Lessons from the Bennett Affair

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The *Bennett* insider trading saga has spanned two jurisdictions and has dragged on for over five years. Based on an account of the particular difficulties encountered in the *Bennett* cases and a description of highly complex securities markets being regulated by a patchwork of regulatory enactments of questionable legality, the author contends that there has been a legacy of legislative abdication and a disappointing judicial response towards securities matters in Canada.

Bennett est une affaire de délit d'initié qui dure depuis déjà cinq ans et chevauche deux provinces. À partir d'une analyse des difficultés soulevées dans les causes *Bennett* et une description de la complexité de nos marchés boursiers, qui sont réglementés par une panoplie de techniques dont la légalité demeure douteuse, l'auteure prétend que la question des valeurs mobilières au Canada a depuis longtemps été négligée par le législateur et que la réaction des tribunaux est tout aussi décevante.

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Synopsis

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"Unlike almost everyone else, many economists reckon insider dealing is rather a good thing."
– "Inside Out" *The Economist* (22 May 1993) 86.

Introduction

The *Bennett* insider trading saga has now dragged on for almost five years.[1] It is an embarrassment, but an instructive one. It is instructive in that it throws into sharp relief the conundrums facing securities regulation in Canada today. It is an embarrassment to the extent that the affair is still far from being resolved to the satisfaction of any of those concerned.[2] It is symptomatic of a regulatory regime in crisis.

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[1]R. v. *Bennett* (12 May 1989), Vancouver B06477C2 (B.C. Prov. Ct.), Craig J.; *Ontario (Securities Commission)* v. *Bennett* (1990), 72 O.R. (2d) 77, 66 D.L.R. (4th) 756 (H.C.J.), aff'd (1991), 1 O.R. (3d) 576, 77 D.L.R. (4th) 576 (C.A.) [hereinafter *Ont. (S.C.)* v. *Bennett* cited to O.R.]; *Bennett* v. *British Columbia (Securities Commission)* (1991), 82 D.L.R. (4th) 129 (B.C.S.C.), aff'd (1992) 69 B.C.L.R. (2d) 171, [1992] 5 W.W.R. 481, 94 D.L.R. (4th) 339 (C.A.) [hereinafter *Bennett* v. *B.C.(S.C.)* cited to B.C.L.R.], leave to appeal to S.C.C. refused [1992] 6 W.W.R. lvii; *Bennett* v. *British Columbia (Superintendent of Brokers)* (2 February 1993), Vancouver CA016670, CA016671 and CA016672 (B.C.C.A.), Lambert J.A.

[2]The cynical would point out that the lawyers are doing nicely, thank you very much. See P.

The Ontario *Securities Act*[3] is badly in need of reform. As the OSA serves as a model for securities legislation in other provinces,[4] legislative deadlock results. The constitutional logjam over federal/provincial jurisdiction in securities matters is far from resolved.[5] Criminal prosecutions, at least for insider trading, seem doomed to failure. And, the courts have shown themselves reluctant to redress the situation.

What has brought about such a sorry state of affairs? Extraordinarily rapid change. Change which has outstripped the legislature's ability to deal with it and left the administrative agencies, the regulators, struggling to catch up with the very inadequate means at their disposal. Money, securities, the stuff of securities trading, have been reduced to electronic impulses, dematerialized. Transactions are concluded across borders around the world in a twinkling of the eye, inevitably raising the question of who has jurisdiction to supervise them.[6]

Internationalization of the markets. Securities markets are no longer the preserve of a few cozy local clubs, following their own unwritten (or minimalistic) rules and minding their own business. The practices observed and forces at work in the major international markets impose themselves on smaller domestic and regional markets. To the extent that such influences provoke harmonization and homogenization in the industry, they also herald the breakdown of consensus and informal methods of constraint, resulting in fragmentation and a moral crisis, if you will.

Regulatory arbitrage. The combination of instantaneous communications across borders and the differences of regulatory regimes, both substantively and as to their jurisdictional reach, opens up the possibility of regulatory arbitrage. The response of regulators has been fairly *ad hoc*, by way of more or less

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Lush, "Bennetts, Doman Can Appeal Hearing" *The [Toronto] Globe and Mail* (3 February 1993) B3: "The marathon series of legal proceedings, fought by some of the most high profile lawyers in Vancouver, undoubtedly has eaten up most of the profits from the Doman trading." *The Globe and Mail* reports that William Bennett gained $1,296,000 by selling before the halt in trading. See P. Lush, "Bennetts to Face BCSC" *The [Toronto] Globe and Mail* (11 January 1993) B3.

[3]R.S.O. 1980, c. 466, now R.S.O. 1990, c. S.5 [hereinafter *OSA*].

[4]Quebec being the notable exception, having gone its own way in 1982.

[5]See, for example, "IDA Backs Provincial Regulation for Most Bank-Owned Brokers" *The Financial Post* (22 June 1993) 3, summarizing the jurisdiction dispute over bank-owned brokers.

[6]Testimony introduced in the British Columbia Provincial Court proceedings, *supra* note 1 at 34-35, as to the actual trade by Russell Bennett through his British Columbia broker over The Toronto Stock Exchange indicated how quickly the transaction took place:

> Q. So also you told him that you could sell a hundred and ninety thousand [shares] at eleven and three-eights?
> [Broker]A. Yes, and that I could do it that instant.
> Q. That's it, you could do it virtually instantaneously with your machine, right?
> A. Rigbt.
> Q. And when you told him after checking that you could sell a hundred and ninety thousand he said to you, 'Okay, sell it.'
> A. He said, 'Sell a hundred and ninety thousand.'
> Q. Yes, and you did?
> A. I did.
> Q. All you had to do was push a button and it's done and that's what you did?
> A. Yes.

informal cooperation stopping short of legislative initiatives. In some instances, these measures are highly effective;[7] once challenged, however, gaping holes and brick walls appear.

I. The Facts

The allegations of tipping and insider trading[8] in the *Bennett* affair arise from events occurring over the course of 1988. Doman Industries Limited ("DIL"), a British Columbia company, was engaged primarily in the logging and lumber business. DIL was controlled and managed by Herb Doman and traded over The Toronto Stock Exchange.[9]

In early 1988, Louisiana-Pacific Corporation ("LP"), a major American company, began to negotiate with Herb Doman, first with a view to forming a joint venture, then to acquiring all or a controlling interest in DIL. A public announcement to this effect was made on September 20, 1988. As a result, the price of a DIL B shares jumped from 7¾ at the beginning of September 1988 to 11½ at the beginning of November 1988 and monthly trading volume during this period nearly tripled.

Russell Bennett and his brother, William Bennett, had been accumulating shares in DIL since the fall of 1987. Over the course of October 1987 and June, July, August and September 1988, William Bennett purchased a total of 329,300 DIL shares for himself and his family. Russell Bennett purchased DIL shares in October, November and December 1987 and January, June, July and September 1988 for a total of 190,000 shares. Herb Doman, president of DIL, and Russell Bennett were acquaintances, "enjoying a mutual interest in horses."[10]

On November 4, 1988, in a conversation lasting a few minutes between 9:52 a.m. and 10:07 a.m., LP informed Herb Doman that LP would not go through with the transaction. At 10:09 a.m., a telephone call lasting until 10:14 a.m. was placed from DIL's offices to the offices of Russell Bennett. Russell Bennett sold his holding in DIL on November 4, 1988 for over $2.1 million; the trade took place over The Toronto Stock Exchange at 10:17 a.m. William Bennett sold his 329,300 shares in DIL on November 4, 1988 for over $3.7 million; the trade took place over The Toronto Stock Exchange at 10:21 a.m. Trading in

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[7]The efforts of the Canadian Securities Administrators, regrouping provincial regulators, are notable. The National Policy Statements which they produce and adopt, for example National Policy No.1, on Clearance of National Issues, have facilitated the operation of a national market.

[8] The essence of insider trading involves the use of confidential information that will, when made public, have a significant effect on the price of securities to which it relates, by a person who obtains the information as a result of a relationship, usually with the issuer, which provides him with access to it. In view of the easy transmissibility of information, a statutory prohibition invariably encompasses not only direct use by trading, but also indirect use through procuring or advising others to trade or simply passing on the information without a proper business justification for doing so.

P. Anisman "Takeover Bid Issues and Insider Trading Legislation" in *Basic Securities Law* (Toronto: Law Society of Upper Canada, Department of Education, 1991) F-1 at F-59.

[9]See *Bennett* v. *B.C.(S.C.)* (S.C.), *supra* note 1 at 143.

[10]*R.* v. *Bennett* (B.C. Prov. Ct.), *supra* note 1 at 13.

DIL shares was halted on The Toronto Stock Exchange an hour later at 11:19 a.m. The stock plummeted to $7.40 when trading resumed on November 7, 1988. Trading volume had dropped from 3,653,120 in October 1988 to 168,740 in December 1988.

The British Columbia Securities Commission and the Ontario Securities Commission began a joint investigation of the transactions three days later on November 7, 1988.[11]

II. The Proceedings

Proceedings in the *Bennett* matter as of the writing of this note (August 1993) are still ongoing. Criminal charges under the British Columbia *Offence Act*[12] against Herb Doman and the Bennetts were dismissed in B.C. Provincial Court in May, 1989. Similar charges laid in Ontario under the *Provincial Offences Act*[13] were withdrawn shortly after the B.C. charges were dismissed. Since then, the last four years have been spent in the so far successful efforts of the Bennetts and Herb Doman to avoid an administrative hearing by either the British Columbia or Ontario Securities Commission into the allegations of tipping and insider trading. Efforts of the Ontario Securities Commission to obtain testimony from the Bennetts in British Columbia ended in 1991 with the refusal by the Ontario Court of Appeal to issue an order requesting the assistance of the British Columbia Court. Challenges to the holding of an administrative hearing by the British Columbia Securities Commission have already been taken to the Supreme Court of Canada (where leave to appeal was refused in August 1992[14]) and are now again pending before the British Columbia Court of Appeal on different grounds.

A. *Testimony before the British Columbia Securities Commission*

In chambers, the British Columbia Supreme Court justice seized of the original petitions by Doman and the Bennetts challenging the B.C. Securities Commission hearing heard fifteen days of argument and rendered a seventy-five-page decision. As the British Columbia Court of Appeal noted on appeal from this decision in July 1992, "some of the issues have more merit than others. And some might better be left to be raised with the Commission during the hearing, or raised upon a review of the final decision of the Commission if the decision is brought forward for review."[15] The Court dismissed the challenges, clearing the way for an administrative hearing to be held.

On January 11, 1993, some four years after the initial investigation had been started, the hearing of the British Columbia Securities Commission finally began. Two weeks of "legal wrangling"[16] preceded presentation of the Commis-

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[11]The British Columbia Securities Commission also imposed a freeze order on funds in British Columbia (which remained in place for nearly 3 years) and issued a temporary cease trade order.

[12]R.S.B.C. 1979, c. 305.

[13]R.S.O. 1980, c. 400, now R.S.O. 1990, c. P.33.

[14]*Supra* note 1.

[15]*Bennett* v. *B.C.(S.C.)* (C.A.), *supra* note 1 at 178.

[16]"Hearing Starts on Doman, Bennett" *The [Toronto] Globe and Mail* (27 January 1993) B5.

sion case. Lawyers for the Bennetts and Herb Doman indicated that they planned "to continue exploring legal avenues to derail the hearing."[17] A few days later they were successful. On February 2, 1993 the British Columbia Court of Appeal again stayed the hearing pending a challenge to the panel on the basis of bias.[18] In granting leave to appeal and staying the Commission hearing, Justice Lambert said that it would not be in the public interest to continue the hearing before the appeal was heard. "He said that proceeding now could cause a grave injustice to the three men. They might be called as witnesses, their credibility might be challenged and their reputations harmed."[19]

Here is the nub of the matter. In the Provincial Court criminal proceedings, the Bennetts and Herb Doman refused to testify and could not be compelled to give testimony. The essence of the offences of tipping and insider trading is the conveyance and use, respectively, of material non-public information affecting the value of the securities traded. In the absence of their own testimony, the case against the Bennetts and Doman was entirely circumstantial, based primarily on telephone and trading records. Only Herb Doman could say, "I called Russell Bennett at 10:09 a.m. and told him the deal was off." Only Russell Bennett could say, "I got the call from Herb Doman, immediately told my brother William and gave instructions to my broker to unload my holding."

The Provincial Court judge refused to make the inference from the evidence that such statements were made.[20] In light of the testimony provided, Craig J. found that "there is at least a reasonable doubt that [Doman] made the call and, in my mind, an equally consistent reasonable inference, on the proven facts, that he did not tip off either Bennett."[21] Although telephone records indicated that a call was made at 10:09 a.m. on November 4 from Doman's offices to Russell Bennett's offices, there was no direct evidence as to who made the call and what was discussed:[22]

> The Crown has failed to prove beyond a reasonable doubt that Russell Bennett sold his DIL shares as a result of Herb Doman giving him insider information. I am satisfied on a preponderance of probabilities that he made the decision to sell his shares and instructed his broker to do so before he could possibly have received any alleged tip.[23]

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[17]*Ibid.*

[18]As of August, 1993, it was expected that the appeal would be heard in the fall of 1993, according to staff at the B.C. Securities Commission.

[19]"Bennetts, Doman Can Appeal Hearing," *supra* note 2.

