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# OSGOODE HALL LAW JOURNAL

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# TOWARDS AN INTEGRATED DISCLOSURE SYSTEM FOR ONTARIO SECURITIES LEGISLATION*


By H. GARFIELD EMERSON**


## I. THE ROLE OF DISCLOSURE IN SECURITIES LEGISLATION

*Introduction*

"Disclosure is and has from the outset been a central aspect of national policy in the field of securities regulation."[1] There is no doubt of the accuracy of this statement and its general acceptance today by those concerned in North America with the regulation of the purchase and sale of securities. Nor is there disagreement that the securities industry is a key industry both in the

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* On June 1, 1972 first reading was given in the Ontario Legislature to Bill 154, being a Bill to enact *The Securities Act, 1972* (herein cited as "Bill 154"). Bill 154 proposes to implement the main recommendations of the 1970 Merger Report of the Ontario Securities Commission providing, among other things, for the concepts of the "reporting issuer" and the cornerstone prospectus, or as it is referred to in Bill 154, the "cornerstone statement." Bill 154 was introduced for the purpose of inviting study and public comment before it proceeds further. While some provisions of Bill 154 may be changed prior to enactment, Bill 154 has been incorporated in this article as tabled in view of its relationship to the proposals of the Merger Report.


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1 *Disclosure to Investors: A Reappraisal of Administrative Policies Under The '33 and '34 Securities Acts, Report of the Disclosure Policy Study to the Securities and Exchange Commission* (March, 1969) at 10 (herein cited as the "Wheat Report"). See also the *Report of the Special Study of Securities Markets of the Securities and Exchange Commission*, H. R. Doc. No. 95, 88th Cong., 1st Sess. (1963) (herein cited as the "Special Study") where it is stated in Part 3 at 1 that "the keystone of the entire structure of Federal Securities legislation is disclosure."

United States and in Canada that plays a central and primary role in the creation of capital markets required to finance the development of each of those economies. As has been succinctly stated, "public interest dictates that the primary purpose of a securities market is to raise capital to finance the economy. Without continuous capital formation, our economy could not grow or prosper."[2] Conditions and practices in the capital markets, both the new issue market and the secondary market, which best serve the investing public and allow the investing public to have confidence in the securities markets will, in the long run, best serve the economy as a whole.[3]

For almost ten years, United States and Canadian securities legislation has been moving towards an integrated and continuous disclosure system whereby issuers whose securities have been publicly distributed would be required on a timely basis to prepare and file periodic public reports disclosing material facts relating to the affairs of such issuers and whereby further public distributions of securities of such issuers would be co-ordinated with such disclosures. The progress in Ontario during this period has been substantial. The recent tabling of Bill 154, delineating the framework that is proposed for Ontario's system of continuous disclosure, marks the final steps to achieve this result in that jurisdiction.

While this article is not meant as an incantation of the virtues of disclosure, it has been written with a preference towards disclosure as the proper approach to the regulation of the distribution of and public trading in securities, as opposed to what may be categorized broadly as the regulatory or "blue sky" approach. It is submitted that to the extent that Canadian securities legislation moves towards concepts of full, frank, timely and effective disclosure that promote confidence, liquidity and increased participation in Canadian securities markets, the better the Canadian investing public, and thereby the Canadian economy, will be served. At the same time, a proper understanding of the proposed continuous disclosure system requires an appreciation of the prior developments and recent problems, both in the United States and Canada, that have provided the foundation from which this continuous disclosure concept has evolved.

While it is not necessary at this stage of development to re-argue the case in favour of disclosure, it may be helpful to note in a general way four main rationales upon which the disclosure philosophy is based. Firstly, those who wish to make use of the public's money should be required to inform the investing public of all facts essential to the formation of intelligent investment decisions. It follows that the use of other people's capital demands the responsibility to inform and to account. Secondly, the creation of free and open public securities markets requires, in theory, that there be full and honest publicity of important information in order that the competing judgments of buyer and seller as to the fair price of a security reflects as nearly as possible a just price and establishes a true market value for the

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[2] William McChesney Martin, Jr., *A Report on the Securities Markets submitted to The Board of Governors of The New York Stock Exchange* (August 5, 1971) at 2.

[3] See, *The Report of the Attorney General's Committee on Securities Legislation in Ontario* (March 11, 1965) at 7-8 (herein cited as the "Kimber Report").

security.[4] A committee of the Ontario Securities Commission stated it this way: "The purpose of the whole [disclosure system] is to provide an equality of opportunity for all investors in the market place, sellers as well as buyers. The object is to make available on a timely basis all material facts the investor requires to make an informed investment judgment."[5] Thirdly, disclosure, in providing material information to the public investor and assisting in the formation of free securities markets, thereby creates the confidence in the market place that is essential to the efficiency of national capital markets. The timely disclosure of the material affairs of public issuers aids the efficiency of the securities industry in meeting tomorrow's ever-increasing capital requirements. Fourthly, the requirement to disclose itself prevents those transactions that cannot stand the light of public scrutiny, thereby protecting the public and increasing the ethical standards of the market place. As is well known, 'sunlight is the best disinfectant'.

The disclosure philosophy should be distinguished from the regulatory or "blue sky" philosophy. Disclosure per se does not involve the regulation of unsound or speculative issues. Generally speaking, under a disclosure statute, such as the Securities Act of 1933, in principle, "a promoter may ask the public to invest in a hole in the ground as long as he does not without supporting geological data describe it as a uranium strike. But under most of the state ["blue sky"] acts full disclosure of material facts is significant primarily in that it is supposed to equip the administrator to apply the substantive or qualitative standards which his act specifies."[6] For example, under some of the "blue sky" statutes of the United States, the state securities administrator may refuse to issue a permit for the sale of specific securities to the public in his state, if, among other things, he finds that the proposed plan of business is not "fair, just and equitable."[7] In enacting the Securities Act of 1933, the United States Congress chose the disclosure philosophy, but not without debate which has continued to the present as to the efficacy of pure disclosure.[8] While the disclosure philosophy has predominated, it has not been and is not advanced as a cure-all, either in Canada or the United States.[9]

The philosophy of disclosure was fully won in the United States more than a generation ago with the enactment of a statute in 1933 "to provide

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[4] Wheat Report, *supra,* note 1, Ch. II.

[5] *Report of the Committee of the Ontario Securities Commission on the Problems of Disclosure raised for Investors by Business Combinations and Private Placements* (February, 1970) at 15 (herein cited as the "Merger Report").

[6] L. Loss, *Securities Regulation* (2d ed. 1961, Supplement 1969), Volume I at 57 (herein cited as "Loss"). See also note 58, *infra.*

[7] *Id.* IV Loss at 2230-32.

[8] *Id.* I Loss Ch. 1G. See text commencing at note 257 *infra.*

[9] Wheat Report, *supra,* note 1 at 48; Merger Report, *supra,* note 5 at para. 2.04.

See text relating to "blue sky" aspects of Ontario securities law commencing with the text relating to note 49 *infra.* The Kimber Report, *supra,* note 3, para. 4.02 at 28 noted that "disclosure, in itself, is not the complete answer to the problems faced by the investor. The ethical standards of directors and management of business corporations and of persons engaged in the securities industry are of great importance. The history of increasing legal requirements as to disclosure has, however, been accompanied by significant improvements and developments in these ethical standards."

full and fair disclosure of the character of securities sold in interstate and foreign commerce . . . ."[10] The primary purpose of the Securities Act of 1933 is, of course, to require that a company issuing securities to the public disclose to the public at the time of offering all material facts relating to the company and to the securities then being issued. The Securities Act of 1933 is "essentially a narrowly focused but high-powered effort to assure full and fair disclosure on the special occasion of a public offering."[11] The purchaser of newly issued securities distributed to the public by an issuer, or the purchaser of already issued securities distributed to the public by a shareholder in a control position to the issuer, is granted a favoured position and is entitled to receive a prospectus at the time of purchase setting forth all material facts relating to the company and the securities being offered.

The Securities Act of 1933 did not, of course, attempt to satisfy the full spectrum embraced by the philosophy of disclosure. As noted above, it is narrowly focused and does not concern itself with disclosure of material facts in connection with subsequent resales of securities by the initial or subsequent purchasers in the trading or secondary market. Accordingly, it does not deal with the legitimate demands of purchasers of already issued securities for continued disclosure of material facts relating to the company whose issued securities he was then buying, unless the selling shareholder was in a control relationship with the company. Nevertheless, the Securities Act of 1933 is a remarkable piece of legislation that has produced "disclosures of amazing quantity and quality in the specific areas where its requirements apply."[12]

To provide a continuing basis of disclosure to the investing public in the secondary market in the United States, a separate statute was enacted in 1934 basically "to provide for the regulation of securities exchanges and of over-the-counter markets operating in interstate and foreign commerce. . . ."[13] In addition to regulating securities brokers and dealers and the securities markets in which they operate, the Securities Exchange Act of 1934 provided a framework for continuing public disclosure at regular intervals of some material information concerning certain types of companies. In outline, the framework provided that established companies file annual, semi-annual and current financial statements and reports and prepare appropriate proxy solicitation material and that the insiders of such companies file public reports on their ownership and changes of ownership of the securities of the company of which they are an insider.

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[10] Securities Act of 1933, 48 Stat. 74, as amended, 15 U.S.C. s. 77 (1964) (herein cited as the "Securities Act of 1933"). The first draft of the legislation that became the Securities Act of 1933 was based on "blue sky" theory. See, J.M. Landis, *The Legislative History of the Securities Act of 1933* (1959), 28 George Wash. Law Rev. 6.

[11] Milton H. Cohen, *'Truth in Securities' Revisited* (1966), 79 Harv. Law Rev. 1340 at 1340 (herein cited as "Cohen").

[12] *Id.* at 1344.

[13] Securities Exchange Act of 1934, 48 Stat. 881, as amended, 15 U.S.C. s. 78 (1964) (herein cited as the "Securities Exchange Act of 1934").

