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## why the OSC so rarely gets its man

**More than 450 employees work at the Ontario Securities Commission. About 40% are paid more than \$100,000 a year. Their dismal track record begs the question: What on earth are they doing?**

December 01, 2007

**TYLER HAMILTON**  
BUSINESS REPORTER

Bruce McLaughlin took millions of dollars from the company he led to pay off personal debts. That was the conclusion of a court-appointed accounting firm that looked into suspicious transactions at Mississauga property developer Mascan Corp.



LUCAS OLENIUK/TORONTO STAR FILE PHOTO

The Ontario Securities Commission in Toronto is seen in this file photo.

The findings of the audit pressured the Ontario Securities Commission to take legal action on behalf of Mascan's minority shareholders.

That was 23 years ago.

The case is still on the OSC's books, listed on the commission's website under "Current Proceedings."

The OSC says it can't comment because it's a "live matter" before the courts.

"Most of the former plaintiffs have died or lost interest," says Edward Waitzer, the lawyer who first pursued McLaughlin back in 1982 — at the time representing the Thomson family's Woodbridge Co. Ltd. — until a reluctant OSC waded into the case. The RCMP wanted no part of it, he says.

Waitzer eventually became OSC chair between 1993 and 1996 and even he couldn't get the case moving.

"It's an example of how things get initiated and never get completed, and nobody holds the OSC to account," he says.

The OSC is Ontario's investment watchdog. It has ultimate authority over the Toronto Stock Exchange, pension funds, mutual funds and investment dealers. Across Canada, everyone from the tiniest investor to online day traders and retirees on a company pension is affected by

### The scandals

#### BRE-X

**Issue:** The company's gold find was exposed as a fraud in 1997. Shares became worthless.

**Action:** The OSC charged Bre-X head geologist John Felderhof with insider trading. Outcome: After a seven-year trial, an Ontario court judge in July acquitted Felderhof on all counts, saying there were no red flags to suggest fraud. No other Bre-X officials were charged.

transactions — right or wrong — under its jurisdiction.

It's accountable by definition. But academics, lawyers and forensic accountants interviewed for this story say accountability is sorely lacking when it comes to securities enforcement, whether it's regulatory matters overseen by the OSC or violations of criminal law overseen by police.

They also cite a lack of focus, and the sense of urgency that makes enforcement an effective deterrent to breaking the rules. The decades-old Mascan case, they say, illustrates much of what's wrong with the system.

More recently, many believe the OSC and Canadian authorities dropped the ball on their investigation of Conrad Black, who will be sentenced later this month in Chicago after a speedy U.S. trial.

"For me, the hardest part about the Conrad Black trial has been explaining why it happened in Chicago and not in Toronto," former Ontario premier Bob Rae wrote recently in his blog.

All this is no surprise to Utpal Bhattacharya, a finance professor at the Indiana University's Kelley School of Business and author of a report comparing the enforcement records of the OSC and the U.S. Securities and Exchange Commission (SEC). "We found the enforcement in Ontario was pathetic," said Bhattacharya. "Canada is a first-world country with second-world capital markets and third-world enforcement."

Many high-profile cases of stock-market meltdown or corporate fraud in recent years have left investors fuming that authorities have either failed to hold people accountable or taken way too long to apply justice.

"I think delay is a big source of frustration for investors," said Poonam Puri, a law professor who teaches about white-collar crime at Osgoode Hall Law School.

This year, for example, many Canadians were frustrated that, after a decade of investigation and courtroom battles over Bre-X Minerals, nobody was held accountable for the world-infamous multi-billion-dollar gold fraud. Many other cases have left Canadians scratching their heads, such as the 1990s meltdown of theatre-producer Livent Inc., the accounting fiasco of Nortel Networks, or the OSC's failure to pin stock-tipping charges on investment banker Andrew Rankin.

Critics say the OSC showed its light touch in the YBM Magnex stock-market scandal a few years ago. Despite FBI investigations linking YBM Magnex to the Russian Mob, the OSC in 2003 ruled "this case isn't about organized crime," and set light fines and penalties against a few company directors.

And investor advocates were shocked when in 2002 the holding company of Michael Cowpland, founder and then CEO of Corel Corp., was fined only \$1 million to settle allegations that he sold \$20.4 million worth of Corel stock in advance of bad earnings news that caused the company's share price to drop 40 per cent.

## LIVENT

**Issue:** Theatre production company Livent Inc. collapses in 1998 and its shares become worthless.

**Action:** U.S. prosecutors file fraud charges against Livent co-founder Garth Drabinsky and others in 1998, but Drabinsky avoids the charges by staying in Canada. Four years later Canadian charges are filed.

**Outcome:** A trial is expected next year, a decade after Livent fell apart. Meanwhile, charges against another Livent executive were stayed this year because of delays in the case.

## ANDREW RANKIN

**Issue:** Royal Bank in 2001 fires investment banker Andrew Rankin over suspicious trading.

**Action:** OSC charges Rankin in 2004 with providing inside information allowing millions in trading profits by friend Daniel Duic, who co-operated in exchange for immunity.

**Outcome:** Rankin is convicted in 2005 and sentenced to six months, but never served the sentence. An Ontario judge

The RCMP says the scope of fraudulent activity across Canada is unknown because there's no "systematic" collection of data. But for certain crimes — such as insider trading — there's plenty of reason for worry.

According to a Bloomberg News study prepared by Port Hope-based Measuredmarkets Inc., 33 of 52 large Canadian mergers last year showed signs of aberrant trading just before the mergers were publicly announced. That's a rate of 63 per cent. A comparative study in the U.S. found a rate of 41 per cent.

The findings don't prove illegal insider trading is widespread, says Measuredmarkets' Christopher Thomas, but "it raises a red flag."

And there are enough of these red flags to spark a growing call for change, increasingly from high-profile voices. Claude Lamoureux, just-retired chief executive officer of the Ontario Teachers' Pension Plan — one of the biggest in Canada — accused regulators last month of "pretending to oversee" securities rules and lambasted authorities for their light-handed treatment of white-collar crime.

Barbara Stymiest, chief operating officer at Royal Bank of Canada and former CEO of the Toronto Stock Exchange, called Canada's securities enforcement an "international embarrassment."

So what's the problem?

Industry watchers point fingers everywhere:

- \* Lax regulations and laws
  - \* A leadership vacuum
  - \* A defeatist culture
  - \* A system short on accountability and focus
  - \* Fragmentation among provincial and territorial regulators. More than 30 separate agencies — many of them self-regulating — are involved in Canadian securities regulation.
- "This could charitably be called the Canadian enforcement mosaic," OSC chair David Wilson told a gathering this month.
- \* A revolving door of investigators and prosecutors, causing delays and gaps in case knowledge.
  - \* An overarching perception among lawyers, judges and politicians that white-collar offences are victimless crimes, lacking the blood, violence and abuse that captures headlines.

It's a long list, but south of the border there are fewer excuses and more action. Adjusted to reflect the market size in each jurisdiction, the Indiana University report revealed that between 1995 and 2005, the SEC prosecuted 10 times more cases and, in the specific area of insider trading violations, 20 times more cases than the OSC.

overturned the conviction, noting inconsistencies in Duic's testimony. The OSC is pursuing a retrial of Rankin in February.

## NORTEL

**Issue:** An independent probe by a U.S. law firm concludes in 2005 that top Nortel officials manipulated accounting to meet profit targets and trigger bonuses.