[20]*R.* v. *Bennett* (B.C. Prov. Ct.), *supra* note 1 at 57-58:

> The prosecution said its case against Herb Doman was entirely circumstantial. It did produce evidence which, if viewed in isolation and in the chronology of [LP's] call to Herb Doman, followed by the unidentified call from DIL to the Bennetts' offices and the sale of their shares soon after, would probably cause me to conclude that the only reasonable inference is that Herb Doman made the call, tipped the Bennetts off, and on that tip they sold their shares.

[21]*Ibid.* at 58.

[22]"It would be speculation at best and cynicism at least to infer that Doman immediately placed the call to [Russell Bennett's offices]. To speculate on Doman's activities between 10:07 and 10:14 a.m. on November 4, 1988, and give only a sinister connotation to such speculation would lead to a conviction based on suspicion" (*ibid.*).

[23]*Ibid.* at 56-57.

Faced with the findings of fact of the trial judge, the Crown did not appeal.

This was not, however, the end of the matter for Herb Doman and the Bennetts. The B.C. Securities Commission had made it known to them before criminal proceedings had formally been initiated that an administrative hearing would be conducted.[24] Unlike the criminal proceedings, Doman and the Bennetts may be compelled to give testimony at the Commission hearing.[25] It is this hearing which they have resisted so strenuously, and to date, so successfully. It is at this hearing that counsel for the B.C. Securities Commission[26] has said that he

> expects Mr. Doman will admit he called Russell Bennett on the morning of Nov. 4, 1988. But instead of admitting that he told [Mr. Bennett] that the Louisiana-Pacific takeover would not proceed — a fact that had just cost him approximately $65-million and for which he was very disappointed — we expect him to say that he chose instead to talk ... only about the fact that he received a cheque of $500 for a horse instead of a cheque for $5,000.[27]

B. Testimony before the Ontario Securities Commission

The issues arising in the Ontario courts with respect to an administrative hearing by the Ontario Securities Commission were very different. The application before the Ontario High Court in February 1990 was for two orders, one appointing a commissioner for the purpose of taking evidence from Herb Doman and the Bennetts in British Columbia for use at an Ontario Securities Commission hearing in Ontario, and the other requesting the proper judicial authorities in British Columbia to issue the necessary process to compel the respondents to attend for examination before the commissioner.

Doman and the Bennetts had voluntarily given evidence in British Columbia during the course of the investigation conducted under section 11 of the *OSA*.[28] The Commission was of the view that the evidence so gathered provided grounds for a hearing under then section 124 of the *OSA*. The Commission issued summonses to Doman and the Bennetts to attend and give evidence at a hearing to be held in Ontario. The respondents refused to attend.

The Ontario High Court refused to give assistance to the Ontario Securities Commission on very narrow grounds. Although the *OSA* specifically provides for the power of the Commission to issue summonses for purposes of conducting an investigation, there is no specific power granted for purposes of a section 124 hearing.[29] Such a power is specifically granted to the Commission under the *Statutory Powers Procedure Act*.[30] "It is a broad power but no express mention

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[24]See *Bennett* v. *B.C.(S.C.)* (S.C.), *supra* note 1 at 175.

[25]"Hearing Starts on Doman, Bennett," *supra* note 16 at B5: "Marvin Storrow, representing Mr. Doman, indicated that he and his colleagues intend to challenge the superintendent's right to compel the Bennetts and Mr. Doman to testify."

[26]Technically, the B.C. Superintendent of Brokers.

[27]"Hearing Starts on Doman, Bennett," *supra* note 16 at B5.

[28]See *Ont. (S.C.)* v. *Bennett* (H.C.J.), *supra* note 1 at 78.

[29]Now R.S.O. 1990, c. S.5, s. 128.

[30]R.S.O. 1980, c. 484, now R.S.O. 1990, c. S.22.

of a territorial limit is made in relation thereto. ... [T]here are no reported decisions on the point in issue."[31] The Court was of the opinion that since the *Statutory Powers Procedure Act* was "silent outside Ontario,"[32] there was no statutory basis upon which the order could be granted. The Court also found that it had no inherent jurisdiction to assist an Ontario administrative tribunal outside Ontario: "If the legislature had intended that the court should assist administrative tribunals outside of Ontario, it would have said so."[33]

On appeal to the Ontario Court of Appeal a year later, the Court agreed with the trial judge. "In the absence of any statutory authorization to this effect, we agree with Steele J. that the court's inherent jurisdiction does not extend to granting assistance to an Ontario administrative tribunal outside the province and cannot be invoked for this purpose."[34] The Court, in a single paragraph dismissal of the request by the Commission, referred specifically to the fact that legislation in other provinces did contain statutory provisions empowering the Commission to issue summonses outside of the province or to apply to the court for a commission for the obtaining of evidence from a witness outside the province.

It is easy to imagine that the Ontario Securities Commission would have been surprised at the result. Certainly, the Commission had felt justified in appealing the decision of the trial court. These decisions of the Ontario courts effectively hamstrung the Ontario Securities Commission; on narrow and quite arguable procedural grounds, the Commission was prevented from proceeding to a hearing concerning possible insider trading over The Toronto Stock Exchange. Two and a half years later, statutory amendments which specifically address the findings in these decisions have been proposed by the Ontario Securities Commission but have not yet reached bill form.[35]

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[31]*Ont. (S.C.)* v. *Bennett* (H.C.J.), *supra* note 1 at 79.

[32]*Ibid.* at 81.

[33]*Ibid.*

[34]*Ont. (S.C.)* v. *Bennett* (Ont. C.A.), *supra* note 1.

[35]An Ontario Securities Commission staff member has indicated that as of August 1993, the proposed amendments read as follows:

154(1) *Application For Letters of Request*: The Commission may apply to the Ontario Court (General Division) for an order

(*a*) appointing a person to take the evidence of a witness outside of Ontario for use in proceedings before the Commission; and

(*b*) for a letter of request directed to the judicial authorities of the jurisdiction in which the witness is to be found, requesting the issuance of such process as is necessary to compel the person to attend before the person appointed pursuant to clause (*a*) to give testimony on oath or otherwise and to produce documents and things relevant to the subject matter of the proceedings.

(2) *Practice and Procedure*: The practice and procedure in connection with an appointment under this section, the taking of evidence and the certifying and return thereof shall, as far as possible, be the same as those that govern like matters in civil proceedings in the Ontario Court (General Division).

(3) *Reciprocal Assistance*: Where it is made to appear to the Ontario Court (General Division) that a court or tribunal of competent jurisdiction outside of Ontario has, on behalf of a securities commission or other body empowered by statute to administer or regulate trading in securities, duly authorized, by Com-

III. The Lessons to be Learned from the Bennett Proceedings

Writing on the *Bennett* matter in November 1992, Ed Morgan, a Toronto practitioner, and Professor Daniels of the University of Toronto adopted a provocative stance: who cares about insider trading?[36] "[A]lmost everyone" according to *The Economist*.[37] Despite the debate over the ills and merits of insider trading,[38] "the emerging global consensus favors punishing such activity because it undermines the integrity of the marketplace and threatens the market's efficiency."[39] Given this emerging global consensus, here is a matter which Canadian regulators must confront.

The *Bennett* matter, however, raises issues that go beyond whether we should care if Bill Bennett made a cool million on a hot tip. It is indicative of a more widespread crisis in the Canadian regulatory regime governing securities and financial markets. It is now patently obvious (as it has been for many years[40]) that securities regulation, in fact, is not a local matter. The constitutional underpinnings of our provincial legislation are simply not adequate to deal with the markets and are responsible for the multiplicity of proceedings afflicting Herb Doman and the Bennetts. Exacerbating this long-standing difficulty has been the more recent breakdown of the mechanisms that had been cobbled

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> mission, order or other process, the obtaining of the testimony of a witness outside of the jurisdiction thereof and within the jurisdiction of the Ontario Court (General Division) for use at a proceeding before that securities commission or other body empowered by statute to administer or regulate trading in securities, the Ontario Court (General Division) may order the examination of such witness before the person appointed in the manner and form directed by the Commission, order or other process, and may, by the same or by subsequent order, command the attendance of the witness for the purpose of being examined, or the production of a writing or other document or thing mentioned in the order, and may give all such directions as to the time and place of the examination and all other matters connected therewith as seem proper, and the order may be enforced and any disobedience thereto punished, in like manner as in the case of an order made by the Ontario Court (General Division) in an action pending in such court.

[36]R. Daniels & E. Morgan, "Is It Worth It to Ban Insider Trading?" *The Financial Post* (18 November 92) 9: "Indeed, the strenuous pursuit of such a high-profile target as Bill Bennett with only sporadic results raises a further question: why does the B.C. Securities Commission, or for that matter anyone else in Canada, care about insider trading?"

[37]"Inside Out" *The Economist* (22 May 1993) 86.

[38]The argument in favour of permitting insider trading, an essentially economic one based on market efficiency theories, was recently summarized in *The Economist*, *ibid.*: "Allowing insiders — *i.e.*, better-informed people — to profit from trading means that share prices reflect information more quickly. This can make markets more efficient, and lets investors spend less time and money searching for information." See also M. Gillen, "Sanctions Against Insider Trading: A Proposal for Reform" (1991) 70 Can. Bar Rev. 215 at 217ff.

[39]C.V. Baltic, III, "The Next Step in Insider Trading Regulation: International Cooperative Efforts in the Global Securities Market" (1991-92) 23 L. & Pol'y in Int'l Bus. 167 at 182.

[40]See generally P. Anisman & P.W. Hogg, "Constitutional Aspects of Federal Securities Legislation" in *Proposals for a Securities Market Law for Canada*, vol. 3 (Ottawa: Consumer and Corporate Affairs Canada, 1979).

[40]See generally P. Anisman & P.W. Hogg, "Constitutional Aspects of Federal Securities Legislation" in *Proposals for a Securities Market Law for Canada*, vol. 3 (Ottawa: Consumer and Corporate Affairs Canada, 1979).

together to deal with it, various means of "informal" enforcement and cooperation coupled with benign neglect on the part of the legislatures and deference on the part of the courts.

A. *A Legacy of Legislative Abdication*

It has been a precarious balancing act, and one which is increasingly hard to maintain. As Anisman and Hogg noted over fifteen years ago, the provincial securities power has flourished in the absence of, some would say much needed, federal legislation.[41] The federal government is not alone, however, in bearing the responsibility for legislative abdication in the area of securities regulation. As Professor Janisch points out in his excellent article in the Law Society of Upper Canada Special Lectures for 1989, the Ontario Securities Commission has been left to its own resources, most notably its "public interest" power, in the absence of a clear legislative mandate.[42] Viewing the state of securities regulation in Canada with the untrammelled vision of an administrative lawyer, Professor Janisch is no less than astounded at the way in which the markets have been supervised.[43]

The Ontario Securities Commission, overseeing the most important capital market in Canada (and a market which is important internationally out of all proportion to Canada's economic importance), has been forced, because securities matters cannot make it to the top of the legislative agenda, to resort to a patchwork of strategies of questionable legality. It has, for example, amended statutory provisions through regulatory enactment.[44] Even the use of the regulatory power is exceptional. Virtually every significant development in the last ten years has been dealt with by way of "policy statement," specifically stated, in yet another policy statement, to be of no binding legal effect.[45]

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[41] *Ibid.* at 145.

[42] H.N. Janisch, "Reregulating the Regulator: Administrative Structure of Securities Commissions and Ministerial Responsibility" [1989] *Special Lectures of the Law Society of Upper Canada* 97.

[43] "[T]he most excrutiatingly refined doctrine in securities law must conform to the basic tenets of our legal system" (*ibid.*).

[44] The $97,000 private placement exemption of s. 72(1)(*d*) *OSA* is increased to $150,000 by ss. 23 and 25 of *Regulation made under the Securities Act*, R.R.O. 1990, Reg. 1015.

[45] The O.S.C. Policy Statements do not have the force of law and are not intended to have such effect. They are, however, intended to set forth certain basic policies of the Commission relating to securities regulation in the Province of Ontario and the role of the Commission with respect thereto and accordingly the Commission expects issuers to comply with the O.S.C. Policy Statements unless compliance is waived (O.S.C. Policy Statement 1.1, "O.S.C. Policy Statements – General").

Policy Statements have recently been dealt a near fatal blow by the Ontario Court (General Division) in the so-called "Penny Stock" case. Speaking of O.S.C. Policy Statement 1.10, Blair J. stated: "This is regulation of the conduct of those engaging in the business of trading in penny stocks. Whatever the desirability of such regulation may be, the O.S.C. simply does not have the statutory mandate to regulate in such a fashion" (*Ainsley Financial Corp.* v. *Ontario (Securities Commission)*, [1993] O.J. No. 1830 (QL), File No. 92-CQ-26469 (13 August 1993), [para. 47]). The decision has been appealed. See O.S.C. Press Release, "Re: Proposed O.S.C. Policy Statement No. 1.10 — Appeal from Court Decision" (27 August 1993) (1993) 16 OSCB 4285. As this article

B. Breakdown of Moral Suasion

Until recently, the moral suasion of the Commission has been so compelling as to command compliance.[46] Writing ten years ago in a report prepared for the Ontario Securities Commission on the *Extraterritorial Application of the Securities Act by the Ontario Securities Commission*,[47] Michael Nicholas estimated almost sixty-five per cent of the investigations conducted by the Commission to be of an informal nature, undertaken without necessity of recourse to the Commission's coercive powers. Informal cooperation (as well as more formal concerted efforts of the Canadian Securities Administrators, embodied in National Policy Statements) has also been characteristic of the interaction of Canada's provincial regulators in the absence of a federal presence.