Initially, the Securities Exchange Act of 1934 applied, basically, only to companies whose securities were listed and traded on an exchange. This, to some extent, codified and expanded the disclosure required by the then existing rules of the New York Stock Exchange that had required listed companies to file annual financial reports for several years prior to 1934 and made such requirements applicable to the other exchanges. Coverage of the reporting requirements was extended in 1936 to those unlisted companies that had filed a registration statement under the Securities Act of 1933 and whose aggregate value of the class of securities covered by such registration statement amounted to at least $2,000,000 following the offering. It was not until 1964, however, thirty years later, that the Securities Exchange Act of 1934 extended its continuing disclosure requirements to companies whose publicly distributed securities were traded on the over-the-counter market in the United States. Following closely the recommendations made in the Special Study,[14] the Securities Acts Amendments of 1964[14a], among other things, extended the reporting requirements for the first time to companies whose securities were only traded on the over-the-counter market that had a million dollars in gross assets and a class of equity securities held of record by 500 or more persons.[15]

The necessity in the United States for this extension of the disclosure requirements by securities legislation to include the secondary trading markets is evidenced by the fact that at that time the corporation law reporting requirements of only 14 of the 50 States and District of Columbia required companies to forward annual financial reports to shareholders, specific requirements setting out the content for such financial reports were generally non-existent and only two states required certification by a public accountant.[16]

*The English Experience*

Disclosure is not and is not claimed to be solely an American discovery. Nor did the Securities Act of 1933 "spring full grown from the brow of any New Deal Zeus. It followed a generation of state regulation and several centuries of legislation in England."[17] Commencing with the English Companies Acts of 1844 and 1845[18] sponsored by Gladstone, then President of the Board of Trade, publicity as the most potent safeguard against fraud has been a prime basis of English company legislation.[19] Since the 1845 English Company Act that provided elementary mechanics for the filing of a circular or prospectus with the companies branch on the issuance of shares to the public,[20] "the history of English securities regulation may be summarized as

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[14] Special Study, *supra*, note 1.

[14a] 78 Stat. 565, 15 U.S.C. s. 781.

[15] See, Hugh L. Sowards, *The Securities Acts Amendments of 1964: New Registration and Reporting Requirements* (1964), 19 U. of Miami Law Rev. 33.

[16] Robert L. Knauss, *A Reappraisal of the Role of Disclosure* (1964), 62 Mich. Law Rev. 607 at 625 (herein cited as "Knauss").

[17] I Loss, *supra*, note 6 at 1.

[18] *Joint Stock Companies Act, 1844*, 7 & 8 Vict., c. 110; *Companies Clauses Consolidation Act, 1845*, 8 & 9 Vict., c. 16.

[19] See, L.C.B. Gower, *The Principles of Modern Company Law* (3rd ed. 1969) at 307; J. Peter Williamson, *Securities Regulation in Canada* (1960, Supplement, 1966) at 4-8 (herein cited as "Williamson") and I Loss, *supra*, note 6 at 1-7.

[20] 8 & 9 Vict., c. 16, s. 4.

repeated attempts to increase the effectiveness of the required disclosure."[21] However, the Securities Act of 1933 did introduce for the first time the requirement that the prospectus be filed with and subject to the prior approval of an independent public agency charged with the duty of scrutinizing the facts bearing upon the proposed issue before permitting the sale of the securities to the public. The creation of such an outside authority of public control for England based on the United States Securities and Exchange Commission model was considered and rejected by the Jenkins Report in view of the "wider devolution of control inherent in the British system."[22] Basically, in England, because there is not a substantial over-the-counter secondary trading market, new issues are generally qualified for trading on The Stock Exchange, London. In the role of a national securities authority, The London Stock Exchange evidently fulfills an undiluted "blue sky" function and its requirements regulating issues of securities are, from the practical point of view, much more important than the applicable British statutory provisions.

The London Stock Exchange's stringent system of vetting and exercising control over new issues which are admitted to quotation is in excess of the legal requirements relating to public issues and includes the regulation of the procedures of the issue, the constitution of the company and the conduct of its affairs by the directors. In addition the Exchange may object to persons connected with the issue or the management of the company who appear to be unsuitable to the Exchange.[23] The combined self-regulatory requirements imposed by The London Stock Exchange and the English Companies Acts 1948 and 1967 and the Prevention of Fraud (Investments) Act 1958, on the one hand, and the apparent public duty exercised by the English issuing houses, or underwriters, on the other hand, create a system of disclosure and investor protection, which, according to some English authorities, is equal to the American standards.[24]

Professor Gower was of the view at one time that "the protection afforded

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[21] Knauss, *supra*, note 16 at 612.

[22] Board of Trade, *Report of the Company Law Committee* (June, 1962) at paras. 227 and 228 (herein cited as the "Jenkins Report").

[23] See, Clive M. Schmitthoff, *The Issue of Securities in Great Britain* (1969), The Journal of Business Law 1.

[24] In connection with the preparation of prospectuses, the Jenkins Report, *supra*, note 22, at 84 noted that "counsel, solicitors and accountants consulted with respect to the preparation of the necessary documents are bound as a matter of professional duty to do their best to see that all is right." The Kimber Report, *supra* note 3, expressed the same view: para. 4.06 at 29.

Recently, in the United States, the Securities and Exchange Commission laid a complaint against National Student Marketing Corp. and other defendants for violation of federal securities law. Included as defendants were two prestigious law firms accused of violating federal securities law by allegedly failing to disclose to public investors and to the shareholders of National Student Marketing Corp. and of the other merging company the contents of a "comfort letter" from the auditors of National Student Marketing Corp. made available at closing. The "comfort letter" is alleged to have stated that significant and, in effect, adverse adjustments had to be retroactively reflected in the financial statements of National Marketing Corp. that were forwarded to shareholders of the merging companies and upon which such shareholders had approved the merger: *SEC* v. *National Student Marketing Corp.*, CCH Fed. Sec. L. Rep. # 93,360 (February 3, 1972); *National Student Marketing*, 5 The Review of Securities Regulation 913 (June, 1972) and Roberta S. Karmel, *Attorneys' Securities Law Liabilities* (1972), 27 The Business Lawyer 1153.

by the sponsoring issuing houses and brokers is probably more effective than that of the American S.E.C. since the former will not imperil their reputations by backing a scheme unless it is both fully documented and economically sound. Similarly, the control exercised by the stock exchanges over the subsequent operations of the company, through the general undertaking and the sanction of suspension of dealings goes some way towards rivalling the S.E.C.'s supervision of corporate activities."[25] Subsequent events appear to have changed Professor Gower's view of the co-ordinated efficiency of the self-regulatory private agencies in promoting investor protection in England. After commenting on the failure to implement the half-way recommendations of the Jenkins Report, he comments:[26]

> And it is now widely acknowledged that continued reliance on private agencies will not do. It is fair to say that dissatisfaction is in relation to take-overs rather than to normal flotations, but, as the Jenkins Committee recognized, the two cannot be kept wholly distinct. The trouble is that Queensbury rules not subject to legal sanctions are inadequate to preserve a code of conduct, at any rate in the heat of a take-over battle. No rules of disclosure, however all-embracing, no City Code, however clearly drafted, and no Panel, however prestigious can really be an adequate substitute for a single authority with statutory powers over the whole field of securities regulation.... What seems to be needed is a statutory body — a smaller (poor man's) S.E.C. — to which would be transferred the functions in this field of the Board of Trade and the Registrar, and which would be provided with a staff adequate to lay down rules and to police them, and be armed with powers to co-ordinate and supervise the activities of the private agencies.

*Securities and Companies Legislation Compared*

From the historical record, it would appear that companies leglislation, not only in the United States but also in Britain and Canada, has generally failed in the past to keep pace with the increasing and evolving needs of shareholders, who are also investors, for adequate financial and other information concerning the affairs of the company with which they are so associated.[27] Corporate law and securities law have focused primarily on different aspects of the shareholder's or investor's relationship to the company. Accordingly, it has been through the progress made by the implementation of recommendations to revise securities laws that the advances and the required disclosure of and access to essential data has generally been provided to the shareholder qua investor.[28] As the references in this article show, in the

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[25] L.C.B. Gower, *The Principles of Modern Company Law* (2d ed. 1957) at 289.

[26] L.C.B. Gower, *The Principles of Modern Company Law* (3rd ed. 1969) at 310.

[27] See, Edwin C. Harris, *Access to Corporate Information* in *Studies in Canadian Company Law* (1967) edited by J.S. Ziegel.

[28] For example, prior to 1966, *The Corporations Act*, R.S.O. 1960, c. 71, s. 84(1)(a) only required the statement of profit and loss submitted to shareholders to disclose "the operating profit or loss before including or providing for other items of income or expense that are required to be shown separately." The Kimber Report, *supra*, note 3, recommended that the legislation be amended to require disclosure of sales or gross revenues: paras. 4.15 to 4.18. By *The Corporations Amendment Act, 1966*, S.O. 1966, c. 28, s. 8(1), "sales or gross operating revenue" was required to be disclosed in the statements of profit and loss of public companies. A similar provision was made to the securities legislation: *The Securities Act, 1966*, S.O. 1966, c. 142, s. 121(1)(a) and s. 129(1)(b)(i). Again in 1970, the Merger Report, *supra*, note 5, recommended that sales or gross revenues be proportioned between substantially different classes of business, which recommendations were incorporated into Ontario companies and securities legislation in 1971: see, paras. 9.27 to 9.36 of the Merger Report and note 99 *infra*.

1960's the strong emphasis on increased public disclosure of corporate information arose not from the revisions of corporate law as such but from the real needs of the public investor for essential facts on which to base a decision to buy or sell. This development may have been influenced by the enormous and relatively recent increase in the size of the investing public which is continuously trading in securities — from 6½ million shareholders in the United States in 1952 to 31 million in 1970.[29] There is every reason to believe that a proportionate increase took place in the Canadian investing public.

This is not to say that current corporate law developments are continuing to ignore the rights of shareholders for corporate information. The Interim Report of the Select Committee on Company Law of the Province of Ontario,[30] the Proposals for a New Business Corporations Law for Canada[31] and Bill No. 66 recently introduced in the British Columbia Legislature to enact a new Companies Act have each re-directed attention to shareholders' rights. However, increased rights for shareholders in the corporate field have not automatically expanded the area of corporate disclosure. The differing primary purposes of corporate and securities laws lead one to question the recom-

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[29] Alan B. Levenson, *The Role of the SEC As A Consumer Protection Agency* (1971), 27 The Business Lawyer 61 at 64.

[30] *The Interim Report of the Select Committee on Company Law* (Ontario, 1967) did not deal extensively with questions of disclosure presumably because the Kimber Report and the amendments to *The Corporations Act* (Ontario) had recently covered this area in Ontario. See text in connection with footnote 69 *infra*. The Interim Report did deal with important and related matters such as the independence of the auditor (Ch. X, s. 2), the creation of an audit committee of the board of directors, a majority of whom must be outside directors (Ch. X, s. 2, para. 10.2.8), the removal of auditors (Ch. X, s. 3) and increased shareholders' rights in various areas, including the abolition of the restrictive provisions of the rule of *Foss* v. *Harbottle* (1843), 2 Hare 461 (Ch. VII, s. 4). The Interim Report also considered and rejected the proposal that the financial statements of all companies incorporated in Ontario be filed in an office of public record on the ground that there then was "no way of assessing the real social value from a public interest standpoint of the harsh requirement that all companies, without exception, disclose their financial affairs to the general public" (Ch. XIII, para. 13.1.7). The recommendations of the Interim Report are now contained in *The Business Corporations Act*, R.S.O. 1970, c. 53; am. S.O. 1971, c. 26 and c. 98.

