



OSC's Michael Watson

## BETWEEN THE LINES

## What enforcement?

It's high time to ask tough questions of securities regulators, underwriters, accountants and lawyers

by Al Rosen



**C**ompared to our heavy-handed neighbours to the south, Canada has much more room for “compassion, understanding and rehabilitation” when it comes to white-collar criminals, at least according to Michael Watson, head of enforcement at the Ontario Securities Commission. Apparently, the U.S. is way off base in swiftly pursuing and jailing those who would financially and emotionally eviscerate their victims with nary a thought of the consequences.

This pernicious ideology has been perched at the top of Canada's

largest securities commission for close to nine years now. During that time, the infection has spread outward to other provincial commissions, who now collectively claim that pursuing criminals is not their job.

In fairness, there are legislative constraints to the powers of the securities commissions that need to be addressed. The commissions must rely on other government agencies to finish the job they start. However, that hardly excuses the fence-sitting attitude and glacial pace of execution that have become the hallmarks of securities enforcement in Canada.

Enforcement must start with the commissions because they have their fingers on the pulse of the market and are most able to react first. They are also responsible for setting the pace, and by direct relation, the likely success of any investigation. Without determined and expeditious pursuit, evidence disappears, momentum fails, confidence evaporates and the chances of success are severely impaired.

There has been inexplicable foot-dragging in many high-profile cases such as Livent, Nortel and Hollinger, and stock-options backdating scandals at dozens of Canadian companies. Worse, other investigations were never initiated. There should have been examinations into why numerous income trust offerings fell precipitously in value shortly after being sold to investors in public offerings overseen by the commissions. FMF Capital Group alone should have warranted a serious look. In March 2005, investors were sold units worth \$197.5 million. Less than eight months later, the units had lost more than 90% of their value, on their way to eventually losing everything.

What prevented an investigation from being launched? It certainly wasn't the commissions' lack of policing powers—that would only have become an issue at the end of an investigation. Maybe it was budgetary, a lack of manpower. Perhaps the commissions have cut too deep in attempting to keep regulatory fees low.

The situation is certainly complex, involving much finger pointing across dozens of government agencies. The impacts could not be more widespread, affecting almost every investor in the country. In short, it's high time for a judicial inquiry to ask tough questions of regulators, underwriters, accountants and lawyers.

The current path of pursuing a national securities commission will not ensure improvement in the area of securities enforcement, even if it does manage to succeed in the face of tough opposition. Instead, investors deserve to know which parties have violated our laws, why the provincial securities commissions are so prone to malingering, and where legislative changes are essential to bring investigations to a successful conclusion. Perhaps we might discover that the entity responsible for protecting investors and setting enforcement budgets should not be the same one responsible for promoting our markets and espousing a veil of confidence to investors.

It's simple human nature. In order to succeed at promoting our capital markets abroad, our secu-

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rities commissions have deluded themselves into believing the markets are safe and that any evidence to the contrary is simply a problem with public perception. They don't believe that anything could be wrong, so they certainly don't waste any effort trying to find it.

Placing the mandate for enforcement in a separate agency altogether might alleviate the need for a balancing act that so frequently tips against the interests of investors. But why don't we leave that up to the judicial inquiry to decide?

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