognized that deterrence would be a primary objective, as well as compensation of aggrieved investors\(^{616}\).

The secondary market civil liability provisions became effective in Ontario on December 2005, followed by five other Canadian provinces, including Québec in 2007, enacting almost identical amendments to their securities legislation\(^{617}\). “Secondary market investors were thereby enabled to bring actions for non-negligent breaches of the issuer’s continuous disclosure obligations”\(^{618}\). These amendments are very much significant considering the fact that 95 percent of capital markets activity in Canada is in the secondary market\(^{619}\). Therefore, the possibility of remedies for investors and potential liability for issuers, corporate officers, and other specified persons is much greater than under the primary market civil liability provisions\(^{620}\).

Chapter 4 review the literature and quantitative data on private enforcement in Canada and highlight some key observations that are essential to understand the evolution of the secondary market civil liability provisions. After having introduced the fundamental concepts of private enforcement such as the primary and the secondary markets, Chapter 4 begins with a detailed analysis of the statutory liability for secondary market


\(^{616}\) Stéphane Rousseau, supra note 24 at p. 22.

\(^{617}\) Poonam Puri, supra note 1 at p. 33.

\(^{618}\) Ibid.

\(^{619}\) Poonam Puri, supra note 1 at p. 33.

\(^{620}\) Stéphane Rousseau, supra note 24 at p. 32.
misrepresentations. To that end, a brief history including a chronological evolution of this recent right action will be presented through some comparisons and analogies to the well-established American regime.

Canadian and American class action and securities laws have been shaped on the same underlying principles and policies. However, important disparities come up as a result of Canada’s jurisprudential approach to class action certification and its cap on secondary market statutory liability. The main characteristics of the Canadian regime will, therefore, be put forward and explained in the light of the case-law of the Canadian Courts. Chapter 4 closes by the presentation of recent Canadian statistics and by the introduction to the latest jurisprudential developments that have had a significant impact on this recent new statutory right of action.

1. Demystification: The primary and secondary market

The way in which securities are brought to the market and traded on various exchanges is fundamental to the market's function. Knowing how the primary and secondary markets work is essential to understanding how securities are trade but above all, to know how securities enforcement works. The word "market" can have various meanings, but it is used most often as a catch-all term to denote both the primary market and the secondary market. In fact, "primary market" and "secondary market" are both distinct terms; the

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621 Janis P. Sarra and Adam C. Pritchard, supra note 608 at p. 2.
622 Ibid.
624 Stéphane Rousseau, supra note 24 at p. 32.
primary market refers to the market where securities are created, while the secondary market is one in which they are traded among investors. In this section, the primary and the secondary markets will be differentiated and their distinctive characteristics will be put forward in order to have a better understanding of the global concept of the "market".

1.1 The Primary Market

“Under the Canadian primary market civil liability provisions, a purchaser of a security offered by a prospectus during the period of distribution has a right of action against the issuer and others where the plaintiff can prove that there was a misrepresentation.” Before going any further, it is essential to address what the primary market means. The primary market is where securities are created. The transaction is conducted between the issuer and the buyer and it's in this market that firms sell new stocks and bonds to the public for the first time. In short, the primary market creates new securities and offers them to the public. For instance, Initial Public Offering (IPO) is an offering of the primary market where a private company decides to sell stocks to the public for the first time. This is the first opportunity that investors have to contribute capital to a company through the purchase of its stock. An important point to remember here is that in the primary market, securities are directly purchased from the issuer.

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626 See: Mary G. Condon, Anita I. Anand and Janis P. Sarra, supra note 186.
627 Janis P. Sarra and Adam C. Pritchard, supra note 608 at p. 2.
628 Stéphane Rousseau, supra note 24 at p. 44.
629 Ibid.
630 Ibid.
631 Ibid.
632 Ibid.
633 Ibid.
Some terms must be defined in order to understand the mechanics of the primary market and its related obligations. First, a "misrepresentation" is broadly defined to mean “an untrue statement of a material fact” or an omission to state a material fact that is either required to be stated or is necessary to prevent a statement that is made from being false or misleading in the circumstances in which it was made. The intention behind this latter phrasing is to capture half-truths and to remain true to the mandate of the act by protecting investors.

An important distinction that should be made is the differentiation between material fact and material change which is far more complex than the following definitions. Indeed, these both terms should be appreciated in parallel with the case law, but for the purpose of this research work, this simple summary will be sufficient. The term “material fact” is defined as a fact that significantly affects, or could reasonably be expected to significantly affect, the market price or value of the securities. While, on the other hand, a “material change” is defined as “a change in the business, operations or capital of the issuer that would reasonably be expected to have a significant effect on the market price or value of any of the securities of the issuer”.

A very important characteristic in the Canadian regime is that there is a deemed reliance provision such that the plaintiff does not have to establish the existence of a duty of care

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634 See: Securities Act, supra note 72 (S.1).
635 Janis P. Sarra and Adam C. Pritchard, supra note 608 at p. 2.
636 Ibid.
638 See: Securities Act, supra note 72 (S.1).
639 Ibid.
or reliance on the misrepresentation. There is also, in Canada, a right of action for buyers that purchased securities during the period of distribution where a misrepresentation is made in an offering memorandum. Where the misrepresentation has occurred in a takeover bid circular, any security holder has the right to bring an action. These characteristics are in most cases consistent with the rules in the United States, which provide for liability for misstatements in the registration statement for investors who can trace their shares to that statement. Misstatements in the prospectus are also actionable by those who are entitled to receive the prospectus during the delivery period. American law also provides a remedy for oral misstatements made in connection with the offering, as well as written materials other than the prospectus.

However, unlike Canadian legislation, the American regime does not impose liability for material changes. The veracity of the registration statement is measured as of the time of its effective date; the prospectus is assessed as of the time that it is sent to investors. Subsequent changes to the issuer's business that render the disclosures in those documents inaccurate do not give rise to liability. U.S. law also does not require a reliance requirement with respect to misstatements in the registration statement or prospectus. Failures to disclose are actionable only if the defendant has traded on confidential

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640 See: Janis P. Sarra and Adam C. Pritchard, supra note 608 at p. 9.
641 Ibid.
642 Ibid.
643 Janis P. Sarra and Adam C. Pritchard, supra note 608 at p. 9.
644 Ibid.
645 Ibid.
646 Ibid.
647 Ibid.
648 Ibid.
649 Ibid at p. 10.
information in violation of a fiduciary duty to disclose, either to the counterparty to the trade or to the source of the information. That being said, both jurisdictions, U.S. and Canada, provide a remedy for false forward-looking statements. Despite these significant differences, the primary market civil liability provisions in Canada are very similar to that of the United States and it remains very relevant to refer to it.

1.2 The secondary market

The secondary market is commonly referred to as the “stock market” and is often associated with the New York Stock Exchange (NYSE), the Toronto Stock exchanges (TSX) and all major exchanges around the world. The defining characteristic of the secondary market is that investors trade among themselves. Shares are traded between investors at varying prices. These reflect not just how well the issuing company is doing, but also its future prospects as seen by investors. Trading in securities allows the stock market to ensure the liquidity and mobility of savings. That is, in the secondary market, investors trade previously issued securities without the issuing companies' involvement.

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650 Janis P. Sarra and Adam C. Pritchard, supra note 608 at p. 9.
651 Ibid.
652 Ibid.
654 Stikeman Elliott, supra note 653.
655 Stéphane Rousseau, supra note 24 at p. 44.
656 Ibid.
657 Ibid.
658 Ibid.
Canadian securities law provides a cause of action to anyone who acquires or disposes of the issuer's securities during the liability period. This strict period extends from the time the document was released, or public oral statement that contained a misrepresentation was made, or there was a failure to make timely disclosure, and the time the misrepresentation was publicly corrected or disclosure was made. American law defines liability the same way with respect to misrepresentations but does not require disclosure of material changes. As with the primary market provisions, there is a deemed reliance provision under the new secondary market provisions in Canada.

“Under this provision, the plaintiff does not need to demonstrate reliance on the misrepresentation, or on the issuer's failure to disclose as required. As Janis P. Sarra pointed out, American law retains a reliance requirement, but judicial interpretations have left that requirement somewhat attenuated. “In cases of pure omission in violation of a duty to disclose, the plaintiff need only show materiality of the omitted statement.” The U.S. Supreme Court has adopted, for affirmative statements, a presumption of reliance -- the “fraud on the market” theory -- when the misstatement was released into a capital market with active trading and a wide following among institutional investors and analysts.

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660 Ibid.
661 Joël P. Rochon & Alison Kearns, supra note 659.
662 Ibid.
663 Janis P. Sarra and Adam C. Pritchard, supra note 608 at p. 9.
664 Ibid.
665 Ibid.
666 Ibid.
As Janis P. Sarra explained, to determine the appropriate burden for imposing liability for misrepresentation or omissions, the Canadian secondary market civil liability provisions distinguish core and non-core documents. The distinction is based on whether the material is a constitutive part of the issuer’s continuous disclosure obligations as opposed to other, non-core compulsory filings with securities regulators. Issuers are subject to strict liability for any misrepresentations or omissions of material facts in their core documents. Core documents notably include a prospectus, takeover-bid circular, issuer circular, directors’ circular, rights offering circular, management discussion and analysis, annual information form, interim and annual financial statements when used in relation to an outside director, an influential person who is not an officer, or a director or officer of such an influential person. For issuers, their officers, or investment fund managers, core documents include the same list of documents, plus material change reports and any other document prescribed by regulation.

“Non-core documents require a higher burden of proof; specifically, the plaintiff must prove that the person or company knew that the document or public oral statement contained a misrepresentation, deliberately avoided acquiring the knowledge, or acted with gross misconduct in connection with release of the document or public oral statement containing the misrepresentation.” Where outside directors and influential persons are

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667 Janis P. Sarra and Adam C. Pritchard, supra note 608 at p. 9.
668 Ibid.
669 Joël P. Rochon & Alison Kearns, supra note 659 at p. 2.
670 Janis P. Sarra and Adam C. Pritchard, supra note 608 at p. 9.
671 Ibid.
672 Ibid.
being sued for failure to make timely disclosure and knew the change was material, this higher burden of proof is also required. However, it is not required in relation to the issuer and its officers, or investment fund manager.

Unlike Canadian Law, American law does not distinguish between types of disclosure; press releases and oral statements are held to the same standard as filings made with the SEC. “For all alleged misstatements, the plaintiff must plead with particularity that the defendant made the misstatement with scienter, generally held to require at least recklessness. For forward-looking statements, the plaintiff must plead actual knowledge of the falsity of the projection.” Thus, Canada’s strict liability standard for core documents imposes greater liability on defendants than in the United States, where plaintiffs are generally required to demonstrate recklessness.

2. The statutory right of action

Both U.S. and Canadian securities laws are aimed to protect investors and promote investor confidence and market integrity. To achieve this mandate, Canadian provincial statutes are all requiring the registration of persons involved in the securities business, prospectus disclosure on the distribution of securities, continuous disclosure of information after the distribution of securities, insider trading regulation, and takeover bid regulation. To
achieve their objectives, mandatory disclosure, imposed by both Canada and the U.S., is the major form of regulation\textsuperscript{680}.

"The new civil liability provisions give secondary market investors a statutory right of action against issuers and key related persons for making public misrepresentations or for failing to disclose material changes"\textsuperscript{681}. Together, the provisions and enforcement by securities regulators when issuers breach securities law, are aimed to "prod directors, officers, and other persons of influence or control to ensure that the issuer meets its continuous disclosure obligations"\textsuperscript{682}. Incidentally, civil liability provisions are also aimed at compensation of individuals through redress for harms caused by the action or inaction of issuers in violation of securities law\textsuperscript{683}. Considering this, it's important to understand that civil liability, public enforcement, and quasi-criminal sanctions provide, together, an integrated approach that promotes investor protection, investor confidence, and market integrity through both deterrence and compensation\textsuperscript{684}.

The main focus of this section is first to present provisions creating statutory civil liability for misrepresentations in continuous disclosure documents and public oral statements\textsuperscript{685}. Because the development of this remedy is pretty recent and has been considered a watershed event in the evolution of Canadian securities laws, its significant characteristics

\textsuperscript{680} See: Mary G. Condon, Anita I. Anand and Janis P. Sarra, \textit{supra} note 186.
\textsuperscript{681} Janis P. Sarra and Adam C. Pritchard, \textit{supra} note 608 at p. 9.
\textsuperscript{682} \textit{Ibid.} at p. 10.
\textsuperscript{683} \textit{Ibid.}
\textsuperscript{685} \textit{Ibid.}
will be put forward and distinguished with the American regime. Secondly, to understand the mechanics of this relatively new development, the Canadian class action regime will be explained and analyzed. To conclude this section, the most recent case law developments will be analyzed and parallels will be drawn with the evolution of this relatively new remedy, which has already undergone several twists and turns.

2.1 History: The discussions

Most of securities trades in Canada occur on the secondary market. However, until less than a decade, there was no statutory cause of action available to investors purchasing securities on the secondary market. Only primary market purchasers of securities offered by a prospectus, offering memorandum, or circular were afforded statutory remedies. In addition, there was also no statutory civil liability for misrepresentations contained in an issuer’s continuous disclosure documents even though these were the principal sources of information on which majority of investors based their trading decisions.

“Historically, investors purchasing securities on the secondary market could pursue only common law claims, usually for negligent misrepresentation.” On the one hand, a claim in negligent misrepresentation required proof that the investors actually relied on the misrepresentation in trading the issuer’s securities. This commonly raised individual

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issues rather than common issues, making it excessively difficult for investors to proceed by class action. On the other hand, it was difficult for secondary market investors to establish a duty of care, principally owing to concerns over indeterminate liability on the part of the issuers and other potential defendants, such as underwriters or auditors.

The significance of this new remedy can only be understood when the background of much older legislation creating statutory civil liability for prospectus misrepresentations is studied and analyzed. Recent legislative initiatives to establish statutory civil liability for misrepresentations in secondary market disclosures represent a major but long-delayed advance on those earlier statutory protections for investors purchasing shares in a public offering.