The audit committee concept has received recent recommendations by the accounting profession in the United States as a requirement for all public corporations in order "to provide the auditors with a means of access to the board to preserve the auditor's independence in their relationship with management." See, Sam Harris, *Proceedings of the ABA National Institute, Officers' and Directors' Responsibilities and Liabilities* (1972), 27 The Business Lawyer (Special Issue) at 72-73.

The Securities and Exchange Commission has recently endorsed the establishment "by all publicly-held companies of audit committees composed of outside directors": Accounting Series Release No. 123, Securities Act of 1933 Release No. 5237 (March 23, 1972). See also, The Wall Street Journal, May 31, 1972.

[31] *The Proposals for a New Business Corporations Law for Canada* by R.W.V. Dickerson, J.L. Howard and L. Getz (1971) recommend that the details of financial statements and the particulars of items of financial information be contained in regulations to the statute. This permits incorporation of future developments easily and recognizes that "in recent years there has been an increasing awareness of the need to improve the quantity and quality of financial disclosure required of corporations": Volume I, para. 326. See also, Bill 154, s. 98, s. 99 and s. 100.

mendation of the Merger Report that the proxy solicitation and information circular requirements be removed from securities legislation and hopefully continued with the same degree of quality in corporate statutes.[32] Bill 154 has followed this proposal by omitting requirements for proxies and proxy solicitation. Admittedly little difference will result where the corporate issuer is subject to statutes such as The Business Corporations Act (Ontario) whose provisions and regulations follow those of the present Ontario Securities Act. However all issuers are not subject to such requirements by their jurisdiction of incorporation or documents of organization. More importantly, the proxy solicitation material has been recognized as providing a route of timely disclosure directly to the investor that probably communicates information more effectively than a prospectus or complex statutory financial and other reports.[33] Quoting from the Special Study, the Kimber Report reported that the Securities and Exchange Commission described the proxy rules as ". . . the single most effective disclosure device in our whole statutory arsenal."[34] The removal of the proxy and information circular requirements from securities legislation would lessen the effectiveness of this important avenue of disclosure and substitute the uneven and generally less effective provisions of various corporate statutes and documents organizing unincorporated issuers.

## II. DISCLOSURE IN A CANADIAN CONTEXT

### *Historical to 1945*

Canadian securities legislation per se commenced with legislation in Manitoba in 1912[35] that regulated the issuance of securities and was based upon the 1911 "blue sky" legislation of Kansas. By 1930 most of the Canadian provinces had adopted anti-fraud and licencing statutes governing brokers and securities salesmen.[36] In Ontario, for example, The Security Frauds Prevention Act, 1928 was a typical statute prohibiting any person from trading in securities unless registered as a broker or salesman. The Attorney-General of Ontario had jurisdiction to order that any application for registration not be granted "for any reason which he may deem sufficient."[37]

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32 Merger Report, *supra,* note 5 at para. 2.34.

33 II Loss, *supra,* note 6 at 1027: "The proxy rules are very likely the most effective disclosure device in the SEC scheme of things."

34 Kimber Report, *supra,* note 3 at para. 6.18.

35 *The Sale of Shares Act,* S.M. 1912, c. 75. It was unlawful under that Act for any company to sell or attempt to sell in Manitoba any securities of any company not incorporated in Manitoba or registered in the province without first obtaining a licence from the Public Utility Commission: s. 2. The Commissioner was required to issue a licence to a company duly applying therefor if, among other things, he found the proposed plan of business and contracts "provide for a fair, just and equitable plan for the transaction of business, and in his judgment promise a fair return on the shares . . . offered for sale. . . .": s.9. Cf. *The Directors' Liability Act,* S.O. 1891, c. 34, and note 38 *infra.*

36 For an outline of the history of Canadian securities legislation, see Williamson, *supra,* note 19, Ch. 1 and I Loss, *supra,* note 6, Ch. 21.

37 S.O. 1928, c. 34; am. S.O. 1929, c. 51, s. 8(1)(a). The present legislation is basically similar: *The Securities Act,* R.S.O. 1970, c. 426, s. 7(1).

The Security Frauds Prevention Act, 1928, however, concerned itself with only half of the problem — the registration of brokers and salesmen and the prevention of fraudulent acts in connection with trading securities. Following the English precedent and applying the disclosure philosophy, the regulation of the issue and sale of securities to the public was then governed in Ontario under companies legislation. Commencing in 1907, Ontario required that every public company, wherever incorporated, "the securities of which were dealt in within Ontario," that offered securities to the public for subscription was required to issue and file a prospectus with the Provincial Secretary containing the information set forth in the Act and to deliver a copy of such prospectus to the purchaser before the contract of sale became binding.[38] These prospectus requirements relating to the issue of securities to the public in Ontario were continued in Ontario companies statutes until 1928.[39] In 1928, the prospectus requirements contained in the Ontario Companies Act were finally repealed and transferred to a new statute, The Companies Information Act, 1928.[40] Under the provisions of that statute, every public company was required to file a prospectus with the Provincial Secretary upon the commencement of any business in Ontario, upon the sale in Ontario of any of its securities, upon any material change in any fact set forth in the last prospectus filed or upon the sale in Ontario of any issue of securities other than in respect of which a prospectus had been filed.[41] These two separate statutes, The Securities Frauds Prevention Act, 1928 and The Companies Information Act, 1928, provided when read together, for a somewhat co-ordinated regulation of the securities industry. They continued to govern the Ontario securities industry on this basis until 1945.[42] Accordingly, during this period, brokers were registered under security frauds Acts and disclosure of information to investors by issuers was left to the provisions of the companies information statutes. However, upon the issue of securities, the issuer was required to register as a broker under the security frauds Acts.[43]

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[38] *The Ontario Companies Act*, S.O. 1907, c. 34, Part VII. The prospectus provisions set out in Part VII of the 1907 Act were revised in 1912 when the 1907 Act was repealed and replaced.

[39] *The Ontario Companies Act*, S.O. 1912, c. 31, Part VII; *The Companies Act*, R.S.O. 1914, c. 178, Part VII; *The Companies Act*, R.S.O. 1927, c. 218, Part VII.

[40] *The Companies Act*, S.O. 1928 c. 32, s. 10; and *The Companies Information Act, 1928*, S.O. 1928, c. 33; am. S.O. 1929, c. 50 and S.O. 1930, c. 38.

[41] *Id.*, s. 3(1).

[42] *The Security Frauds Prevention Act, 1930*, S.O. 1930, c. 39; *The Securities Act*, R.S.O. 1937, c. 265 and *The Companies Information Act*, R.S.O. 1937, c. 253.

[43] Williamson, *supra*, note 19, at 22.

With the consolidation and revision effected by *The Securities Act, 1945*, the prospectus provisions of *The Companies Information Act*, R.S.O. 1937, c. 253, referred to above were unnecessary and were accordingly deleted by *The Companies Information Act, 1947*, S.O. 1947, c. 16, s. 2. However, from 1947 to 1966, the Companies Information Acts required "every company of a class prescribed by the regulations" to file a prospectus with the Provincial Secretary before the sale in Ontario of an issue of securities. Ont. Reg. 125/47 provided that all companies must file a prospectus except private companies, companies filing a statement or prosectus under The Securities Act and companies whose securities were listed on a stock exchange. Such provisions were eventually repealed by *The Corporations Information Amendment Act, 1966*, S.O. 1966, c. 29, s. 1.

*Securities Legislation Since 1945*

With the enactment of The Securities Act, 1945,[44] which may be considered the first modern Canadian Securities Act, Ontario consolidated its various statutes relating to the licensing of brokers and salesmen and to the filing of a prospectus upon the issuance of securities to the public.

The Securities Act, 1945 introduced the definition of "primary distribution to the public"[45] and the recognizable prohibition against trades in the course of a primary distribution to the public until "a clear and concise statement . . . containing a full, true and plain disclosure of all material facts . . . has been filed with the [Ontario Securities] Commission and a written receipt therefor received from the registrar."[46] While the form of the statement or prospectus was prescribed by the regulations, The Securities Act, 1945 did require a balance sheet and profit and loss statement, certified by the issuer's auditors, as at the end of the last completed financial year, or as at a date not more than 120 days prior to the date of the statement, whichever is later.[47] For the period from 1945 to 1966, it may be said that the only significant developments of Ontario securities legislation were those concerned with expanding and refining the principles of disclosure.[48]

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[44] S.O. 1945, c. 22; am. S.O. 1946, c.86.

The impetus for the 1945 Ontario securities legislation was the Report of the Royal Ontario Mining Commission, 1944 known as the Urquhart Report. See, J.C. Baillie, *The Protection of the Investor in Ontario* (1965), 8 Can. Public Admin. 172 at 174. In moving the first reading of the Act, the Attorney-General indicated that where securities registration was concerned the emphasis was to be on full disclosure and assurance that the disclosure reached the purchaser: Williamson, *supra*, note 19, at 31.

[45] S.O. 1945, c. 22, s. 1(j). The definition contained the dual aspect — trades to the public upon issuance from treasury and trades of already issued securities from a control position.

[46] S.O. 1945, c. 22, s. 49(1). The contents of the "statement" or prospectus required by *The Securities Act, 1945* were set out in the regulations. See, Ont. Reg. 95/45. With the 1947 revision, note 48, *infra*, the contents of the prospectus were prescribed by statute. In 1966, the prescribed items of disclosure were returned to the regulations on the recommendations of the Kimber Report, *supra*, note 3, at para. 5.15. See Ont. Reg. 101/67 and currently, Ont. Reg. 794/70, as amended.

[47] *Id.*, s. 49(4).

[48] *The Securities Act, 1945* was repealed and replaced by *The Securities Act, 1947*, S.O. 1947, c. 98. The 1947 revision was basically housekeeping. "There is really no difference in principle between the 1945 and 1947 Acts. The difference lies in the machinery employed in obtaining full disclosure": O.E. Lennox, *Securities Legislation and Administration*, Special Lectures of the Law Society of Upper Canada 1950 at 85.

*The Securities Act, 1947* set forth 33 specific statutory items to be disclosed in the prospectus and required directors', promoters' and underwriters' certificates to be contained in the prospectus: s. 44(1). In addition the profit and loss statement of the issuer was expanded to include the last 3 completed financial years and pro forma balance sheets were permitted: s. 44(5)(b) and s. 44(8). If primary distribution was still in progress 12 months from the date of the last prospectus, a new prospectus was required: s. 44(10). *The Securities Act*, R.S.O. 1950, c. 351 consolidated the 1947 Act as amended. By *The Securities Amendment Act, 1956*, S.O. 1956, c. 81, the prospectus was required to include statements of earnings for the last 5 completed financial years and was permitted to contain pro forma statements of earnings if the proceeds of the issue were to be applied to acquire a business. *The Securities Act*, R.S.O. 1960, c. 363 continued the 1950 Act as amended and no major disclosure amendments were made until 1966.