This informal cooperation, in an effort to preclude regulatory arbitrage,[48] is evident in the contrapuntal nature of the proceedings in the *Bennett* matter[49] as they shift back and forth between British Columbia and Ontario. Evident too in the initial stages (the "joint investigation" by both Commissions) was the informal nature of the proceedings. The Bennetts originally testified voluntarily at this stage.[50] This fact alone speaks eloquently to the power of persuasion of the Commissions, a power to which they have become accustomed.

To its surprise, however, the Ontario Securities Commission found that once the Bennetts had thought better of their situation, the Commission was no longer able to obtain testimony voluntarily; Doman and the Bennetts refused to recognize the Ontario Securities Commission subpoenæ and the Ontario courts refused assistance. This was likely a rude shock to the Commission, but indicative of the limits of moral suasion and regulation by informal means. It is also indicative of the fragmentation which is occurring within the securities dealing community, where challenges to Commission authority are becoming more frequent.[51] The Commissions no longer have the carte blanche they once had.[52]

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was going to press, the Ontario government announced the formation of a task force to recommend ways to ensure that the Ontario Securities Commission "has the power to fulfil its mandate" (*The Financial Post* (8 October 1993) 17).

[46]*Ibid.*

[47]M. Nicholas, *Extraterritorial Application of the Securities Act by the Ontario Securities Commission*, (Ontario Securities Commission, October 1993) [unpublished].

[48]Filling the potential gaps that could be "exploited by the unscrupulous," as Hogg and Anisman have put it. See *supra* note 40 at 145.

[49]See Appendix.

[50]*Ont. (S.C.)* v. *Bennett* (H.C.J.), *supra* note 1 at 78.

[51]See *e.g.* Jacques Forget's successful defamation suit against the Quebec Securities Commission as reported in "Former Montreal Publisher Wins Suit against QSC" *The [Toronto] Globe and Mail* (30 June 1993) B2.

[52]Just ten years ago Peter Dey, then Chairman of the Ontario Securities Commission, stated that the Commission was seldom challenged. Although he was speaking specifically with respect to what he had characterized as the extraterritorial application of the *OSA*, his statement is likely applicable in a broader context as well. See Law Institute of the Pacific Rim, Notices (Press Releases Ch. 1, P.J. Dey, "Opening Statement for Panel on Extraterritorial Application of Securities Laws" (Los Angeles, 21 October 1983) (1983) 6 O.S.C.B. 3481 at 3483.

C. *A Disappointing Judicial Response*

Once the administrative authority of the Commissions is challenged, they must look to the courts for assistance. As has been noted by commentators, traditionally the courts have demonstrated a reluctance to strike down provincial securities legislation on constitutional grounds, given the absence of federal legislation to fill the gaps.[53] In the latest round of challenges to Commission authority, however, the support of the judiciary has been anything but consistent.

There are several reasons for such lack of consistency. One is the notable paucity of securities-related litigation in the courts. Since issues have been resolved at the Commission level in the past, a significant body of case law to which the courts could turn has not developed. Neither has the expertise of the judiciary;[54] there is no court the equal in experience to the Southern District of New York or the Delaware Chancery Division.

The courts, once seized of a matter, are in a difficult position. The long-ignored inadequacy of the constitutional basis of the provincial securities law power, local matters, "property and civil rights in the province," has become a glaring defect given the borderless nature of modern securities dealing. And legislative neglect has been crippling. Securities regulation is an area which rivals taxation in complexity and technicality. Legislatures, for obvious reasons, pay close attention to their fiscal legislation, closing loopholes, amending legislation yearly, producing statutes which resemble small telephone books.[55]

Not so with securities legislation. The self-interest of the legislature is not invoked to nearly the same degree and the Commissions have been left to their own devices to deal with the rather creaking apparatus of outdated and inadequate statutes.[56] Thus the recourse to policy statements, both national and provincial, blanket orders and notices, all effective to the extent complied with, but highly vulnerable before the courts.

The Ontario courts in the *Bennett* case (and the British Columbia courts in the recent *Pezim* decisions[57]) have unfortunately given the Commissions little

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[53]See *e.g.* Anisman & Hogg, *supra* note 40.

[54]See Janisch, *supra* note 42 at 104.

[55]By comparison, the *OSA*, in a recent commercial version, is a meagre 145 sections over 91 pages. Various policy statements in the same publication stretch over 530 pages. See *Ontario Securities Act and Regulation*, 21st ed. (Scarborough: Carswell, 1992).

[56]It is interesting to note here that Quebec, again, seems to be an exception. See generally Janisch, *supra* note 42. A possible reason for this has been the competitive pressures felt in Quebec to retain market share and to render its financial markets attractive and responsive.

[57]*Pezim* v. *British Columbia (Securities Commission)* (1992), 96 D.L.R. (4th) 137 (B.C.C.A.). Leave to appeal has been granted and the case is pending before the Supreme Court of Canada. In *Pezim*, the B.C. Court of Appeal very narrowly construed the B.C. *Securities Act*, drawing a fine distinction between material change and material fact in the statute and ignoring National Policy Statement 40, which eliminated this distinction by referring to "material information." Commentators have expressed disappointment with a result which is so contrary to the policy of the Act. See V.J. O'Connor, "*Pezim* v. *British Columbia (Superintendent of Brokers)*: Material Fact or Material Change? A Distinction with a Difference" [March 1993] Business & The Law 21. The decision was a

assistance in dealing with their difficult position. Both the Ontario High Court and the Court of Appeal abdicated in *Bennett*: They adopted an extremely narrow and technical reading of the statutes invoked, in effect turning their backs on the Commission, and in the view of this commentator, without sufficient consideration of the infirmities and policies of the statutes with which they were dealing.

Despite the absence of reported decisions on the point and the broad powers of the *Statutory Powers Procedure Act*, the High Court refused assistance in the absence of an "express power given to the court to assist a tribunal outside Ontario."[58] The court found it had no "inherent jurisdiction."

The High Court decision is arguable to the extent that the two cases relied upon by the Court in its decision both dealt with applications by the U.S. Securities and Exchange Commission ("SEC"), a foreigu agency, and interpretation of a different statute, the Ontario *Evidence Act*.[59] It is difficult to see how Steele J. found himself "bound by the decision in *McCarthy*"[60] in the light of cases so distinguishable. In addition, there were very different policy factors at work in *McCarthy* and *Becker*. Rather than lending assistance to an Ontario agency in its cooperative efforts with another provincial agency (in fact, the only means by which regulators in Canada can effect supervision of Canadian domestic securities markets), the courts in the *McCarthy* and *Becker* cases were dealing with the exercise of what could be seen as exorbitant jurisdiction by a foreign agency, the SEC.[61]

The decision of the Ontario Court of Appeal is even more disappointing. The appeal of the Ontario Securities Commission was dismissed in an oral endorsement.[62] The Court stated that the powers of the Commission were governed by "the comprehensive statutory scheme set forth in the Securities Act, R.S.O. 1980, c. 466."[63] The *OSA* is far from a comprehensive statutory scheme;[64] it is not the *Income Tax Act* and, as noted earlier, does not benefit

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departure from the historical reluctance of the courts to interfere with the determination of a specialized body such as a securities commission ... However, from a policy perspective, the public interest is not well served by such a narrow interpretation, particularly when dealing with something as significant as the fiow of information to investors. It is regrettable that the matter had to be heard by the Court of Appeal in any event (*ibid.* at 23, 24).

[58]*Ont. (S.C.)* v. *Bennett* (H.C.J.), *supra* note 1 at 81.

[59]*McCarthy* v. *United States Securities and Exchange Commission*, [1963] 2 O.R. 154, 38 D.L.R. (2d) 660 (C.A.) [hereinafter *McCarthy*]; *Re A.G. Becker Inc.* (1984), 45 C.P.C. 163 (Ont. H.C.J.) [hereinafter *Becker*].

[60]*Ont. (S.C.)* v. *Bennett* (H.C.J.), *supra* note 1 at 81.

[61]The SEC has to an impressive degree mended its ways in the last few years by formally adopting, for certain purposes, a territorial approach to the exercise of its jurisdiction. See *Regulation S: Rules Governing Offers and Sales Made outside the United States without Registration under the Securities Act of 1933*. 55:85 F.R. 18322 (2 May 1990).

[62]*Ont. (S.C.)* v. *Bennett* (C.A.), *supra* note 1 at 576.

[63]*Ibid.*

[64]The court did seem most impressed by the fact that legislation in other provinces contained provisions empowering their commissions to issue summonses outside of the province and to apply to the court for a commission for the obtaining of evidence from a witness outside the province

from the legislative attention which the *Income Tax Act* receives. The *OSA* is replete with lacunæ that, of necessity, have been supplemented by administrative action.

The Ontario Court of Appeal decision is doubly disappointing to the extent that the procedural means invoked by the Commission avoided the traditional constitutional infirmity of Canadian securities legislation, provincial legislation purporting to act with extraterritorial effect. The Commission, for example, was not seeking to enforce provincial securities legislation empowering the Commission to issue summonses outside of the province, legislation that constitutionally would be highly susceptible of challenge. The Commission was not a foreign tribunal seeking to enforce either directly its own subpoena power or a request for assistance of its own domestic court as was the case in *McCarthy* and *Becker*. The Commission was requesting an order of an Ontario court requesting the proper judicial authorities in British Columbia to issue the necessary process there to compel British Columbia residents to attend for examination before the Commission for the purpose of taking evidence. The means chosen by the Commission seemed above reproach.

It is not disputed that the trades in question took place over The Toronto Stock Exchange (the principal market with which the Commission is charged with oversight) and in securities of an issuer reporting to the Ontario Securities Commission. Accepting the traditional justification for Commission involvement at all in allegations of insider trading, protection of the integrity of its capital markets, Ontario is arguably the jurisdiction which has the greatest interest in pursuing the *Bennett* matter. The physical presence of Doman and the Bennetts in British Columbia is quite fortuitous. On these facts and assumptions, there is not even the "extrajurisdictional" argument to muddy the waters of the substantive jurisdiction of the Ontario Securities Commission.[65] In the absence

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(*ibid.*). The B.C. Securities Commission, however, has had little success in invoking the assistance of the British Columbia courts under s. 154.3(1) of the B.C. *Securities Amendment Act, 1992*, S.B.C. 1992, c. 52, B.C. Reg. 289/92, dealing with extrajurisdictional evidence. S. 154.3 came into force 24 July 1992 and states:

> Where it appears to the Supreme Court, on an application made by the commission, that a person outside of the Province may have evidence that may be relevant to an investigation ordered by the commission under section 126, the Supreme Court may issue a letter of request directed to the judicial authority of the jurisdiction in which the person to be examined is believed to be located.

The B.C. Commission in a petition filed 25 November 1992 sought letters of request with respect to an Ontario resident in counection with the Bennett administrative hearing. As counsel for the commission indicated in their petition, a commission investigation order dated 18 April 1989 under s. 126 remained in effect. The petition was denied, Finlay J. stating: "In my view, although there may still be an ongoing investigation as ordered by The Commission under s. 126. The real purpose of this petition is not to advance that investigation but to prepare evidence by way of deposition to be tendered to The Commission [*sic*]." See *British Columbia (Securities Commission)* v. *Jerome Lapointe as Manager of the Canadian Broadcasting Corporation Pension Plan* (18 December 1992), Victoria 923955 (B.C.S.C.). The decision has been appealed: *B.C. Securities Commission* v. *Jerome Lapointe as Manager of the Canadian Broadcasting Corporation Pension Plan*, Victoria V01810, filed 13 April 1993.

[65]This argument has been invoked on other occasions but parried by the Commission. See Dey, *supra* note 52 at 3486. In fact, although not formally recognized in Canada, long implicit in the

of a federal securities commission, to have made available the process of the Ontario and British Columbia courts would have been a step in the right direction.[66] It would have provided a means of coordinating at the judicial level efforts at coordination already well developed at the administrative level.

In an era where securities authorities around the world are entering into administrative understandings[67] and engaging in cooperative efforts to provide effective market surveillance for activity that transcends national borders, it is particularly anomalous that the Ontario Securities Commission cannot invoke the process of its own courts in aid of supervision of its own markets. There is considerable irony as well in the fact that the SEC, on the facts of *Becker* and *McCarthy*, would now invoke the assistance of the Ontario Securities Commission directly, bypassing the Ontario courts, on the strength of the administrative understanding for mutual assistance entered into between the two agencies.[68]

D. Multiplicity of Proceedings

Finally, there is the issue of multiplicity of proceedings. Multiplicity of proceedings constituting an abuse of process was argued by Doman and the

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pronouncements of the Ontario Securities Commission has been the adoption of the U.S. conduct and effects doctrine. See *e.g.* Nicholas, *supra* note 47 at note 118 and accompanying text [no page number reference in original text]:

> [I]t is submitted that many of the [Ontario Securities] Commission's policies and decisions expressed as being in the public interest, or for the purpose of protecting the market integrity of Ontario's capital markets, are better understood if also considered as applications of the impact or effects doctrine or the conduct doctrine of the United States. It is further submitted that such considerations should govern the extraterritorial application of the Act by the Commission and that such application should be premised on a substantial effect within the province, as a result of conduct outside the province, or substantive conduct within Ontario which has a detrimental effect or impact felt outside the province.

The issue of extraterritorial application of the *OSA* was also raised and laid to rest by the Ontario Court of Appeal in the recent "Asbestos" case:

> What is in issue in this case is the application within Ontario of legislative sanctions against the appellant as a result of transactions entered into by the appellant which allegedly had a damaging effect on the interests of shareholders resident in Ontario. ... As stated above, the simple legislative objective involved in this appeal is regulation of the operation of capital markets in Ontario for the benefit of all who use them. ... It can hardly be considered fair and reasonable to suggest that only Ontario residents are subject to Ontario regulatory rules when operating in Ontario capital markets.