For more than a hundred years, Canadian law has implemented for statutory civil liability in the case of misrepresentations in prospectuses issued in connection with the public offering of securities. Shortly after the United Kingdom Parliament enacted the Directors Liability Act in response to the House of Lords decision in Derry v Peak, the province of Ontario reproduced the reform by creating its own Directors Liability Act in 1891. At that time, there was no securities statute in Ontario neither in Canada. That being so, these liability provisions then became an addition to corporate law and they purported to apply

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693 Robb C. Heintzman, supra note 684 at p. 8.  
694 Ibid.  
695 Stéphane Rousseau, supra note 24 at p. 16.  
696 Stéphane Rousseau, supra note 687.  
697 Ibid.  
698 The Directors Liability Act of 1890, 53 & 54 Vict. c. 64.  
699 Derry v Peak, [1889] UKHL 1.  
“to all companies” in Ontario “where or by what authority so ever incorporated” and dealt only with the liability of corporate directors and promoters.\(^{701}\)

In 1928, when Ontario’s first securities statute was enacted, it did not include statutory civil liability provisions. Québec and the other provinces neither included such provisions when they enacted their securities statutes\(^ {703}\). However, it is important to raise the fact that the Federal Companies Act, which incorporated prospectus provisions applicable to offerings by federally incorporated corporations, had included a civil remedy for prospectus misrepresentations since 1917\(^ {705}\). More than a decade later, in the 1940s, Ontario securities law underwent major reform\(^ {706}\). By that time, the Securities Act of 1933\(^ {707}\) had been enacted in the US with prospectus liability provisions that also traced their roots to the UK Directors Liability Act\(^ {708}\). The statutory civil remedy for prospectus misrepresentations in the federal incorporation statute have often been described as a “simplified version of s. 11 of the US Securities Act of 1933”\(^ {709}\).

As Stéphane Rousseau explained, these statutory civil liability provisions were aimed at facilitating actions by investors mainly in two ways. First, they eliminated any requirement to prove that a misrepresentation was made with the knowledge of an issuer’s

\(^{701}\) Stéphane Rousseau, supra note 24 at p. 16.

\(^{702}\) Janis P. Sarra and Adam C. Pritchard, supra note 608 at p. 9.

\(^{703}\) Stéphane Rousseau, supra note 24 at p. 16.

\(^{704}\) See: Canada Business Corporations Act, R.S.C., 1985, c. C-44.

\(^{705}\) Stéphane Rousseau, supra note 24 at p. 16.

\(^{706}\) Ibid.

\(^{707}\) Securities Act of 1933, supra note 74.

\(^{708}\) The Directors Liability Act of 1890, supra note 698.

\(^{709}\) Securities Act of 1933, supra note 74.

\(^{710}\) Stéphane Rousseau, supra note 24 at p. 45.
officers or directors, or with reckless disregard as to a statement’s accuracy. Secondly, they eliminated the need for a plaintiff to prove that he or she had actually relied on a statement found to be a misrepresentation—initially through the statutory device of “deemed reliance”, then later by providing that an action could be maintained “without regard to whether the purchaser relied on the misrepresentation”. Potential defendants under these statutory civil liability provisions were later extended from directors and promoters to other individuals and companies involved in the public offering process, including underwriters and experts.

Although this statutory provision has been a part of Canadian law for over a hundred years, it had been the basis of a decided case for the first time in Ontario in 2004 in the Kerr v Danier Leather Inc. decision. This decision of the Ontario Superior Court of Justice was ultimately appealed to the Supreme Court of Canada, where the plaintiff investor’s claim failed. To this date, there has not been a single successful claim brought by an investor under Canadian statutory provisions allowing for civil liability in the case of prospectus misrepresentations. In light of Canadian developments in securities law and the U.S. and U.K. context, it is surprising that a corresponding civil remedy for secondary market misrepresentations was so long in coming.

711 Stéphane Rousseau, supra note 24 at p. 45.
712 Ibid at p. 46.
713 Ibid.
716 See: Canadian Securities Administrators, supra note 296.
According to Christopher C. Nicholls, the case for a statutory remedy for secondary market disclosures would seem to be at least as interesting as the case for statutory civil liability for prospectus misrepresentations for at least two reasons:

“First, the volume of trading in secondary markets dwarfs primary market trading, so a regime of statutory civil liability for continuous disclosure would complement the evolution in Canada (in tandem with similar US developments) from a transaction-based securities law regime to an issuer-based system.

Secondly, the existing legal hurdles facing secondary market victims of misrepresentation are no less daunting than those that had been faced by primary market purchasers prior to the enactment of the Directors Liability Act. The common law remedies of deceit and fraudulent or negligent misrepresentation pose equally difficult barriers for prospective plaintiffs who have purchased securities in secondary markets, chiefly because of the need for plaintiffs to prove reliance on the alleged misrepresentation.”

The secondary markets are much larger than primary markets notably because the most vulnerable investors tend to acquire their securities in a secondary market transaction than in a public offering. Pursuit of civil remedies for misrepresentation would normally be possible for such investors only through class action proceedings. That being said, it was in the class action context that the common law hurdles the most especially because of the requirement to prove individual reliance on a misrepresentation. This situation was most problematic in Canada since courts in most Canadian jurisdictions rejected the US “fraud on the market” concept as an expedient solution to the challenges of proving reliance.

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718 Christopher C. Nicholls, supra note 4 at p. 18.
719 Ibid at p. 22.
720 Ibid.
721 Ibid at p. 23.
722 Ibid.
723 Ibid.
At the time of the Allen Committee in 1998 there were contrary opinions as to how great a barrier the requirement to prove individual reliance posed for plaintiffs seeking certification of a class action\textsuperscript{724}. Some Canadian academics have recently suggested that, despite the rejection of “fraud on the market theory”, Canadian courts have been prepared to certify class actions based on negligent misrepresentation, notwithstanding the recognition that proving reliance on the impugned statements could ultimately prove challenging for plaintiffs at trial\textsuperscript{725}.

However, the point is that primary market victims of misrepresentation were privileged over their secondary market counterparts by a statutory regime that obviates the need to prove reliance in the case of primary market, but not secondary market, purchases\textsuperscript{726}. Some experts have prompted the fact that secondary market securities purchases, unlike primary market transactions, do not bring funds to the issuer\textsuperscript{727}. Their argument had been based on the premise that an ideal securities law regime would focus on third-party liability, not issuer liability, in the case of secondary market misrepresentations\textsuperscript{728}.

As Christopher C. Nicholls mentioned, “this suggestion raises a more general policy issue about how to design an optimal civil liability regime to create the best incentives to improve the quality of public company disclosure”\textsuperscript{729}. However, it is essential to mention that it does not account for the more specific question of whether there “ought to be two wholly

\textsuperscript{724} Christopher C. Nicholls, \textit{supra} note 4 at p. 22.
\textsuperscript{725} Janis P. Sarra and Adam C. Pritchard, \textit{supra} note 608 at p. 9.
\textsuperscript{726} \textit{Ibid}.
\textsuperscript{727} \textit{Ibid}.
\textsuperscript{728} \textit{Ibid}.
\textsuperscript{729} Christopher C. Nicholls, \textit{supra} note 4 at p. 22.
different approaches taken to the question of whether plaintiffs should bear the burden of proving actual reliance to succeed in a claim based on misrepresentation depending solely on whether they purchased in the primary or the secondary market”730.

Being often criticized and opposed, proposals to expand statutory civil liability to secondary market purchases have received criticism claiming that such a reform would open the floodgates to spurious and destructive litigation731. Yet, according to the long history of a statutory remedy for prospectus misrepresentations, this argument is based on an assumption that secondary market investors are more likely to launch unmeritorious lawsuits than primary market purchasers, or at least, as Christopher C. Nicholls noted, “that the sheer greater volume of secondary market trading will result in more unmeritorious lawsuits than in the primary market context.”732 Without any doubt, fear of disproportionate and counterfeit litigation does seem to account for historical opposition to extending statutory civil liability to secondary market disclosures.733

2.2 History: The Building of a New Regime

There had been, over a period of almost 30 years, a considerable number of recommendations to expand statutory civil liability to continuous disclosure734. These recommendations also included the coordination of remedies arising out of secondary market transactions with those available for primary market transactions735. Indeed, in

730 Janis P. Sarra and Adam C. Pritchard, supra note 608 at p. 9.
731 Christopher C. Nicholls, supra note 4 at p. 22.
732 Ibid.
733 Ibid.
734 Ibid.
735 Janis P. Sarra and Adam C. Pritchard, supra note 608 at p. 9.
1984, calls for a statutory remedy were renewed by the Ontario Securities Commission but those proposals and recommendation were not followed neither enacted\textsuperscript{736}. Ten years later, in 1994, the TSX Committee on Corporate Governance recommended that this concern be reconsidered\textsuperscript{737}.

These efforts concluded in the recommendation of statutory civil actions by the Allen Committee final report issued in 1997, which generated the perfect momentum for legislative change\textsuperscript{738}. Indeed, the Allen Committee put forth a detailed proposal for legislation to create statutory civil liability for continuous disclosure violations\textsuperscript{739}. The TSX Committee on Corporate Disclosures has been greatly influenced by an acknowledgement that there were significant pressures on Canadian legislators and regulators to adopt a secondary market regime that was not noticeably out of step with the US model\textsuperscript{740}. Instead of being based on *US Rule 10b-5 liability*\textsuperscript{741}, the regime proposed was built on the existing Ontario statutory civil remedy for prospectus misrepresentations\textsuperscript{742}.

Arguing that the principal objective of such liability should not be compensation but deterrence, the Allen Committee also claimed that investor confidence could not come at the cost of unduly burdening issuers\textsuperscript{743}. In that regard, the Committee noted that

\textsuperscript{736} Janis P. Sarra and Adam C. Pritchard, *supra* note 608 at p. 10.
\textsuperscript{737} Christopher C. Nicholls, *supra* note 4 at p. 25.
\textsuperscript{738} Ibid.
\textsuperscript{739} Ibid.
\textsuperscript{740} Ibid.
\textsuperscript{741} SEC Rule 10b-5, 17 C.F.R. 240.
\textsuperscript{742} Christopher C. Nicholls, *supra* note 4 at p. 25.
\textsuperscript{743} Ibid.
“The cost to Canada’s capital markets of implementing our recommendations is impossible to quantify. It is, however, our view that it is warranted and will be at least counter-balanced by the gain arising from enhanced credibility of disclosure by issuers accessing Canada’s capital markets and their resulting reduced cost of capital.”

After the release of that Report, there was an extensive perception in Canada, who still persists to this day, that the US securities law regime was inordinately litigious. The idea of moving to a “US-style” system of private enforcement was, therefore, frequently raised as a negative aspect to extending the civil enforcement regime. Being endorsed by the CSA, the proposal of the Allen Committee suggested that each Canadian jurisdiction would enact such legislation as part of its securities laws. Nevertheless, the recommendations have been suspended and all the proposals stalled.

Together, the collapse of Worldcom in 2002 and of Enron in 2001 and of other high-profile governance and accounting debacles opened a legislative window of opportunity. In these corporate disturbances waves and the market confusion that accompanied them, proposals to introduce statutory civil liability for secondary market disclosure were promptly “repackaged” in Ontario as part of a Canadian legislative response to the US Sarbanes-

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744 See: TSE Committee on Corporate Disclosure (Thomas Allen, Chair), Responsible Corporate Disclosure: A Search for Balance (Toronto, Toronto Stock Exchange, 1997), at p. 6.
745 Christopher C. Nicholls, supra note 4 at p. 26.
746 Ibid.
747 Ibid.
748 Ibid.
749 Ibid.
Oxley Act750. Although these amendments received Royal Assent in December 2002, they were not immediately proclaimed into force because of “technical flaws”751.

In 2003, a committee created by the Ontario government to be in charge of a statutorily mandated five-year review of Ontario’s securities legislation included in its report a recommendation that “the still-languishing Bill 198 proposals be proclaimed into force as soon as possible”752. In its analysis of the Five Year Review Committee Report, the Ontario Government’s Standing Committee on Finance and Economic Affairs also urged that the new civil liability provisions in Bill 198 be proclaimed into force753.

The new statutory civil liability regime was based on draft legislation that the OSC and Canadian Securities Administrators (CSA) proposed for public comment in 1998 and 2000754. That draft legislation, based on the Allen Committee's recommendations, became the subject of further public policy debate755. The major problems expressed with respect to the draft legislation were the potential costs to issuers and their directors of having to defend against unmeritorious class actions756.

Despite these positive changes, the implementation of these new statutory remedies continued to face resistance757. However, after several consultations and eventually further

751 Christopher C. Nicholls, supra note 4 at p. 26.
753 See: Christopher C. Nicholls, supra note 4 at p. 26.
754 Stéphane Rousseau, supra note 24 at p. 36.
755 Ibid.
756 Ibid.
757 Christopher C. Nicholls, supra note 4 at p. 26.
amendments\textsuperscript{758}, the provisions came into force in Ontario on December 2005.\textsuperscript{759} The Five Year Review Committee Report, combined with pressure to coordinate secondary market remedies for Canadian market participants with those available in the U.S., provided the impulse for the Ontario government to introduce the current regime effective 2005\textsuperscript{760}. The Ontario initiative been followed by all other Canadian provinces and at least one of the three territories, namely Alberta (31 December 2006)\textsuperscript{761}, Manitoba (1 January 2007)\textsuperscript{762}, New Brunswick (30 May 2007)\textsuperscript{763}, Québec (9 November 2007)\textsuperscript{764}, Nova Scotia (15 November 2007)\textsuperscript{765}, Saskatchewan (15 February 2008)\textsuperscript{766}, Prince Edward Island (17 March 2008)\textsuperscript{767}, Yukon (17 March 2008)\textsuperscript{768}, Newfoundland and Labrador (1 May 2008)\textsuperscript{769}, and British Columbia (4 July 2008)\textsuperscript{770}. In the two remaining territories, Nunavut and the Northwest Territories, legislation providing for a similar remedy has received Royal Assent but has not yet been proclaimed into force\textsuperscript{771}.

\textsuperscript{759} Christopher C. Nicholls, \textit{supra} note 4 at p. 26.
\textsuperscript{760} Stéphane Rousseau, \textit{supra} note 24 at p. 36.
\textsuperscript{761} Securities Act (Alberta), RSA 2000, c S-4, pt 17.01.
\textsuperscript{762} The Securities Act (Manitoba), CCSM cS50, pt XVIII.
\textsuperscript{763} Securities Act (New Brunswick), c S-5.5, pt 11.1.
\textsuperscript{764} Securities Act (Quebec), RSQ, c V-1.1, ss 225.2–225.33.
\textsuperscript{765} Securities Act (NS), RSNS 1989, c 418, ss 146A to 146N.
\textsuperscript{766} The Securities Act, 1988 (Saskatchewan), RSS S-42.2., pt XVIII.1.
\textsuperscript{767} Securities Act (PEI), c S-3.1, pt 14.
\textsuperscript{768} Securities Act (Yukon), SY 2007, c 16, pt 14.
\textsuperscript{769} Securities Act (Newfoundland and Labrador), RSNL 1990, cS-13, pt XXII.1.
\textsuperscript{770} Securities Act (British Columbia), RSBC 1996, c 418, pt 16.1.
3. The new regime explained

What the “Bill 198” amendments have done is to enhance a statutory right of action to a different set of investors, namely those who purchase or sell securities from third parties in the secondary market typically through a stock exchange772. Under the secondary market liability regime, such investors have a right of action with respect to773:

- A misrepresentation made by or on behalf of a responsible issuer in its disclosure documents or in public oral statements; and

- A responsible issuer’s failure to make timely disclosure of a material change. 774

In contrast to the common law cause of action for negligent misrepresentation, which requires each plaintiff to prove that it relied to its detriment on the alleged misrepresentation, the provisions create a statutory right of action “without regard to whether” the purchaser or seller of securities relied on the alleged misrepresentation775. That is, reliance is not required and not even relevant776. In other words, the purpose of creating a statutory regime for secondary market liability is two-fold777:

”- It makes recovery of damages much easier for secondary market investors because, without having to prove a duty of care or actual reliance, they can usually meet the conditions necessary to pursue their claims by class action.