Ontario securities legislation since 1945 has not been, is not now and is not proposed to be based solely on the principles of disclosure in connection with qualifying securities for sale to the public by filing a prospectus. Commencing with The Securities Act, 1945, the Ontario Securities Commission has had discretion to accept a statement or prospectus for filing unless, among other things, the prospectus contained any statement, promise or forecast which was "misleading, false or deceptive" or had the "effect of concealing material facts" or unless an "unconscionable consideration" was paid or was to be paid for promotional purposes or acquisition of property.[49] The Ontario Securities Commission has on occasion publicly acknowledged this power of final authority to accept a prospectus for filing.[50] The language of the present section[51] grants the Director a discretion to accept a prospectus for filing "unless" certain circumstances exist, at which point the Director would seem to lose his discretion and be required to refuse the filing. Obviously it is also a matter of interpretation and therefore opinion, to be exercised judicially, whether such prohibitive circumstances exist in fact. By contrast, it is mandatory to issue a receipt for the filing of a preliminary prospectus if the preliminary prospectus complies with the Act and the regulations.[52] The ambit of the discretion of the Director of the Ontario Securities Commission in section 61 has not been subject to judicial review but it is clear that the Ontario Securities Act is more than a full disclosure statute. While such discretion has in fact been exercised in the past largely in connection with

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[49] S.O. 1945, c. 22, s. 52. Such provisions have been continued in substance in *The Securities Act, 1947,* S.O. 1947, c. 98, s. 49, *The Securities Act,* R.S.O. 1950, c. 351, s. 44, *The Securities Act,* R.S.O. 1960, c. 363, s. 44 and *The Securities Act, 1966,* S.O. 1966, c. 142, s. 61. By *The Securities Amendment Act, 1967,* S.O. 1967, c. 92, s. 1(2), the Director was permitted to refuse to issue a receipt for a prospectus of a finance company where the plan of distribution is "not acceptable to the Director".

[50] See, O.E. Lennox, *Securities Legislation and Administration,* Special Lectures of the Law Society of Upper Canada 1950.

The Merger Report, *supra,* note 5, noted at para. 2.05 that "although strongly disclosure oriented, through provisions such as section 61 of the [1966] Act the Ontario legislation provides a residual discretion. This affords the Commission the opportunity of offering guidance through policy statements as to the circumstances under which this discretion may be exercised." The Ontario Securities Act was referred to as a "blue sky" statute by the Vice-Chairman of the Ontario Securities Commission, H.S. Bray, Q.C., at the Osgoode Hall Corporate and Securities Law Programme, March 4, 1972.

[51] Section 61 of *The Securities Act,* R.S.O. 1970, c. 426, states that "the Director may in his discretion issue a receipt for any prospectus filed under this Part, unless it appears to the Director that. . . ." This discretion is proposed to be continued by s. 80(1) of Bill 154 with respect to filing offering circulars of reporting issuers.

By contrast s. 15.23(1) of the Draft Canada Business Corporations Act set out in Volume II of the *Proposals for a New Business Corporations Law for Canada, supra,* note 31, provides that the "Registrar may by order in writing refuse to issue a receipt for a prospectus sent to him under this Part, if it appears to the Registrar that. . . ." Under such a provision the Registrar's discretion would be totally different from that of the Director of the Ontario Securities Commission and would be limited to his interpretation or opinion whether the prohibitive circumstances exist and his refusal would have to be based on the existence of such circumstances.

[52] *The Securities Act,* R.S.O. 1970, c. 426, s. 35(2). See also s. 61 and s. 71 of Bill 154 to the same effect with respect to filing a preliminary cornerstone statement and a preliminary offering circular, respectively.

speculative mining ventures and, to a lesser extent, with junior industrials, the Ontario Securities Commission appears to have exercised such "residual discretion" cautiously, responsibly and not restrictively and has "confined the scope of its interference to policies and rules that few serious observers would claim to be detrimental to the operations of the securities industry."[53]

Bill 154 proposes to add another requirement to the "blue sky" approach. To become a "reporting issuer", a company must file a preliminary cornerstone statement and a cornerstone statement with the Ontario Securities Commission and obtain receipts therefor.[54] Following the existing residual discretion relating to filing prospectuses, "the Director may, in his discretion, issue a final receipt for a cornerstone statement filed by an issuer, unless it appears to him that . . .", among certain other things, "the issuer does not meet such financial requirements and conditions as are specified in the regulations."[55] While it is not clear from Bill 154 exactly what this requirement means because draft regulations are not available, the proposed legislation would appear sufficiently broad to enable the Ontario Securities Commission to deny certain companies, presumably those with minimal financial resources, the ability to seek public financing, irrespective of the degree and clarity of disclosure to the proposed public investor of the financial condition and affairs of such an issuer.

The discussion outlining the merits of this extension of "blue sky" control by regulation and the existing public prejudice it is meant to remove does not appear on the public record. It was not a recommendation of the Merger Report. The extension of the regulatory authority by means of setting "financial requirements and conditions" establishing which issuers may become reporting issuers is a significant and questionable proposed change in securities administration in Ontario because Bill 154 also proposes that only reporting issuers will be permitted access to normal public financing by the use of an offering circular.[56] In addition, while the primary exemptions from the prohibition against trading securities in the course of a distribution without an offering circular appear to be available to all issuers, Bill 154 proposes that only securities of reporting issuers purchased pursuant to those exemptions may be re-sold without constituting a "distribution".[57] Accordingly, it will be virtually mandatory for all non-closely-held companies to become reporting issuers. Those that cannot meet the "financial requirements and conditions" imposed by regulation may find their access to outside financing severely restricted.

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[53] J.W. Baillie, *The Protection of the Investor in Ontario* (1965), 8 Can. Public Admin. 172 at 232.

[54] Bill 154, s. 59.

[55] Bill 154, s. 64(1)(b). It would appear that an amendment to s. 155 of Bill 154 is necessary to permit the enactment of regulations contemplated by s. 64(1)(b). Cf. s. 155, item 22 of Bill 154.

[56] Bill 154, s. 69(a).

[57] Bill 154, s. 93(3)(a) and s. 93(4)(a). The term "distribution" is proposed to replace the existing term "distribution to the public": see, Bill 154, s. 1(1)10, and text relating to notes 158 and 191 *infra*.

By contrast, the Securities Act of 1933 is more firmly based on pure disclosure.[58] Under the Securities Act of 1933, the Securities and Exchange Commission may refuse to permit a registration statement to become effective where it appears to the Commission that the registration statement is "on its face incomplete or inaccurate in any material respect" or "includes any untrue statement of a material fact or omits to state any material fact required to be stated therein or necessary to make the statements therein not misleading."[59] As noted by Loss, "the heavy artillery provided by s. 8 is reserved for flagrant cases" and very workable examination procedures have developed.[60] The same comment presently applies to the qualification of issues with the Ontario Securities Commission in practice, notwithstanding the residual discretion contained in current legislation noted above.

*Secondary Markets*

The Ontario Securities Acts prior to 1966 provided scant authority to regulate the secondary markets of already issued securities, apart from the anti-fraud provisions and the power to licence persons engaged in the securities business. Ontario securities legislation from 1945 to 1966 may generally be considered as Canadian versions of the Securities Act of 1933, focusing solely on new issues and distributions from control groups. Prior to 1966 Canadian investors were without the benefit of provisions similar to those contained in the Securities Exchange Act of 1934 governing the continuing financial and other timely reporting requirements of companies whose securities had been distributed to and were freely traded in the public securities markets. Viewed in perspective, the appointment in Ontario in 1963 of a Committee on Securities Legislation to report among other things, on the "working of securities legislation in Ontario" and "the degree of disclosure of information to shareholders"[61] may be considered the turning point in Canada of disclosure for investors solely through a prospectus on the special occasion of a public offering to disclosure on a continuing basis by periodic reporting of material facts. The thrust of the recommendations of the Kimber Report was directed at filling this long-standing gap in the application of disclosure policy between the new issue market and the trading market.

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[58] "The SEC, which reviews the registration statement, has no authority to pass on the merits of a particular offering. The SEC has no general power to prohibit an offering because it considers the investment opportunity to be a poor risk. The sole thrust of the Federal statute is disclosure of relevant information. No matter how speculative the investment, no matter how poor the risk, the offering will comply with Federal law if all the required facts are disclosed. By contrast, many state securities or "blue sky" laws, which are applicable in the jurisdictions where the distribution takes place, do regulate the merits of the securities." Carl W. Schneider and Joseph M. Manko, *Going Public — Practice, Procedure and Consequences* (1970), 15 Villanova Law Rev. 283 at 291.

[59] Securities Act of 1933, *supra*, note 10, s. 8(b) and s. 8(d).

[60] I Loss, *supra*, note 6, at 272. See also, Securities Act of 1933 Release No. 4936, as amended (December 9, 1968), *Guides for Preparation and Filing of Registration Statements.*

In connection with filings in Ontario, see, T.O.P. Brown, *Administration under The Ontario Securities Act, 1966* (1969), 94 Canadian Chartered Accountant 24 at 27.

[61] Kimber Report, *supra*, note 3, at 6.

The Kimber Report succinctly recommended revised policy directions in connection with continuing disclosure for investors by way of expanded annual and semi-annual financial reporting, proxies and proxy solicitation, insider trading and take-over bids.[62] As stated in the Report, its recommendations dealt "directly or indirectly with disclosure of information to investors, that is to say, with the factor of public confidence."[63]

In line with the Securities Exchange Act of 1934 and following the recommendations contained in the Kimber Report, Ontario passed The Securities Act, 1966[64] which contained for the first time continuing financial reporting and disclosure requirements upon companies that had issued equity shares to the public in Ontario after May 1, 1967 through a prospectus or any of whose shares were listed and posted for trading on The Toronto Stock Exchange. As stated by the then Director of the Ontario Securities Commission, "the need for additional financial disclosure, particularly where the securities of a company are in the hands of the public, has ceased to be a matter of debate. The questions being asked are only ones of degree and of kind."[65] Basically, the Ontario Securities Act, 1966 required such companies to forward to shareholders expanded annual audited comparative financial statements consisting of a balance sheet and statements of profit and loss, surplus and source and application of funds and semi-annual unaudited comparative financial reports[66] and to prepare and forward to shareholders proxy solicitation material for meetings of shareholders[67] and required insiders of such companies to file public reports on their ownership and changes of ownership of securities of such companies.[68] The foregoing provisions did not apply to companies incorporated under the law of the Province of Ontario but identical amendments were simultaneously made to the Ontario Corporations Act.[69] The specific changes introduced by The Securities Act, 1966 have been reviewed in detail elsewhere and need not be repeated here.[70] Accordingly, The Securities Act, 1966 combined in one statute the disclosure provisions of the Securities Act of 1933 relating to new issues and trades from control groups and the continuing disclosure provisions of the Securities Exchange Act of 1934 relating to certain companies whose issued securities were publicly traded.

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62 *Id.*, Parts IV, VI, II and III, respectively.

63 *Id.*, para. 1.17 at 9.