**Action:** Both the OSC and SEC investigate accounting issues.

**Outcome:** Nortel agrees to pay the SEC \$35 million (U.S.) to settle fraud charges while the OSC agrees to settle with Nortel for just \$1 million to cover costs. Cases against several Nortel executives are ongoing.

## HOLLINGER

**Issue:** Investors in newspaper publisher Hollinger International Inc. complain that top executives, including Conrad Black, siphoned off millions through sham transactions.

**Action:** The SEC and OSC launch investigations into Hollinger, while U.S. prosecutors file criminal charges.

As for financial penalties, "the SEC fines for insider trading per case are about 17 times more than the OSC fines," concluded the study, prepared last year for the Task Force To Modernize Securities Regulation in Canada.

Surprisingly, the SEC doesn't appear to have a leg up when it comes to resources, according to Howell Jackson, a professor who teaches securities regulation at Harvard Law School. In a recent comparison of Canadian and U.S. regulatory activity, he found a well-funded Canadian system.

"Adjusted for most measures of economic scale — population, GDP, or market capitalization — Canadian budgets and staffing may actually be somewhat more intensive than those in the United States," discovered Howell. "Indeed, by international levels, total Canadian staffing and budgets seems to be on the high end."

Both the Ontario Securities Commission and the RCMP have seen their budgets increased in recent years. The OSC staffing budget jumped 28 per cent in three years, to \$51.51 million in fiscal 2007 from \$40.15 million in fiscal 2004. About 40 per cent of the regulator's 464 employees make over \$100,000, including \$524,065 paid to the chair, Wilson.

Meanwhile, the RCMP launched its highly touted Integrated Market Enforcement Team in 2003, backed by \$120 million in new federal support. But so far it has been mostly tough talk and little action, a criticism IMET director John Sliter called "well founded" in an interview with the *Star*.

The OSC, however, is not so willing to accept the blame. Commission vice-chair Lawrence Ritchie points out that regulatory enforcement ends once the evidence gathered by investigators is put before the court.

"What the court does with it, any regulator has absolutely no control over how a judge or jury will treat that," he says. "I'm not saying the focus or criticism should be laid elsewhere, but it should be seen within the proper context."

Others say the blame also lies with police. They emphasize the often forgotten distinction between breaches of regulation and violations of the Criminal Code. Douglas Hyndman, chair of the B.C. Securities Commission, says regulators are criticized for weak enforcement of cases that criminal authorities should be pursuing, but don't.

"I just don't think our criminal investigation authorities strike fear into the hearts of crooks in the industry," Hyndman says. They point out that most of the high-profile U.S. cases — WorldCom, Enron, Adelphia — were the result of criminal, not regulatory, enforcement. Like in the U.S., regulators in Canada can refer serious cases of securities fraud to criminal authorities — the RCMP's commercial crimes unit or IMET — but there's no guarantee they'll be taken on.

The Investment Dealers Association and the Mutual Fund Dealers Association, two self-regulatory bodies accountable to the OSC in Ontario that can refer cases to IMET, have identified at least 84 cases

**Outcome:** A Chicago court in July found Black guilty of obstruction of justice and fraud. Sentencing is slated for Dec. 10.

## The investors

### James Markis

Bolton computer consultant says he lost \$104,000 in the Nortel collapse. He is expecting a settlement early next year after the company agreed to pay \$2.4 billion in cash and shares to settle a class-action lawsuit. Nortel also agreed to pay a \$1 million fine to the OSC and \$35 million to the SEC to settle allegations of wrongdoing. Markis, 53, feels that, in both cases, Nortel paid only "minimum" fines.

"Who's going to have faith in the equities markets when the regulators give them a slap on the wrist?" Markis asked. "I think the OSC should have set a precedent to say Canadian equities markets are safe and the watchdogs are doing their job."

### Chris Morgis

The Toronto real estate developer lost \$2 million due to

of suspected fraud, forgery or misappropriation of funds to police, according to an association spokesperson.

It's unclear how many of these cases have been investigated, as IMET resists disclosing names of those being probed until charges have been formally laid.

Cases not pursued by criminal authorities can easily slip through the cracks, though in some cases wrongdoers will get a regulatory wrist slap for criminal offences more deserving of jail time.

Hyndman says regulators shouldn't be forced to use their own limited resources to prosecute allegations that are clearly criminal in nature.

In the case of Bre-X's John Felderhof, accused of insider trading, many felt the RCMP should have laid fraud charges and pursued a federal conviction. Instead, the OSC was forced to go after Felderhof with weaker quasi-criminal charges of insider trading in an Ontario provincial court, a forum typically reserved for cases like drunk driving and breaking and entering.

The case dragged on for years, arguably diverting the OSC's resources away from its core duties of enforcing regulation. But investor advocates like Ken Kivenko argue nothing justifies the kind of delay both accused individuals and shareholders have faced over the years, whether it's two decades in the case of Bruce McLaughlin, six years after signs of crooked accounting appeared at Nortel, or 10 years for the Bre-X case to conclude.

"The whole system is not set up to protect investors," says Kivenko, a former aerospace executive who wants to see major securities reforms. "If you did a cost-benefit economic model, Canada would be the place to go for white-collar crime. Your chance of detection is small and the consequences for getting caught are not high."

Ontario's new attorney general, Chris Bentley, says a lot has been done over the past few years to improve enforcement of securities crimes, including a doubling of OSC enforcement staff and new offences in the Criminal Code, but he acknowledges more must be done.

"There's no stepping back. No taking a rest. We continue to push on this front, take it very seriously, and I'll continue to look for ways to strengthen investigation and prosecutorial capacity," says Bentley. "The best way to protect those who use securities markets is by action, not words ..... By all means, judge me by my actions."

Waitzer, benefiting from 30 years of hindsight, has little sympathy for any more excuses. "The regulators are becoming like the people they're trying to regulate," he says. "They're spending their time managing reputations instead of getting results. There's not a lot of accountability. They can talk a big game, and the fact is they don't deliver."

unauthorized trading by now-defunct brokerage Thomson Kernaghan & Co. Morgis, 42, sued the adviser and Thomson Kernaghan. Morgis filed complaints with the Investment Dealers Association in March, 2001. The agency did not respond for more than a year. The brokerage went bankrupt in 2002. Its former chair, Mark Valentine, was later found guilty of securities fraud in the United States. Morgis tried to sue the IDA, but a court declared it has statutory immunity. Dealing with Canadian regulators, Morgis said, "was such a disappointing process. There was smoke there, and there was a fire, but the IDA didn't go in."

### Osamu Shimizu

The Etobicoke retiree, who lost \$7,800 when his shares of Bre-X collapsed, joined a class-action lawsuit against Bre-X, John Felderhof, and other former Bre-X executives. The lawsuit is pending, though it has been dealt a serious blow by an Ontario court ruling last summer that acquitted Felderhof, Bre-X's former chief geologist, of insider trading charges. Shimizu, 80,

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## OSC's mandate: protect investors

The Ontario Securities Commission's job is to protect investors from practices considered unfair, improper or fraudulent under the Securities Act.

It regulates investment advisers and companies that trade in securities. It has oversight over the Toronto Stock Exchange and a number of self-regulatory organizations composed of mutual fund and investment dealers.