- It deters issuers from breaching their continuous disclosure obligations under securities legislation by imposing civil liability.” 778

772 Mary G. Condon, Anita I. Anand and Janis P. Sarra, supra note 186.
773 Ibid.
774 See: Securities Act, supra note 72 (PART XXIII.1)
775 Mary G. Condon, Anita I. Anand and Janis P. Sarra, supra note 186.
776 Ibid.
777 Ibid.
778 Ibid.
The Canadian regime has a unique characteristic: the claimant must obtain leave of the
court before commencing a secondary market liability claim. “This particular adding
modernized Canadian securities legislation by providing investors with a strict liability,
statutory right of action when an issuer breaches their continuous disclosure obligations.”
Making secondary market liability more attainable than under the common law remedies
of negligent misrepresentation and fraud, this reforms greatly simplified the secondary
market liability framework and provided a common legal issue for investors to rely upon
in seeking certification in a class action.

3.1 Double avenue

Although the Ontario Securities Act gives plaintiffs a statutory right of action for
misrepresentations or omissions, the common law torts of negligent misrepresentation and
fraud is still available to investors in both the primary and secondary markets. This is
equally true for all other common law provinces as well as for Québec, which has a right
of action under civil law in addition to that provided for by the Québec's Securities Act.
Plaintiffs in secondary market misrepresentation class actions almost invariably pursue
common law negligent misrepresentation claims, in addition to statutory claims. They
do so because common law claims as well as civil law claims in Québec are not subject to
the leave requirement or to the liability caps imposed by the Securities Act. These both

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779 See: Securities Act, supra note 72 (S.138.8)
780 Poonam Puri, supra note 1 at p. 34.
781 Ibid.
782 Stéphane Rousseau, supra note 687 at p. 12.
783 Securities Act (Quebec), supra note 764.
784 Stéphane Rousseau, supra note 687 at p. 12.
785 Stéphane Rousseau, supra note 687 at p. 12.
particular characteristics imposed by the Securities Act will be discussed further in the next section.

However, as mentioned before, to succeed in a negligent misrepresentation claim, plaintiffs must prove that they actually relied on the alleged misrepresentation. Reliance is typically regarded as something that can only be proved on an individual basis, not on a class-wide basis. These common law and civil law remedies are then preferable where the plaintiffs seek damages in excess of the statutory cap on secondary market liability or where limitation period under the Securities Act has elapsed. Thus, it is frequent that plaintiffs plead both a statutory claim under the Securities Act and a common law or a civil law claim of negligent or fraudulent misrepresentation. In pleading a common law or a civil law cause of action, plaintiffs should demonstrate their reliance on the misrepresentation.

Many experts question this strategy, which is becoming more and more widespread and has developed into a sort of a norm for a large majority of plaintiffs. Indeed, it is still questionable today whether negligent misrepresentation claims are economically viable, because even if the class members succeed at the “common issues” trial, each class member

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786 See: Securities Act, supra note 72 (S.130).
787 Stéphane Rousseau, supra note 687 at p. 13.
789 Stéphane Rousseau, supra note 687.
790 Ibid.
will then need to prove actual reliance and damages in an individual trial\(^{792}\). Only class members with important individual claims will have the economic incentive to pursue such an individual trial\(^{793}\). That being said, plaintiffs will undoubtedly continue bringing common law negligent misrepresentation claims and civil claims in securities class actions in an attempt to exert leverage over defendants for settlement purposes\(^{794}\).

Following the Supreme Court of Canada’s decision in *Queen v. Cognos*\(^{795}\), courts were uncertain on the best approach to proving detrimental reliance in the context of class actions\(^{796}\). In *McCann v. CP Ships*\(^{797}\), the court strictly refused to impose every class member to prove reliance in order for the claim to proceed as a class action\(^{798}\). The same year, in *Silver v. Imax*\(^{799}\), this approach has subsequently been confirmed by the court who allowed questions of reliance to be considered at trial\(^{800}\).

However, in *Dobbie v. Arctic Glacier Income Fund*\(^{801}\), the *Imax* and *McCann* decisions were called into questions\(^{802}\). Indeed, only two years after being rendered, the Court found that “in certain circumstances the question of individual reliance may overwhelm the common issue and render the negligent misrepresentation claim inappropriate for a class

\(^{792}\) Stéphane Rousseau, *supra* note 687 at p. 13.

\(^{793}\) Ward K. Branch and Paul Miller, *supra* note 791.

\(^{794}\) *Ibid.*

\(^{795}\) *Queen v. Cognos Inc.*, [1993] 1 S.C.R. 87 (Can.).

\(^{796}\) Poonam Puri, *supra* note 1 at p. 36.


\(^{798}\) *Ibid.*


\(^{800}\) See: Poonam Puri, *supra* note 1 at p. 36.


\(^{802}\) See: Poonam Puri, *supra* note 1 at p. 36.
action proceeding.” The procedural aspect, as well as the Canadian characteristics of class actions, will be discussed further in section 4.

3.2 The Leave test

The most notable aspect of the statutory scheme regarding secondary market liability is the requirement that any party seeking to bring a claim must first obtain leave of the court. The test for leave, which is the same in all Canadian provinces and territories, imposes both a requirement of good faith and an evidentiary threshold. Under section 138.8 of the Ontario Securities Act, in order to obtain leave to proceed, a plaintiff must show that (i) the claim is being brought in good faith; and (ii) there is a reasonable possibility that the plaintiff will succeed at trial.

138.8 (1) No action may be commenced under section 138.3 without leave of the court granted upon motion with notice to each defendant. The court shall grant leave only where it is satisfied that,

(a) the action is being brought in good faith; and

(b) there is a reasonable possibility that the action will be resolved at trial in favour of the plaintiff.

Intended to be a screening mechanism to protect defendants against coercive and unmeritorious claims whose purpose is to pressure a defendant into settlement to avoid

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804 See: Securities Act, supra note 72 (S. 138.8).
805 Stéphane Rousseau, supra note 687.
806 See: Securities Act, supra note 72 (S. 138.8).
807 Ibid.
costly litigation, this procedure does not appear in the US legislation for secondary market liability\textsuperscript{808}.

This Canadian initiative give a significant gatekeeping role to the court as it has to conduct at least a preliminary examination of the contravene act or inaction in order to determine whether there is a reasonable possibility that the plaintiff will succeed at trial\textsuperscript{809}. Nevertheless, due to the test for leave requires an assessment of the merits of the claim, the stakes are significantly high even at this preliminary stage\textsuperscript{810}. In its April 2015 decision in \textit{Theratechnologies inc. v 121851 Canada inc.}\textsuperscript{811}, the Supreme Court affirmed that the “reasonable possibility” test is more than a “speed bump”\textsuperscript{812}. The test requires the plaintiff to “offer both a plausible analysis of the applicable legislative provisions, and some credible evidence in support of the claim”\textsuperscript{813}. The \textit{Theratechnologies}\textsuperscript{814} decision, as well as other key Canadian cases, will be further analyzed in the final chapter in order to concretely present the progress of private enforcement over the past few years.

In the U.S. plaintiffs are not required to seek leave of the court before filing an action for primary liability\textsuperscript{815}. In secondary liability cases, however, as Janis P. Sarra explained, “the plaintiff’s complaint must plead the facts relating to the fraud, including facts "giving rise to a strong inference that the defendant acted with the required state of mind," with

\begin{footnotesize}
\begin{enumerate}
\item Janis P. Sarra and Adam C. Pritchard, \textit{supra} note 608 at p. 11.
\item Robb C. Heintzman, \textit{supra} note 684.
\item \textit{Theratechnologies Inc. c. 121851 Canada Inc.}, [2015] 2 SCR 106.
\item \textit{Ibid.}
\item See: \textit{Securities Act, supra} note 72 (S. 138.8).
\item \textit{Theratechnologies Inc. c. 121851 Canada Inc.}, \textit{supra} note 811.
\item J. Armour, B. Black, B. Cheffins and R. Nolan, \textit{supra} note 438.
\end{enumerate}
\end{footnotesize}
particularity. Complaints that do not plead facts relating to the fraud with sufficient particularity are subject to dismissal”816. This requirement poses a significant challenge for the plaintiff which is “heightened by the stay of discovery that applies while a motion to dismiss is pending”817. That being said, in practice, complaints are met by a motion to dismiss, which means that the “action is effectively stayed until the court decides the motion”818. Considering all this, U.S. law provides an implicit gatekeeping role for the court as well as Canada819.

Under the Canadian provisions, once the court has granted leave to commence an action, the plaintiff must quickly issue a press release disclosing that leave has been granted and must send a written notice to the securities commission of the concerned province.820 It is important to point out that when an action is commenced, it cannot be discontinued, abandoned, or settled without the approval of “the court on such terms as the court thinks fit, including terms as to costs”821. In the U.S., the plaintiff must, within 20 days of filing the complaint, provide notice to members of the prospective class822. Then, class members have 90 days from the filing of the notice to make a motion to the court to be appointed lead plaintiff823. Having the authority to select the lawyer who will represent the class, the member with the largest losses benefit of a presumption that it should be appointed as lead

816 Janis P. Sarra and Adam C. Pritchard, supra note 608 at p. 11.
817 Ibid.
818 Ibid.
819 Ibid at p. 12.
820 See: Securities Act, supra note 72 (PART XXIII.1) and Janis P. Sarra and Adam C. Pritchard, supra note 608 at p. 11.
821 Janis P. Sarra and Adam C. Pritchard, supra note 608 at p. 11.
plaintiff824. Another important point that must be raised is about settlement: Every settlement of a U.S. class action requires judicial approval825. “Before the court can approve the settlement, notice must be given to the members of the class, setting forth the aggregate amount of the settlement, the recovery per share, and the parties' views on the amount of damages potentially recoverable.”826

### 3.3 The limitations

The characteristic which is the most restrictive and distinct of the new statutory civil liability provisions and also the clearest distinction between Canada and the U.S. is the inclusion of liability limits both for corporate and individual defendants827. Indeed, the limit on secondary market statutory liability is a defining feature of Canada’s securities regime828. Individual defendants, including directors and officers of the responsible issuer, influential persons, and directors and officers of a corporate influential person, are subject to a liability limit which is the greater of $25,000 and 50% of their aggregate compensation from the issuer and its affiliates in the 12 months period preceding the misrepresentation829. Concerning the issuer itself, liability is limited to the greater of $1 million and 5% of the issuer’s market capitalization830.

138.7 (1) Despite section 138.5, the damages payable by a person or company in an action under section 138.3 is the lesser of,

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826 *Ibid*.
827 Christopher C. Nicholls, *supra* note 4 at p. 17.
828 Stéphane Rousseau, *supra* note 687.
829 See: Securities Act, *supra* note 72, S.138.7(1)
830 *Ibid* S. 138.1, definition of “liability limit”, paras (b), (d) and (e)
(a) the aggregate damages assessed against the person or company in the action; and

(b) the liability limit for the person or company less the aggregate of all damages assessed after appeals, if any, against the person or company in all other actions brought under section 138.3, and under comparable legislation in other provinces or territories in Canada in respect of that misrepresentation or failure to make timely disclosure, and less any amount paid in settlement of any such actions.831

However, the Canadian secondary market liability limits are not applicable, except for the responsible issuer, if the plaintiff is able to prove that the defendant authorized, permitted, acquiesced in, or influenced “the making of the misrepresentation or the failure to make timely disclosure while knowing that it was a misrepresentation or failure to make timely disclosure.”832 This is a significant exception to the liability limits for individuals833. As Jannis P. Sarra pointed out:

“This may result in actions being brought only in the clearest cases of fraud or misrepresentation, such as earnings restatements, in order for plaintiffs to avoid the liability cap. It may be that the only cases that are financially worth pursuing, given the costs of litigation, are those cases in which the cap on damages would not apply. Of course, if the issuer has a large market capitalization, even 5 percent of that figure would justify the cost of a lawsuit.”834

Aiming at balancing remedies for investors against the desire to protect and advance capital market activity through the protection of officers and other persons, the damages cap enhance plaintiffs to focus on actions likely to have merit835. As many experts pointed out,

831 Securities Act, supra note 72, S.138.7.
833 Christopher C. Nicholls, supra note 4 at p. 17.
834 Janis P. Sarra and Adam C. Pritchard, supra note 608 at p. 12.
835 Ibid.
the negative aspect of this is that it is likely to result in investors recovering less than the full amount of their losses, absent clear evidence of fraud\textsuperscript{836}. Even given this, the liability cap for issuers means that investors will not recover full compensation in cases of significant fraud\textsuperscript{837}. Experts questioned whether the liability cap has been judiciously chosen in terms of creating the appropriate mix of remedies and deterrence\textsuperscript{838}. Mary G. Condon is of the opinion “that the limit on damages indicates that legislators were more interested in achieving deterrence than compensation, but she questions whether the liability limits are set high enough to achieve the desired deterrence”\textsuperscript{839}.

As Christopher C. Nicholls pointed out, the liability limit for issuers is especially interesting in the context of distinguishing characteristics of Canada’s capital markets\textsuperscript{840}. Canada has more public corporations per capita than any other country for which data are available; however, most of these corporations are very small\textsuperscript{841}.

“Based on data for the year ending 31 December 2005 (when the new statutory civil liability provisions first came into effect in Ontario), of Canada’s roughly 4012 public companies (reporting issuers), only 1362 listed issuers on the TSX and 371 listed issuers on the junior TSX Venture Exchange had market capitalization of more than $20 million (the threshold at which 5% of market capitalization would exceed $1 million). Given the costs and risks of pursuing a class action claim against a public corporation for misrepresentation in continuous disclosure documents, including Ontario’s robust “loser pays” costs rules, the prospect of receiving no more than $1 million in damages would not appear to provide a significant incentive for prospective plaintiffs and their counsel to pursue litigation.”\textsuperscript{842}

\textsuperscript{836} Janis P. Sarra and Adam C. Pritchard, \textit{supra} note 608 at p. 12.
\textsuperscript{837} \textit{Ibid.}
\textsuperscript{838} \textit{Ibid.}
\textsuperscript{839} \textit{Ibid.}
\textsuperscript{840} Christopher C. Nicholls, \textit{supra} note 4 at p. 17.
\textsuperscript{841} \textit{Ibid.}
\textsuperscript{842} \textit{Ibid.}
John C. Coffee from Columbia Law School has noted that, that in the US, “the conventional wisdom has long been that companies with small market capitalizations are less likely to be sued in securities class actions”\textsuperscript{843}. Based on her examination of a sample of class actions consisting of all class action suits relating to the initial public offerings of computer or computer related companies in the first half of 1983, Janet Alexander further suggested that “actions were not pursued except where there had been a market loss of at least $20 millions”\textsuperscript{844}.