Re The Securities Act, R.S.O. 1980, c. 466, as amended (1992), 58 O.A.C. 277 at 283, 287, 288, McKinlay J.A. (indexed as *Re Asbestos Corp, Société de l'Amiante and Quebec (Province)*). Leave to appeal to the S.C.C. refused (27 May 1993), 23356.

[66]The Ontario High Court noted that it was "likely that if this court granted the application and issued an order requesting the assistance, the British Columbia court would do so without looking behind the order" (*Ont. (S.C.)* v. *Bennett*, *supra* note 1 at 81).

[67]There are now at least a dozen Memoranda of Understanding (MOUs) between various securities regulators. "MOUs are non-binding statements of intent between like-minded regulators, providing for exchanges of information and mutual cooperation on a bilateral basis" (Baltic, *supra* note 39 at 191).

[68]*Memorandum of Understanding between the United States Securities and Exchange Commission and the Ontario Securities Commission, the Commission des valeurs mobilières du Québec and the British Columbia Securities Commission*, 11 O.S.C.B. 114 (7 January 1988).

Bennetts before the British Columbia Court of Appeal in their initial efforts to prevent an administrative hearing before the B.C. Securities Commission.[69] The argument, dismissed by the Court of Appeal, highlights the fact that there are a multiplicity of proceedings which may be taken in conjunction with allegations of insider trading. The fact that more and more frequently several jurisdictions may be involved, each with their own remedies, adds to the complexity of insider trading allegations. Ed Morgan and Professor Daniels attribute this multiplicity of actions to the "fact that neither the courts nor any of the provincial securities commissions has a coherent theory of what drives our insider trading laws."[70]

Rather than incoherence, insider trading regulation may simply be trying to do too much, and thus failing to do much of anything. The primary goals are often stated to be deterrence and compensation, deterrence being promoted by criminal sanctions and compensation by civil liability. Both sanctions have been notable failures. While there has been a considerable amount of commentary on the criminal and civil liability sanctions,[71] little has been said about what may be emerging as the truly significant sanction for insider trading, the administrative hearing.

It is the administrative hearing by the B.C. Securities Commission which has become the focus of the *Bennett* affair.

1. Criminal Sanction

"It has been called the victimless crime. Some question whether it is a crime at all."[72] The difficulties with the criminal sanction for insider trading have been examined at length,[73] beginning with this very fundamental question. Characterization of the activity as a form of fraud on the market is the usual justification for the creation of the criminal offence.

Traditionally, both detection and enforcement have been difficult. However, detection, at least of the indicators of possible insider trading, is getting easier with the rapid technological changes in the markets. Regulators now look to trading volume, size, direction and number of trades,[74] all of which can be tracked virtually instantaneously. The investigation of the *Bennett* matter, for example, began in a matter of days after the trades took place over The Toronto Stock Exchange.

A suspicion of insider trading is one thing; a criminal conviction is quite another. The *Bennett* affair is an archetypal example of the difficulties encoun-

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[69]*Bennett* v. *B.C.(S.C.)* (C.A.), *supra* note 1 at 182.

[70]*Supra* note 36 at 9.

[71]See R.L. Simmonds, "Penal Liability for Insider Trading in Canada: *Commission des valeurs mobilières du Québec* v. *Blaikie*" (1988) 14 C.B.L.J. 477; Gillen, *supra* note 38; P. Anisman, *Insider Trading Legislation for Australia: An Outline of the Issues and Alternatives* (Canberra: Australian Govt. Publications, 1986).

[72]"Balancing Act" *The Economist* (22 May 1993) 84.

[73]See *e.g.* Gillen, *supra* note 38.

[74]See "Inside Out," *supra* note 37 at 86.

tered in a criminal prosecution of insider trading; in the absence of testimony by the accused, all the evidence was circumstantial and the prosecution was unable to meet the burden of proof, beyond a reasonable doubt.[75] The high profile prosecutions in the United States in recent years almost invariably involved an ongoing scheme or pattern of insider trading; in these circumstances direct evidence was made available, testimony resulting from plea bargaining or legal electronic surveillance, evidence which is virtually impossible to obtain with respect to a suspected isolated incident.

A further difficulty is the prosecution of insider trading as a provincial offence, a considerable limitation on its effectiveness. In the United States, which has led the way in insider trading prosecutions, there is real justification for prosecution of insider trading at the agency level, by the SEC under its anti-fraud power. There is no federal criminal law power in the United States and the SEC, as a federal agency, provides consistent enforcement throughout the United States. The situation is quite the opposite in Canada with our federal criminal law power and our securities agencies operating at the provincial level.

If a criminal sanction is to be retained for insider trading,[76] on the basis of its deterrent function (or otherwise), perhaps real criminalization in Canada should be considered. Arguably, a *Criminal Code* offence (if vigorously prosecuted) would provide even greater deterrent force than the existing quasi-criminal provincial offences. As a bonus, *Criminal Code* offences would be enforceable throughout Canada, with less likelihood of constitutional challenge. There exist already "fraud on the market" offences in the *Criminal Code*.[77] Politically, however, this suggestion may be impractical; the Federal government has let the *Proposals for a Securities Market Law for Canada*[78] languish

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[75]Gillen provides a good discussion of the type of difficulties encountered in the *Bennett* matter with respect to the use of the criminal sanction. See Gillen, *supra* note 38 at 219-30. See also Simmonds, *supra* note 71 at 493:

> There are severe limitations in enforcing norms like those against insider trading through criminal process. ... There is good reason to think that the insider trading standard is neither as well understood nor as deeply felt by the business community as say the standards that oppose theft or fraudulent misstatement, perhaps because the norm seems concerned with unfairness rather than the taking of property. In that context, cases are more likely to end in a series of technical conclusions, rather than ringing normative pronouncements ...

[76]The use of criminal sanctions for insider trading is far from a dead letter. The European Community in its recent Directive on Insider Trading requires all member countries to adopt legislation imposing penalties "sufficient to promote compliance." See Council Directive 89/592 of 13 November 1989 Coordinating Regulations on Insider Dealing, O.J. (1989) No L334 at 30, art. 13, at 32. See Baltic, *supra* note 39 at 192-96. Germany and Britain are the only EC countries which have not implemented the directive in its entirety. See "Balancing Act," *supra* note 72 at 86.

[77]"Securities related [Criminal] Code offences include the indictable offences of deceit or fraud, using the mails to defraud, fraudulent manipulation of stock exchange transactions, gaming in stocks, short sales against margin accounts and the making, publication or circulation of a fraudulent prospectus" (Nicholas, *supra* note 47 at note 63 and accompanying text [no page number in original text]). See R.S.C. 1985, c. C-46, ss. 384, 400. See also *OSA*, *supra* note 3, s. 11 with respect to the Ontario Securities Commission's investigation powers for *Criminal Code* offences.

[78]*Supra* note 40.

for fifteen years now. As it stands, the criminal sanction for insider trading is largely symbolic.[79]

2. Civil Liability

An action for civil liability is the one ingredient, which at first glance, seems to be missing in the *Bennett* affair.[80] This is not surprising. "The victims of insider trading will rarely choose to bring the civil actions provided for in the Securities Acts."[81] As critics of this remedy are not shy to point out, problems of detection and enforcement, while differing from those associated with the criminal sanction, are no less and perhaps more daunting in civil actions.[82]

In the United States, civil liability serves to a much greater extent both a deterrent and compensatory function. If civil liability is to be taken seriously in Canada, consideration should be given to lifting a few leaves from the U.S. book. For example, continuous disclosure rules in the United States catch a much broader range of companies, triggering insider reporting obligations which can serve as a basis for establishing liability.[83]

In addition, section 16(b) liability, the so-called "short-swing profit" rule[84] (which has no counterpart in Canada) is highly effective in overcoming the dif-

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[79]See *e.g.* Simmonds, *supra* note 71 at 493-94:

> If the norms against insider trading are in this state, then the most urgent task facing the securities commissions is to better implant in the public trading markets an ethic against insider trading that tracks the legislative standard. If that is the most urgent task, then penal actions should be brought only in the most egregious cases. The commissions' energies should be going into ensuring the securities industry, reporting issuers, and the legal and accounting professions fully share the commissions' disfavour of the prescribed behaviour and express that in their co-operation in the development of strategies to reduce it.
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> That is, the enforcement of insider trading norms requires that those norms be better internalized in our markets. The commissions, not the courts, are the institution to do it.

[80]There were in fact two civil actions commenced in Ontario and one in British Columbia: *Trustees of the Canadian Broadcasting Pension Plan* v. *Bennett* (1 May 1989), Toronto 37340/89 (Ont. S.C.); *First Marathon Securities Ltd.* v. *Bennett* (2 May 1989), Toronto 37378/89 (Ont. S.C.); *Hartrikson* v. *Bennett* (7 June 1989), Vancouver C892956 (B.C.S.C.). All actions were quickly settled. The claim in the action by the CBC Pension Fund was for an amount in damages of $2,500,000. Details of the settlement are not in the public record. The rise in importance of the institutional investor, well-endowed and ready to act to protect its interests, may breathe new life into an old remedy. Two of the three civil actions in *Bennett* were taken by institutional investors, a pension fund and a brokerage house.

[81]Gillen, *supra* note 38 at 232.

[82]Gillen, *ibid.* at 233, summarizes these problems as: the detection of the identity of the insider trader, establishing whether the victim actually traded with the person who had inside information and, despite the lower burden of proof, the high cost of proving the case.

[83]Companies which have never made a public offering of securities in the United States or listed securities on a U.S. stock exchange may nonetheless be subject to continuous disclosure and insider reporting obligations where the number of their equity securities holders exceeds 500. See § 12(g) of the *Securities Exchange Act of 1934*, 15 U.S.C. § 78a *et seq.* (1988). Although the company has not voluntarily entered the public markets, the SEC considers the number of shareholders to be significant enough to require information to be made public on a continuous basis. There is no comparable provision under Canadian securities statutes.

[84]See *ibid.*, § 16(b).

ficulties of proof associated with a civil action. The short-swing profit rule, in fact, deems certain trades by a limited group of insiders to have been made on the basis of inside information. A director, officer or ten per cent beneficial equity owner trades at his or her peril; any purchase that can be matched against a sale at a higher price within a six-month period gives rise to liability for the "profit."[85] Certainly, there are drawbacks to the use of the short-swing profit rule, most notably that the profits "shall inure to and be recoverable by the issuer." A shareholder may act on behalf of the issuer but the action is derivative in nature and only indirectly compensatory to shareholders who may have traded. Nevertheless, an improvement on the current state of affairs in Canada.

The tendency in Canada towards the greater availability of class actions[86] and contingency fees will obviously increase the likelihood of the instigation of civil suits, as will the emergence of a more militant breed of Canadian shareholder.[87] For those fearful of a proliferation of U.S.-style frivolous litigation, some comfort is offered by a recent study indicating that insider trading suits monetarily worth pursuing are the exception.[88] For the moment, however, the civil suit for insider trading in Canada is of limited utility.[89]

3. Administrative Sanction

Here is the heart of the *Bennett* affair, administrative sanction by the securities commissions. Of the several sanctions possible pursuant to a commission hearing (including in British Columbia removal from corporate directorships[90]), the power to deny trading privileges in the market has emerged as the most effective.[91] The use of this particular sanction is a fairly recent develop-

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[85]§ 16(b), *ibid.*, provides:

> For the purpose of preventing the unfair use of information which may have been obtained by such beneficial owner, director, or officer by reason of his relationship to the issuer, any profit realized by him from any purchase and sale, or any sale and purchase, of any equity security ... within any period of less than six months ... shall inure to and be recoverable by the issuer. ... Suit to recover such profit may be instituted ... by the issuer, or by the owner of any security of the issuer in the name and in behalf of the issuer ....

[86]See *e.g.* new legislation in Ontario: *Class Proceedings Act, 1992*, S.O. 1992, c. 6.

[87]Implausible as this may seem, there are some indications of this occurring in the wake of the Royal Trust fiasco. See *e.g.* "Shareholders Speak Out: 'You Have Brought This Company to Its Knees'" *The [Toronto] Globe and Mail* (19 June 1993) B1.

[88]L. Meulbroek, "An Empirical Analysis of Illegal Insider Trading," (December 1992) *J. of Fin.*, as referred to in *The Economist*, "Inside Out," *supra* note 37: "Despite the sensational headlines about the millions of dollars earned by Ivan Boesky, Dennis Levine et al, these cases were exceptional. The median insider-dealer made a profit of just $25,000, calculates Miss Meulbroek."

[89]Gillen proposes the creation of a compensation fund and civil actions taken by the commissions to recover damages on behalf of "victims." See Gillen, *supra* note 38 at 240-42.

[90]See *Securities Act*, S.B.C. 1985, c. 83, s. 144(1)(*d*), as am. by S.B.C. 1989, c. 78, s. 39.

[91]See Dey, *supra* note 52 at 3484:

> The most effective remedy for the Commission is the power to deny persons or companies access to the Ontario capital markets. This remedy is more effective, because it can be aimed directly at the persons or companies of concern to the Commission. The power is effective if these persons or companies have an "Ontario market dependency" — which simply means that they require access to the Ontario capital markets in order to finance their businesses. In this respect, Ontario has an advantage, because The

ment,[92] but one that is particularly suited to insider trading offences. The other possible administrative sanctions, suspension of registration and cease trading orders, are directed to market intermediaries (broker-dealers) and reporting issuers, respectively.