### Why it matters

Securities crimes affect most Canadians. If you've bought shares in a publicly traded company, either directly or indirectly through holdings in mutual funds and pension funds, any fraud hurting that company's performance or affecting its share value can leave the honest investor holding the bag.

Insider trading, stock manipulation, accounting fraud and the illegal sale of shares are among the crimes that regulators and law-enforcement agencies track. For certain crimes, white-collar crooks prey more often on seniors and other vulnerable members of society.

In one way or another, widespread securities fraud left unchecked can lead to a breakdown in market confidence, discouraging investment in the Canadian economy that might otherwise lead to job creation.

Outside our borders, international investors are known to apply a "Canadian discount" on equities here to account for lax enforcement. Indeed, in many financial circles, Canada is considered an "enforcement-free zone" where people don't just get away with white-collar crime, they profit dearly from it.

feels regulators should have taken a closer look at the mining company's early claims that it had discovered the world's biggest gold deposit at its Busang property in Indonesia.

"The OSC is a toothless tiger," Shimizu said. "They make all kinds of noise — but no teeth."

### THE SERIES

**TODAY:** How regulators have failed to crack down on stock- market miscreants while developing an international reputation for inaction and ineffectiveness.

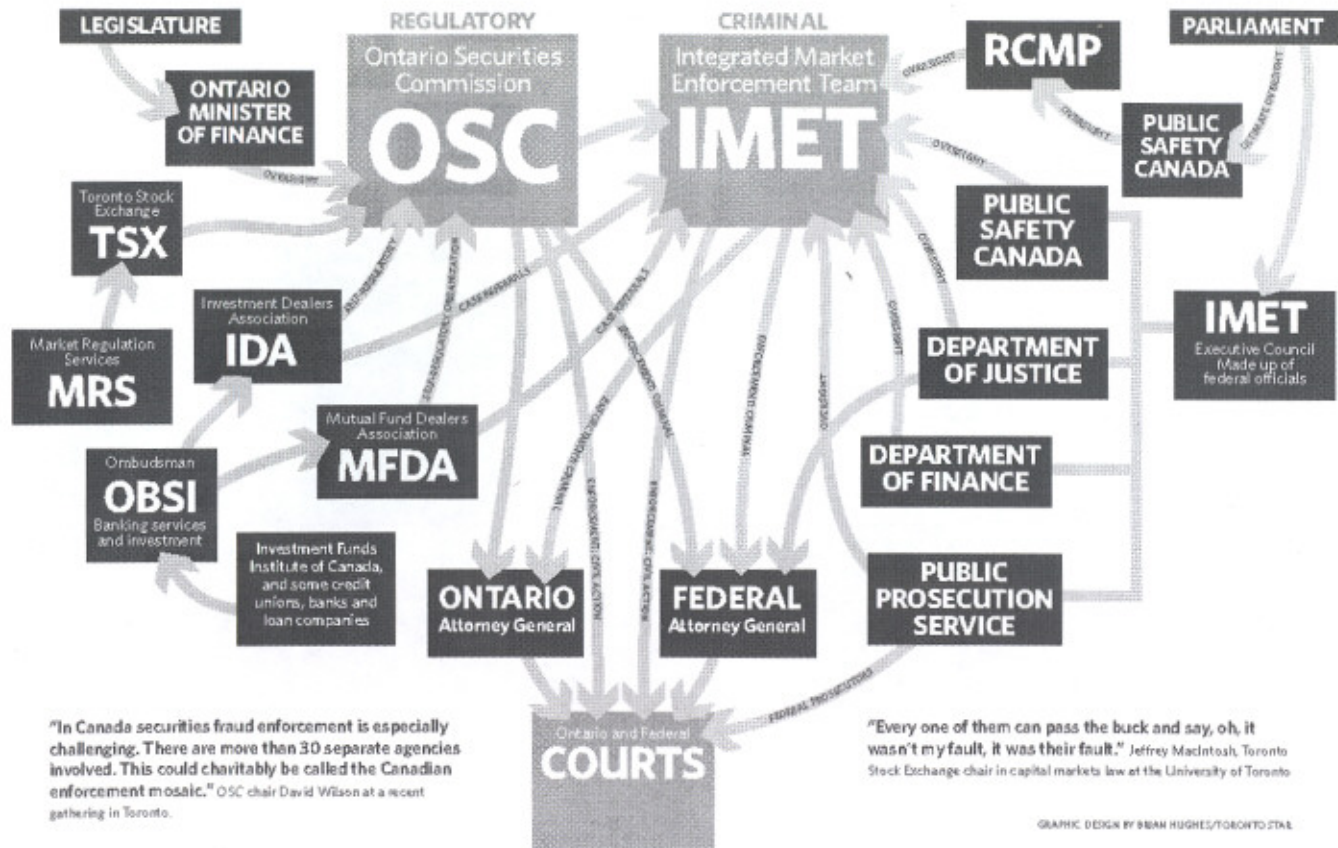
**TOMORROW:** Why a big-budget police squad set up to take on corporate crime degenerated into a bureaucratic mess with few results.

**MONDAY:** An interview with the head of securities watchdog, Ontario Securities Commission chairman David Wilson.

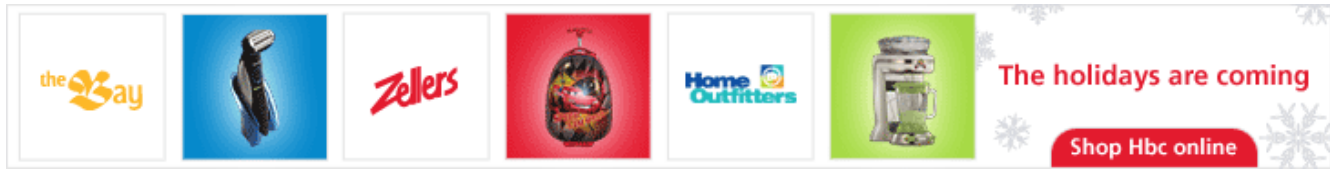
**COMING UP:** What's needed to fix the mess?

## FINANCIAL REGULATORS &gt; AN INVESTIGATION

## Worried about stock fraud? Here's who's in charge



## Ontario enforcement 'third world'



**the**star.com

## Breach of privacy complaint goes nowhere

December 01, 2007

**TYLER HAMILTON**  
BUSINESS REPORTER

Industry whistleblower James MacDonald says he was betrayed.

At a recent public forum in Toronto, MacDonald took the opportunity to tell David Wilson, chair of the Ontario Securities Commission, why the system let him down.

The former BMO Nesbitt Burns investment adviser discovered evidence of what he described as "alleged illegal activity" by a senior person within the industry. He said he dutifully reported his findings by phone – in a voicemail – to the Investment Dealers Association (IDA), a self-regulatory organization accountable to the OSC.

Within hours of that message being left, he said he received an email message from his branch manager at the bank asking MacDonald why he contacted the IDA. MacDonald was shocked to learn that his confidential message had been brought to his employer's attention.


"As an employee, I was trying to do my part and I was betrayed," MacDonald, microphone in hand, told Wilson.

MacDonald continued, explaining he had written two letters to Wilson to complain about this breach of confidentiality. Both times he received a reply from someone else at the OSC who advised MacDonald to deal directly with the IDA, which was the subject of his complaint. "You've washed your hands totally of this," MacDonald said to Wilson.


Wilson advised MacDonald that if the IDA can't resolve his issue he should feel free to phone the OSC contact centre and file a complaint. "Or," added Wilson, "write me a letter."