When the civil liability provisions came into force, many commentators viewed them as something of a “dead letter”\textsuperscript{845}. Commenting on the new legislation, some practitioners even suggested that “while the system marks a step forward for shareholders, the significant checks and safeguards within the system will make it challenging for plaintiffs to bring claims in some instances”\textsuperscript{846}. Despite the unpromising outlook of many commentators and practitioners, there have been a number of proceedings initiated under these statutory provisions since they came into force in Ontario, in Québec and in the other provinces\textsuperscript{847}. The negative outcome anticipated by many as to limitations seem not to have proven true\textsuperscript{848}. This may be explained in part by the fact that the new statutory remedy preserves plaintiffs’ common law and civil law rights\textsuperscript{849}.

\textsuperscript{845}Christopher C. Nicholls, supra note 4 at p. 17.
\textsuperscript{846}Janis P. Sarra and Adam C. Pritchard, supra note 608 at p. 12.
\textsuperscript{847}Marc-André Landry, Laing, Andréa et Ariane Bisaillon, " Recours collectif en matière de responsabilité sur les marchés secondaires – les enjeux selon une perspective pancanadienne ", in Repères, mai 2014, Droit civil en ligne (DCL), EYB2014DEV2091.
\textsuperscript{848}Marc-André Landry, Laing, Andréa et Ariane Bisaillon, supra note 847.
\textsuperscript{849}Ibid.
Deciding whether or not to combine claims in this way does, of course, involve a number of strategic considerations. First, it is not to forget that section 138.3 of the *Ontario Securities Act* states that the statutory right of action is available to an investor “without regard to whether the person or company relied on the misrepresentation”\(^{851}\). This being so, following certification of the action as a class proceeding, an investor suing under Part XXIII of the *Ontario Securities Act* will not be required to demonstrate detrimental reliance in order to be eligible for relief\(^{852}\). Moreover, under section 138.4(6) of the *Ontario Securities Act*, the defendants bear the burden of demonstrating that they exercised reasonable diligence\(^{853}\). As Poonam Puri mentioned, “in a negligent misrepresentation claim, conversely, the plaintiff bears the burden of demonstrating that the defendants conduct failed to meet the requisite standard of care”\(^{854}\). Therefore, plaintiffs’ counsel in a securities class action should prudently take into considerations the relative advantages and disadvantages of pursuing exclusively a common law or civil law claim or supplementing that claim with a statutory claim under the *Securities Act*\(^{855}\).

### 4. Class Action Regime

“A class action is a form of civil action where one or a few plaintiffs can sue a defendant or a number of defendants on behalf of a larger group of people who claim the same type of loss from the same defendant of group of defendants.”\(^{856}\)

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\(^{850}\) Marc-André Landry, Laing, Andréa et Ariane Bisaillon, *supra* note 847.

\(^{851}\) See: *Securities Act, supra* note 72 (S. 138.3)

\(^{852}\) Poonam Puri, *supra* note 1 at p. 56.

\(^{853}\) See: *Securities Act, supra* note 72 (S. 138.4(6))

\(^{854}\) Poonam Puri, *supra* note 1 at p. 56.

\(^{855}\) Stéphane Rousseau, *supra* note 687.

Compared to the United States, Canada is not equipped with a “multidistrict litigation” system to consolidate numerous cases against the same defendant against for the same claims. That being so, it is essential to well understand how this very particular procedural vehicle works.

Canadian class proceedings are governed by Canada’s unique constitutional arrangement. As a consequence, provincial courts have jurisdiction to hear class proceedings regarding civil actions and provincial governments have authority to legislate on the conduct of class proceedings that concern property and civil law. This structure has resulted in Canada’s current class proceedings being a patchwork of provincial class action statutes that are mostly similar but differ somewhat as to procedural rules. That being so, this fragmented structure does not allow the Canadian Federal Government and its courts to have authority to coordinate provincial actions. As a result, there is no supervisory court or multidistrict litigation panel in Canada to streamline putative class proceedings as in the United States.

“In Canada, a class action is a form of collective remedy that provides access to justice, judicial economy and the deterrence of anti-social behavior.”

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859 Ibid.
860 Catherine Piché and André Lespérance, supra note 858.
861 Ibid.
862 Stephen C. Yeazell, supra note 856.
In Ontario and for all the common law provinces, an action must be “certified” as a class action, a representative plaintiff must be appointed by the court, and common issues or questions of fact or law must be certified by a judge to be determined at trial before a case can proceed as a class action. This is done through a motion for certification. Being less rigorous than the one in the United States, the test for certification of a class action in Canada does not require that the representative plaintiff meet the prerequisites of numerosity and predominance. In addition, defendants are not exposed to excessive punitive damages and to jury trials as in the United States. For plaintiffs, class actions are seen as a tool to increase access to justice, as the costs of litigation are shared among a larger group, and the downside risk is limited as costs in unsuccessful cases are often underwritten by the plaintiffs’ law firm or a third party fund. For defendants, class actions are beneficial in that the result in the case binds all class members, preventing those class members from pursuing subsequent, separate cases.

Compared to the United States, the Canadian class action regime places the greatest procedural hurdle before the action commences, rather than assessing the claim during the pleadings process. Consequently, Canada has taken a relatively reserved approach to securities class actions and has yet to develop a class action bar as large and highly

864 Stephen C. Yeazell, supra note 856.
865 Ibid.
867 Ibid.
868 Stephen C. Yeazell, supra note 856.
869 Ibid.
specialized as that found in the United States. Securities legislation provides investors with a broad right to bring civil actions against an issuer. However, the high cost of litigation relative to the quantum of damages often make these actions impractical for retail investors. The introduction of class action legislation helps to overcome these barriers and makes securities litigation financially viable for a far wider class of investors. Thus, any discussion of the effectiveness of Canada’s private securities enforcement regime must also consider the efficacy of the class action system.

Although the procedure as well as the fundamentals elements of the class proceedings are relatively similar across all Canadian provinces, the province of Québec has some distinctive characteristics that are well worth considering. Indeed, among all Canadian jurisdictions, Québec’s procedure is unique in that it is plaintiff-oriented. It is considered more than just a set of procedural rules but a true measure of access to justice. In Québec, the bar for authorization is lower than in the Common Law jurisdictions and each case is subject to mandatory case management by a designated Superior court judge who ensure that the matter will proceed to authorization promptly. If Québec is distinct in the Canadian Common Law legal landscape, it is mostly because of its unique bilingual and

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872 Ibid.
873 Ibid.
874 Rachael Mulheron, *supra* note 870 at p. 34.
875 Ibid.
876 Yves Lauzon, *supra* note 866.
878 Ibid.
bimodal legal system forming the basis of the administration of justice under which civil matters are regulated by French heritage civil law.

This section discusses the development of Québec and Ontario’s class action regime since its inception in Canada. Once the history and mechanics of class action in Ontario and Québec well understood, the presentation of the most recent jurisprudence that has had a major impact on the securities class actions sector will take place to conclude this section.

4.1 Ontario’s Regime

Modeled on Rule 23 of the *United States Rules of Civil Procedure*, Ontario’s *Class Proceedings Act* came into force in 1993. Nonetheless, the 1982 Law Reform Commission of Ontario had major influence and generated the big majority of the policy used for interpreting the provisions of the *Class Proceedings Act*. As Janet Walker explained, these guiding principles were (1) the promotion of judicial efficiency and economy, (2) enhanced access to private litigation, and (3) the modification and deterrence of the wrongdoer’s behavior. Before the coming into force of the Ontario’s Class Proceedings Act, class actions in Ontario were prescribed by one rule: Rule 75 of the *Rules of Practice*. This rule allowed a representative plaintiff to initiate an action on behalf of

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883 Poonam Puri, *supra* note 1 at p. 38.
a class, thereby linking it, without the knowledge and consent of its absent members and without any judicial oversight to ensure their interests were considered:

“Where there are numerous persons having the same interest, one or more may sue or be sued or may be authorized by the court to defend on behalf of, or for the benefit of, all.”

This Rule, having been criticized since its coming into force, reached a turning point after the *Naken* decision. Indeed, it is when the Honourable Mr. Justice Estey, mentioned that the rule was “totally inadequate” for the task of managing a complex and unwieldy action involving a potential class of 2000 members, that the Ontario government finally decided to undertake the enormous task of building a comprehensive procedure for class actions. It is then in 1976 that the Attorney General formally referred the matter to the Ontario Law Reform Commission to develop recommendations for a class action procedure for Ontario. In a voluminous and noteworthy research work, the report, released in 1982, explored the numerous policy and practice challenges while recommending thoughtful options for a class procedure going forward. That report formed the first foundations of Ontario legislation on class action but also represented the foundational blueprint for eventual legislation in many other provinces.

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891 See: *G.M. (Canada) v Naken*, *supra* note 889 and Janet Walker, *supra* note 885.
However, Ontario has engaged in a different avenue by creating a legislation that more closely reflected the recommendations of the Ontario Attorney General’s Advisory Committee on Class Action Reform (AG’s Advisory Committee Report), which was established in 1989, with a report released in 1990.\textsuperscript{895} Indeed, it is mainly under the influence of that report, that the Ontario’s \textit{Class Proceedings Act} came into force in 1993.\textsuperscript{896} Although the new Act was largely influenced by the AG’s Advisory Committee Report, it is not to forget that recommendations and reports that took place in the years before its coming into force had also a major influence on its final result.\textsuperscript{897} To support the goals of the new legislation, and in recognition that the procedure would be of limited assistance if the plaintiff could not fund costly litigation, the Ontario’s government created the Class Proceedings Fund (CPF) by amendments to the Law Society Act.\textsuperscript{898} The Class Proceedings Fund is funded through a 10 per cent statutory levy on all awards in matters funded by it.\textsuperscript{899}

\textbf{4.1.1 The certification}

“The certification motion is intended to screen claims [...] at least in part to protect the defendant from being unjustifiably embroiled in complex and costly litigation.”\textsuperscript{900} In addition to requiring plaintiffs to obtain leave from the court to bring a secondary market statutory liability claim, they must also seek certification under the \textit{Class Proceedings Act}.\textsuperscript{901} Indeed, in Ontario, an action must be certified as a class action. A representative

\textsuperscript{895} Janet Walker, \textit{supra} note 885 at p. 24.  
\textsuperscript{896} Ibid.  
\textsuperscript{897} Ibid.  
\textsuperscript{898} Law Commission of Ontario, \textit{supra} note 892.  
\textsuperscript{899} Ibid.  
plaintiff must be appointed by the court, and common issues or questions of fact or law must be certified by a judge to be determined at trial before a case can proceed as a class action 902. This is done through a motion for certification 903.

It is important to understand that certification does not determine the merits of the case 904. It is rather a procedural matter aimed at screening cases that are not appropriate to be dealt with as a class proceeding 905. Judges hearing certification motions ensure that the representative plaintiff and the proposed class action meet the elements of the prescribed test: whether the claim: (i) discloses a cause of action; (ii) contains an identifiable class; (iii) proposes issues common to the class; (iv) is the preferable procedure for resolving the complaint; and (v) has an appropriate representative plaintiff 906.

The representative plaintiff must show it is not “plain and obvious” that no claim exists and there is “some basis in fact” to meet the remaining elements of the test 907. Nevertheless, where there is a conflict in either the factual or expert evidence, the court hearing the certification motion does not resolve that conflict; that is a task for the judge presiding over the trial 908. Consequently, the test for granting certification is a relatively easy one for plaintiffs to meet 909. Over the past few years, Canadian courts have taken a very permissive view of class actions and see them as an important component of enabling the public to

902 Commission de la réforme du droit d'Ontario, supra note 901.
903 Ibid.
905 Ibid.
907 Commission de la réforme du droit d'Ontario, supra note 901.
908 Ibid.
909 Ibid.
obtain access to justice in an economic and efficient way. Therefore, it has become more and more difficult to successfully oppose class certification in Ontario or in other common-law provinces.

Ontario is an “opt-out” jurisdiction, which means that persons who do not wish to be part of a certified class proceeding and be bound by its results must take active steps to opt out of the proceeding. Ontario permits non-residents of the province to be part of a class. The “opt out” nature of the regime therefore applies regardless of the province in which the class member resides. The British Columbia, Newfoundland, and New Brunswick class action legislation are opt-in regimes; the class is comprised of residents in the jurisdiction unless non-residents opt in to a class action. Class members residing in British Columbia, Newfoundland, and New Brunswick must then take steps to opt out of the class if they do not wish to be bound by the result. However, non-residents must opt in to participate in the class proceeding, meaning that out-of-province class members are not bound by the result if they do not actively choose to join the case.

Once an action is certified as a class proceeding, it proceeds to a common issues trial where a judge resolves the certified issues that apply to all class members. A common issues trial is procedurally similar to a “standards” case, including documentary and oral discovery.

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910 Commission de la réforme du droit d'Ontario, supra note 901.
911 Ibid.
913 Ibid.
915 Janet Walker, supra note 885 at p. 27.
916 Ibid.
917 Ibid.
obligations. The decision binds all members of the class. In many cases, individual trials are required after the resolution of common issues to determine the claims of or compensation owed to particular class members. In practice, most class proceedings settle before trial, although in light of the low bar for certification, many defendants are choosing to opt for a common issues trial on claims they view as lacking merit.

**4.1.2 Brief comparison with the American counterpart**

Canada and the United States have chosen comparable approaches to certify classes by requiring individuals to present a common question of law or fact and by ensuring that the class action is the preferable procedure in each particular case. By enacting legislation such as the Private Securities Litigation Reform Act of 1995, the American reforms focused on reducing “abusive litigation”. Instead of examining the substance of a claim during the certification process, these amendments generated procedural protection to filter out abusive and frivolous litigation at the pleading process. In the same vein, the Securities Litigation Uniform Standards Act of 1998 extended the Private Securities Litigation Reform Act’s provisions from federal court securities fraud suits to include state court securities fraud suits. Consequently, American law and jurisprudence has evolved in a way auspicious to achieving large and numerous securities class actions.