The use of the restriction on market access is significant in two respects. To a certain extent, it overcomes the territorial limitations inherent in a commission's enforcement powers (particularly acute in the Canadian context of provincial regulation of securities matters),[93] provided, of course, that a commission has the opportunity to make a case.[94] It neatly sidesteps the ongoing debate over extraterritoriality and implicity adopts the U.S. effects doctrine.[95]

Secondly, and perhaps more significantly, its use indicates a shift in focus from issues of individual deterrence and compensation to issues of market integrity. This is the "public interest" which Ed Morgan and Professor Daniels wonder about.[96] Tolerance of insider trading and questions of market integrity have become very closely linked in the rapid growth of international securities markets. Jurisdictions which have traditionally tolerated insider trading (most notably, in the developed markets, Japan and continental European countries)

Toronto Stock Exchange provides the most liquid market in Canada for equity securities and Toronto is generally regarded as the capital for securities markets in Canada.

[92]According to Baillie and Alboini, denial of trading privileges in an insider trading case was first used in 1976:

> There can be no reasonable quarrel with the general statement that the O.S.C. may appropriately deny trading privileges to persons who have engaged in improper activities. Historically, trading privileges have been denied to persons who are considered to have abused the registration exemptions, or have solicited funds from the public improperly or fraudulently, or have sold securities to the public without a prospectus or with an inadequate prospectus. All of these seem appropriate grounds for exercise of the s. 19(5) power, but the *National Sea* case [(June 1976) O.S.C.B. 149] significantly extends these traditional grounds. Denial of personal trading privileges previously had not been used as a sanction to hold insiders accountable for any improper trading in securities of their corporation nor to ensure timely disclosure responsibility ... (J.C. Baillie & V.P. Alboini, "The *National Sea* Decision — Exploring the Parameters of Administrative Discretion" (1977-78) 2 C.B.L.J. 454 at 459-60).

[93]Anisman, *supra* note 71 at 129, calls this sanction "peculiar to Canada" and suggests it may be worthy of consideration in Australia:

> In 1973 the Toronto Stock Exchange recommended that insiders who trade on the basis of confidential information should be prohibited from any trading in securities. Several provincial securities commissions implemented the recommendation through exercise of their power to deny the trading exemptions under the provincial securities acts and the Ontario Commission in particular has made active use of this power to address insider trading.

[94]The Ontario Securities Commission did not have this opportunity in the *Bennett* matter.

[95]See *supra* note 65.

[96]Daniels & Morgan, *supra* note 36:

> The present intention of the B.C. Securities Commission is to conduct an administrative hearing into the same allegations that led to Bennett's 1989 acquittal. Their goal is to determine whether it is in the "public interest" to deny him and his co-defendants their trading and other securities-related privileges in the province. In seeking to understand the commission's thinking, however, one needs to know the one thing that has never been well-articulated in the cases: which "interest" of the public are they out to protect?

have recently changed their stance, in an effort to attract foreign investors. "[M]ost countries now have rules against insider dealing, not least because it can put outside investors off securities markets."[97]

As domestic markets become increasingly concerned with their competitive position in the international marketplace, their efforts to shore up credibility have proliferated. This is particularly true of the British Columbia markets, given the battering which the Vancouver Stock Exchange has taken in terms of market credibility.[98] Issues of market integrity have surged to the forefront of regulators' concerns.[99] Can the phenomenal rise in the importance of the international capital markets be an underlying reason for the dogged persistence with which the B.C. Securities Commission feels compelled to pursue the *Bennett* matter?

Conclusiou

Where does this leave us? The Bennetts, five years later, are still before the courts.[100] Two years later, Ontario still has no legislation which its courts would recognize as authorizing them to lend assistance to the Ontario Securities Commission in gathering evidence outside Ontario.[101] International cooperation among securities regulators, both formal and informal, may have grown to the point where it is easier to pursue suspected insider trading internationally than to pursue the Bennetts within Canada.

It is time for legislative action, at both the federal and provincial levels. Provincially, it is time for a major overhaul of the *OSA*; the time for occasional tinkering is past. At the federal level, it is time for a recharacterization of issues such as insider trading; insider trading is no longer so much a question of corporate governance, an area where federal interest is fading, as it is a question of market integrity, an area of lively federal interest.[102] And it is time to act quickly. The pressures of the international market place will only increase, giving the lie to the antiquated notion that securities regulation is a local matter.

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[97]"Balancing Act," *supra* note 72 at 84.

[98]This is especially true of the perception among U.S. investors and issuers. A particularly damaging piece on the Vancouver Stock Exchange, "Too Good to be True?", aired on ABC's *Prime Time Live* on October 4, 1990. Currently, an inquiry into the operations of the Vancouver Stock Exchange ("VSE") is taking place "to find ways to improve the Vancouver-based securities market's badly tarnished international image." See "Regulator Criticizes VSE for Catering to Fads" *The [Toronto] Globe and Mail* (14 July 1993) B11: "Douglas Hyndman, chairman of the B.C. Securities Commission, said the VSE, which the commission oversees, will have to reverse its current reputation as 'an undisciplined market in which dealers, promoters and insiders profit at the expense of public investors.'"

[99]For example, the most ambitious ongoing project of the SEC is the Market 2000 initiative, a study of the U.S. equity markets. See 57:141 F.R. 32587 (22 July 1992).

[100]As of August 1993, their appeal to the B.C. Court of Appeal, contesting the administrative hearing before the B.C. Securities Commission, was scheduled to be heard in the fall of 1993.

[101]See proposed amendments, *supra* note 35.

[102]To the extent there is federal regulation at all, in the face of the inevitable integration of financial markets both domestically and internationally, insider trading should be the responsibility of the Department of Finance rather than Consumer and Corporate Affairs; the issues raised by insider trading are now of market integrity rather than strictly of corporate governance.

APPENDIX

BRIEF CHRONOLOGY OF PROCEEDINGS IN THE BENNETT MATTER*

November 7, 1988	Joint investigation by the B.C. and Ontario Securities Commissions begins. Bennetts are interviewed in the course of the investigation.
January 27, 1989	Information sworn; quasi-criminal charges laid against the Bennetts and Doman under section 68 of the B.C. *Securities Act.* The Commission also gives notice of intention to hold a hearing on February 10, 1989. The Bennetts' trading privileges are suspended until date of hearing (under then subsection 145(2)). Doman agrees to provide the Commission with written notice of his trades in securities; the Commission agrees not to take administrative action against Doman.
February 2, 1989	Quasi-criminal charges laid against Bennetts and Doman in Ontario under the *Provincial Offences Act.*
February 10, 1989	B.C. Securities Commission administrative hearing begins and is adjourned by consent the same day pending the outcome of the quasi-criminal action.
April 17, 1989	Information sworn regarding B.C. quasi- criminal proceedings; Provincial Court trial begins in British Columbia.
May 12, 1989	B.C. Provincial Court decision. All charges dismissed; no appeal.
June 29, 1989	Ontario *Provincial Offences Act* charges withdrawn.
December 15, 1989	Bennetts and Doman served with summons to attend and give evidence at Ontario Securities Commission hearing; they decline to attorn to the jurisdiction of the Commission.
December 29, 1989	Ontario Securities Commission brings application to Ontario High Court to appoint commissioner to take evidence outside of province.
February 6, 1990	Decision of Ontario High Court. Application refused; notice of appeal filed.
February 19, 1990	Ontario Securities Commission hearing adjourned when Bennetts decline to submit to the jurisdiction of the Ontario Commission; B.C. Securities Commission administrative hearing preparations continue.

September 11, 1990	Summons for further oral examination served on Bennetts by B.C. Securities Commission, the Commission having lost the tapes of earlier examinations.
October 9, 1990	Bennetts file petitions to B.C. Supreme Court in chambers challenging B.C. Securities Commission hearings.
October 26, 1990	Amended notice of hearing by B.C. Securities Commission for February 18, 1991 (Doman named for first time).
January 11, 1991	Doman files petition challenging the B.C. Securities Commission hearings.
January 21, 1991	Melnick J. (B.C. Supreme Court) hears challenge to B.C. Securities Commission hearing in chambers — 15 days of argument.
February 14, 1991	Appeal to Ontario Court of Appeal re taking evidence outside of province dismissed.
February 18, 1991	B.C. Securities Commission administrative hearing (pursuant to October 26, 1990 notice) rescheduled to August 10, 1992.
May 2, 1991	Decision of Melnick J. in chambers; hearing allowed to proceed but B.C. Securities Commission enjoined from conducting further examinations re lost tapes. Appealed to B.C. Court of Appeal.
July 22, 1992	B.C. Court of Appeal affirms Melnick J.'s ruling. Leave to appeal to Supreme Court of Canada sought.
August 10, 1992	B.C. Securities Commission administrative hearing rescheduled (Supreme Court of Canada granted stay until Supreme Court of Canada leave to appeal heard).
August 1992	Supreme Court of Canada refuses to hear appeal from B.C. Court of Appeal re B.C. Securities Commission administrative hearing.
January 11, 1993	B.C. Securities Commission hearing begins.
January 18, 1993	Bennetts and Doman move that the hearing be quashed, alleging, *inter alia*, that a member of the panel is in a conflict of interest position.
January 25, 1993	B.C. Securities Commission panel dismisses the motion.

February 2, 1993	The B.C. Court of Appeal grants leave to appeal the panel's decision and stays the hearing pending the outcome of that appeal. The appeal is scheduled to be heard by the B.C. Court of Appeal in the fall of 1993.

* The information in this chronology is based on information appearing in the judgments and the press.

BOOK REVIEW
CHRONIQUE BIBLIOGRAPHIQUE

W. Michael Reisman, *Systems of Control in International Adjudication and Arbitration: Breakdown and Repair*. Durham: Duke University Press, 1992. Pp. xi, 174 [$29.95]. Reviewed by David A. Chemla*

In this remarkable book, first presented on the occasion of the 1989 Currie Lecture and partly based on some of his previously published articles, Michael Reisman, Wesley Newcomb Hohfield Professor of Jurisprudence at Yale Law School, warns that existing international dispute resolution processes are currently imperilled and in urgent need of repair. The malaise sapping the reliability, effectiveness and appeal of interstate, mixed and truly private interuational tribunals, is a breakdown of the control mechanisms which necessarily undergird all types of dispute resolution. Reisman's self-declared purpose is first to clearly diagnose the malaise, and second, to offer effective antidotes.[1]

The first of the book's five chapters is an introduction explaining the purposes and types of control mechanisms and their indispensability to transnational third party decision-making. The central aim and absolute necessity of control mechanisms are, according to the author, inextricably linked to the limited mandate conferred to an arbitrator by contracting parties:

> Arbitration is a delegated and restricted power to make certain types of decisions in certain prescribed ways. Any restricted delegation of power must have some system of control. Controls are techniques or mechanisms in engineered artifacts, whether physical or social, whose function is to ensure that an artifact works the way it was designed to work. In social and legal arrangements in which a limited power is delegated, control systems are essential; without them the putative restrictions disappear and the limited power may become absolute ... Controls are necessary not only for efficient operation. Effective controls are the only assurance of limited government. In this sense controls are a sine qua non of liberty.[2]

Controls are thus necessary to ensure that arbitrators render awards which fall within the contractual limits imposed by the parties as well as within their

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[1] W.M. Reisman, *Systems of Control in International Adjudication and Arbitration: Breakdown and Repair* (Durham: Duke University Press, 1992) at 10 [hereinafter *Systems of Control*].

[2] *Ibid.* at 1.

shared expectations. Should an arbitrator do anything not authorized by the parties, he commits an *excès de pouvoir*, which serves as the conceptual foundation of control for arbitration. Controls must either serve as a *garde-fou* for arbitrators who may stray off the contractually charted course, or in cases where arbitrators have manifestly deviated from it, controls must offer efficacious recourses to nullify the tainted award. Any useful control mechanism must, however, strike a delicate balance between on the one hand, preventing possible abuse of arbitral autonomy, and on the other, not constraining autonomy to the point of effectively suffocating it. Either extreme would inevitably lead to dissatisfaction of arbitration's users and would, in the long run, cause arbitration to lose its status as a preferred means of dispute resolution.

Reisman espouses the view that international arbitration cannot simply copy control mechanisms prevalent in domestic adjudication because the international legal landscape lacks a hierarchical and permanent judicial bureaucracy which is "equipped with an effective compulsory jurisdiction to review allegations of excessive jurisdiction and to decide impartially the alleged nullity of the award."[3] National courts are ill-suited to act as control entities for international arbitration because courts' involvement necessarily detracts from arbitration's desirable characteristics, *e.g.* simplicity, economy, time efficiency, right to appoint decision-maker.[4]

On this last point, Reisman probably overstates his case. After all, a great majority of national arbitration laws provide for setting aside procedures of awards (in civil law parlance, *recours en nullité*), which have not been so cumbersome and time-consuming that confidence in arbitration has really suffered. Secondly, Article V.1(c) of the *New York Convention* provides that courts in which enforcement of a foreign award is sought may refuse enforcement of the award in cases where the award debtor adduces evidence of excess of jurisdiction.[5] Accordingly, domestic courts in which enforcement proceedings are governed by the *New York Convention* or in which setting aside procedures have been initiated, already play a useful and essential control function. They act *de facto* as a permanent judicial bureaucracy which reviews allegations of tainted awards and in appropriate cases, either annuls or refuses to enforce them. Reisman's contention here simply does not square with the thrust of his fourth chapter where he recognizes the practical and indispensable control function performed by national courts in private international arbitration.