MacDonald later told the *Star* he has little confidence in the ability of Canadian enforcement agencies to adequately protect investors. "Canadians would be better off if we just disband everything and subcontract the work to Eliot Spitzer and the U.S. Securities and Exchange Commission."





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**the star.com**

## Why white-collar crime team fizzled

**Launched four years ago to clean up markets, police squad is now best known for its failures**

December 02, 2007

**MADHAVI ACHARYA-TOM YEW**  
BUSINESS REPORTER

It was designed for show, an in-your-face warning in the heart of Canada's financial centre.

Two dozen police, followed by a swarm of reporters and television crews, swept into the Bank of Nova Scotia at King and Bay armed with a search warrant. The bank itself was not under suspicion. It had been caught up in a probe surrounding another company, Royal Group Technologies Ltd.



COLIN MCCONNELL/TORONTO STAR FILE PHOTO  
The media were out in force when IMET raided downtown offices in February, 2005.

It was the first operation of IMET – the Integrated Market Enforcement Team – set up 14 months earlier to tackle white collar crime in Canada. The idea was to make headlines.

"They're sending a message to investors ... `We're going to clean up the markets and you can depend on us,'" Richard Powers, professor at the University of Toronto's Rotman School of Management, said at the time.

Yet after four years of operation, only five charges have been laid – one in Vancouver and four in Toronto. In the Vancouver case, broker Kevin Steele was jailed six years for bilking investors out of \$10.3 million.

The four Toronto cases – accounting fraud, stock market manipulation, theft and fraud over \$5,000 – are still working their way through the courts. IMET's investigation into Royal Group is continuing. To date, no charges have been filed.

Today when the enforcement team makes the news, it's usually because of its dismal track record. Instead of reaping glory, the vaunted police squad is becoming a public whipping boy in the debate about Canada's perceived tendency to let white-collar crime go

### THE SERIES

**YESTERDAY:** How regulators have failed to crack down on stock market miscreants while developing an international reputation for inaction and ineffectiveness.

**TODAY:** How a big-budget police squad set up to take on corporate crime degenerated into a bureaucratic mess with few results.

**TOMORROW:** An interview with the head of securities

unpunished.

Even the man in charge admits to shortcomings.

"There's a lot of stakeholders unhappy and I think justifiably so," said John Sliter, the head of IMET in Ottawa.

But he's quick to deflect blame: "Yes, justice is taking a long time, but I don't want to put the full responsibility for that on [IMET's] shoulders. In that sense, it's the Canadian system."

Interviews with former officers and other observers show IMET started with much hope, but soon felt the burden of a weighty RCMP bureaucracy and territorial bickering.

Former team leaders in Toronto and Vancouver talk of their frustration and "disappointment across all boundaries." Investigators complain of legal roadblocks in increasingly complicated cases, leading to delays in investigations and charges being laid.

The federal government commissioned a report last May to look into IMET's failings. It's recommendations are expected to be released this week.

The Integrated Market Enforcement Team was formed in 2003, when stock markets and regulators around the world were still smarting from the effects of U.S. scandals like Enron and WorldCom.

Canada's own high-profile debacles – Bre-X Minerals Ltd. and YBM Magnex Ltd.– were still fresh, and the federal government wanted to set investors' minds at ease. For the first time, an elite team of regulators, police and legal experts was being brought together to investigate and prosecute big stock market crimes.

"Helping protect Canadian capital markets, that's what this announcement is all about," Canada's solicitor-general, Wayne Eaton, told reporters at the time.

Ottawa dedicated \$120 million over five years to set up nine units across Canada, in Vancouver, Calgary, Toronto and Montreal.

The Toronto units were to be led by Detective Inspector Craig Hannaford. A veteran white-collar crime officer, Hannaford headed up the RCMP's probe of Livent, the Toronto theatre company that imploded under charges that Garth Drabinsky and other former principals had falsified corporate statements. A trial is expected to begin in the spring.

Setting up the teams took upwards of a year, a complex process that involved getting secure sites and staff. Territorial issues emerged early on.

Prosecutors from the federal department of justice were deemed essential to help guide the complex investigations.

According to an internal planning document, obtained by Canadian Press in March, 2006, federal lawyers were needed to give "advice and assistance regarding aspects such as wiretap applications, search warrants and disclosure advice to the IMETS during the course of investigations."

The justice department had been given \$17 million to make the lawyers available, but it initially failed to do so.

"We are at a point in our implementation where we are in dire need of legal advisers to work

watchdog, Ontario Securities Commission chairman David Wilson.

**COMING UP:** What's needed to fix the mess.

alongside of our investigators. They were to form an integral part of our integrated teams," Sliter wrote to the department almost a year after the launch. Delays, as well as the lingering feeling that neither provincial nor federal prosecutors were willing to step up, hurt morale, said Bill Majcher, former head of IMET's Vancouver team.

"For the better part of the time I was there, we didn't have either the provincial or federal Crown (prosecutor) willing to take responsibility for dealing with us. We were already running, and then things start falling apart ..." Today, lawyers from the department are assigned to IMET teams in Toronto, Vancouver, Calgary and Montreal.

Despite the program's well-funded start, it could be difficult to get beyond established RCMP procedures when it came to hiring and pay, former insiders say.

In Toronto, Hannaford wanted a stock market expert on the team, a career Bay Streeter who knew the big players, the market mechanics, and what was ordinary trading activity and what was not – credentials, he knew, would command a six-figure salary. The government's standard checklist for qualifications, however, put the pay scale in the middle five digits.

"We just couldn't get the classification process in the government to recognize that this person had to be paid fairly well," Hannaford said.

Another frustration was the RCMP's habit of pulling officers off projects when it was short-staffed in other areas. Need more security for visiting world leaders? Get an officer from IMET. A big drug or immigration case needs more manpower? IMET.

IMET officers also complain that the Canadian legal system is too easily bogged down by procedural sideshows such as stringent disclosure requirements – the prosecutor's legal responsibility to give the defence access to all evidence it has gathered during an investigation.

In a complicated stock market fraud or investment scam, disclosure can amount to hundreds of thousands of documents that have to be gathered, sorted, organized, and copied so they can be given over to the defendant and his lawyers as soon as charges are laid in a case.

By some estimates, 30 per cent of the cost of an investigation goes to cataloguing, tracking, and duplicating information to make sure copies will be available for the defence.

Even so, prosecutors may only rely on 100 documents or so to present their case; the defence, about the same when putting alternate theories forward. "The rest is just sort of filler," says Majcher, "but if somehow one box of nothing didn't get stored properly, in many cases that's the basis for having a case tossed."

Another hurdle, they say, is the issue of compelling witnesses to speak to investigators.

In the U.S., prosecutors can issue subpoenas, forcing witnesses to provide testimony before a grand jury once charges are laid.

Under Canadian law, members of the public are under no obligation to speak to law enforcement officers. When trying to piece together a securities fraud case, the accountants, consultants, and other office staff who may have information invariably consult their lawyers, then tell investigators they don't want to give a statement.

If officers can convince a witness to talk to them, it's strictly voluntary. "It's basically, we're totally open to their schedule and their lawyer's schedule," Hannaford said.