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918 Janet Walker, *supra* note 885 at p. 27.
919 *Ibid*.
920 Poonam Puri, *supra* note 1 at p. 39.
922 Poonam Puri, *supra* note 1 at p. 39.
924 *Private Securities Litigation Reform Act, supra* note 921.
926 Poonam Puri, *supra* note 1 at p. 39.
Compared to United States which has provided for class actions and secondary market liability since the 1930s, Canada’s legislation is quite recent and provinces have not yet recognized class actions as a fundamental element of Canada’s civil procedure regime.\(^{927}\) Despite the fact that Canada and the United States have adopted similar approaches to certification, the data on private enforcement show that Canada has much fewer securities class actions than the United States, even after appropriate deflators are taken into account.\(^{928}\) From a legislative perspective, this may be attributed to Canada’s emphasis on certification, which according to some experts, creates a barrier to entry before the class action can get under way and in some sense provides an incentive to litigate outside of Canada.\(^{929}\) In contrast, the U.S. focus on “abusive litigation” moves delays into the pleadings stage, enabling U.S. courts to establish the class more expeditiously.\(^{930}\)

Another important distinctions with the United States is that in Canada, the structure of the class proceedings requires prospective class counsel to produce a plan and to provide a workable method for structuring the proceedings.\(^{931}\) Consequently, the process of certification, is, in most cases, extremely litigious and competing firms challenge each other’s capacity to adequately manage the action.\(^{932}\) As a result, “protracted contests for carriage of the class action may add significant delays to the early stages of the securities class action process in Canada.”\(^{933}\) “When carriage of the class action is not contested, the

\(^{927}\) Pierre-Claude Lafond, supra note 877 at p. 24.

\(^{928}\) Janet Walker, supra note 885.

\(^{929}\) Pierre-Claude Lafond, supra note 877 at p. 26.

\(^{930}\) Ibid.

\(^{931}\) See: Fischer v. IG Investment Management, 2012 ONCA 47.

\(^{932}\) See: Smith v. Sino Forest Corp., 2012 ONSC 24 (Can.).

\(^{933}\) Poonam Puri, supra note 1 at p. 39.
court will grant leave and where it is satisfied the action is brought in good faith and there is a reasonable possibility of success”934. Thus, although class actions in Canada seem to develop with each passing year, the access of smaller investors to class action litigation is still problematic935.

According to Christopher C. Nicholls, liberal class action legislation is not enough without a corresponding relaxation in traditional restrictions against lawyers contingency fee arrangements936. As Nicholls noted, contingency fee arrangements were historically forbidden in Ontario and in most provinces. Indeed, such arrangements were contrary to the Solicitors Act937 as well as the governing body of the legal profession in the province of Ontario; the Code of Conduct of the Law Society of Upper Canada.938. Beeing recognized as a potential obstacle to access to justice, this restriction on contingency fee arrangements has been heavily criticized939. In 1988, several reports proposed allowing contingency fee arrangements notably in Ontario - a recommendation that was subsequently echoed by the 1996 Report to the Ontario Attorney General by the Civil Justice Review team940. Ultimately, the prohibitions were relaxed and the contingency fees have been permitted, in Ontario since 2002, and in other Canadian jurisdictions afterwards941.

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935 Poonam Puri, supra note 1 at p. 39.
936 Christopher C. Nicholls, supra note 4 at p. 37 par. 3.
937 Solicitors Act, R.S.O. 1990, c. S.15
938 Christopher C. Nicholls, supra note 4 at p. 37 par. 4.
939 Christopher C. Nicholls, supra note 4 at p. 37 par. 4.
941 Christopher C. Nicholls, supra note 4 at p. 37 par. 4.
Contributing to a rise in Canadian securities class actions, the combination of more accommodating class action legislation, fewer restrictive rules on lawyers’ contingency fees, and the new statutory civil liability provisions have had a considerable impact in the years that followed these big changes. Indeed, a study lead by the firm NERA shows clear indications that after the implementation of these changes, there have been a significant rise in the number of securities class actions that have been filled. However, this encouraging pattern is now being reversed by the drastic decline in the number of securities class actions filed over the past 3 years. In 2008, 2011 and 2014, the number of cases filed reached respectively 12, 15 and 13. In 2015, this number has fallen to 4. Last year, in 2017, Nera has counted only 6 securities class actions filed over the year. The reasons for this significant decline are complex in that a number of factors are involved. The last section of this chapter will attempt to provide answers and hypothesis to this current situation.

4.2 Québec’s Regime

As mentioned earlier, the French heritage has a major impact on the way in which the law is interpreted in Québec. However, although Québec's jurisdiction is civil law, the fact remains that the United States and the Common Law in general have a significant level of

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942 Christopher C. Nicholls, supra note 4 at p. 37 par. 4.
944 Ibid.
945 Ibid.
946 Ibid.
947 Bradley A. Heys and Robert Patton, supra note 943.
948 Pierre-Claude Lafond, supra note 877 at p. 32.
influence on how the Law is conceived\textsuperscript{949}. In 1978, Québec was the first province to adopt an opt-out class action regime inspired from Rule 23 of the \textit{Federal Rules of Civil Procedure in the United States}\textsuperscript{950}. Québec’s class actions rules are codified in the \textit{Code of Civil Procedure}\textsuperscript{951} - Chapter C-25.01 - (“CCP”) and the procedure is divided in three stages: 1) the authorization (certification) of the class action, 2) if authorization is granted, the trial on the merits and 3) the recovery\textsuperscript{952}.

\textbf{4.2.1 Authorization Criteria}

Québec is by far the Canadian province that has authorized the most class actions that have proceeded on the merits\textsuperscript{953}. One of them is the tobacco litigation in which $15.5 billion in damages were awarded against the tobacco companies\textsuperscript{954}. Another case is the Lac Mégantic rail disaster of 2014 that generated both class action and insolvency proceedings that were recently settled, certainly one of the largest mass tort cases in Canadian history\textsuperscript{955}.

Having no restriction on the nature of a class action that can be initiated, areas such as consumer-related matters, mass torts, securities, product liability, anti-trust and insurance cases are the most common in Québec’s landscape\textsuperscript{956}. For a class action to be authorized, the plaintiff must show that the prerequisites of Article 575 CCP are met:

\textsuperscript{949} Pierre-Claude Lafond, \textit{supra} note 877 at p. 32.
\textsuperscript{950} \textit{Federal Rules of Civil Procedure in the United States}, \textit{supra} note 881.
\textsuperscript{951} \textit{Code of Civil Procedure}, CQLR c C-25.01.
\textsuperscript{952} Pierre-Claude Lafond, \textit{supra} note 877 at p. 33.
\textsuperscript{953} Jean Saint-Onge and Myriam Brixi, “Québec’s distinctive class action regime” (2017), Lavery (blog), online: <www.lavery.ca/upload/pdf/saintongejean/Qu%C3%A9bec_s%20distinctive.pdf>.
\textsuperscript{954} See: \textit{Létourneau c. JTI-MacDonald Corp.}, 2015 QCCS 2382.
\textsuperscript{955} See : Montréal, Maine & Atlantique Canada Cie (Arrangement relatif à), 2015 QCCS 2706; Montreal, Maine & Atlantic City Canada Co. (Montreal, Maine & Atlantique Canada Cie) (Arrangement relatif à), 2015 QCCS 3235; Montréal, Maine & Atlantique Canada Cie (Arrangement relatif à), 2015 QCCS 3236.
\textsuperscript{956} Jean Saint-Onge and Myriam Brixi, \textit{supra} note 953.
575. The court authorizes the class action and appoints the class member it designates as representative plaintiff if it is of the opinion that

(1) the claims of the members of the class raise identical, similar or related issues of law or fact;

(2) the facts alleged appear to justify the conclusions sought;

(3) the composition of the class makes it difficult or impracticable to apply the rules for mandates to take part in judicial proceedings on behalf of others or for consolidation of proceedings; and

(4) the class member appointed as representative plaintiff is in a position to properly represent the class members.  

In the same spirit than the common law, the authorization stage in Québec is considered a filter mechanism whose primary objective is to eliminate frivolous class actions. It is essential to understand that at this early stage, the representative plaintiff’s burden is one of demonstration, not of proof. The judgment authorizing the class action does not dispose of the merits of the dispute as the defendant will be able to defend the case at the trial on the merits. Indeed, the representative plaintiff is only required to make out a defendable case in a context where the allegations of the motion are taken as true prima facie. The representative plaintiff must also show that the questions raised by the group are to the benefit of the putative class on a class-wide basis. That being said, a single common question is enough to justify a class action provided there exists no conflict within the proposed class. Québec courts are relatively flexible when determining if a class

957 Code of Civil Procedure, supra note 951 (S. 575).
958 Jean Saint-Onge and Myriam Brixi, supra note 953.
959 Ibid.
960 Pierre-Claude Lafond, supra note 877 at p. 34.
961 Marc-André Landry, Laing, Andréa et Ariane Bisaillon, supra note 847.
962 Ibid.
963 Ibid.
action is preferable to obtaining individual mandates or a consolidation of actions as well as the ability of the representative plaintiff to properly represent the class members\textsuperscript{964}.

As illustrated by a series of decisions of the Supreme Court of Canada\textsuperscript{965}, Québec courts have adopted a very flexible approach in the analysis of the authorization criteria\textsuperscript{966}. Indeed, these decisions have confirmed the relatively low authorization threshold as compared to the other Canadian jurisdictions\textsuperscript{967}. Provided these four requirements are met, the court has no discretion and must authorize the proposed class action provided that the rule of proportionality is observed\textsuperscript{968}:

\textbf{18.} The parties to a proceeding must observe the principle of proportionality and ensure that their actions, their pleadings, including their choice of an oral or a written defence, and the means of proof they use are proportionate, in terms of the cost and time involved, to the nature and complexity of the matter and the purpose of the application.

Judges must likewise observe the principle of proportionality in managing the proceedings they are assigned, regardless of the stage at which they intervene. They must ensure that the measures and acts they order or authorize are in keeping with the same principle, while having regard to the proper administration of justice\textsuperscript{969}.

This rule stipulates that the parties must ensure that the proceedings they choose are proportionate in terms of the costs and time required, to the nature and ultimate purpose of the action or application and complexity of the dispute\textsuperscript{970}. However, this does not constitute

\textsuperscript{964} Marc-André Landry, Laing, Andrée et Ariane Bisaillon, \textit{supra} note 847.
\textsuperscript{966} Jean Saint-Onge and Myriam Brixi, \textit{supra} note 953.
\textsuperscript{967} \textit{Ibid}.
\textsuperscript{968} \textit{Ibid}.
\textsuperscript{969} \textit{Code of Civil Procedure, supra} note 951 (S. 19).
\textsuperscript{970} Pierre-Claude Lafond, \textit{supra} note 877 at p. 34.
a stand-alone requirement but rather a principle that must be considered in the assessment of each of the four criteria of article 575 CCP. 971

Unlike the Common Law provinces, in Québec, Defendants do not have the possibility of filing a written contestation - statement of defense - to the motion for authorization 972. Indeed, the motion can only be contested orally 973. Nevertheless, the judge has a discretionary power to allow relevant evidence to be submitted 974. Hence, as the procedural process does not allow the defendant opposing the authorization to file affidavits, documentary evidence or expert reports unless leave is granted by the court, the authorization is analyzed on the basis of the allegations of the motion 975.

4.2.2 The new Code of Civil Procedure

On January 1, 2016, the new Code of Civil Procedure came into force and brought significant changes to the rules governing class actions in Québec. This section briefly presents some of the most significant changes.

4.2.2.1 Asymmetrical right of appeal

Under the former Article 1010 CCP, the defendant had no right to appeal the decision of a judgment authorizing a class action but the plaintiff had the possibility to grant an appeal

971 See: Vivendi Canada Inc v. Dell’Anniello, supra note 965.
972 Jean Saint-Onge and Myriam Brix, supra note 953.
973 Ibid.
974 Ibid.
975 Ibid.
as of right of a judgment disallowing the authorization\textsuperscript{976}. This article was considered among the defense bar as an infringement of the principles of procedural fairness\textsuperscript{977}:

1010. The judgment dismissing the motion is subject to appeal pleno jure by the applicant or, by leave of a judge of the Court of Appeal, by a member of the group on behalf of which the motion had been presented. The appeal is heard and decided by preference.

The judgment granting the motion and authorizing the exercise of the recourse is without appeal\textsuperscript{978}.

This conjuncture has now been resolved with the new CCP who made significant changes to the former Article 1010 CCP. Indeed, under the new Article 578, defendants now have the right to seek leave to appeal a judgment granting the authorization:

578. A judgment authorizing a class action may be appealed only with leave of a judge of the Court of Appeal. A judgment denying authorization may be appealed as of right by the applicant or, with leave of a judge of the Court of Appeal, by a member of the class on whose behalf the application for authorization was filed.

The appeal is heard and decided by preference\textsuperscript{979}.

Although there is little case law about Article 578 CCP, it is nonetheless possible to trace a certain tangent that has been established over the decisions rendered by the Court of Appeal\textsuperscript{980}. Indeed, in each of these cases, Counsel have been invited to submit a brief before

\textsuperscript{976} Vincent De l’Étoile and Marion, Benoît, "Récents développements en droit de l'action collective au Québec" dans Service de la formation continue du Barreau du Québec, ed, Colloque national sur l'action collective -Développements récents au Québec, au Canada et aux États-Unis (Montréal : Yvon Blais, 2016).

\textsuperscript{977}Ibid.

\textsuperscript{978} See: Code of Civil Procedure, CQLR c C-25 (S. 1010).

\textsuperscript{979} Code of Civil Procedure, supra note 951 (S. 578).

\textsuperscript{980} Jean Saint-Onge and Myriam Brix, supra note 953.
a special panel of three judges as to the criteria that should guide the Court of Appeal in allowing leave\(^{981}\). The first decisions of the Court of Appeal have adopted a quite restrictive approach by limiting the right of appeal of the defendants considering that the judgment of the Superior court would not have caused serious injustice if not appealed\(^{982}\). It will be interesting to follow the evolution of the interpretation that the courts will take over the next few years.

4.2.2.2 Standing to institute a class action

The new CCP has modified the rule governing standing to file a class action or be part of a class which, for corporations, was limited to companies having less than 50 employees:

571. A class action is a procedural means enabling a person who is a member of a class of persons to sue, without a mandate, on behalf of all the members of the class and to represent the class.

In addition to natural persons, legal persons established for a private interest, partnerships and associations or other groups not endowed with juridical personality may be members of the class.

A legal person established for a private interest, a partnership or an association or another group not endowed with juridical personality may, even without being a member of a class, ask to represent the class if the director, partner or member designated by that entity is a member of the class on behalf of which the entity is seeking to institute a class action, and the designee’s interest is related to the purposes for which the entity was constituted\(^{983}\).