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[3]*Ibid.* at 6.

[4]*Ibid.* at 8.

[5]*United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 10 June 1958, 330 U.N.T.S. 38, 21 U.S.T. 2517 [hereinafter *New York Convention*]. Art. V.1(c) of the New York Convention provides that a court may refuse to enforce a foreign award upon proof that:

> (c) [t]he award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced ...

In chapter 2, the author analyzes the component parts of the control system of the International Court of Justice ("ICJ") and their breakdown over the passage of time. The ICJ's conception of its own jurisdiction constitutes one of the most crucial informal mechanisms making up the ICJ's control system. Reisman demonstrates that the ICJ's precursor, the Permanent Court of International Justice, and the ICJ, at least from 1945 to 1973, strictly adhered to a restrictive conception of jurisdiction, which meant that the ICJ only impleaded States which clearly consented to its jurisdiction.[6] This informal control mechanism acted to reassure government advisers fretful of their State being dragged before the Court.

The *Nuclear Tests Case* of 1973-74[7] signalled the beginning of the demise of restrictive jurisdiction, with the Court's various decisions in the *Nicaragua*[8] saga heralding the consecration of a more expansive conception of jurisdiction. In *Nuclear Tests Case* and *Nicaragua*, Reisman contends that the ICJ made unsubstantiated jurisdictional decisions, apparently motivated by a political concern to be seen to be filling the vacuum created by the Security Council's paralysis on the issues raised by these cases.[9] These decisions were also characterized by an unhealthy disregard for the actual consent of the putative defendant. In *Border and Transborder Armed Actions between Nicaragua and Honduras*,[10] in which the Court once again asserted its jurisdiction, Judge Manfred Lachs, the Court's most senior and experienced member, affirmed that "the mere opening of the door [of the Court] may bring about a solution to a dispute [and] the parties retain their freedom of action, and full possibilities of finding solutions."[11] Reisman concludes from Lachs' remarks that the Court's new thinking is not being nourished by law but by politics: "The conception of the court's function implicit in these remarks is not one of a tribunal whose jurisdiction depends upon the agreement of the parties and whose confirmation in each particular case is the subject of a strict legal decision by the tribunal. Rather, it is of an institution performing an explicit political role ... "[12]

He regrets the political role that the Court seems determined to arrogate to itself because it was neither provided for in the ICJ Statute, nor was it contemplated by the Statute's signatories. In addition, he fears that the ICJ may be unable to discharge its judicial functions effectively if diplomatic and political preoccupations are uppermost in its mind, with the consequent result that the ICJ will lose credibility and legitimacy in the eyes of industrialized States which have other, more controlled ways of resolving their disputes.[13]

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[6]*Systems of Control*, *supra* note 1 at 19-20.

[7](*Australia* v. *France*) (interim measures), Order of 22 June 1973, [1973] I.C.J. Rep. 99; (*Australia* v. *France*) (merits), [1974] I.C.J. Rep. 253 [hereinafter *Nuclear Tests Case*].

[8]See, in particular, *Case Concerning Military and Paramilitary Activities in and against Nicaragua*, (*Nicaragua* v. *United States*) (jurisdiction and admissibility), [1984] I.C.J. Rep. 392 [hereinafter *Nicaragua*].

[9]*Systems of Control*, *supra* note 1 at 41.

[10](*Nicaragua* v. *Honduras*) (jurisdiction and admissibility), [1988] I.C.J. Rep. 69.

[11]Cited in *Systems of Control*, *supra* note 1 at 26.

[12]*Ibid.*

[13]*Ibid.* at 26, 42-43.

The whittling away of restrictive jurisdiction has also been accompanied by the breakdown of *stare decisis*, another potentially useful control mechanism since respect for previous case law ensures coherence, predictability and ultimately, confidence in judicial decision-making. The author examines recent case law to show that the ICJ has made it a practice to engage in sloppy quotations of earlier case law to justify erroneous conclusions. Aside from deploring the misleading and objectionable quotation practice, Reisman believes that by not respecting its own case law the ICJ is doing itself and others who may be considering its use a great disservice. Its recent decisions have undermined the confidence in its reliability, caused some potential State litigants either to canvass other dispute settlement mechanisms, or in some cases, to withdraw altogether from the ICJ's jurisdiction.

As Reisman also correctly implies, even when some of the more economically powerful States are prepared to use the ICJ dispute settlement mechanism, they frequently prefer to have their dispute considered by an ICJ chamber, and not the full Court.[14] In the revised Chamber procedure, States are entitled to pick the judges they trust, who sit in minicourt and adjudicate the dispute between the litigants. Although some authors have argued in favour of the Chamber procedure,[15] it is hard to disagree with Reisman that the development of such a procedure signals a definite lack of confidence in the ability of the full Court to adjudicate cases in an impartial, logical and predictable way. This lack of confidence will continue to cause some States, primarily industrialized ones, to reconsider the extent to which they can use the ICJ. Reisman concludes that the ICJ must act now to reestablish some controls in an effort to rebuild confidence and places the responsibility of such action squarely on the judges currently sitting at the ICJ.

In chapter 3, Reisman describes and then assesses the performance of *ICSID*'s control system.[16] The crucial component of *ICSID*'s control system, and its principal innovation, is the existence of an internal body to which are submitted claims for nullification of awards rendered by an initial arbitral tribunal. This body is known as an *ad hoc* Committee, which is composed of three persons, all of whom are appointed by the Chairman of the *ICSID* Administrative Council and none of whom can have the nationality of either litigant.[17] The *ad hoc* Committee may stay enforcement of the tribunal rendered by the initial award, pending its decision, and can annul the initial award, either in whole or in part, on the basis of one of the grounds enumerated at Article 52(1).[18] Reisman appears convinced of the great potential (but not the actual practice) of the *ICSID* control system:

> Of course, the *optimum* control institution for international commercial arbitration would be self-contained at the international level, completely avoiding national

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[14]*Ibid.* at 42-43.

[15]See S. Schwebel, "Reflections on the Role of the International Court of Justice" (1986) 61 Wash. L. Rev. 1061.

[16]*Convention on the Settlement of Investment Disputes between States and Nationals of Other States*, 18 March 1965, 575 U.N.T.S. 159, 17 U.S.T. 1270, T.I.A.S. No. 6090 (in force 14 October 1966)[hereinafter *ICSID* or *Convention*].

[17]Art. 52(3) of the *Convention*.

[18]Art. 52(1) of the *Convention* is reproduced below.

> courts, but would perform all necessary control requirements. This sort of control institution has proved elusive. It is now relatively easy to establish workable international arbitral institutions, as their proliferation demonstrates. It has proved much more difficult to create comparably workable explicit control institutions, whether through some form of review or appeal.
>
> There is one dramatic exception. World Bank arbitration, thanks to the opportunities presented by its structure and the imagination of its conceivers, provides us with an example of an entirely internal and international control mechanism. [emphasis added][19]

My quibble with Reisman here is his characterization of the *ICSID* control system as completely internal or self-contained, by which he means independent of domestic courts.[20] Yet the operation and control system of *ICSID* dispute settlement are not wholly divorced from national courts and national law. Indeed, should the losing party in an *ICSID* arbitration refrain from complying with the terms of the award rendered against it, the creditor of the award has no choice but to take enforcement proceedings in the domestic jurisdiction where assets of the award debtor are located. It appears that this is not an uncommon occurrence.[21] Furthermore, in such proceedings, any award is, even with the *Convention*,[22] subject to the law of the enforcement jurisdiction regarding state immunity from execution. This can frequently have the effect of frustrating the enforcement of *ICSID* awards against States, thereby nullifying any possibility that the contested award could be satisfied against the debtor's assets within the territorial jurisdiction of the domestic court.[23]

Reisman examines the decisions of three *ad hoc* Committees and discusses, among other things, their "constitutive rulings," by which he means those that not only addressed the case at bar but also future review decisions under Article 52(1). Article 52(1) reads as follows:

> 52(1). Either party may request annulment of the award by an application in writing addressed to the Secretary-General on one or more of the following grounds:
> (a) that the Tribunal was not properly constituted;
> (b) that the Tribunal has manifestly exceeded its powers;
> (c) that there was corruption on the part of a member of the Tribunal;

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[19]*Systems of Control*, *supra* note 1 at 46.

[20]Such a characterization of Reisman's view seems justified by a later passage where the author states: "Control systems such as those devised by ICSID were animated in large part by a desire to bypass national courts in the postaward enforcement phase of the international awards issued by ICSID tribunals. Hence the creation of an entirely internalized control system within the World Banks [*sic*] arbitration center itself" (*ibid.* at 108).

[21]See S. Carias-Borjas, "Recognition and Enforcement of ICSID Awards: The Decision of the French Cour de Cassation in *Soabi v. Senegal*" (1991) 2 Amer. Rev. Int'l Arb. 354.

[22]In fact, Art. 55 of the *Convention* specifically preserves the application of municipal law governing state immunities from execution. Art. 55 reads as follows: "Nothing in Article 54 [which directs courts of Contracting States to recognize an ICSID award as binding and a final judgment of a court in that State] shall be construed as derogating from the law in force in any Contracting State relating to immunity of that State or of any foreign State from execution."

[23]S.J. Toope, *Mixed International Arbitration: Studies in Arbitration between States and Private Persons* (Cambridge: Grotius, 1990) at 249. In both France and the United States, national laws on immunity from execution have thwarted attempts to enforce *ICSID* awards in both countries. On this point, see Carias-Borjas, *supra* note 21 at 369-71.

(d) that there has been a serious departure from a fundamental rule of procedure; or
(e) that the award has failed to state the reasons on which it is based.

In *Klockner I*,[24] the first *ad hoc* Committee to interpret Article 52(1), the Committee annulled the initial award. In so doing, the Committee adopted what Reisman has dubbed a "hair trigger," which leads any technical defect in an award, regardless of its magnitude and even in the absence of any material violation of the *Convention*, to the automatic nullification of the award. A second troublesome constitutive ruling held that an award should be annulled if it fails to respond to every point raised during the arbitral proceedings including those made in oral argument. Thirdly, the *Klockner I* Committee concluded that the arbitrators' duty to state reasons *per* Article 52(1)(e) had been violated because the reasons given by the arbitral tribunal were not "sufficiently relevant," defined as "reasonably capable of justifying the result reached by the Tribunal." As one commentator has suggested, this test plants the seeds for appellate review of the merits, an option which was considered and rejected in the course of *ICSID's travaux préparatoires*.[25] As a result of the constitutive rulings of the *Klockner I* Committee, the grounds for annulment of an *ICSID* award were considerably expanded. The annulment of the initial award by the *Klockner I* Committee led to the establishment of a second arbitral tribunal, which in turn produced a second *ad hoc* Committee.

From a control perspective, the picture brightened somewhat with the decisions of subsequent *ad hoc* Committees, notably in *Mine I*,[26] in which the Committee concluded against the automatic annulment of an award in case of a technical defect in the award. In *Mine I*, the Committee also narrowed the range of grounds for annulment (whose scope had been enlarged by *Klockner I*) by holding that any excess of arbitrator power has to be manifest to violate Article 52(1)(b) of the *Convention*, and that only serious departures from a fundamental rule of procedure may ground a successful annulment action *per* Article 52(1)(d). In addition, the *Mine I* Committee rejected the view that a tribunal must produce an award which deals with every question submitted to it. Instead, only a tribunal's failure to state reasons for the grounds on which it is based will be a ground for annulment.

Reisman is concerned that *ICSID* controls have detracted from the advantages normally associated with arbitration by extending disputes *ad infinitum*, and by adding significant litigation costs to the parties involved. Furthermore, parties frequently resort to *ad hoc* Committees where they have no role to play in selecting the arbitrators. He is encouraged, however, by recent decisions which have paved the way for an "apparently effective process of reconstruction."[27]

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[24]*Klockner GmbH* v. *United Republic of Cameroon*, (1986) 1 ICSID Rev.-FILJ 89 [hereinafter *Klockner I*].

[25]J. Paulsson, "ICSID's Achievements and Prospects" (1991) 6 ICSID Rev.-FILJ 380 at 388-89.

[26]*Maritime International Nominees Establishment* v. *Government of Guinea*, (1990) 5 ICSID Rev.-FILJ 95 [hereinafter *Mine I*]

[27]*Systems of Control*, *supra* note 1 at 106.

Reisman's suggestions for improving the *ICSID* control system are numerous and varied.[28] Their detailed consideration is simply beyond the scope of this review and warrants a more in-depth treatment. Many of them have, however, been pooh-poohed by Aron Broches, a former Secretary General of *ICSID*. This has, in turn, provoked a stinging reply from Reisman.[29]

In chapter 4, Reisman analyses the central control mechanisms supporting private international arbitration and their gradual erosion. The control scheme for this type of dispute settlement is found in the *New York Convention*, which assigns distinct review functions to what the author calls "primary" and "secondary" jurisdictions.[30] Primary jurisdictions are those where an award was rendered or much less frequently, under whose law the arbitration was governed. Under the *New York Convention*, it is in primary jurisdictions where an award debtor may initiate setting aside procedures, which if successful, render the award unenforceable in all jurisdictions. The nullificatory consequences of the judgment rendered by the primary jurisdiction are thus universal. In contrast, secondary jurisdictions are those jurisdictions where enforcement of an award is sought. Should such enforcement proceedings prove unsuccessful, the effects of such a judgment are limited to the territorial jurisdiction of the State where enforcement was sought. In other words, the failure of the award creditor to enforce his award in one jurisdiction does not, in any way, prevent him from seeking enforcement in another secondary jurisdiction.