To add insult to injury, under the Mutual Legal Assistance Treaty, authorities from other countries who come to Canada to conduct investigations can legally compel witnesses to provide

statements. "So you have a funny situation where foreign law enforcement have more power to collect evidence from witnesses in Canada than our own domestic police," Hannaford said.

All this leads to investigations dragging on, and on. Add historically light sentences into the mix, and it's a recipe for plummeting morale.

In the meantime, white collar crime in Canada festers – along with a growing reputation for being soft on stock market and financial crime. Majcher saw the devastating effect Canada's disclosure law can have on international investigations first-hand in 2002 when he went undercover as part of a joint RCMP-FBI sting that nabbed two corrupt Canadian lawyers.

The sting included Jack Purdy, a Canadian stock promoter who was charged, but later acquitted of money laundering.

Even though the charges were filed in Florida, Purdy's lawyer was able to convince a judge that the RCMP should be forced to turn over all its documents in the case, including those that actually came from the FBI.

"The defence lawyer says he's a Canadian citizen and protected by the Charter," Majcher recalled. " ` He's entitled to everything in that (RCMP) file, including FBI intelligence reports, their operational plans, and other notes."

The judge agreed, and the FBI officers involved were completely furious, threatening to cut Canadian law enforcement out of subsequent investigations.

Majcher says that now he's on the investment side, he's a managing director with Hong Kong-based investment bank Baron Group, he sees the impact on Canada's reputation in a new light.

"I remember meeting a fellow in New York. He said, ` Bill, what's your area code. I said 604. He said, ` Oh, that's one of the area codes that I don't answer."



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## OSC chief takes it all in stride

**Under fire for perceived regulatory failings, David Wilson says he 'sleeps pretty well'**

December 03, 2007

**JENNIFER WELLS**  
BUSINESS COLUMNIST

"What keeps you awake at night?"

"I sleep pretty well."

In a small, antiseptic meeting room at the Ontario Securities Commission, David Wilson quickly stops himself. He fears, one supposes, that his response to an interviewer's question, amidst a discussion about enforcement in the capital markets, may seem glib.

"I don't want to answer the question that way," the commission's chief executive officer says swiftly. "I guess a huge financial fraud of an Enron-type magnitude would be a very unfortunate reflection on the markets and on the regulatory structure."

This meeting with the province's top securities regulator has not been easy to arrange. A public servant, earning a salary last year of \$524,000, David Wilson appears to be as closely guarded and strictly managed as a head of state. Two years into the job, he has given few interviews and, according to one of his public relations representatives, has an aversion to being profiled and would rather leave his reflective thoughts on where the commission has been and where it's headed to prepared speeches.

It is unclear whether Wilson is naturally media averse. Or whether he has defensively assumed that posture as the commission has come under fire for being lax and inadequate, charges that Wilson does not accept. Or whether his handlers are to blame.

What is clear is that Wilson has not adopted the higher profile of his American counterpart. The top job at the U.S. Securities and Exchange Commission, currently occupied by Christopher Cox, has frequently been a headline generator.

Wilson, on the other hand, remains well known largely within the



TANNIS TOOHEY/TORONTO STAR  
Ontario Securities Commission chief David Wilson.

### **Insecurities: what investors think**

*The Canadian Securities Administrators, representing the country's 13 securities regulators, recently surveyed 5,868 individuals across the country – including victims of investment fraud – to get their thoughts on investing in Canada. Here's what they found:*

70 per cent of Canadians surveyed feel that fraud artists get away with their crimes. If fraudsters do get caught they get

arena that created him. Some who have worked with him through his long career on Bay Street attest to his financial wizardry, his cool mind, his sense of humour.

He spent 34 years in investment banking, growing his career at McLeod Young Weir Ltd. when Austin Taylor was its fabled leader. Wilson was a deal guy. It is in recognition of his years on the street that he has hung a work by Gerald Vaandering on his office wall, featuring three guys out on a deal, "Poised to prosper," as the piece proclaims.

"My wife saw that and said, 'You have to buy that ... That's you. That's what you do,'" says Wilson.

Or what he used to do.

"When we were mounting a major campaign over something. Or when we needed money, or we needed street advice, David was the one we would go to," says Phil Lind, vice-chair at Rogers Communications Inc. Wilson was on the board of Rogers from the time it was originally constituted, in 1979, and was essential to that company's ceaseless need to raise money. Wilson also was a direct adviser to the company during its takeover of Maclean Hunter Ltd. Lind says he's a "helluva nice guy" and naturally predisposed to public service.

On the road in Winnipeg, Brent Belzberg recounts the near-impossible restructuring of First City Trust, the debt-encrusted company he had inherited from his uncle, Sam. "Everyone else at the time said, 'This is a mess and we don't want to put our hands on it,'" says Belzberg. "(Wilson) stood up without even hesitating and stood by my side the whole time ... He helped us through the restructuring of the junk bond debt. He helped us through the restructuring of hundreds of millions of dollars of Swiss debt," which extended to the sweet-talking of bond holders in dozens of cantons in the Swiss countryside.

After his last big initial public offering – for Canadian National Railway Co. in 1995 – Wilson migrated to the management side of what had become Scotiabank, rising to vice-chair.

When Rick Waugh was ultimately tapped to take over the CEO's job upon the retirement of Peter Godsoe, the unanointed Wilson stepped out of Scotia and into the regulator's seat.

For this interview he arrives with highlighted talking points.

And a securities commission annual report, an aid to which he refers more than once.

His conversational presentation is cautious and contained as he directs the questioner to such reporting improvements under his leadership as the disclosure of enforcement timelines. "These are enforcement statistics that haven't been disclosed before," Wilson says. "Level of activity. Types of sanctions imposed ... You can see my background in the finance business being reflected in how we show what we've done in the year just ended."

off with light sentences, according to 71 per cent of those polled.

Roughly 5 per cent surveyed said they had been victims of investment fraud. Of them, 74 per cent didn't recover any of their investment from the most recent fraud they were involved in.

The impact on victims is huge, with 68 per cent reporting they are less likely to trust people in general and 63 per cent less willing to make future investments.

Victims also reported negative impacts to their health and social life. One in five reported feelings of depression, extreme loss or isolation. Such feelings were twice as likely with people who lost more than \$10,000.

Overall, the study found that 90 per cent of Canadians believe the impact of investment fraud is as serious as that of violent crimes, though most people believe the justice system downplays the impact.

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### The series

**SATURDAY:** How regulators have failed to crack down on

Will this measured reliance on metrics resonate with investors?

In the fall of 2006, the honourable Peter Cory and law professor Marilyn Pilkington submitted their research study, "Critical Issues in Enforcement," to the Task Force to Modernize Securities Legislation in Canada.

"There are a number of issues in enforcement that have generated serious concern," the authors said in summary. "They include the lack of effective enforcement in high-profile securities cases in Canada" and "negative comparisons with the ability of U.S. authorities to bring timely and effective prosecutions."

The commission's epic failure in the case of John Felderhof, who was found not guilty last summer of insider trading in Bre-X shares, subsequently reinforced the fact that successful high-profile prosecutions have eluded the regulator.

What effect does Wilson feel the Felderhof decision had on investor confidence?

"I don't know," he responds. "Investor confidence in what? In the Canadian capital markets? How do you measure that?"

John Coffee, a law professor at Columbia University in New York and a member of the aforementioned securities task force, addresses the so-called "Canadian discount," a reference to having to sell more securities in Canadian markets to raise the same amount of money as an issuer would, say, in the United States. "Part of the explanation for the Canadian discount can be placed on weak enforcement, part of it can be placed on poor corporate governance in the sense of dual-class capitalization and part of it can be placed on regulatory fragmentation," says Coffee.