64 S.O. 1966, c. 142.

65 Harry S. Bray, Q.C., *Financial Disclosure and Accounting Practice*, Special Lectures of The Law Society of Upper Canada 1968, at 251.

66 S.O. 1966, c. 142, Part XII.

67 *Id.*, Part X.

68 *Id.*, Part XI.

69 *The Corporations Amendment Act, 1966*, S.O. 1966, c. 28.

70 See, for example, R.C. Meech, Q.C., *Prospectus and Registration Requirements*, G.E. Creber, Q.C., *Take-Over Bids, Insider Trading and Proxy Requirements* and Harry S. Bray, Q.C., *Financial Disclosure and Accounting Practice*, all in Special Lectures of The Law Society of Upper Canada 1968; Harry S. Bray, Q.C., *Recent Developments in Securities Administration in Ontario; The Securities Act, 1966* in *Studies in Canadian Company Law* (1967) edited by J.S. Ziegel.

The continuing disclosure provisions introduced in Ontario by The Securities Act, 1966 did not apply, however, to all companies whose securities were distributed to or freely traded by the public in Ontario. Parts X, XI and XII of The Securities Act, 1966 did not apply to a company whose shares were not listed and posted for trading on The Toronto Stock Exchange that had issued debt securities or equity shares to the public, whether by way of a prospectus or otherwise, prior to May 1, 1967, that issued debt securities to the public, whether by way of a prospectus or otherwise, after May 1, 1967 or that issued debt securities or equity shares to the public after May 1, 1967 by way of an exemption to the prospectus requirements of The Securities Act, 1966, as for example, by way of a private placement under section 19(3) of that Act.[71] Accordingly a company whose shares were not listed and posted for trading on The Toronto Stock Exchange that issued debt securities to the public in Ontario by way of a prospectus or that issued equity shares to the public by way of an exemption to the prospectus requirements after May 1, 1967 was not subject to the financial, proxy solicitation or insider reporting requirements of The Securities Act, 1966.

There does not appear to be any clear indication in the Kimber Report that its recommendations were not to include companies whose unlisted equity shares were issued to the public in Ontario by way of a prospectus prior to May 1, 1967 or by way of an exemption from the prospectus requirements thereafter or whose debt securities were issued to the public in Ontario by way of a prospectus at any time. With respect to the latter point, the Kimber Report specifically referred to the needs for disclosure of the long term creditor.[72] It would appear that constitutional problems were thought to have prevented the Ontario Securities Act from seeking jurisdiction over extra-provincial unlisted companies that sought access to the Ontario capital market prior to May 1, 1967, but this consideration does not appear as a factor in Bill 154 which proposes expanding the financial disclosure requirements to a larger group of companies.[73] The expanded financial disclosure requirements proposed by Part XV of Bill 154 are clearly needed in the interests of investor disclosure. The Merger Report also recommended the abolition of the distinction between a company that has issued "equity shares" by way of a prospectus and one that has issued other types of securities and this recommendation is incorporated in Bill 154.[74]

## III. DISCLOSURE FOR TRADING MARKETS

There is no doubt that all of the arguments in favour of full and complete disclosure in respect of securities offered to the public on an initial distribution

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[71] See the definition of "corporation" in sections 100(a), 108(1)(b) and 118(b) of *The Securities Act, 1966*, S.O. 1966, c. 142.

[72] Kimber Report, *supra*, note 3 at para. 4.03.

[73] *Id.*, Part IX. See also, Merger Report, *supra*, note 5 at para. 2.35.

By contrast, see the definition of a "corporation" in Bill 154, s. 96(1)(b), the financial reporting requirements proposed by Part XV of Bill 154 and note 157 *infra*. See, in addition, *The Business Corporations Act*, R.S.O. 1970, c. 53; am. S.O. 1971, c. 26 and c. 98, s. 1(9), and as proposed to be amended by Bill 180, 2nd Session, 29th Legislature, s. 1(5).

[74] The Merger Report, *supra*, note 5 at para. 2.36. Bill 154, s. 96 (1)(b).

apply equally in respect of outstanding securities that are publicly traded in the secondary market, either through the facilities of an exchange or over-the-counter. Indeed, the available data supports the proposition that in the past the disclosure requirements of securities legislation were probably deficient in not providing full, complete and continuous disclosure of material facts in respect of all companies whose already issued securities were publicly traded in ever expanding trading markets. The amount of money raised in the new issue market is substantial. However, in comparison to the amount of money changing hands in the trading markets for already issued securities, the significance of the new issue market has been over-emphasized in the application of a disclosure policy. According to information compiled by the Wheat Report, in the United States during the period from 1920-1967, inclusive, the aggregate volume of new equity securities offered for cash was approximately 3.15% of aggregate exchange trading volume. During that period of almost 50 years, investors spent approximately $31.70 on the purchase of already outstanding listed equities for every dollar they spent on newly issued equities.[75] Along similar lines, the Merger Report noted that new issues filed with the Ontario Securities Commission in 1968 comprised less than 10% of the value of securities traded on The Toronto Stock Exchange in 1968.[76]

Without in any way lessening the valid arguments in favour of full prospectus disclosure in connection with the distribution of newly-issued securities to the public and the special economic significance of such issues, the trading markets of already issued securities are, quantitatively speaking, of greater significance for the application of a full disclosure policy. This unevenness in the application of a policy of full continuing disclosure for the trading markets of already issued securities was commented on and constructively criticized in the United States in recent years.[77]

*United States Experience*

The basic criticism of the United States federal securities disclosure policies was that the combined application of the Securities Act of 1933 and the Securities Exchange Act of 1934 failed to focus the light of disclosure on the secondary market for the benefit of purchasers of already issued securities with the same intensity that it did for the benefit of purchasers of newly

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[75] Wheat Report, *supra,* note 1 at 58-59. This data relates only to equity securities and does not cover trading in debt securities which are mostly traded, even when listed, on the over-the-counter market. In addition, the lack of statistical information relating to securities traded on the over-the-counter market requires use of exchange volume statistics as the sole measure of trading market activity. This results in an understatement of trading volume.

[76] Merger Report, *supra,* note 5 at 27, n. 51.

*Canada's Capital Market* (1972), a study by Professors David C. Shaw and T. Ross Archibald notes at 33 that "the characteristics of the secondary markets in Canada and the transactions within them cannot be fully documented." The study reports however that during 1966-1970 net Canadian stock issues averaged $579 million whereas the total market value of domestic shares listed in 1966 on Canadian stock exchanges was $36 billion (Tables 4-4 and 4-5). *The Toronto Stock Exchange 1971 Annual Review* reports at 24 that trading in 1971 in issues listed on Canada's six stock exchanges totalled $6.8 billion.

[77] See, Cohen, *supra,* note 11; Knauss, *supra,* note 16; and Carl. W. Schneider, *Reform of the Federal Securities Laws* (1967), 115 U. of Pa. Law Rev. 1023.

issued securities. As a matter of principle, the advocates of a continuing disclosure system argued for full continuous prospectus-type disclosure concerning companies that had issued securities to the public in order that purchasers in the trading markets might have available the same kind of material facts in connection with a security on which to base a decision to buy or sell that was afforded to a prospective purchaser on an initial distribution. Accordingly, a company issuing its securities to the public should be required to maintain the prospectus level of disclosure for the benefit of the trading markets by means of timely current and up-to-date filings of material facts with a public authority. Within the federal structure of United States securities legislation, this aim could be achieved by coordinating and integrating the continuing disclosure provisions of the Securities Exchange Act of 1934 with the disclosure provisions of the Securities Act of 1933 required at the time of the initial distribution. By this means, the information contained in a prospectus would be continually updated in order that the public files would contain, at any one time, information substantially equivalent to that contained in a current prospectus. Accordingly, within the limits of practicality, it was put forward that the continuous disclosure system of the Securities Exchange Act of 1934 "should be solidified and strengthened in terms of quality, currency, and accessibility of filed data, to the end that there may be available in the public file at all times, in readily identifiable and accessible form, substantially the equivalent of a current prospectus of every continuous registrant."[78] As a corollary of this procedure, a further public offering of a new issue of securities by a continuous registrant or "reporting company" would not require a full prospectus duplicating information already appearing in the public file.

The Special Study[79] of the Securities and Exchange Commission in 1963 also recommended the development of such a program of integrated continuous disclosure by companies that had made a public distribution of its securities. As simplified by Knauss:[80]

> These recommendations [of the Special Study] move in the direction of reducing or removing the registration and prospectus requirement for established companies, and substituting for these requirements obligations of a stricter periodic reporting by the companies, as well as disclosure by broker-dealers in all sales — not just the sale of new issues. This approach stresses the importance of disclosure in the trading of securities and conforms with the important objective of providing a free market as an evaluator of the value of each security. Only the company selling securities to the public for the first time should be required to go through a full registration [prospectus] process. Commission investigation of these companies can become even more detailed. Established companies should be able to file a short form registration [prospectus] containing only data pertinent to the new issue. If a company desires to use a prospectus as a selling tool, this document should conform to minimum requirements; even here, however, a shorter, more flexible form of prospectus would be possible.

On this point as well, the Wheat Report was also of the view that there was "a need to achieve a better balance in disclosure policy, with greater

[78] Cohen, *supra*, note 11 at 1406.

[79] *Supra*, note 1.

[80] Knauss, *supra*, note 16 at 629-30.

emphasis on continuing disclosure for the trading markets."[81] As noted above, the recommendations of the Kimber Report in 1965 and the enactment of The Securities Act, 1966 were consistent with this objective. The Merger Report noted that "with the implementation of the Kimber Report the emphasis shifted from the particular issue being sold to continuing information concerning the issuer."[82]

In November, 1967 the Securities and Exchange Commission formed an internal study group "to examine the operation of the disclosure provisions of the Securities Act of 1933 and the Securities Exchange Act of 1934."[83] The report of that study group was issued in March, 1969 and is known as the Wheat Report. The Wheat Report accepted and recommended the concept of an integrated and continuous disclosure system under the Securities Exchange Act of 1934 by "reporting companies" as one which would provide "continuing sources of disclosure which could act, to a larger degree, as an acceptable substitute for the special and, at best, occasional disclosures produced under traditional '33 Act practice."[84]

In particular the Wheat Report made specific and important recommendations to expand the nature of the financial and material corporate information to be filed by companies subject to the reporting provisions of the federal securities laws as contained in Form 10 (registration form for companies that did not file a registration statement under the Securities Act of 1933), Form 10-K (annual report) and in a new Form 10-Q (quarterly report).[85] The heart of modern disclosure lies in timely disclosure of material corporate events and in a fair presentation of the financial condition of the issuer. The technical recommendations of the Wheat Report in these areas are important because such disclosures provide the raw material and basic financial and other facts to professional securities analysts and investment dealers that they can absorb and use in formulating their recommendations for the benefit of public investors. The intricate and complex financial and corporate affairs of securities issuers cannot be appreciated fully by the average public investor. However, through the "filtration process" of trained professionals, the public trading market will benefit from such financial disclosures.