The scrutiny performed by the primary jurisdiction is, according to the author, absolutely crucial to the limited review function assigned to secondary jurisdictions, as well as to the legitimacy and survival of the *New York Convention* control scheme as a whole:

> The possibility of the scrutiny of the award, in terms of the standards of the primary jurisdiction, whatever they are, is an indispensable part of this control scheme: it is one-half of the quid pro quo that is at the base of the implicit compact between primary and secondary jurisdictions. Without an assurance of the continuing possibility of such scrutiny at the behest of the loser, any secondary jurisdiction will be, quite reasonably, reluctant to buy a "pig in a poke" and to enforce an unsupervised private act (far less supervised than a foreign judgment) whose effectiveness requires the application of its own official power and whose consequence will be the removal abroad of the treasure of someone subject to local jurisdiction.[31]

This leads Reisman to vigorously contest the view that the obligations imposed by the *New York Convention* on primary jurisdictions are merely discretionary. He then shows how domestic courts have rendered decisions and

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[28]*Ibid.* at 87-106.

[29]A. Broches, "Observations on the Finality of ICSID Awards" (1991) 6 ICSID Rev.-FILJ 321 at 372-75, in which the author responds to the arguments presented in W.M. Reisman, "The Breakdown of the Control Mechanism in ICSID Arbitration" [1989] Duke L.J. 739. The chapter of *Systems of Control, ibid.*, on *ICSID* is a revised version of Reisman's 1989 article. Broches' dismissal of Reisman's purported remedies for *ICSID* 's dispute settlement mechanism has, in turn, led to W.M. Reisman, "Repairing ICSID's Control System: Some Comments on Aron Broches' 'Observations on the Finality of ICSID Awards'" (1992) 7 ICSID Rev.-FILJ 196.

[30]*Systems of Control, ibid.* at 113-14.

[31]*Ibid.* at 118.

how national legislatures have enacted statutory reforms which disregard the control functions assigned to primary jurisdictions. In this regard, Reisman is much less concerned by episodic judicial non-performance than legislative non-performance because of the latter's more systemic and enduring character.[32] The author is particularly critical of the Swiss and Belgian arbitration reforms which seriously curtail, and in the Belgian case, completely eliminate any possibility of initiating setting aside procedures in an arbitration not involving Belgian parties.

The consequences of such reforms for the operational finality of arbitration awards are far-reaching. First, in the absence of the slightest scrutiny by the primary jurisdiction, the degree of review in the secondary jurisdiction should and undoubtedly will be greater. This will entail greater investment of judicial resources by the secondary jurisdiction. This enables Reisman to make the case that States like Belgium and Switzerland are free-riders because they are avoiding the expense of their core obligations of scrutiny as primary jurisdictions, but at the same time they are benefitting, when their courts must perform secondary jurisdiction functions, from the judicial resources invested by other States who have performed their obligations of review as primary jurisdictions.[33] In addition, Reisman makes the point that the debtor no longer has the opportunity to nullify a defective award once and for all in the primary jurisdiction. The nuisance value of an award is correspondingly increased given that the creditor of a defective award has multiple opportunities to harass the debtor in any secondary jurisdiction where the debtor has assets.

Aggravating the breakdown of control mechanisms underpinning private international arbitration is the concurrent development of *lex mercatoria*. The crux of his argument, revealed in the following passage, is that *lex mercatoria* serves to override the choice of law made by contracting parties and the controls inherent to the applicable law: "*Lex mercatoria* usurps parties' choice of law and the designation by private international law of some national law's system for governing that choice of law. It usurps the governing law and the controls that a particular national community deems necessary for commercial transactions occurring within its space."[34]

In my view, Reisman overstates the threat posed by *lex mercatoria* to the parties' choice of applicable law and the controls inherent to that law. First, there are very few actual cases where an arbitral tribunal has applied *lex mercatoria* when the parties have specified an applicable national law in their contract.[35] Usually, this has occurred when application of the applicable national law would violate transnational public policy, or when the parties have explicitly conferred the powers of an *amiable compositeur* to the arbitral tribunal.[36]

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[32]*Ibid.* at 123-24.

[33]*Ibid.* at 129, 131-32.

[34]*Ibid.* at 138.

[35]B. Oppetit, "La lex mercatoria dans les contrats et l'arbitrage internationaux: réalités et perspectives" [1979] J.D.I. 471 at 483.

[36]*Ibid.*; L.J. Mustill, "The New Lex Mercatoria: The First Twenty-Five Years" (1987) 4 Arb. Int'l 86 at 104.

In the fifth and concluding chapter of the book Reisman advocates, among other things, a greater understanding of the important role played by individuals in law, in general, and in legal control systems, in particular. More specifically, the author suggests that international judges and arbitrators must appreciate and meet the manifest expectations of their roles in order to contribute to global order and prosperity.[37] When judges and arbitrators lose sight of the responsibilities of their roles, a system of checks and balances is necessary to rectify the oversight. This is true in the domestic context and even more so in the international arena.

Reisman's work represents a solid contribution to the existing scholarship on international dispute resolution. Particularly impressive is Reisman's scope, that is, his ability to demonstrate the breakdown of control mechanisms in the three main types of transnational dispute resolution. The book will probably be of greater interest to scholars than practitioners, though the chapter on *ICSID*, for instance, could probably benefit both groups equally. Finally, the author's writing style is delectable, given its remarkable grace, fluidity and precision. We can only hope that Reisman tackles other legal subjects in the future, with the same style and depth of analysis that he has mustered in *Systems of Control.*

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[37]*Systems of Control, supra* note 1 at 144-45.

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THESIS SURVEY
RECENSION DES THÈSES

I. Doctoral Theses/Thèses de doctorat

Alex Adeyinka, *Telecommunications Regulatory Reform: Theories, Principles and Policies*, University of Toronto

The aim of the research leading to this work is to use telecommunications regulatory reform as a subject of contribution to the scholarship on regulatory policy analysis. In the last ten years there has been a significant change in the relationship between the state and the economy — a development which has challenged our revived understanding of the role of government in economic activities. This development is now a major subject of critical analysis among economists, political scientists, legal scholars and other policy analysts, seeking to define the factors responsible for recent changes and to determine whether these changes are good or bad.

The primary purpose of this thesis is to show how developments in the regulation of telecommunications in Canada demonstrate this phenomenon of change and the fundamental value problems involved. The central argument is that current developments in Canadian telecommunications are driven by economic efficiency concerns. The crucial challenge is to protect and promote non-economic goals of regulation while allowing progressive market-oriented reform to proceed in this sector.

Fu Hualing, *Formalizing Popular Justice, Police and Community in Post-Mao China*, Osgoode Hall Law School

The thesis is to examine the return of "socialist legality" in post-Mao China as reflected in the modernization of Pai Chu'uo, the neighbourhood police station. It will discuss the political-legal and social-economic context in post-Mao China and its impact on the police reform, concluding that the reform, far from being a result of the blunt state imposition, is a complex process which involves continuous conflict, negotiation, and compromise, which can be best understood as an entity that fuses the characteristics of Maoism, reformism, and traditionalism.

Although it lagged before the reforms in other fields and was limited in scope and intensity, the police reform was initiated by the government in the late

1970s and intensified in the middle of the 1980s. The issue of police independence, coupled with the theoretical, if not practical, separation of the party from the police in lower level police units, was put onto the reform agenda. At the same time, the police are becoming more mobile and proactive. The priority of policing has been shifted from household registration to mobile random patrol. Finally, measures are taken to make the police more accountable. The mysterious veil hanging over the police is gradually being removed and the issue of public security is being lifted from the shadows and held up for public scrutiny.

The reform is part of the political restructuring and it in turn reinforces the trend toward political emancipation and cultural liberation. There is a general consensus in both political and popular culture that legal formalism is symbolically and instrumentally superior to the Maoist and traditional forms of social ordering. The radical Maoism has been discredited, and traditionalism is too ill-equipped to deal with modern social problems. A modified Western model of social and legal ordering could provide an alternative.

Gao Zhiguo, *International Offshore Petroleum Contracts: Towards the Compatibility of Energy Need and Sustainable Development*, Dalhousie University

International oil companies have carried out exploration and exploitation in many developing countries since the turn of this century. The legal and commercial relationship between petroleum producing countries and foreign oil companies was defined and governed by what were called traditional oil concession agreements before the 1950s, and since then by what are known as modern petroleum contracts.

This dissertation scrutinizes the development policies behind the evolution of various arrangements for offshore petroleum exploitation. By studying the examples of contracts in four developing countries (Thailand, Indonesia, Brazil and China), it examines in particular the issues of mutuality of interests and environmental sustainability that are reflected in both the structure and substance of the modern petroleum contracts that have emerged since the 1950s.

The major findings are that modern petroleum contracts are generally able to achieve and maintain a necessary balance of rights, interests and benefits between the contracting parties, but they have failed to produce any balance between the extraction of resources and environmental sustainability. The existing contractual systems have failed in principle to provide adequate environmental regulation and, moreover, they have not addressed the issue of sustainable development at all.

The arrangements that have focused on economic interests are inappropriate for future energy development, but through the proper use of contract terms that contain elements favouring sustainable development, economic and environmental interests can nevertheless be accommodated and served at the same time.

The future direction for petroleum agreements is that they must recognize explicitly the inherent independence and coexistence of commerciality and sustainable development.

Gerald Goldstein, *De l'exception d'ordre public aux règles d'application nécessaire: étude du rattachement substantiel impératif en droit international privé canadien*, Institute of Comparative Law, McGill University

L'analyse théorique du conflit de lois dans l'espace et dans le temps en droit international privé (conflit « mobile ») permet de se prononcer en faveur de sa résolution dans le cadre de chaque catégorie de cas, et de la règle particulière de conflit qui lui correspond.

Par conséquent, il est nécessaire de se pencher sur le contenu et le domaine de la règle de conflit « réelle » en Common Law (Angleterre, Canada) et en Droit Civil (France, Québec) afin d'étudier, dans ces systèmes, la résolution des conflits mobiles affectant les rapports juridiques portant sur des meubles corporels (à titre particulier). En effet, la présence d'obligations personnelles entre les parties et l'intervention des lois « d'application immédiate » viendront perturber la résolution du conflit.

L'analyse comparée de l'impact respectif de chacune de ces règles sera alors entreprise afin de rendre compte du Droit Positif et des perspectives futures.

Louise Labreche-Renaud, *De la folie à la maladie mentale en Common Law et l'institutionnalisation au Québec de 1845 à 1892*, Université de Montréal

Résumé non disponible/no abstract available

Mohamed Munavvar, *Ocean States: Archipelagic Regimes in the Law of the Sea*, Dalhousie University

The United Nations Convention on the Law of the Sea, 1982, (LOSC) has legitimized ocean states. Ocean states are archipelagic states within which their archipelago constitutes the total state territory.

The development of a new concept in the international law of the sea, which created ocean states was necessary as traditional international law, which was mainly concerned with continental or land-based states, and could not be properly applied to states which consisted of archipelagos. The geographic, economic, social, political and environmental circumstances of ocean states, therefore, require a more realistic definition of their territory. Such definition must also conform to the public perception of ocean states, formed through a lengthy process of interaction between the inhabitants of the state and their surrounding

waters and inter-connecting islands. Accordingly, the archipelagic concept in the modern law of the sea has created an entirely new, yet eminently functional method of acquisition of territory in international law.

Nevertheless the archipelagic concept must not be viewed simply in terms of expanded coastal jurisdiction by certain states, but as a practical as well as functional basis for the determination of the territorial limits of such "ocean" states. In other words, the waters inter-connecting the islands of the archipelago *are* a constituent part of the *territory* of the archipelagic state. Furthermore, in the case of many smaller ocean states, their ocean areas are of greater importance than their land territory.

Although the size, nature and requirements of the various ocean states differ greatly, the archipelagic concept provides the necessary *territorial* basis for their national unity, independence and integrity. Most critically, the new concept also determines the essential basis of such ocean states' sustainable development.

Willy Mutuuga, *Relational Contract Theory Outside National Jurisdictions*, Osgoode Hall Law School

Straddling between liberal and radical legal theories, relational contract theory claims that it reconceptualises contract theory in a way that is both realistic and relevant to the contractual relations that are now taking place under developed capitalism. On this basis it criticises both classical and neo-classical contract theories that, according to relational contract theory, reflect the economic and philosophical policies of the Industrial Revolution. Relational contract theory's *positiveness* and *limitations* as a *status quo* theory are brought out by analysing and contrasting it with and within the terrain of radical legal theories, namely, the Critical Legal Studies (CLS) and the Marxist Theory of State and Law (MTSL). In reconceptualising contract theory the thesis analyzes the *positiveness* and *limitations* of classical, neo-classical contract theories, relational contract theory, the CLS and the MTSL. The *positiveness* of a legal theory whether *status quo* or *radical* forms the juridical elements of a jurisprudence of basic needs for all people. This jurisprudence has also another non-legal element, that of organised resistance politics. This concept is not defined and is left vague to avoid dogma at this stage. Each country will define its vision of organised resistance politics. We attempt to sketch out our vision of such politics in this thesis. We posit that a jurisprudence of basic needs is universal.