"If there is a discount you're dealing with something that has a chilling macroeconomic effect on the Canadian economy," continues Coffee. "I think that's the point where regulators should start."

Does Wilson believe the Canadian discount is for real? "The Bank of Canada has done studies on the cost of capital in Canadian equities," Wilson replies, referring to research that supports the existence of a risk premium. "I can't comment on those studies. We haven't done them here."

It was Coffee who commissioned Harvard Law professor Howell Jackson to comparatively analyze financial resources directed toward securities regulation in Canada and the U.S. "Howell's study does find that there is a substantial amount of money spent on the regulatory inputs," Coffee says of the budgets directed toward Canadian enforcement. "But if you look at the study there's nothing in terms of the outputs."

The lack of criminal enforcement of insider trading is a case in point. "I suspect that invites some people who are a little bit predatory to say, 'No risks and enormous gains here,'" says Coffee, who goes on to lament the collapsed case against Felderhof. "I think the rest of the world sees Bre-X as probably the most flamboyant market manipulation of our time."

One might expect the head of the OSC to list illegal insider trading as a scourge upon which he has set his sights. Does he feel there is a problem with insider trading in this country?

"We investigate all kinds of insider trading cases," replies Wilson. "Suspicious trades are easier to identify; they're harder to prove."

stock market miscreants while developing an international reputation for inaction and ineffectiveness.

**YESTERDAY:** How a big-budget police squad set up to take on corporate crime degenerated into a bureaucratic mess with few results.

**TODAY:** An interview with the head of securities watchdog, Ontario Securities Commission chairman David Wilson.

**COMING UP:** What's needed to fix the mess.

"I understand that. Do you think we have a problem with insider trading in this country?"

"I don't have an opinion if we have a problem."

Wilson offers a big-picture comment. "I've concluded in the last two years there is no two, three or four things that can be done in Canada to make the enforcement effectiveness of securities market fraud better tomorrow," he says, snapping his fingers as he utters the word "tomorrow."

It is true, as he says, that this country's regulatory framework is fragmented – the lack of a national securities regulator being key – and peopled with a multiplicity of players. It *is* unfair to compare equally Canadian securities regulators with U.S. law-enforcement activities. And it is true that the commission's roles and responsibilities are as much about overseeing compliance as they are about enforcing the laws and those who break them.

But it is from enforcement, or lack thereof, that investors draw their conclusions about the effectiveness of securities regulation. As Columbia's John Coffee says, in the absence of successful prosecutions, laws are fairly meaningless.

Last month, the national Securities Fraud Enforcement Working Group, of which Wilson is co-chair, presented its working group paper to the federal, provincial and territorial justice ministers. "What we say ... to the ministers is, the system is working," said Wilson in advance of the report's submission. "Can it be better? Yes. Should we try to make it better? Yes. That's the reality as we see it."

In Wilson's view, the changes required are incremental, or "granular." In the allotted interview time, there is no evidence that David Wilson was driven into this job by any particular passion. If there's anything that fires him, it's not on display. He golfs at Rosedale. Summers at Big Bay Point. He says an explosive fraud is the one thing that would cause him to lie awake at night.

Would he put Bre-X in that category? "Oh yeah," he replies. "Four or five billion to zero? That's big."

If David Wilson is very lucky, the next big blow-up won't happen on his watch.





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## An insider speaks out

**'We have people who steal from investors and nothing happens,' says former OTTP chief executive**

December 03, 2007

**TYLER HAMILTON**  
BUSINESS REPORTER

*Claude Lamoureux, the retired chief executive of the Ontario Teachers' Pension Plan, has been stalwart in the fight for better corporate governance, as well as a vocal critic of Canada's track record on investigating, prosecuting and convicting white-collar crooks.*

*In a frank interview with the Toronto Star, Lamoureux holds no punches. There's been too much talk about what's wrong with securities law enforcement in Canada and not enough action, he says, arguing that the Ontario government has done little to achieve real change that will protect investors.*

*His recommendation? Heed the advice of Osgoode Hall law professor Marilyn Pilkington and former Supreme Court of Canada justice Peter Cory, whose report for the recent task force to modernize securities legislation has fallen on deaf ears.*

**The Star:** There's been a lot of focus recently on the small number of securities fraud convictions in Canada compared with the United States. What's your view on this?

**Lamoureux:** To me, it demonstrates we take this very lightly. We've spent \$120 million (on the Integrated Market Enforcement Team) and have nothing to show for it. The crime in all of this is our legislators. The legislators should pass laws that make it easier to convict people who steal from investors. We can talk all we want, though we just had an election in Ontario and the Pilkington-Cory report is out. Did we hear one word about this? There was not one word about this report that cost \$8 million.

**The Star:** Who needs to spearhead this change in Ontario?

**Lamoureux:** I think it should be the attorney-general, or it should be the party. We can talk about health and we can talk about education, but (market fraud) is very important because it touches everybody in the province. We have people who steal from investors and nothing happens.

**The Star:** The Pilkington-Cory report, among its many recommendations, argues that authorities need better tools to crack down on white-collar fraud. It also points out the need for judges that specialize in securities law and related crimes. Do you agree with those recommendations?

**Lamoureux:** When a judge one day hears a divorce in court and the next day has to look at an insider-trading case, it's tough to understand that's a crime. There's nobody hurt. Nobody is crying. It's just a group of investors who lost some money.

**The Star:** The Ontario Teachers' Pension Plan has been quite active in suing companies, as well as leading class-action lawsuits, but many of these legal actions have taken place south of the border. Is this a statement on the Canadian system?

**Lamoureux:** We've sued a few corporations, Nortel being one of them, in the U. S. Why? Because our lawyers say it doesn't make sense to waste our time in Canada. I don't make this up. Our lawyers essentially tell us, you want to have a chance of winning and getting something done? Go to the U.S.

**The Star:** What, in your view, explains this?

**Lamoureux:** Maybe we have too many people who say this is just a job; I don't care whether I win or lose. Maybe there's not enough pride in the job. But at the same time, if the law is too tough, the level of proof is too tough ... Maybe we get what we deserve.

**The Star:** So how do we go about improving the situation?

**Lamoureux:** The problem is that our legislative process is caught in the 19th century. What is being done of the serious work that needs to be done? There's a lot of time being wasted. To me, you go to Cory and Pilkington, and you start with their report. Implementing this will go a long way to getting us on the map.

## Richer rogues not on radar

**New study on corporate crime suggests system is stacked in favour of influential industry insiders**

Dec 05, 2007

**Tyler Hamilton**  
Business reporter

Regulators charged with pursuing insider traders and other market scammers tend to target small-time crooks and shy away from high-profile figures with deep pockets and powerful lawyers, according to a new study out of Queen's University.

"What happens is that they bifurcate the population of rogues," says study author Lauren Snider, a professor of sociology who has spent 25 years researching corporate crime and the role of regulatory agencies.

"They try to concentrate their resources on where they're more likely to get action."

As part of her latest research, Snider conducted a number of anonymous interviews with enforcement officials at the Ontario Securities Commission and the British Columbia Securities Commission, as well as some RCMP officers within the force's four-year-old Integrated Market Enforcement Team.