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\(^{981}\) Karim Reno, "Sauf circonstances exceptionnelles, les jugements interlocutoires rendus avant l'audition de la demande d'autorisation d'une action collective ne sont pas appelables" (August 30, 2016), À bon droit (blogue), en ligne : <http://www.abondroit.com/2016/08/sauf-circonstances-exceptionnelles-les.html>.

\(^{982}\) See: Valeant Pharmaceuticals International Inc. c. Catucci, 2016 QCCA 1349.

\(^{983}\) Code of Civil Procedure, supra note 951 (S. 571).
There was no longer any justification for this rule which had been introduced in 1978, in a context where class actions were considered to be a procedural tool designed for the sole benefit of individuals and consumers\textsuperscript{984}. This amendment, in addition to broadening access to justice and promoting the principle of judicial economy, harmonizes the rules with that of the other Canadian jurisdictions\textsuperscript{985}. It also avoids situations where companies which did not qualify under the former rule will no longer have to exercise their rights and ask to be included in class actions of the same nature pending in other Canadian jurisdictions as they can now have standing to initiate a class action and be member of a class\textsuperscript{986}.

### 4.2.2.3 Multijurisdictional class actions

In Canada, the filing of multijurisdictional class actions is quite common\textsuperscript{987}. However, this increase raises issues of \textit{lis pendens} and recognition of judgments from other Canadian jurisdictions\textsuperscript{988}. Indeed, the filing of multiple class actions in various jurisdictions are increasingly difficult considering the fact that the law and particular issues vary from one jurisdiction to another\textsuperscript{989}. Although a protocol has been implemented to streamline such proceedings, Canada does not have the equivalent of a MDL like in the US\textsuperscript{990}. Multidistrict

\textsuperscript{984} Yves Lauzon, \textit{Le recours collectif} (Cowansville : Yvon Blais, 2001).

\textsuperscript{985} Jean Saint-Onge and Myriam Brixi, \textit{supra} note 953.


\textsuperscript{988} Jean Saint-Onge and Myriam Brixi, \textit{supra} note 953 at p. 4.

\textsuperscript{989} \textit{Ibid}.

\textsuperscript{990} \textit{Ibid}. 


litigation, (MDL) is a procedure used by federal courts of the United States to consolidate civil cases, involving similar issues\(^{991}\).

Article 577 CCP reinforces the principle that Québec courts are the custodians of the interests of class members and must consider the best interest of Québec residents before granting the discontinuance of a motion for authorization to allow a class action introduced in another Canadian jurisdiction which includes Québec residents to proceed or allowing the Québec class action to be stayed\(^{992}\).

577. The court cannot refuse to authorize a class action on the sole ground that the class members are part of a multi-jurisdictional class action already under way outside Québec.

If asked to decline jurisdiction, to stay an application for authorization to institute a class action or to stay a class action, the court is required to have regard for the protection of the rights and interests of Québec residents.

If a multi-jurisdictional class action has been instituted outside Québec, the court, in order to protect the rights and interests of class members resident in Québec, may disallow the discontinuance of an application for authorization, or authorize another plaintiff or representative plaintiff to institute a class action involving the same subject matter and the same class if it is convinced that the class members’ interests would thus be better served\(^{993}\).

This new provision codifies the existing case law on the issue of multijurisdictional class actions. It is not unique to Québec as other provinces, namely Alberta and Saskatchewan have adopted similar rules\(^{994}\).

\(^{991}\) Jean Saint-Onge and Myriam Brixi, *supra* note 953 at p. 4.

\(^{992}\) *Ibid.*

\(^{993}\) *Code of Civil Procedure, supra* note 951 (S. 577).

\(^{994}\) See: *Class Proceedings Act, SA 2003, c C-16.5; The Class Actions Act, SS 2001, c C-12.01.*
Class proceedings in Québec introduced by the legislator in 1978 are clearly plaintiff friendly and designed to provide access to justice primarily to individuals and consumer groups soliciting collective redress and behavior modification\textsuperscript{995}. The new CCP only enhances a regime that has worked well over the years and is considered to be efficient in the administration of justice\textsuperscript{996}. The new provisions also ensure some uniformity with the procedural rules applied in the common law jurisdictions and make Québec a more attractive jurisdiction in the context of multijurisdictional and cross-border class actions\textsuperscript{997}. There is no doubt that class action activity will not only be maintained but will significantly increase in the years ahead, bringing about quite interesting challenges for the defense Bar in opposing class actions in Québec\textsuperscript{998}.

5. Empirical Data on Securities Class Action Litigation in Canada

Review of the empirical data on securities class action litigation highlights several distinct characteristics in Canada’s private enforcement regime. Since the introduction of secondary market statutory liability in 2005, the number of new filings and ongoing cases has steadily increased to then underwent a progressive fall which has spread over the last 5 years.\textsuperscript{999} This decline, which appeared to be only a temporary phase, continues today and seems to be representative of the current trend in the Canadian landscape\textsuperscript{1000}. Many factors, as well as several circumstances, may provide a variety of explanations for this situation\textsuperscript{1001}.

\textsuperscript{996} Nicole Duval Hesler, \textit{supra} note 987.
\textsuperscript{997} Jean Saint-Onge and Myriam Brixi, \textit{supra} note 953 at p. 8.
\textsuperscript{998} \textit{Ibid}.
\textsuperscript{999} See: Bradley A. Heys and Robert Patton, \textit{supra} note 943.
\textsuperscript{1000} \textit{Ibid}.
\textsuperscript{1001} William E. White, Kurt Wolfe, Usman M. Sheikh, Heyla Vettyvel and Alex Zavaglia, \textit{supra} note 198.
However, the current Canadian context cannot be studied in a vacuum and must be analyzed as a whole in order to make a valid judgment about its effectiveness. This section presents a brief portrait of the Canadian securities class actions current situation and highlight the most recent trends in the country.

5.1 First Observation: A fall that persists

As Bradley A. Heys and Robert Patton from NERA noted in their 2017 annual report, filings of Canadian securities class actions more than doubled in 2016 compared to 2015 but is still below the pace observed from 2010 through 2014\(^{1002}\). In 2017, only six new Canadian securities class actions were filed\(^{1003}\). Taking the past three years together, the average rate of filings has now fallen to about half that of the preceding seven years\(^{1004}\).

This recent slower pace of filings changes the upward trend following the introduction of secondary market civil liability at the end of 2005\(^{1005}\). While practitioners once anticipated that Canada would become a preferred venue for shareholder class actions, the last two years may indicate otherwise\(^{1006}\). Experts are uncertain whether this recent slowdown is being driven by “higher expected costs and lower expected payoffs for class counsel, or by fewer potential claims, or whether it is merely a transient phenomenon"\(^{1007}\).

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\(^{1002}\) Bradley A. Heys and Robert Patton, *supra* note 943.

\(^{1003}\) Ibid.

\(^{1004}\) Ibid.

\(^{1005}\) Poonam Puri, *supra* note 1 at p. 53.

\(^{1006}\) William E. White, Kurt Wolfe, Usman M. Sheikh, Heyla Vettyvel and Alex Zavaglia, *supra* note 198.

\(^{1007}\) Bradley A. Heys and Robert Patton, *supra* note 943.
Bradley A. Heys and Robert Patton remarked that this recent slowdown in Canadian filings comes even as US filings continue to trend upward\textsuperscript{1008}. Indeed, the Canadian situation contrasts with the trend in the US, where the two past years witnessed the highest number of securities class action filings\textsuperscript{1009}. Actually, filings of US class actions alleging violations of \textit{Rule 10b-5}\textsuperscript{1010}, Section 11, and/or Section 12 have grown in each of the last four years and are at their highest level since 2008\textsuperscript{1011}.

An important point that some experts raised is the fact that the much larger number of annual filings in the US is partly a function of the larger number of listed companies, it is also the case that “a company listed on one of the major US exchanges is approximately 10 times more likely to be targeted by a securities class action than is a company listed on the Toronto Stock Exchange (TSX)”\textsuperscript{1012}. Indeed, if publicly listed companies in Canada were targeted by domestic class actions with the same frequency as are their US counterparts, we might expect more than 50 Canadian securities class action filings per year, as compared to the six filings actually observed in 2017\textsuperscript{1013}.

Given this current situation, Canadian experts commented that it is unclear whether the slower rate of filings in Canada is merely a transient phenomenon as many practitioners and academics claimed\textsuperscript{1014}. While the next economic downturn may well give rise to a

\textsuperscript{1008} Bradley A. Heys and Robert Patton, \textit{supra} note 943.
\textsuperscript{1009} \textit{Ibid.}
\textsuperscript{1010} See: SEC Rule 10b-5, 17 C.F.R. 240.10b-5
\textsuperscript{1011} Bradley A. Heys and Robert Patton, \textit{supra} note 943.
\textsuperscript{1012} \textit{Ibid.}
\textsuperscript{1013} Bradley A. Heys and Robert Patton, \textit{supra} note 943.
\textsuperscript{1014} Poonam Puri, \textit{supra} note 1 at p. 53.
higher rate of filings, Bradley A. Heys and Robert Patton hold the view that it now appears safe to say that the current slower pace is the new norm, rather than simply a temporary calmness\(^{1015}\).

### 5.2 Second Observation: Revealing Numbers

From all the six new cases filed in 2017, they were all filed in Ontario\(^{1016}\). Historically, approximately 78% of all securities class actions from 1997 have involved a filing in Ontario and 27% have involved a filing in Québec\(^{1017}\). Only 12% of all cases have not involved a filing in either Ontario or Québec - a majority of these were filed in Alberta\(^{1018}\). Approximately 26% of all cases involve claims filed in more than one province\(^{1019}\). This distribution of filings across provinces has not changed substantially over time\(^{1020}\).

With respect to affected sectors, the six new cases filed in 2017 involved companies in several industries, including Health Technology, Technology Services, Finance, and Non-Energy Minerals\(^{1021}\). Two of the six new cases filed in 2017 involve companies in the Non-Energy Minerals (mining) sector, and two involve companies in the Finance sector\(^{1022}\). Heys and Patton remarked that from 2012 to 2017, approximately 45% of all cases have involved companies in the Energy and Non-Energy Minerals sectors, compared to approximately 31% of cases filed in the period from 2008 to 2011, and 21% of cases filed

\(^{1015}\) Bradley A. Heys and Robert Patton, supra note 943.  
\(^{1016}\) Ibid.  
\(^{1017}\) Ibid.  
\(^{1018}\) Ibid.  
\(^{1019}\) Ibid.  
\(^{1020}\) Ibid.  
\(^{1021}\) Bradley A. Heys and Robert Patton, supra note 943.  
\(^{1022}\) Ibid.
between 1997 and 2007. The proportion of new cases involving companies in the Finance sector has declined in the last six years; approximately 11% of new filings between 2012 and 2017 involved an issuer in the financial services industry, compared to 29% of new filings in the period from 2008 to 2011, and 28% in the period from 1997 to 2007.

Of the six Canadian securities class actions resolved during 2017, four were resolved by way of a settlement, which is twice the number that settled in 2016. Indeed, although six Canadian securities class actions were resolved during 2016, only two of these were resolved by way of a settlement, the lowest number since 2011. Four of the six cases filed in 2017 involve secondary market civil liability claims filed under the provincial securities acts - “Statutory Secondary Market.”

Since the “Statutory Secondary Market” provisions began coming into force 12 years ago, a total of 81 such cases have been filed. Of these 81 cases, 32 (40%) remained unresolved at the end of 2017. Ten of these cases (12%) have been denied leave and/or certification and four have been discontinued. Including partial settlements in some of the still active cases, defendants have agreed to pay a total of more than $647 million to settle claims in 35 cases. A total of 144 Canadian securities class actions filed over the 21-

1023 Bradley A. Heys and Robert Patton, supra note 943.
1024 Ibid.
1025 Ibid.
1026 Ibid.
1027 Ibid.
1028 Ibid.
1029 Ibid.
1030 Ibid.
year period from 1997 to 2017, of which 93 (65%) have reached some resolution. The 51 active securities cases at the end of 2017 together represent more than $27 billion in stated claims.

5.3 Third Observation: Statutory Secondary Market Cases

As mentioned in the precedent section, four of the six new cases filed in 2017 were Statutory Secondary Market cases, bringing the total number of such cases filed to 81 as of the end of 2017. These four Statutory Secondary Market cases involve issuers with market capitalizations ranging from $15 million to more than $18 billion. Three cases involve companies with market capitalizations greater than $1 billion. The number of such cases filed in 2017 is fewer than the seven filed in 2016. Indeed, the seven cases filed in 2016 represented a reversal of the significant drop observed in 2015, which saw only four new Statutory Secondary Market cases filed compared to 11 in 2014. From 2008 through 2014, this total of four new filings in 2017 is also the lowest from all year. During that period, nearly five new Statutory Secondary Market cases were filed on average per year which is lower than the average of approximately nine new filings per year over the seven-year period from 2008 through 2014.

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1031 Bradley A. Heys and Robert Patton, supra note 943.
1032 Ibid.
1033 Ibid.
1034 Ibid.
1035 Ibid.
1036 Ibid.
1037 Ibid.
1038 Ibid.
As Bradley A. Heys and Robert Patton have showed in their report, the median settlement in 2017 was $17.8 million—less than the $27.1 million observed in 2016, but greater than in any year from 2012 to 2015. The median settlement from 1997 to 2017 is $13.0 millions. For more recent cases, from 2007 through 2017, the median settlement is $13.4 millions. There have now been 35 settlements of Statutory Secondary Market cases in Canada. The average settlement in these 35 cases is $14.0 millions, and the median is $9.6 millions. The average settlement as a percentage of claimed compensatory damages in these cases is 11.7%, and the median is 7.8%.

5.4 Fourth Observation: An uncertain future?

In light of the figures and statistics presented, it is readily to conclude that only a handful of Canadian securities class actions were filed in 2017. In fact, this trend is not new since both 2015 and 2016 were below the levels observed over the preceding five years. This is in stark contrast with the US, where securities class actions filings have increased in each of the last four years. One possible interpretation of the trend observed in Canada over the past two years is that a slower pace of filings is the new norm.
As Heys and Patton recalled, when the provisions for civil liability for secondary market misrepresentations were first introduced into the provincial securities acts, some commentators expressed concern about a potential flood of new securities class actions and US-style litigation. After more than a decade since these amendments came into force, this concern does not seem to have been borne out.

6. Private Enforcement’s overview

Today, a little more than a decade after the introduction of secondary market statutory liability, it is fair to say that since its implementation, views on that new remedy have been divided. Indeed, even before its arrival in Canada, many apprehended its implementation by fear of reproducing the American experience and today, its results are compared to those of the United States and criticized for not being effective and aggressive enough. However, although the new provisions came into effect slowly and took a lot of efforts and coordination to get fully integrate into the Canadian system, it has shown great results over the past few years and investors can now pursue far more claims than it would have been possible under the common law.