It is the reconceptualisation of contract theory by relational contract theory and its rescue by the other theories that is applied to the entire data from the case studies. The data deal with private foreign investment. Two of the case studies are about joint ventures. The other two case studies are not joint ventures but deal with the issue of foreign investment. The data are not conclusive and the shortcomings are explained. There is also some comparative data from four African countries. The latter data focus on the legal issues of foreign investment

in Africa and the role that law has played in social transformation and in the politics of economic nationalism.

The thesis concludes that the propositions of relational contract theory as theorised are applicable in a developing country. The usefulness of the propositions as arguments in the ongoing rescheduling and renegotiations of debts, joint ventures and investment agreements is brought out. The thesis also concludes that these propositions have to be analyzed within the historical and socio-economic context of a society so that they cease to be value-neutral. Such an analysis is able to bring out not only the theory's *positiveness* and *limitations* but also those theories that criticise it.

A jurisprudence of basic needs for all people is the new approach that is proposed. It draws on the strengths of liberal and radical theories, interacts the present with the future and gives law a political content. We have called this political ingredient organised resistance politics. In this thesis, a possible application of a jurisprudence of basic needs for all people is illustrated by drawing on the data from the case studies and by analysing the political economy of Kenya. We conclude that its prospects have perhaps just begun in Kenya.

Kenneth Orie, *Legal Aspects of Groundwater Quantity Alloeation and Quality Protection in Canada*, Institute of Comparative Law, McGill University

Groundwater quantity allocation and quality protection in Canada largely proceed in a fragmented fashion. Each jurisdiction pursues the management of its water resources and the aquatic environment separately as well as independently of other jurisdictions. This approach is at odds with the unity of the natural environment and the inter-connectedness of groundwater resources.

The challenge facing Canada is to make the law recognize and be more responsive to the unity of the aquatic environment and water resources. An active federal role in uniting and coordinating the efforts of the provinces in this regard is crucial if this challenge is to be met. However, since the constitutional division of powers in Canada encourages a fragmented approach to managing environment and water resources, the federal government is incapacitated, purely on a legal score, with respect to pulling together the efforts of the provinces. A cooperative approach, based on political rather than legal coordination, is therefore, the most realistic option for the federal government to meet the challenge.

In this work, the writer examines the various areas for federal-provincial cooperation regarding groundwater allocation and protection. Such institutional integration or cooperation cannot be effective unless groundwater is addressed together with the other component of the hydrologic cycle, namely: surface water and the ecosystem they support. At the same time, in adopting an integrated hydrologic cycle approach, specific groundwater management strategies canvassed in this work must be taken into account if groundwater is to be more efficiently allocated and protected. Pursuant to these considerations, this writer is of the opinion that groundwater resources in Canada should be managed in

a way that meets both present and future needs of Canadians, thus in a sustainable fashion. This can best be achieved if resource management relies upon a combination of contaminant-focused and resource-focused approaches adopted under unified federal-provincial efforts as well as under an integrated hydrologic cycle management.

William Schabas, *The Abolition of the Death Penalty in International Law*, Université de Montréal

Résumé non disponible/no abstract available

Setsuko Ushioda, *Satellite-Based Multilateral Arms Control Verification Schemes and International Law*, Institute of Air and Space Law, McGill University

Verification of compliance has been and will continue to be an essential component of arms control and disarmament agreements. Following a brief historical survey of verification, this study examines in detail verification provisions in all major multilateral and bilateral disarmament agreements, in force and in the drafting stage, from the perspective of monitoring compliance by satellites. The feasibility of verification from space is examined from technical and legal points of view. Important differences are noted between bilateral and multilateral agreements in terms of verification requirements. The effectiveness of, as well as confidence in, the verification process, it is suggested, will be significantly enhanced if the monitoring is carried out by an organization in which all contracting states have a say in the planning and conduct of monitoring and participate in decision-making. This study analyzes various official and private recommendations for the establishment of such an organization, with special emphasis on the proposed International Satellite Monitoring Agency (ISMA) whose constitution, structure and functions are set out in a comprehensive report prepared by a United Nations group of experts. The ISMA could play, in the opinion of the author, an important auxiliary role in monitoring compliance with many existing disarmament agreements as well as with those currently in the drafting phase.

Mohammed Zerouali, *Les questions du droit international et du traitement national dans le Code de conduite de l'ONU sur les sociétés transnationales*, Université Laval

L'étude affirme que les formules actuellement proposées par la Commission des sociétés transnationales en vue de résoudre les questions en suspens dans le Code de l'ONU sur les STN sont pertinentes tant en termes de leurs contenu et

portée juridiques qu'en termes de satisfaction de la plupart des besoins, intérêts et thèses étatiques sur des sujets longtemps controversés parmi les États et en doctrine (traitement des entreprises étrangères « conformément au droit international », octroi du traitement national, nationalisation et indemnisation, règlement des différends d'investissement, droit applicable, transfert des bénéfices, renégociation des contrats, arbitrage international etc.).

De telles solutions constituent du point de vue juridique comme pratique, un compromis raisonnable qui permettra de surmonter l'impasse dans laquelle sombrent les négociations entamées voilà une décennie et demie et qui devaient mener en principe, c'est l'un des objectifs fondamentaux du nouvel ordre économique international, à l'avènement d'un régime international global régissant et les activités et le traitement d'acteurs ayant des impacts diversifiés et parfois décisifs sur les économies nationales et internationales: les entreprises trans- ou multinationales.

L'argument central de l'étude est à l'effet que vu l'absence — pour des raisons historiques, politiques, juridiques et socio-économiques — de consensus parmi la communauté internationale quant aux règles détaillées qui devraient régir le traitement des ETN par les pays hôtes, les textes du Code de l'ONU sur le sujet représentent un modus vivendi réaliste et acceptable qui établira pour la première fois en droit international les obligations et les droits respectifs de toutes les parties intervenant dans une relation d'investissement transnational. Malgré leur relative imprécision ou leur insuffisance présumée ou réelle, les dispositions du Code de l'ONU sur le traitement des ETN effectuent un accommodement indispensable et équilibré sur des problèmes politiquement et économiquement complexes et juridiquement impossibles à transcrire dans des formules de droit très précises. Il est conclu de l'analyse tant bien de l'esprit que de la lettre de tels textes que ces derniers devraient accueillir l'assentiment des États qui leur opposent encore une fin de non-recevoir afin de permettre l'adoption du Code sans laquelle les énoncés en question ne pourraient être approfondis et perfectionnés à la lumière de l'expérience pertinente et ce, dans l'intérêt compris à long terme de tous les protagonistes.

L'étude analyse les textes proposés par la Commission des sociétés transnationales en vue de résoudre les questions en suspens dans le Code de l'ONU sur les STN. Elle démontre leur pertinence tant en termes de leur contenu juridique qu'en termes de satisfaction des intérêts et thèses étatiques sur les sujets complexes dont ils traitent (référence au « droit international » pour le traitement des firmes étrangères, traitement national, nationalisation et indemnisation, règlement des différends d'investissement, etc.). Vu qu'ils réalisent un compromis raisonnable dans lequel toutes les parties à un investissement transnational trouveront intérêt, l'étude conclut à l'absence de raison juridiquement valable permettant de persister à s'opposer à l'adoption du Code de l'ONU. Ce dernier demeure une nécessité pour la réalisation de l'un des objectifs primordiaux du nouvel ordre économique international: la réglementation, convenue au niveau multilatéral global, tant des activités que du traitement des entreprises trans- ou multinationales.

II. Master's Theses/Mémoires de maîtrise

Randy Hammer Abramsky, *Reconcilable Regimes — Integrating Statutory and Collective Bargaining Rights*, University of Toronto

Elizabeth A. Adjin-Tettey, *The Legal Foundation for a Sustainable Energy in Developing Countries*, University of Calgary

Mehari Gebre Amlak, *African Countries and the Conventions on the Control of Transboundary Movements of Hazardous Waste*, Institute of Comparative Law, McGill University

Didier Ardaine, *Concentrations et acquisitions des compagnies aériennes et droit communautaire*, Institute of Air and Space Law, McGill University

Enid Carolyn Armstrong, *The Legal Relationship between Parent Unions and their Locals: A Study of International Unionism in Canada*, Institute of Comparative Law, McGill University

Daniel Arnold, *King's Enemies: An Account of the Confiscation and Sale of Enemy Property in Canada and the U.S. during Periods of Armed Conflict*, University of Ottawa

Howard Baker, *Small Claims, Communal Justice, and the Rule of Law in Kingston, Upper Canada c. 1785-1819*, Osgoode Hall Law School

Michel Beaupré, *Le lien juridique, médecin-centre hospitalier*, Université de Sherbrooke

Rambod Behboodi, *Trade Policy or Trade Politics? International Regulation of Domestic Industrial Subsidies*, University of Toronto

Nathalie-Anne Béliveau, *La situation juridique de la femme enceinte au travail*, Université de Montréal

Nathalie Bernard, *The Legal Liability of Directors and Offices of Corporations for Environmental Degradation*, Dalhousie University

Antoine Bigenwald, *L'article premier de la Charte canadienne des droits et libertés à la lumière de la Convention européenne des droits de l'homme*, Université de Montréal

Hélène Bisson, *La coordination du droit des sociétés entre les pays membres de la C.E.E.*, Université Laval

James U. Blacksher, *In Search of a Legitimate Politics of Ethnicity: An American's View of Canada's Experience*, Dalhousie University

Raymond Bodnarek, *The Concept of Sustainable Development and its Implications for Environmental Law*, Dalhousie University

Nathalie Bornoz, *The New Federal Environmental Impact Assessment Process in Canada: A Step Towards Sustainable Development?*, Institute of Comparative Law, McGill University

Charlaine Bouchard, *La réforme du droit des sociétés : l'exemple de la personnalité morale*, Université Laval

Jonathan Bruneau, *Antitrust Law Enforcement within the U.S. Airline Industry*, Institute of Air and Space Law, McGill University

Luc Bruneau, *La Commission de la fonction publique du Québec : sa juridiction et ses pouvoirs*, Université Laval

Daphne Budge, *Recognizing Lesbian Oppression as Sex Discrimination Under the Charter*, University of Ottawa

Holger Buerskens, *Copyright Protection of Musical Compositions in the U.S.A.*, Institute of Comparative Law, McGill University

Rosemary L. Cairns Way, *The Charter, the Supreme Court and the Invisible Politics of Fault: A Critical Analysis of the Constitutionalization of Fault*, Queen's University

Susan Cantlie, *An Autonomy-Based Account of Bankruptcy Discharge*, University of Toronto

Cao Xin-Guang, *A Practical Analysis of International Commercial Arbitration in the People's Republic of China*, Queen's University

Michele L. Caron, *Sortir les Fonctionnaires de l'Ombre*, Dalhousie University

Francis Cheung, *The Preparation of Bilingual Legislation in Hong Kong*, University of Ottawa

Benoit Coens, *The "Hamburg Rules" : Articles 1 to 5.1*, Institute of Comparative Law, McGill University

Bradly J. Condon, *Making Environmental Studies Trade Friendly Under the North American Free Trade Agreement*, University of Calgary

Barbara Craig, *Jurisdiction for Aboriginal Health in Canada*, University of Ottawa

Fiona Cribb, *Pay Equity: An Inquiry Into the Legislated Implementation of the Principle of Equal Pay for Work of Equal Value*, University of Saskatchewan

Philip Croes, *Trucking Air Cargo: The Application of the Warsaw System to Bimodal Transport*, Institute of Air and Space Law, McGill University

Hélène D'Anjou, *Le sida, le droit aux services de santé et l'allocation des ressources limitées*, Université de Montréal

Caroline Desbiens, *Government's Liability for the Control of Air Traffic as well as the Inspection and Certification of Aircraft*, Institute of Air and Space Law, McGill University

Jean-Rémy Deschênes, *La capitalisation des institutions bancaires internationales à la lumière des normes de la banque des règlements internationaux et de la législation de la communauté économique européenne*, Université Laval

Patrice Deslauriers, *La déclaration précontractuelle de risque en droit québécois*, Université de Montréal

Balinder Singh Dhillon, *The State Role in Occupational Health and Safety Administration*, Institute of Comparative Law, McGill University

Harold Dick, *Lawyers of Mennonite Background in Western Canada before the Second World War*, University of Manitoba

Anne Dickson, *Judicial Control over Arbitration — Great Britain*, Institute of Comparative Law, McGill University

Marc Doucet, *Les pouvoirs des municipalités en matière de santé publique*, Université de Sherbrooke

Marina Drel, *The Dispute Settlement in the 1982 United Nations Convention on the Law of the Sea*, Dalhousie University

Madeleine Dussault, *De la juridiction extraterritoriale des tribunaux canadiens en matière de droit criminel*, Université d'Ottawa

David Dzidzornu, *The International Law of Marine Environmental Protection and Preservation: An Analysis with Application to Ghana*, University of Calgary

Richard Edwards, *The Legal Fact as a Work of Art: Artificial Intelligence and the Pragmatics of Legal Interpretation*, University of British Columbia

André Enmond, *Décision politique ou acte d'exécution: un nouveau fondement à la responsabilité des autorités publiques*, Université Laval

Marc Etcheberry, *La situation de l'affréteur/propriétaire de cargaison au regard de l'Oil Pollution Act américain de 1990*, Institute of Comparative Law, McGill University

Andrew Fainer, *Social Assistance, Equality and Section 15 of the Charter*, University of Ottawa

Dermot K. Feenan, *Substitute Decision-Making in Health Care: Who Decides, and How? A Study of the Law of Ontario*, Queen's University

Feng Yanling, *The Law of Security in the People's Republic of China — An Emerging Capitalist Device*, University of Toronto

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