The Wheat Report recommended that the annual Form 10-K be amended to provide that significant business and financial information be consolidated and updated annually and that such report be filed within 90 days of the year end. Specifically, it was recommended that each annual report include a five year summary of earnings and statement of source and application of funds, and, for companies in more than one line of business, a breakdown of revenues and of profits by each such separate line of business. It was also recommended that Form 10-K require disclosure of specific current developments

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[81] Wheat Report, *supra,* note 1 at 61.

[82] Merger Report, *supra,* note 5 at para. 1.20.

[83] Wheat Report, *supra,* note 1 at 3.

[84] *Id.* at 328.

[85] *Id.* Ch. X.

in a company's business, including an updating of information relating to properties, pending legal proceedings and holders of equity securities, all such annual disclosures to be coordinated and identified with documents previously filed.[86] In order to provide more timely information, the Wheat Report also recommended the implementation of a new quarterly report, Form 10-Q, to be filed within 45 days of the end of each quarter, except for the financial portion of the report which would not be required for the fourth quarter. The use of the new quarterly Form 10-Q involved the repeal of the then existing Form 9-X required to be filed 45 days after the close of the first six months of a registrant's fiscal year and, in the opinion of the Wheat Report, the repeal of Form 8-K, the current report required to be filed within 10 days of the end of the month in which a material event occurs, such as change of control and acquisition or disposition of assets. New Form 10-Q was basically to provide for condensed quarterly unaudited financial reports similar to but in greater detail to that then provided on a semi-annual basis by Form 9-X, with the addition of earnings per share data.[87]

Within six months of the release of the Wheat Report, the Securities and Exchange Commission proposed the amendment of its Forms 10 and 10-K and the adoption of Form 10-Q basically as recommended.[88] In adopting the amendments to the annual return, Form 10-K, the Securities and Exchange Commission stated that the purpose of the revision was to provide that the information contained in the Form, together with that contained in the proxy statement, will furnish on an annual basis a reasonably complete and up-to-date statement of the business and operations of the company. The revised Form 10-K requires that the reporting company annually disclose within 90 days after the end of each fiscal year its principal products, services and markets and describe any significant changes relating thereto, disclose material and significant developments relating to competitive conditions in the industry, the dollar amount of backlog of orders, on a comparative basis, sources of raw materials, the importance of patents, licences and franchises held, dollar amount spent on research activities and the numer of employees.[89] In addition, revised Form 10-K requires disclosure by the reporting company of its and its subsidiaries separate lines of business for the last five years, setting out total sales and revenues and income before taxes and extraordinary items attributable to each line of business which during either of the last two fiscal years accounted for 10% or more of sales and revenues, 10% or more of income before taxes and extraordinary items or a loss which equalled or exceeds 10% of such amount of income, provided that if total sales and

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[86] *Id.* Ch. X, para. E.

[87] *Id.* Ch. X, para. F. Form 10-Q as recommended by the Wheat Report and as adopted by the SEC only applies to the first three fiscal quarters of each fiscal year. Bill 154, on the other hand, proposes to require reporting issuers to file a report for the fourth quarter as well: s. 100.

[88] Securities Exchange Act of 1934 Releases No. 8681, 8682 and 8683 (September 15, 1969).

[89] Form 10-K pursuant to s. 13 or s. 15(d) of the Securities Exchange Act of 1934, Part I, Item 1(a) and (b).

revenues do not exceed $50,000,000, the percentage specified becomes 15% and not 10%.[90]

The Securities and Exchange Commission did not, however, adopt the recommendation of the Wheat Report that the current report, Form 8-K, be dropped and its items be included in the quarterly Form 10-Q. The Commission was of the view that the Form 8-K requirements[91] result in prompter reporting of important events than would be the case if the reporting requirement were converted to a quarterly basis.[92]

*Canadian Experience*

As more particularly referred to in Parts V and VI of this article, the Merger Report also adopted the concept of the "reporting company" and the filing of annual and quarterly financial reports. Unfortunately, the Merger Report did not consider in depth the quality or kind of financial or other information that should be required to be disclosed by "reporting companies" in their annual and periodic reports nor attempt to review the standard of disclosure contained in a prospectus. The Merger Report "accepted the facts available through a prospectus as the facts which are necessary to an informed investment decision."[93] While this assumption may be satisfactory in general, it is unsatisfactory if it reflects a static attitude towards items of disclosure in a continually evolving climate. The Wheat Report devoted Chapter III to the form and content of prospectuses and made the detailed recommendations concerning the financial content of the annual and periodic reports now required to be filed by "reporting companies" in the United States as referred to above. Bill 154 does not provide a glimpse of the extent or quality of the disclosure in the proposed system for Ontario because the Bill proposes that the form and contents of each of the cornerstone statement, offering circular, annual audited comparative financial statements and quarterly unaudited comparative interim financial statements shall be prescribed by regulation.[94] Pre-

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[90] *Id.*, Item 1(c)(1). Form 10-K also required disclosure of the amount or percentage of total sales and revenues contributed by each class of similar products or services which contributed 10% or more to total sales and revenues in either of the last two fiscal years or 15% or more if total sales did not exceed $50,000,000: Item 1(c)(2).

[91] Form 8-K is required to be filed within 10 days after the close of each month during which any of the following specified events occurs: changes in control, acquisition or disposition of a significant amount of assets, institution of material legal proceedings, material modifications in rights of any class of security holders, material withdrawal or substitution of assets securing any class of securities, material default in payment of any indebtedness exceeding 5% of the company's assets, cumulative increases or decreases exceeding 5% in the amount of outstanding securities, granting or extending of options on more than 5% of the outstanding securities on a cumulative basis, material revaluation of assets and matters submitted to a vote of security holders.

[92] See, Daniel B. Posner, *Developments in Federal Securities Regulation* (1971), 26 The Business Lawyer 1677 at 1682 to 1689.

[93] Merger Report, *supra*, note 5, at para. 2.19.

[94] Bill 154, s. 62(1)(b), s. 75(1)(b), s. 98 and s. 100.

scription by regulation will, however, provide flexibility to change items of financial and corporate disclosure to meet evolving conditions.[95]

The Merger Report did consider financial disclosure in connection with mergers and acquisitions.[96] In connection with financial disclosure relating to business combinations, the Merger Report's recommendation for an "acquisition equation" has already been enacted.[97] The "acquisition equation" requires that the assets acquired be equated to the consideration paid. Basically, the assets acquired are segregated into the net tangible assets on the books of the vendor plus adjustments to such assets to bring them to fair value with the balance of the purchase price, if any, identified as goodwill. The purchase price is divided into payments made from working capital, long-term debt incurred and preferred and common shares issued. Similar recommendations were made by an exposure draft of the CICA Accounting and Auditing Research Committee in November, 1971. In addition, the Merger Report's recommendations that companies filing annual audited and semi-annual unaudited financial statements disclose "basic earnings per share" and "fully diluted earnings per share" were also adopted.[98]

The Merger Report also recommended that annual audited financial statements required to be filed with the Ontario Securities Commission disclose, where the company carries on two or more classes of business that, in the opinion of the directors, differ substantially from each other, the proportion in which the sales or gross revenue is divided among those classes of

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[95] For example, there is current debate in the United States whether earnings and sales projections should be permitted to be estimated in a prospectus and other documents filed pursuant to securities legislation and if so, on what basis or assumptions. See, Securities Act of 1933 Release No. 5276 (July 26, 1972). The Wheat Report recommended that no change be made in the policy of the Securities and Exchange Commission not to permit such projections: at 95-96. Ontario legislation permits estimates of future earnings with the permission of the Director of the Ontario Securities Commission provided auditors or accountants are not associated with such estimates: Ont. Reg. 794/70, as amended, s. 41 and s. 42. On the other hand, prospectuses and take-over bid circulars in the United Kingdom invariably contain profit forecasts or projections. See, John Grieves, *English Profit Forecasts* (1972), 5 The Review of Securities Regulation 919.

The Securities and Exchange Commission has proposed amendments requiring more meaningful prospectus disclosure on initial public issues and particularly new high risk ventures to alleviate the problem of "hot issues". See, Securities Act of 1933 Release No. 5276 (July 26, 1972) and remarks of William J. Casey, Chairman of the Securities and Exchange Commission, CCH Fed. Sec. L. Rep. #78,905 (July 25, 1972).

[96] Merger Report, *supra*, note 5, Ch. IX.

[97] *Id.*, at para. 9.17. The "acquisition equation" was enacted by s. 40 of *The Securities Amendment Act, 1971*, S.O. 1971, c. 31, and is now required in the annual audited financial statements of companies reporting under Part XII of the Ontario Securities Act, *infra*, note 101, by s. 126(3)17 of that Act. The contents of the "acquisition equation" are provided for in Ont. Reg. 794/70, as amended, s. 82. Identical amendments are also contained in *The Business Corporations Act*, R.S.O. 1970, c. 53; am. S.O. 1971, c. 26 and c. 98, s. 178(3)19.

[98] *Id.*, at para. 9.26. See, the Ontario Securities Act, *infra*, note 101, s. 121(1)(k) and (l) and s. 130(1)(b)(vi) and (vii). Part XI of Ont. Reg. 794/70, as amended, deals with the calculation of basic earnings per share and fully diluted earnings per share. A concurrent amendment was made to Ontario companies legislation: see, *The Business Corporations Amendment Act, 1971*, S.O. 1971, c. 26, s. 28.

business, provided that for companies with more than $25,000,000 in total sales or gross revenue only those classes of business contributing 10% or more to the gross revenue need be reported and that for companies with total sales or gross revenue of less than $25,000,000 only those classes of business that contribute 15% or more of the total gross revenue need be reported.[99] Substantially identical provisions have been enacted in the Canada Corporations Act,[100] the Ontario Securities Act and The Business Corporations Act.[101]

It is to be noted that the breakdown by substantially different classes of business is required only for sales or gross revenue and is not required for income or net profit. As noted earlier, the Wheat Report recommended that the annual report, Form 10-K, filed with the Securities and Exchange Commission include a breakdown of profits for separate lines of business and that this was adopted in the United States.[102] The Merger Report was of the view, however, that it should await the recommendations of the CICA Accounting and Auditing Research Committee before adopting this increased financial disclosure.[103]

As noted earlier,[104] as a result of the recommendations of the Kimber Report, companies subject to the financial disclosure provisions of Part XII of the Ontario Securities Act were first required in 1966 to disclose "sales or gross operating revenue" in their statement of profit and loss. The Ontario Securities Act authorizes the Ontario Securities Commission, on application, to make an order permitting the sales or gross operating revenue to be omitted from the annual audited financial statements and the semi-annual unaudited statements of "reporting companies" where it is satisfied "that the disclosure of such information would be unduly detrimental to the interests of the corporation."[105] Bill 154 proposes to continue this discretion.[106]

The Ontario Securities Commission has recognized fortunately that the disclosure of sales or gross operating revenue is important in placing investors on an equal footing in the market place and has accordingly exercised its discretion sparingly, noting recently that "the cases in which there is likely to be sufficient evidence to demonstrate 'undue detriment' will be rare."[107]

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[99] *Id.*, at para. 9.36.