She discovered immense frustration and a sense that the system, the way it's designed, is stacked against enforcement officials and in favour of industry "stakeholders" who help determine the rules that oversee them.

"You're dealing with very powerful actors, and these actors are referred to by and large as stakeholders, so they get the chance to shape legislation," Snider explains.

The OSC, for example, routinely holds consultation meetings with those in the financial industry, giving the perception that the regulator's primary role isn't to protect investors.

Snider says it's a model that gives unusual power to those in the financial sector who are regulated, pointing out that such an approach doesn't happen, and would never be accepted, with traditional criminal enforcement. "The police don't habitually consult prospective burglars on Criminal Code changes, but regulatory agencies must negotiate with those they are charged with regulating."

It's a major problem, she adds, "if you believe in equality. Our system is theoretically premised on equality."

During her interviews she also discovered that lawyers representing powerful clients routinely flood regulators and investigators with paperwork, resulting in major case delays as staff pore over a seemingly endless stream of documents and data.

"One of the officials I interviewed called it death by 53 cartons and boxes," she recalls.

OSC enforcement director Michael Watson, speaking at an investors gathering last month in Toronto, said it isn't unusual on specific cases to have to sift through hundreds of thousands of document pages. "It's just a function of the electronic age," he said.

"Right now we have four cases we're working on that have more than three million pages of documents. So the cases are getting bigger from that point of view."

Claude Lamoureux, the recently retired president and chief executive officer of the Ontario Teachers' Pension Plan, characterizes it as a battle "between a peewee hockey team and an NHL hockey club."

"Those being investigated or charged will understandably bring substantial high-quality resources to bear to defend themselves," wrote Nick Le Pan, a special adviser to the federal government, in a report released on Monday that examines how to make the RCMP's enforcement team program more effective.

"The program is `playing in the big leagues' and needs to act that way."

Snider, however, says it's challenging playing in the big leagues if the way the system is designed has major imbalances and other flaws.

"There's no way I defend it, but in order to understand why regulators make the decisions they do and why their hands are tied as they are, you have to look at that context."

# Trading ahead of the news

Here are four examples of unusual trading since the start of 2006 that occurred in advance of company news. The list is based on data collected by investor research firm Measuredmarkets Inc. of Toronto. Unusual trading can be a sign of insider trading, but can also be influenced by analyst recommendations, commodity prices and sector-wide news and trends. All TSX transactions fall under the jurisdiction of the OSC.

EVENT	RED FLAG	ANALYSIS
<b>1. Nurun Inc.</b> Majority owner Quebecor Media reveals Dec. 5, 2007 that it wants to buy the rest of Nurun shares at 33 per cent premium.	Shares skyrocket 26 per cent in the four trading days leading up to the announcement. Volume and number of trades spike on Nov. 29 and 30.	Trading on Nov. 29 and 30 exhibit "extremely aberrant behaviour" with no obvious explanation.
<b>2. BlackRock Ventures Inc.</b> Shell Canada's announcement on May 8, 2006, that it's acquiring BlackRock Ventures.	BlackRock's stock price jumps 22 per cent in the week preceding the announcement.	Share price hike shows "highly deviant trading over the period of April 17 to May 5."
<b>3. La Senza Corp.</b> Company announces Nov. 15, 2006 it will be acquired at 48 per cent premium.	A 10-fold jump in trading volumes on Oct. 27 compared to three-month daily average.	Trading "massively unusual" over three weeks leading up to the acquisition announcement.

## 4. Algoma Steel Inc.

Feb. 14: In talks with a potential buyer.

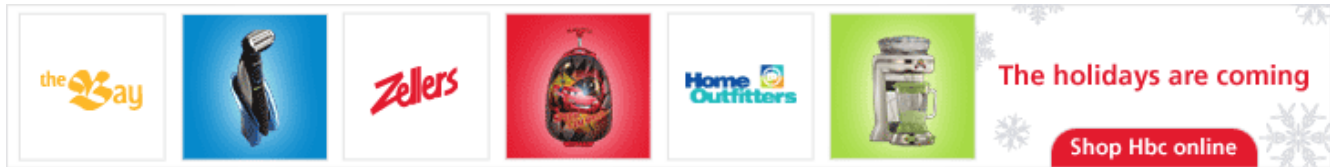
A 21 per cent hike in share price in three days leading up to announcement based on unusually high trading volumes.

Trades "clearly out of the ordinary."



SOURCE: Measuredmarkets Inc.

TORONTO STAR GRAPHIC



**the**star.com

## Solutions to market regulation faults sought

### Experts suggest changes to an ineffective system

December 08, 2007

**TYLER HAMILTON**  
BUSINESS REPORTER

Ontario securities regulators and law-enforcement authorities are failing in their mission to protect investors.

A series of articles in the *Toronto Star* this week catalogued a quagmire of issues, from ill-equipped prosecutors and inexplicable delays to an overarching defeatist mentality that is sapping confidence from a fragmented system perceived as weak.

The failures touch virtually everyone in the country, including retail stock traders, families heavily invested in mutual funds, and the employees of companies that have been financially devastated by corporate fraud. Internationally, Canada's financial and investment credibility continues to be eroded.

Here's a breakdown of six inherent problems in the system and possible solutions:

**Problem:** Legal talent.

Unlike the U.S., where white-collar crime cases can be major career builders for prosecutors, law students and lawyers here don't have securities regulation on their radar, says Marilyn Pilkington, a professor of law and former dean at Osgoode Hall Law School. There's no incentive for law professionals to specialize in white-collar crime.

**Solution:** Create a team of expert prosecutors focused on market crimes, to work in a special court.

A separate "capital markets" court could handle all cases involving securities offences, regardless of jurisdiction, says Pilkington. The National Judicial Institute – which provides continuing education for judges in all levels of government – could provide special training programs to help judges handle complex securities cases.



LUCAS OLENIUK/TORONTO STAR FILE PHOTO

The Ontario Securities Commission in Toronto is seen in this file photo.

### The U.S. has the SEC – a national watchdog. Is that what we need here?

David Wilson, the chair of the Ontario Securities Commission, often points out that Canada has 30 securities regulators and law-enforcement agencies all working toward a similar goal. He calls this an "enforcement mosaic."

Critics call it a recipe for confusion, duplication and finger pointing when cases go wrong or nowhere. Delay is routine, and

On Thursday, the McGuinty government announced the hiring of 40 new Crown prosecutors, mostly focused on cases involving gangs and guns. None specialize in securities law. Attorney General Chris Bentley told the *Star* that Ontario has prosecutors dedicated more broadly to white-collar fraud, but experts say securities cases are a more complex, specialized beast.

Bentley acknowledged there is room for improvement. "The recent series of comments (in the *Star*) contain information that we need to follow up on," he said.

**Problem:** Accountability.

The Ontario Legislature has never really held the Ontario Securities Commission to account, although the securities watchdog has occasionally appeared before the Senate Standing Committee on Banking, Trade and Commerce, says former OSC chair Ed Waitzer.

Technically, the provincial finance ministry oversees the OSC but observers say a lack of staff limits this to rubber-stamping. "The oversight they supply is very little, and the politicians really don't take any interest," says law professor Jeffrey MacIntosh, who holds the Toronto Stock Exchange chair for capital markets law at the U of T.