Although it has evolved very strongly following its implementation and has suffered a significant decline in the past five years, securities class action litigation in Canada have always occurred far less frequently than in the United States. This appears to be the

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1048 Bradley A. Heys and Robert Patton, supra note 943.
1049 Ibid.
1050 Wendy Berman, Kate Byers and Stephanie Voudouris, supra note 555.
1051 Ibid.
1052 Stéphane Rousseau, supra note 24 at p. 16.
1053 Bradley A. Heys and Robert Patton, supra note 943.
result of multiple factors. First, Canadian capital markets are approximately one-tenth the size of American markets. Second, secondary market statutory liability has been part of the U.S. securities landscape for over ninety years, whereas it has existed in Canada for only twelve years and is still developing sufficient jurisprudence to guide its implementation. Also, elements of the Canadian regime may limit the number of cases pursued under the secondary market civil liability provision. The limits on statutory liability and the double leave requirement for certifying a secondary market statutory liability class action serve as procedural gatekeepers for private enforcement. Consequently, the frequency and range of defendants appearing in private securities actions appears to be limited.

Launching a securities class action in Canada is by no means an easy task; a series of factors can make it very complex and grueling. The speed at which securities transactions and its associated litigation occur requires enormous resources and devotion. The issue of costs for cases brought in Québec as well as in Ontario can be daunting. On the merits, the courts will generally grant the corporation reasonably wide latitude in relation to its decision-making. Nonetheless, class actions have increased

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1054 Christopher C. Nicholls, supra note 4 at p. 14.
1055 Ibid.
1056 Poonam Puri, supra note 1.
1057 Ibid.
1058 Ibid.
1059 See: Christopher C. Nicholls, supra note 4 at p. 16.
1060 Pierre Lortie, supra note 100 at p. 7.
1061 Poonam Puri, supra note 1.
1062 Ibid.
exposure for securities issuers and have also improved both the conduct of issuers and a lot of the shareholders wronged by improper activities\textsuperscript{1063}.

**CHAPTER 5: Conclusion**

This research has reflected the Canadian current state of public and private enforcement by highlighting their major achievements over the past few years. While going through historical aspects, statistics as well as various approaches, a conclusion following the results obtained over this research work has been drawn: Public and Private enforcement are often placed in antagonistic situations and compared competitively. This research does not pretend to be a solution to the issues raised in this work. Its objective is rather to establish a link between private and public enforcement to define their respective objectives in 2018. In light of the results analyzed in previous chapters, this conclusion presents the key elements that emerge from the investigation conducted during this research by going through methods and approaches used to compare public and private enforcement.

In the 1920s, only one Canadian household in fifteen owned stock\textsuperscript{1064}. Today, one in three does\textsuperscript{1065}. If the past trend is any evidence of the future movement, this percentage is bound to increase in the years to come\textsuperscript{1066}. The purpose of stock investment has also changed

\begin{footnotesize}
\textsuperscript{1063} Poonam Puri, *supra* note 1.
\textsuperscript{1064} Luigi Zingales, *supra* note 53 at p. 1.
\textsuperscript{1065} Ibid.
\textsuperscript{1066} Ibid
\end{footnotesize}
After starting as a speculative activity, stock investing has become one of the major means of asset accumulation to finance future retirement needs. Following these developments, the average Canadian is not only more exposed to stock market vacillations, he is also asked to make more financial choices that will impact his future life. By providing access to capital for business and governments, and investment opportunities for investors, Canadian securities industry plays a vital role in Canada’s economy. The effective regulation of these markets is essential; lack of confidence in capital markets can have severe economic repercussions as participants withdraw from them.

The value of public enforcement of securities law are evaluated for the development of stock markets around the world. Assessing the efficiency of public and private enforcement correctly has significant implications for the understanding of what strengthens financial markets. To understand how financial markets deepen and broaden, the value of public and private enforcement is a key issue. Indeed, strong enforcement may attract more risk-averse investors, enhance the credibility of capital markets and increase valuations. In recent years, researches in finance have focused on

1067 Luigi Zingales, supra note 53 at p. 1.
1068 Ibid.
1069 Ibid.
1070 Stéphane Rousseau, supra note 24 at p. 2.
1071 Ibid.
1072 Luigi Zingales, supra note 53 at p. 2.
1073 Ibid
1074 Howell E. Jackson & Mark J. Roe, supra note 5.
1075 Ibid.
how securities laws work, concluding that private enforcement via private lawsuits among contracting parties works best and how public enforcement is working poorly\textsuperscript{1076}.

Following this trend, the World Bank, an international financial institution that provides loans to countries of the world for capital projects, has recently dismissed public enforcement of securities laws as being unimportant, while seeing private enforcement as central\textsuperscript{1077}. Indeed, the financial institution, whose head office is situated in United States, has adopted this switch in seeking to strengthen financial markets and propel economic growth\textsuperscript{1078}. Several American experts have highlighted the significance of evaluating the importance of private enforcement versus public enforcement of securities obligations that protect investors\textsuperscript{1079}. From our perspective, this point of view underestimates the extent to which robust public enforcement is associated with capital market development\textsuperscript{1080}. Canadian as well as U.K. experts have found important weaknesses when analyzing private enforcement mechanisms prevailing in countries like United States\textsuperscript{1081}. Structural elements such as dispersed ownership, to name but a few, can make “collective private remedies weak and put authority in the lawyers’ hands, an authority that is not relentlessly used in the interest of outside investors”\textsuperscript{1082}.

\begin{footnotesize}
\textsuperscript{1076} Howell E. Jackson & Mark J. Roe, supra note 5.
\textsuperscript{1077} Ibid at p. 4.
\textsuperscript{1078} Ibid.
\textsuperscript{1079} Ibid at p.5.
\textsuperscript{1080} Howell E. Jackson & Mark J. Roe, supra note 5.
\textsuperscript{1082} Howell E. Jackson & Mark J. Roe, supra note 5 at p. 34.
\end{footnotesize}
Having adopted a completely different approach than the one of the United States, UK, with an important securities market, relies very little on private litigation and much on informal public enforcement\(^{1083}\). U.K. financial works have also revealed a robust relationship between the intensity of public enforcement and the size of a country’s capital markets\(^{1084}\). Supporting the view that public regulation plays an important role in setting the institutional foundations for securities markets, the U.K. example should be taken into account when assessing the Canadian context\(^{1085}\).

However, the value of private remedies in Canada had already been raised in the past\(^{1086}\). Indeed, in the 1970s, major revisions to Canadian corporate law had argued persuasively for the value of a self-enforcing model of corporate law. It has been suggested that the infrequency of private enforcement in Canada could be accounted for by a “general aversion to litigation in Canada”\(^{1087}\). Could this “societal differences” between Canada and the U.S. be a plausible explanation? According to Canadian legislators and judges who have little faith in this supposed congenital Canadian “litigation aversion”, this sort of national character argument is problematic\(^{1088}\). Christopher C. Nicholls noted that if Canadians were in fact culturally “averse to litigation” there would be little need for Canadian legislators and courts to erect so many formal barriers to investor litigation\(^{1089}\).

In the absence of tight restrictions, strike suits by Canadian investors could become an


\(^{1084}\) *Ibid.*

\(^{1085}\) Howell E. Jackson & Mark J. Roe, *supra* note 5 at p. 35.

\(^{1086}\) *Ibid.*

\(^{1087}\) Christopher C. Nicholls, *supra* note 4 at p. 18.


\(^{1089}\) Christopher C. Nicholls, *supra* note 4 at p. 18.
unmanageable burden on the court system and the Canadian capital markets. Considering all this, supposed Canadian “aversion to litigation” is thus an unlikely explanation for the scarcity of Canadian civil enforcement actions.

In order to more thoroughly understand the similarities and differences between Canadian and U.S. securities law enforcement we refer to Howell Jackson who compared budget, staffing and data on enforcement activity. Surprisingly, when adjusted for population and the implicit price deflator considered, Howell Jackson found that the levels of Canadian staffing and budget are very close to that of the U.S. In some cases, Jackson noted that Canadian levels may be even more intensive. He observed that Canadian regulatory budgets per staff member are lower than their counterparts in the U.S. The U.S. counterparts had regulatory budgets that were approximately 60% higher. However, increasing budgets does not necessarily imply that there would be an increase in number of enforcement personnel. Jackson also noted that it was slightly more difficult to draw conclusions with respect to levels of enforcement activity. According to him, this was due to many possible methods of comparison, such as the number of prosecutions, total monetary fines, levels of market capitalization. He observed that despite some fluctuations in Canadian enforcement activity in the past few years, there has been a general

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1090 H. Jackson, supra note 1088.
1091 Christopher C. Nicholls, supra note 4 at p. 18.
1092 See: Howell E. Jackson & Mark J. Roe, supra note 5.
1093 Ibid.
1094 Ibid.
1095 Ibid.
1096 Ibid.
1097 Howell E. Jackson & Mark J. Roe, supra note 5 at p. 31
1098 Ibid.
1099 Ibid at p. 24.
upward trend. To this day, it is not clear whether this upward trend is permanent or merely transitory and Jackson’s researches suggested that further research might be required. However, one particularly important and clear observation that he did was that the U.S. had a significantly higher level of private enforcement.

Although there have been some U.S. successes in enforcement, this should not cause Canada to imitate U.S. enforcement approaches without regard to the unique circumstances and characteristics of Canadian capital markets. Transplantation of a legal system without regard to local culture and norms will likely fail. Thus, not only is a straight transplantation often not desirable, it may be impossible. That being said, the relative infrequency of public enforcement actions cannot be explained by the existence of a correspondingly more robust level of Canadian private enforcement. In fact, both public and private securities law enforcement have been less vigorous in Canada than in the U.S.

Howell Jackson remarked that "neither the public enforcement measures nor the private enforcement variables predict several intermediate outcomes associated with the development of strong capital markets, such as stock market efficiency or other more technical measures of stock market performance." Indeed, in his report, Jackson did not

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1100 Howell E. Jackson & Mark J. Roe, supra note 5 at p. 31
1101 Ibid.
1102 Ibid at p. 25.
1103 Poonam Puri, supra note 1.
1104 Ibid.
1105 Ibid.
1106 Poonam Puri, supra note 1.
1107 Ibid.
1108 Howell E. Jackson & Mark J. Roe, supra note 5 at p. 38.
see any data showing that public enforcement is more important than private enforcement1109. "Further improving how we measure enforcement may yield a better understanding of which outcomes public enforcement most affects, which one private enforcement influences, which channels for each are vital, and how the two main enforcement mechanisms interact"1110. Following Jackson’s results, it is evident to observe that instead of pitting public and private enforcement against each other, it is much better advised to understand and to assess them well first to then be able to make them interact together to create efficient, reasonable and intelligent policies.

That being said, it is essential to acknowledge that both public and private enforcement mechanisms could have significant weaknesses and powerful advantages1111. Beginning with the defects, Howell E. Jackson and Mark J. Roe have noted that a public enforcement system is "degraded because public actors have mixed and often weak incentives to do their jobs well and because they often suffer from poor information of both general market and specific firm conditions"1112. However, a private enforcement system is subject to "collective action and free rider effects among dispersed investors, to slow and inept judiciaries, to lawyers’ rent–seeking, and to the potential inability of private enforcement to visit severe monetary penalties on wrongdoers"1113. On the positive side, Jackson and Roe have noticed that "public enforcement could be run by public–regarding policymakers and invoke sharp criminal, financial, and reputational penalties that deter egregious

1109 Howell E. Jackson & Mark J. Roe, supra note 5 at p. 38.
1110 Ibid.
1111 Ibid.
1112 Ibid.
1113 Ibid.
wrongdoing, while private enforcement actions could be brought by well-informed actors with well-aligned incentives”1114. These positive and negative points only represent a meager sample of the elements that can be considered in the assessment of public and private enforcement1115. However, the work of Howell E. Jackson and Mark J. Roe, although having been realized in the United States, capture the fundamental essence of the constant struggle between public and private enforcement not only nationally but internationally as well1116.

Securities law is an area of law that is constantly in motion and the speed at which it evolves can be disconcerting. This being so, it is essential to take a step back before positioning oneself on the recent changes. After covering all these aspects and analyzed the evolution of the most recent developments, it is striking to conclude that some cautionary advice is needed. The first lesson to be learned is to be very careful when comparing two systems/jurisdictions together1117. Throughout this research, it has been pointed out on several occasions that comparing Canada and the United States, especially with respect to enforcement, must be done in a very conscientious way since many factors and components must be taken into consideration1118. In so doing, wrongly accusations and unfounded criticisms can be avoided1119.

Although many factors and several comparative studies indicate that both public and private enforcement are decreasing and not aggressive enough, it is clear, in light of

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1114 Howell E. Jackson & Mark J. Roe, supra note 5 at p. 38.
1115 Janis P. Sarra and Adam C. Pritchard, supra note 608.
1116 Ibid.
1117 Janis P. Sarra and Adam C. Pritchard, supra note 608 at p. 25.
1118 See: Poonam Puri, supra note 1.
1119 Ibid.
what has been shown in this paper, that Canada's situation is far from being alarming\textsuperscript{1120}. Indeed, it must be understood that despite the number of securities class actions that have been declining in recent years, it does not mean that the health of the securities industry is necessarily affected\textsuperscript{1121}. On the contrary, as mentioned before in this research work and as supported by several experts\textsuperscript{1122}, this situation is a trend that has been taking hold in recent years and is in no way indicative of a system that is doing badly\textsuperscript{1123}. The work deployed by the regulatory authorities as well as the coordination's efforts between the provinces testify to a system which is on the lookout for its flaws and which is aware of its strengths and weaknesses\textsuperscript{1124}. That being said, the second lesson to be drawn is the fact of conducting an analysis must always go beyond the numbers and primary indicative to justify a fair and enlightened interpretation; a decrease in numbers does not necessarily mean a negative situation\textsuperscript{1125}.

For the last recommendation, it seems justified to first recall the definition of public and private enforcement:

"Private enforcement refers to the ability of aggrieved investors to commence a lawsuit against parties who may have violated securities laws. This is different from public enforcement where it is a government official, typically a securities regulator, who commences a prosecution on behalf of the government. "\textsuperscript{1126}

\textsuperscript{1120} See: Canadian Securities Administrators, \textit{supra} note 296.
\textsuperscript{1121} See: Poonam Puri, \textit{supra} note 1.
\textsuperscript{1122} See securities administrator: Bradley A. Heys and Robert Patton, \textit{supra} note 943.
\textsuperscript{1123} See: Poonam Puri, \textit{supra} note 1.
\textsuperscript{1124} Stéphane Rousseau, \textit{supra} note 24 at p. 16.
\textsuperscript{1125} \textit{Ibid}.
\textsuperscript{1126} Poonam Puri,"Will Canada step up?", Canadian Investment Review, 20, at p. 53-54.
This definition, which brings us back to basics, is of incredible usefulness because it reminds, on the one hand, the very basis of public and private enforcement, but above all, the fact that they complement each other in a very mutual way. This aspect, often overlooked in the criticisms, is a basic principle that should always govern interpretations. Thus, instead of pitting one against the other when assessing public and private enforcement, changing the approach and the philosophy by looking at them as a whole would definitely bring a new light on how enforcement results are seen.