[100] R.S.C. 1970, c. C-32, as amended by S.C. 1969-70, c. 70, s. 122.1. The *Canada Corporations Act* does not, however, contain minimum percentages of gross revenue that must be contributed by a class of business before requiring disclosure.

[101] *The Securities Act*, R.S.O. 1970, c. 426; am. S.O. 1971, c. 31 (herein cited as the "Ontario Securities Act"), s. 126(3)16; and *The Business Corporations Act*, R.S.O. 1970, c. 53; am. S.O. 1971, c. 26 and c. 98, s. 178(3)18.

[102] See text relating to note 86 *supra*.

[103] Merger Report, *supra*, note 5 at para. 9.35.

[104] Note 28 *supra*.

[105] Ontario Securities Act, *supra*, note 101, s. 132(1)(a)(ii).

[106] Bill 154, s. 102(1)(a)(ii).

[107] *In The Matter Of The Niagara Wire Weaving Company Limited*, Bulletin of the Ontario Securities Commission (November, 1971) 178 at 188.

In connection with this matter generally, see also, *Re Niagara Wire Weaving Co. Ltd.*, [1971] 3 O.R. 633 (C.A.); *In The Matter Of The Niagara Wire Weaving Company Limited (No. 2)*, [1972] 3 O.R. 129 (C.A.); and *In The Matter of Zenith Electric Supply Limited*, Bulletin of the Ontario Securities Commission (January, 1972) 13.

## IV. SECONDARY DISTRIBUTIONS, THE WHEAT REPORT AND RULE 144

### *Secondary Distributions*

Although it has only been referred to in a peripheral way, one of the major problems that has faced and still faces investors, securities administrators, securities lawyers, brokers and investment banking firms is the secondary distribution problem. In this article a secondary distribution means a resale of securities to the public by purchasers who acquired such securities either by the use of some exemption from the registration or prospectus requirements of the applicable securities laws or by means of an essentially "non-public" or private offering and sale, neither of which required a prospectus standard of disclosure to be made available to the public generally relating to the issuer or the securities involved. The specific statutory framework within which the secondary distribution problem arises is different under the Securities Act of 1933 and the Ontario Securities Act, as it was at the date of the Merger Report.[108] However, the problem faced in Canada and the United States is substantially similar: the ultimate distribution of securities to the public through the use of essentially "non-public" offering and sale exemptions from the registration or prospectus requirements of the Acts without adequate and timely disclosure to the public generally in respect of the issuer and the securities so distributed.

In the United States, the Wheat Report found that there was general uncertainty, inherent ambiguity and wide divergence of practice involved in the determinations whether a purchaser was an "underwriter", as defined in section 2(11) of the Securities Act of 1933, or whether a sale was exempt from the registration statement requirements on the ground that the offering was not a "public offering" under section 4(2). In addition, the intricate and subjective doctrines of "investment intent" and "change of circumstances" and the concept of fungibility[109] had operated to create an interwoven web of legal logic that had permitted, because of a lack of objective standards, an

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[108] It is not necessary to repeat here the respective frameworks of the Securities Act of 1933 and the Ontario Securities Act within which the secondary distribution problem operates. These have been adequately set out elsewhere. See, in connection with the United States aspects, I Loss, *supra,* note 6 at 182-183, Ch. 3A(3) and Ch. 3C; W. McNeil Kennedy, *The Case of the Scarlet Letter or The Easy Out of "Private Offerings"* (1967), 23 The Business Lawyer 23; Carlos L. Israels, *Some Commercial Overtones of Private Placement* (1959), 45 Virginia L. Rev. 851; Gary L. Wood, *The Investment-Intent Dilemma in Secondary Transactions* (1964), 39 New York University Law Review 1043 and the Wheat Report, *supra,* note 1 at 152-182. The sole useful comment on the Canadian aspect is contained in the Merger Report, *supra,* note 5, Chs. III, IV and V.

[109] As to the concept of fungibility, see, *Fungibility* (1971), 4 The Review of Securities Regulation 905; and Jack I. Samet, *The Concept of Fungibility in Securities Laws* (1972), 27 The Business Lawyer 383.

A form of fungibility is recognized in Canadian securities law in connection with distributions to the public from a control position. Under s. 1(1)6a(ii) of the Ontario Securities Act, *supra,* note 101, once securities form part of a control position, they become "restricted" even if they had been "previously distributed to the public." This concept will continue under Bill 154 notwithstanding the deletion of the words "to the public": Bill 154, s. 1(1)10(ii).

avoidance of the statutory purpose of the securities statutes by non-functional exemptions bearing no relation to the needs of the ultimate public investors for adequate disclosure. As noted by the Wheat Report, the use of the private offering exemption permitting the eventual distribution of securities to the public by the "investment letter" and "change of circumstances" doctrines is of little practical value in furthering the policy of securities legislation to provide disclosure to the investing public when it needs it.[110] Accordingly, "the existence of vague and imprecise standards . . . [relating to the private placement provisions of the Securities Act of 1933] have operated through the years to sanction the sale in interstate commerce of large quantities of securities originally issued in non-public transactions. Such sales have occurred and are occurring irrespective of the availability or non-availability of information concerning the issuers of the securities."[111]

A similar concern about the adequacy of disclosure of material facts to the secondary market for the benefit of the investing public who bought from vendors who acquired their securities in essentially "non-public" transactions was reflected in the Merger Report: "The facts raised serious question as to whether these exemptions [sections 19(1)3 and 19(3) of the Ontario Securities Act] were intended to permit the ultimate distribution of quantities of securities to the general public involving many millions of dollars. ... the present law [1970] imposes no meaningful restriction on the right to resell the securities into the market place but permits resales without the benefit of a prospectus standard of disclosure and without the rights and obligations which flow if such disclosure is deficient. . . ."[112]

*Wheat Report*

In answering the problem, the Wheat Report, as the Merger Report was to do subsequently, adopted the test enunciated by Mr. Justice Clark in the Supreme Court of the United States and focused on ". . . the need of the offerees for the protections afforded by registration [a prospectus]."[113] The solution proposed by the Wheat Report to the consequences of the secondary distribution problem in the United States was to integrate and co-ordinate the expanded continuing disclosure requirements recommended for the Securities Exchange Act of 1934 referred to above with the disclosure provisions of the Securities Act of 1933 and to differentiate between "reporting companies" and "non-reporting companies". In summary, the Wheat Report proposed that limited secondary distributions without registration of privately placed securities of "reporting companies" be permitted while

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110 Wheat Report, *supra*, note 1, Ch. VI. "The lack of objective tests to determine when and how shares issued in a non-public transaction may be offered publicly provides an unfortunate leeway for the unscrupulous. It has been the Commission's experience that unprincipled counsel will often give opinions on the availability of exemption from registration when careful or responsible counsel would not do so." *Id.* at 177.

111 *Id.* at 174-75.

112 *Supra*, note 5, at para. 5.04.

113 *SEC* v. *Ralston Purina Co.*, 346 U.S. 119 (1952) at 127. See, the Wheat Report, *supra*, note 1 at 19. The Merger Report said that it "applied this 'need to know' test throughout our consideration": *supra*, note 5 at para. 1.26.

secondary distributions without registration of privately placed securities of "non-reporting companies" be restricted for the substantial period of 5 years.[114] The proposed rules would have replaced the existing uncertainty and divergence of subjective determinations with the more finite guidelines of objective tests while at the same time strengthening the position of the ultimate public investor for full disclosure relating to the securities traded in the open markets. The conclusions of the Wheat Report and its recommendations were stated as follows:[115]

> It was concluded that a sensible answer to this question could only be found by drawing a distinction between companies which filed regular reports on their affairs with the [Securities and Exchange] Commission ... (so-called "reporting companies") and companies which do not. If there has been no full disclosure of a company's business, earnings and financial condition (or if, despite the fact that the company is a reporting company, its reports appear to be defective or out of date), then a sale to the public of that company's securities ought to be accompanied by the disclosures afforded by '33 Act registration. Conversely, if a company has registered a class of its securities with the Commission under the '34 Act and is maintaining the currency of the information in that original registration statement through up-to-date periodic reports to the Commission, then it ought to be possible to permit secondary sales of its securities to the public without the filing of a '33 Act registration statement except (i) where the quantity of those securities to be sold exceeds an amount which the trading market could normally be expected to absorb within a reasonable period of time, or (ii) where, in order to move the securities from private into public hands, arrangements for the solicitation of buying customers, or selling incentives exceeding the commissions paid in ordinary trading transactions, are required.
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> In other words, the exemptions from '33 Act registration should be interpreted not only in light of the selling effort which can reasonably be anticipated but also in light of the character and extent of the disclosures already made by the issuer of the securities.

The recommendations made by the Wheat Report based on the differentiation of "reporting companies" and "non-reporting companies" may be divided into two further areas: firstly, a definition of "distribution", or public offering, to apply both to the sale of securities on behalf of controlling persons and to sales by persons who have purchased their securities in private offerings and, secondly, the term "restricted security". The Wheat Report recommended that non-public secondary transactions should be excluded from the term "distribution" and that no registration of the securities involved be required; that public secondary offerings of securities of "non-reporting companies" should be a "distribution" requiring registration; and that public secondary offerings of securities of "reporting companies" that are not delinquent in their filings are not a "distribution" and no registration of the securities is required if the amounts involved and the method of sale are consistent with ordinary trading.[116]

Notwithstanding the concept of a "reporting company" and the continuous disclosure that would be made available on a timely basis concerning

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114 Under the rules proposed by the Wheat Report, a privately placed or "restricted security" would lose that status after a period of 5 years provided that the issuer is an active, going business during that period: Wheat Report, *supra*, note 1 at 203. See text in connection with note 120 *infra*.