In practice, the OSC answers only to itself. It has the power to investigate, make rules, adjudicate and establish policy. Every five years it is subject to a review, but recommendations are often ignored. "Any rules the OSC creates must actually be approved by the finance minister, but in most cases that's a formality," adds MacIntosh.

**Solution:** The Ontario Legislature should take on a more proactive role.

In the U.S., the Securities Exchange Commission is regularly hauled before congressional committees to report on its batting average, Waitzer points out.

The media, he says, act as an important watchdog but it's not enough. "What happens is the regulators say 'we're doing something, we're doing something,' and then everybody forgets about it."

**Problem:** Deterrence.

There's a perception within the courts that illegal insider trading, selling fake stock and misleading investors doesn't cause much harm relative to other wrongdoings. White-collar crooks in Canada know they're likely to get a hand slap, and often the perception of light punishment makes regulatory breaches and certain frauds worth committing.

"Used to dealing with crimes of violence, judges look at well-dressed people and think, this is someone who's employed, looks like a decent person, and it's not the most egregious crime," says Osgoode's Pilkington.

A defeatist mindset also seeps into the system. Prosecutors faced with

accountability blurred.

Canada has 13 provincial and territorial regulators, as well as several self-regulatory groups that work under them. Each is a silo of knowledge, and they don't always easily share information. Add to that the RCMP, its enforcement program, and provincial and local police across the country and the fragmentation problems grow deeper.

It's why talk is heating up about creating a common regulator, a goal the federal government has pursued since the 1960s. Federal Finance Minister Jim Flaherty has been pushing it, and Ontario Finance Minister Dwight Duncan supports the idea.

A common regulator would streamline the process and cut costs. But experts warn its effectiveness depends on the determination of the people running it. "Unless you're going to create a culture of protection, a national regulator is not a panacea," says investor advocate Ken Kivenko.

Enforcement, many argue, might benefit under a common

murky evidence and unqualified judges will shy away from cases perceived as too difficult to win, says Douglas Hyndman, chair of the B.C. Securities Commission. "Then the police, because the prosecutors don't want the cases, they get discouraged."

**Solution:** "Shift the mindset" says Pilkington, and send a message.

New York did it. Between 1983 and 1989, when Rudolph Giuliani was U.S. attorney for the state's Southern District, an aggressive crackdown on insider trading and other white-collar crimes led to a flood of cases that rocked Wall Street and, among others, brought down "junk bond king" Michael Milken.

Those cases were corralled to a specific court, where judges over time gained an expertise in handling complex securities cases and gained an appreciation for the seriousness of securities crimes. White-collar offenders, used to having their wrists slapped, also faced new laws requiring judges to hand down mandatory sentences.

The reforms inspired confidence in the system, gave momentum to the investigators and prosecutors pursuing cases, and sent a clear message aimed at deterring market abuses. Canada, while it shouldn't necessarily copy the American system, could sharpen its teeth a bit.

**Problem:** Revolving doors.

Nick Le Pan, a federal adviser who reported recently on the RCMP's Integrated Market Enforcement Teams, recognized high turnover rates as a big problem. Since IMET began four years ago, about a third of the team's officers have moved on, mostly to other RCMP posts.

The result is discontinuity, which can cause delays, and a dearth of senior officers equipped to supervise and push through investigations.

Tedd Avey, one of Canada's most experienced forensic accountants, says officers assigned to investigate white-collar crimes, particularly complex securities cases, often don't want it as a career path. They tend, after a short stint often marked by failures, to transfer to other posts when they can.

**Solution:** Pay incentives and better training.

Le Pan recommended the Mounties offer retention pay to promising enforcement team officers who commit to staying with the program, particularly if an investigator is entering a crucial stage of a case.

He also urged the Mounties to set better priorities for training and be more aggressive in identifying officers who could benefit from experience and fit into leadership roles.

**Problem:** Legislative handcuffs.

This isn't as much an issue for regulators, which have broad investigative powers and could go after high-profile cases in a more timely and aggressive fashion. Criminal authorities, on the other hand, face legal hurdles that can cripple investigations and tilt the power in favour of the accused.

regulator on the assumption it would improve information sharing, harmonize legislation and make it easier to co-ordinate and co-operate with criminal authorities. Eliminating duplication would lead to cost savings that could be redirected to enforcement efforts.

There are two approaches to creating a common regulator. One is for Ottawa to assert its federal jurisdiction over trade and commerce by creating a national securities act, effectively bypassing the provinces to create a national regulator similar to the U.S. Securities Exchange Commission. It's likely a more effective option, but it would also get strong constitutional pushback from the provinces.

Another proposed model – the one endorsed by Flaherty and Duncan, but resisted by every province but Ontario – would create a council of provincial ministers that gives each province equal clout under a single commission. Law professor Jeffrey MacIntosh warns such an approach is a recipe for disaster.



Criminal law professor Michael Code, an expert in securities crimes who teaches at the University of Toronto, says the biggest roadblock to market and other criminal enforcement efforts is that investigators can't force witnesses to testify. And witnesses usually don't, for fear of being caught up in civil liabilities later on. "They're afraid the evidence is going to be used against them," says Code.

**Solution:** Change the law to allow investigative subpoenas.

Then police could compel witnesses to co-operate while protecting them from self-incrimination, says Code and others who follow securities issues. The OSC has this power. The SEC has this power, and so do U.S. criminal authorities under the grand jury system.

Without giving authorities such as enforcement teams similar powers, criminal investigators say it's unfair to compare Canada's track record against the U.S., which obtains more convictions, dishes out higher fines and does so much faster.

But Code cautions subpoenas must be used judiciously. If, for example, they're used during an investigation to compel testimony from someone who, it turns out later, emerges as a chief suspect, it can jeopardize a case. Under the Constitution, "you can't compel the accused," says Code.

**Problem:** Leadership

Market enforcement problems in Canada are not new. In the last two years alone, at least three major reports have studied the issue and offered recommendations on how to improve it.

So far, it's been mostly talk and little action.

"I think it's 95 per cent political will and leadership," says Mohammad Fadel, a professor of securities law at the University of Toronto and an American citizen who has experienced enforcement systems on both sides of the border

As more Canadians become invested and involved in the capital markets, governments will be overwhelmed with pressure to act, Fadel predicts. "That's what happened in the United States."

**Solution:** Someone must take the lead.

When critics complain about a leadership vacuum, they often point to New York Governor Eliot Spitzer, who in his previous role as attorney general led an aggressive crackdown on securities fraud and other market crimes, Will Ontario Finance Minister Dwight Duncan tackle the issue? Or Attorney General Bentley? Is there some other white knight poised to become Ontario's Eliot Spitzer?

"It would take a very strong personality, and a lot of support from the Ontario government," says U of T's MacIntosh.

It's an issue, however, begging for ownership.

"Who is really accountable? Nobody in the end ... and it could actually make things worse."

If structured properly, there's no question a national regulator would be part of the enforcement solution. But in the words of one investor advocate: 13 rotten vegetables won't make an appetizing salad.

- Tyler Hamilton

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## The Series

**Dec. 1:** How regulators have failed to crack down on stock market miscreants while developing an international reputation for inaction and ineffectiveness.

**Dec. 2:** How enforcement teams, a big-budget police squad set up to take on corporate crime, degenerated into a bureaucratic mess with few results.

**Dec. 3:** An interview with David Wilson, chair of the Ontario Securities Commission.

**Today:** Fixing a broken system.

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*With a file from Robert Benzie*