Although these recommendations seem at first sight of a disconcerting simplicity, it is regrettable to note that in recent years they have been all too rarely taken into account. Having generated unsubstantiated criticism and, above all, reputations which are not relevant neither appropriate in the case of Canada, the works of recent years have neglected these fundamental aspects. This paper, having presented the historical, theoretical and critical aspects of public and private enforcement, has demonstrated, through a necessary but too-often neglected understanding process, the current state of the Canadian situation. After a series of new developments that have spanned crises and turmoil followed by severe and heavy reinforcements, the securities industry in Canada has reached a period of relative calm, which, through this research, has been explained.

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1127 Stéphane Rousseau, supra note 24 at p. 98.
1128 See: Poonam Puri, supra note 1.
1129 See: Howell E. Jackson & Mark J. Roe, supra note 5 at p. 38.
BIBLIOGRAPHY

LEGISLATION

Québec

Securities Act, CQLR c V-1.1.

Code of Civil Procedure, CQLR c C-25

Code of Civil Procedure, CQLR c C-25.01

Civil Code of Québec, CQLR c CCQ-1991

Business Corporations Act, CQLR c S-31.1

Act respecting administrative justice, CQLR c J-3.

Civil Code of Lower Canada, CCLC, 1865, c. 41.

Act respecting the Autorité des marchés financiers, RLRQ c. A-33.2

Regulation 51-102 respecting Continuous Disclosure Obligations, RLRQ, c. V-1.1, r. 24

Ontario

Securities Act, RSO 1990, c S.5

Broker-Dealer’s Act, 1947 (Ont.), c. 8.


The Security Fraud Prevention Act, S.O. 1928, c. 34.
Alberta


United-States


Act of Congress, May 27, 1933, c. 38, Title 1, 48 Stat. 74.


Dodd-Frank Wall Street Reform and Consumer Protection Act, 124 Stat. 1376–2223


England

British North America Act, 1867, 30-31 Vict., c. 3 (U.K.).

The Directors Liability Act of 1890, 53 & 54 Vict. c. 64.

Supreme Court of Judicature Act, 1873 (R.U.), 36 & 37 Vict., c. 66, sch. A, s. 10.

Canada - Federal

The Constitution Act, 1867 (UK), 30 & 31 Victoria, c. 3.

Canada Business Corporations Act, R.S.C., 1985, c. C-44.
JURISPRUDENCE

Québec


Nadon c. Anjou (Ville), 1994 QCCA 5900.


Harmegnies c. Toyota Canada inc., 2008 QCCA 380.

121851 Canada inc. c. Theratechnologies inc., 2012 QCCS 699.

Theratechnologies inc. c. 121851 Canada inc., 2013 QCCA 1256.


Mouakiel c. Facebook inc., 2013 QCCS 4176.

Delaire c. SNC-Lavalin Group inc., 2013 QCCS 400.

Autorité des marchés financiers c. Morin, 2015 QCBDR 112.

Lévesque c. Vidéotron, s.e.n.c., 2015 QCCA 205.
Asselin c. Fiducie Desjardins inc., 2016 QCCS 839.
Valeant Pharmaceuticals International Inc. c. Catucci, 2016 QCCA 1349.


Ontario

Silver v Imax Corporation, 2009 ONSC 72342.
Gould v Western Coal Corporation, 2012 ONSC 5184.
Sharma v Timminco Ltd., 2012 ONCA 107.
Smith v. Sino Forest Corp., 2012 ONSC 24 (Can.).
Fischer v. IG Investment Management, 2012 ONCA 47.
Bayens v Kinross Gold Corporation, 2014 ONCA 901.
Dugal v Manulife Financial Corporation, 2014 ONSC 1347.
Bayens v Kinross Gold Corporation, 2014 ONCA 901.
Excalibur Special Opportunities LP v Schwartz Levitsky Feldman LLP., 2014 ONSC 475.
Swisscanto v BlackBerry, 2015 ONSC 6434.
Rahimi v SouthGobi, 2015 ONSC 5948.
Coffin v Atlantic Power Corp., 2015 ONSC 3686.


Rahimi v SouthGobi Resources Ltd., 2016 ONSC 1634.

Bradley v Eastern Platinum Ltd., 2016 ONSC 1903.

Swisscanto v BlackBerry, 2016 ONSC 534.

Alberta


British-Columbia

Round v MacDonald Deltwiter and Associates Ltd., 2011 BCSC 1416.

Round v MacDonald, Dettwiler and Associates Ltd., 2012 BCCA 456.

U.S.


England

Brown v Vermuden (1676), 22 Engl. Rep. 796 (Ch.).

Chancey c May, (1722) Prec. Ch. 592 ; 24 E.R. 265.

Derry v Peek, [1889] UKHL 1.

**Supreme Court of Canada**


*Queen v. Cognos Inc.*, [1993] 1 S.C.R. 87 (Can.).

*Québec (Curateur public) c. Syndicat national des employés de l'hôpital St-Ferdinand*, [1996] 3 R.C.S. 211.


*Theratechnologies Inc. c. 121851 Canada Inc.*, [2015] 2 RCS 106.

SECONDARY MATERIAL: Monographs


**SECONDARY MATERIAL: Periodicals**


De l'Étoile, Vincent et Marion, Benoît, "Récents développements en droit de l'action collective au Québec" dans Service de la formation continue du Barreau du Québec, ed, Colloque national sur l'action collective – Développements récents au Québec, au Canada et aux États-Unis (Montréal : Yvon Blais, 2016).


Finn, Shaun, " Commentaire sur la décision Asselin c. Fiducie Desjardins inc. – La démonstration d'une cause défendable est une exigence plus que théorique" in Repères, avril 2016, Droit civil en ligne (DCL), EYB2016REP1905.

Finn, Shaun, " Commentaire sur la décision Theratechnologies inc. c. 121851 Canada inc. – Un cas d'exception statutaire où des éléments de preuve crédibles sont requis pour faire autoriser un recours collectif ", in Repères, mai 2015, Droit civil en ligne (DCL).
Finn, Shaun, "Commentaire sur la décision Banque Canadienne Impériale de Commerce c. Green – La Cour suprême du Canada réaffirme que le seuil est plus élevé pour faire autoriser un recours collectif en valeurs mobilières" in Repères, janvier 2016, Droit civil en ligne (DCL), EYB2016REP1864.

Finn, Shaun, " Chronique – Une nouvelle trilogie sur l'action collective et sur l'approche, toujours plus atténuée, à laquelle elle invite " in Repères, janvier 2017, Droit civil en ligne (DCL) EYB2017REP2108.


Gouvernement du Québec, Les valeurs mobilières : Une réglementation efficace et appropriée des provinces, (Québec ; Bibliothèque nationale du Québec, 2002).


Jodoin, André & Marie-Ève Sylvestre, "Changer les lois, les idées et les pratiques : Réflexions sur l'échec de la réforme de la détermination de la peine" (2009) 50 C. de D. 534.


Landry, Marc-André, Laing, Andréa et Ariane Bisaillon, " Recours collectif en matière de responsabilité sur les marchés secondaires – les enjeux selon une perspective pancanadienne ", in Repères, mai 2014, Droit civil en ligne (DCL), EYB2014DEV2091.


Nicholls, Christopher C., “Civil Enforcement in Canadian Securities Law” (October 1, 2009), Journal of Corporate Law Studies, Vol. 9, No. 2, pp. 367-408.


SECONDARY MATERIAL: Papers delivered at conferences

Bouthinon-Dumas, Hugues, "La quête de l’effectivité dans la régulation financière à travers les sanctions dissuasives et la conformité" (Paper delivered at the Faculty of Law, Université de Montréal, 14 October 2016), [Unpublished].

Langevoort, Donald C., "Behavioral Ethics : Behavioral Compliance" (Paper delivered at the Faculty of Law, Université de Montréal, 31 march 2016), [unpublished].


SECONDARY MATERIAL: Online Material


Heintzman, Robb C., Michael D. Schafler and Soloman Lam, “Secondary Market Liability in Canada: Securities Class Actions” (2013), Dentons (blog), online:


Saint-Onge, Jean and Myriam Brixi, “Québec’s distinctive class action regime” (2017), Lavery (blog), online: <www.lavery.ca/upload/pdf/saintongejean/Qu%C3%A9bec.pdf>.


APPENDIX

FIGURE 1
CASES FILED BY YEAR AND ALLEGATION TYPE 1997–2017

FIGURE 2
FILINGS OF STATUTORY SECONDARY MARKET CASES 2006–2017


2 SOURCE: Ibid.
**FIGURES 3 & 4**  
CONCLUDED CASES - 2016³

**CONCLUDED CASES**

<table>
<thead>
<tr>
<th>Year</th>
<th>2014</th>
<th>2015</th>
<th>2016</th>
</tr>
</thead>
<tbody>
<tr>
<td>Cases</td>
<td>105</td>
<td>145</td>
<td>109</td>
</tr>
</tbody>
</table>

**HOW MATTERS WERE CONCLUDED 2016**

- Contested hearing before a tribunal: 57%
- Settlement agreement (with or without admission of fact or liability): 22%
- Court decision (under securities legislation): 21%

**FIGURES 5 & 6**  
RESPONDENTS - 2016⁴

**RESPONDENTS**

<table>
<thead>
<tr>
<th>Year</th>
<th>2014</th>
<th>2015</th>
<th>2016</th>
</tr>
</thead>
<tbody>
<tr>
<td>Individuals</td>
<td>149</td>
<td>233</td>
<td>168</td>
</tr>
<tr>
<td>Companies</td>
<td>106</td>
<td>117</td>
<td>94</td>
</tr>
</tbody>
</table>

**RESPONDENTS BY CATEGORY 2016**

- Illegal Distributions: 53%
- Fraud: 13%
- Misconduct by Registrants: 7%
- Illegal Insider Trading: 3%
- Disclosure Violation: 3%
- Market Manipulation: 3%
- Other Cases: 2%


⁴ SOURCE: Ibid.
### FIGURE 7
FINES, ADMINISTRATIVE PENALTIES AND OTHER - 2016

<table>
<thead>
<tr>
<th>Type of Offence</th>
<th>2014</th>
<th>2015</th>
<th>2016</th>
</tr>
</thead>
<tbody>
<tr>
<td>Illegal Distributions</td>
<td>$17,600,090</td>
<td>$36,571,080</td>
<td>$9,528,534</td>
</tr>
<tr>
<td>Fraud</td>
<td>$25,038,461</td>
<td>$68,460,000</td>
<td>$36,695,000</td>
</tr>
<tr>
<td>Misconduct by Registrants</td>
<td>$7,476,755</td>
<td>$2,485,394</td>
<td>$103,854</td>
</tr>
<tr>
<td>Illegal Insider Trading</td>
<td>$87,850</td>
<td>$5,240,872</td>
<td>$607,655</td>
</tr>
<tr>
<td>Disclosure Violations</td>
<td>$79,500</td>
<td>$30,000</td>
<td>$189,000</td>
</tr>
<tr>
<td>Market Manipulation</td>
<td>$61,500</td>
<td>$24,187,450</td>
<td>$6,323</td>
</tr>
<tr>
<td>Other Cases</td>
<td>$7,895,000</td>
<td>$1,324,000</td>
<td>$15,018,500**</td>
</tr>
<tr>
<td>Total</td>
<td>$58,239,156</td>
<td>$138,298,796</td>
<td>$62,148,866</td>
</tr>
</tbody>
</table>

### FIGURE 8
RESTITUTION, COMPENSATION AND DISGORGEMENT - 2016

<table>
<thead>
<tr>
<th>Type of Offence</th>
<th>2014</th>
<th>2015</th>
<th>2016</th>
</tr>
</thead>
<tbody>
<tr>
<td>Illegal Distributions</td>
<td>$12,723,110</td>
<td>$27,221,497</td>
<td>$5,367,735</td>
</tr>
<tr>
<td>Fraud</td>
<td>$23,724,705</td>
<td>$49,206,788</td>
<td>$44,708,937</td>
</tr>
<tr>
<td>Misconduct by Registrants</td>
<td>$26,418,512</td>
<td>$18,928,330</td>
<td>-</td>
</tr>
<tr>
<td>Illegal Insider Trading</td>
<td>$27,280</td>
<td>$858,839</td>
<td>$334,121</td>
</tr>
<tr>
<td>Disclosure Violations</td>
<td>-</td>
<td>-</td>
<td>-</td>
</tr>
<tr>
<td>Market Manipulation</td>
<td>-</td>
<td>$7,424,245</td>
<td>-</td>
</tr>
<tr>
<td>Other Cases</td>
<td>$2,824,153</td>
<td>$8,011,730</td>
<td>$299,243,586*</td>
</tr>
<tr>
<td>Total</td>
<td>$65,717,760</td>
<td>$111,651,429</td>
<td>$349,654,379</td>
</tr>
</tbody>
</table>

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6 SOURCE: Ibid.
FIGURE 9
SETTLEMENTS BY YEAR 2001 - 2017

FIGURE 10
MEDIAN SETTLEMENT AMOUNT IN CANADIAN SECURITIES CLASS ACTIONS BY YEAR


SOURCE: Ibid.
**Figure 11**
Source of complaints received by IIROC Enforcement

<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Public</td>
<td>198</td>
<td>209</td>
<td>222</td>
<td>280</td>
<td>252</td>
</tr>
<tr>
<td>ComSet*</td>
<td>1,207</td>
<td>1,076</td>
<td>1,058</td>
<td>1,307</td>
<td>1,529</td>
</tr>
<tr>
<td>Internal (from other IIROC departments)</td>
<td>32</td>
<td>43</td>
<td>53</td>
<td>78</td>
<td>52</td>
</tr>
<tr>
<td>Other SROs and Commissions</td>
<td>20</td>
<td>11</td>
<td>12</td>
<td>17</td>
<td>26</td>
</tr>
<tr>
<td>Other (media, Dealer Member firms and whistleblowers)</td>
<td>2</td>
<td>2</td>
<td>5</td>
<td>8</td>
<td>13</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td>1,459</td>
<td>1,341</td>
<td>1,350</td>
<td>1,690</td>
<td>1,872</td>
</tr>
</tbody>
</table>

**Figure 12**
Most common complaints received by IIROC and opened by case assessment

**Figure 11**
Source of complaints received by IIROC Enforcement


**Figure 12**
Most common complaints received by IIROC and opened by case assessment

SOURCE: Ibid.