115 Wheat Report, *supra*, note 1 at 186-87.

116 *Id.* at 189-90.

its affairs, the Wheat Report was of the view that resale of privately placed securities of reporting companies must continue to be controlled. "The use of ostensible private purchasers as conduits for the sale of securities to the public without registration must be prevented. To solve this problem, a short mandatory holding period is essential, during which the private purchaser is at risk."[117]

Accordingly, the Wheat Report recommended that a private purchaser of securities from a "reporting company", or from a person in a control position with such an issuer, be required to hold the securities for a period of one year. The Wheat Report said that all who were consulted with respect to this matter recognized the need for such a holding period but views as to its appropriate length differed appreciably from a period of six months to a period of two years. Such a mandatory one year holding period would continue to apply to a purchaser from an initial private purchaser in a subsequent private resale.[118] In addition, there would be a quantity limitation on the right of the private purchaser of securities of the "reporting company" to resell such securities after the one year holding period to amounts consistent with ordinary trading. In this regard the Wheat Report recommended preservation of the existing test set out in Rule 154 that such resales be limited to sales, which together with all other sales of securities of the same class by the same person within the preceding six months will not exceed 1% of the outstanding securities of that class and, with respect to listed securities, the lesser of either 1% of the outstanding securities of that class or the aggregate reported volume of trading during any one week within the preceding four calendar weeks.[119]

The term "restricted security" would mean a security acquired directly or indirectly from the issuer, whether "reporting" or "non-reporting", or from a person in a control relationship with the issuer, in a transaction or a chain of transactions, none of which was a public offering or a public disposition. Accordingly, securities purchased privately either from the issuer or a control person and subsequently disposed of privately would remain "restricted securities". However, once such securities are resold in a public offering, they would cease to be "restricted securities".[120]

From the foregoing summary of the proposals of the Wheat Report in the area of secondary distributions, the following practical consequences would result:

(i) A controlling person of a "non-reporting company" would not be able to sell his securities to the public without registration;

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[117] *Id.* at 199.

[118] *Id.* at 200. It is interesting to note that with respect to the length of the holding period, in basically analogous recommendations, the Merger Report settled on only a 28 day mandatory holding period prior to public resale without filing a prospectus. See text relating to notes 180 and 191 *infra.*

[119] *Id.* at 190-91.

[120] *Id.* at 202-203. See note 114, *supra.* The concept of the "restricted security" is similar to the present concept in the Ontario Securities Act of securities "not previously distributed to the public", the sale of which securities to the public constitutes a distribution requiring a prospectus: Ontario Securities Act, *supra,* note 101, s. 1(1)6a(i).

(ii) A controlling person of a "reporting company" who had acquired his securities in a public distribution, that is to say, non-restricted securities, would not be subject to the one year holding period and would be entitled to sell his shares to the public under existing rules in limited quantities during any one six-month period in brokerage transactions where no more than the minimum commission was charged;

(iii) A non-controlling person holding "restricted securities" of a "non-reporting company" would be in the same position as a controlling person of a "non-reporting company" (item (i) above); and

(iv) A holder of "restricted securities" in a "reporting company", including a controlling person, would be required to hold such "restricted securities" for a period of one year and then could only sell such "restricted securities" to the public in ordinary brokerage transactions involving a limited quantity of securities in any one six-month period.[121]

The Wheat Report itself estimated that the objectivity of its proposals would have made 90% of the 500 written requests for "no action" letters the Securities and Exchange Commission received in November and December, 1968 unnecessary.[122]

The Wheat Report stressed that its proposals summarized above were grounded on and assumed the operation of the expanded and continuous disclosure system for "reporting companies" subject to the filing requirements of the Securities Exchange Act of 1934. As summarized by the Wheat Report:[123]

> The central policy embodied in the proposed rules is that public resales without registration [of securities sold in private offerings] under the '33 Act should be confined to the securities of those companies which are filing information with the [Securities and Exchange] Commission adequate to keep the trading markets reasonably well informed and immediately available to all interested investors and their advisors through the Commission's microfiche system.

The continuous disclosure system and the rules to deal with the problem of secondary distributions proposed by the Wheat Report were favourably received and approved by the United States securities bar.[124] The Committee on Federal Regulation of Securities of the American Bar Association unanimously praised the Wheat Report. Its recommendations were commended by the Council of the Section of Corporation, Banking and Business Law of the American Bar Association and the House of Delegates of the American

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[121] *Id.* at 226-31. Cf. the proposals of the Merger Report and Bill 154, note 191 *infra*.

[122] *Id.* at 175. For an analysis of the "no action" letter practice, see, Lewis D. Lowenfels, *SEC "No Action" Letters: Some Problems and Suggested Approaches* (1971), 71 Columbia Law Rev.1256.

[123] *Id.* at 207.

[124] See, Hugh L. Sowards, *The Wheat Report and Reform of Federal Securities Regulation* (1970), 23 Vanderbilt Law Rev. 495 and Herbert S. Wander, *Secondary Distributions* (1969), 2 The Review of Securities Regulation 865 at 869: "There is already widespread agreement that they [the Wheat Report proposals] represent a significant and urgently needed improvement over the existing structure. They should be adopted promptly and, if experience dictates, modified accordingly."

Bar Association, and the Securities and Exchange Commission was urged to implement its essential recommendations.[125]

On September 15, 1969, the Securities and Exchange Commission announced that it proposed to adopt the major recommendations of the Wheat Report without substantial change by implementing the "160 Series" of proposed rules relating to secondary distributions proposed by the Wheat Report.[126] The Release stated that the purpose of the proposed rules was "to inhibit the creation of public markets in securities of issuers which do not disclose information to the public in appropriate filings with the Commission" and that such proposals were vitally related to and dependent on the expanded reporting requirements simultaneously proposed.[127] The rules proposed by the Securities and Exchange Commission were stated to "mark a major advance in the administration of the Securities Act."[128]

*Rule 144*

The major non-development during 1970 in United States securities law was, however, the decision of the Securities and Exchange Commission not to adopt the "160 Series" of proposed rules recommended by the Wheat Report.[129] Instead, a year after its original recommendation of the Wheat Report proposals, the Securities and Exchange Commission proposed a new Rule 144 dealing with unregistered secondary distributions by controlling persons and by persons who purchase securities in private transactions.[130] Rule 144 as originally proposed by the Securities and Exchange Commission continued the essential condition that permissable resales of "restricted securities" be irrevocably linked to publicly available and reasonably current and informative information about the issuer of the securities. However, Rule 144 as originally proposed not only differed in various ways from the complex though clearly stated Wheat Report proposals[131] but "met

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[125] Allen E. Throop, *Federal Regulation of Securities Committee Comments on The Wheat Report* (1969), 25 The Business Lawyer 39; *The Wheat Report — Time is Running Out* (1970), 25 The Business Lawyer 1267.

[126] Securities Act of 1933 Release No. 4997. See, Herbert S. Wander, *Implementing The Wheat Report* (1969), 2 The Review of Securities Regulation 821 and *The SEC's Disclosure Proposals* (1969), 2 The Review of Securities Regulation 798 at 801; "The proposed [SEC] rules and forms make good sense. If adopted they will provide more meaningful information for investors and abolish much of the nonsensical black magic that has prevailed in the securities community for too long."

[127] *Id.* at 1. See, note 88 *supra.*

[128] A. Holland, *Public Sale of Control Stock and Private Investment Stock: The SEC's Proposed New Rules* (1970), 25 The Business Lawyer 1027 at 1036.

[129] See, Daniel B. Posner, *Developments in Federal Securities Regulation* (1970), 25 The Business Lawyer 1643 at 1682.

[130] Securities Act of 1933 Release No. 5087 (September 22, 1970).

[131] For an analysis of the Wheat Report proposals and Rule 144 as originally proposed, see, Michael J. Halloran, *The Public Disposition of Restricted Securities and of Securities Held By Controlling Persons — The Wheat Report, SEC Proposed Rule 144 and The Search for Certainty* (1971), 45 St. John's Law Rev. 665 and Glen W. Clark, *SEC Regulation of Resale of Securities by Controlling Persons of Non-Reporting Issuers: The Ghost of Ira Haupt Reads the "Wheat Report" and Rule 144* (1971), 20 Drake Law Rev. 576.

with wholesale opposition from almost all sectors of the Securities Bar."[132] Almost a year later and two years after its first proposals recommending the implementation of the Wheat Report proposals, the Securities and Exchange Commission published a revised draft of proposed Rule 144[133] which met the main criticisms of the first draft. Revised Rule 144 returned to the basic framework of the Wheat Report proposals with minor variations and some changed numbers. While being somewhat more restrictive, revised Rule 144 adhered to the tenet that "restricted securities" should not become "freely salable without adequate disclosure to investors at the time of sale" through continuous filing of updated business and financial information by "reporting companies".[134] Within several months, the Securities and Exchange Commission adopted a further revision of Rule 144 which became effective on April 15, 1972.[135]

Generally, Rule 144 as finally adopted incorporated the basic structure of the Wheat Report proposals as summarized above, including the quantity restrictions on the number of restricted securities that may be sold during any six month period. Under Rule 144 a person, including a controlling person of the issuer, that has been the beneficial owner of "restricted securities" of a "reporting company" for at least two years may sell in ordinary broker's transactions, not involving the solicitation of purchasers or the payment of more than the customary brokerage commission, during any six month period, (a) where the securities are listed, an amount equal to the lesser of 1% of outstanding securities of that class or the average weekly reported volume of trading on all exchanges over the four-week period prior to the date of the filing of a notice of sale with the Securities and Exchange Commission, or (b) where the securities are not traded on an exchange, an amount equal to 1% of the outstanding securities of that class. In calculating the amount of "restricted securities" that may be sold by such a person during any six month period, there must be included sales by any relative or spouse of such person that has the same home as such person, any trust or estate in which such person and such relatives and spouse, collectively, own 10% or more of the beneficial interest and any corporation or organization in which such person and such relatives and spouse, collectively, own beneficially 10% or more of any class of equity securities.[136]

In addition, Rule 144 increased the mandatory holding period for the non-public purchaser from the one year recommended by the Wheat Report to two years before permitting limited resale of "restricted securities" of

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132 Daniel B. Posner, *Developments in Federal Securities Regulation* (1971), 26 The Business Lawyer 1677 at 1682. See also, Herbert S. Wander, *Proposed Rule 144* (1970), 3 The Review of Securities Regulation 843, *The SEC Under Fire* (1970), 3 The Review of Securities Regulation 829, and William C. Morrow, *The Investment Letter Dilemma and Proposed Rule 144: A Retreat to Confusion* (1970), 11 Santa Clara Lawyer 37.

133 Securities Act of 1933 Release No. 5187 (September 15, 1971).

134 See, Herbert S. Wander, *Rule 144 Revised* (1971), 4 The Review of Securities Regulation 857 and *PLI Securities Law Institute — I* (1971), 4 The Review of Securities Regulation 824.

135 Securities Act of 1933 Release No. 5223 (January 11, 1972).

136 Rule 144, (e)(2) and (a)(2). Cf. Wheat Report proposals at note 121 *supra*.

"reporting companies". The two year holding period as a condition for public resale without registration by purchasers, including controlling persons, of "restricted securities" of "reporting companies" may be considered excessive, but evidently the Securities and Exchange Commission seemed "convinced that a lengthy holding period during which the private placee accepts an unconditional economic risk is essential to prevent [reporting] issuers from making unregistered sales through conduits who would purchase privately and, shortly thereafter, resell publicly."[137] In addition, the vendor is required to file a brief notice of sale with the Securities and Exchange Commission and have a bona fide intent to sell after the filing thereof. If all the securities are not sold within 90 days after such filing, an amended notice of sale must be filed when sales are recommenced. The burden will be on the vendor to prove the availability of the exemption and he must also represent that he does not know of any non-public materially adverse information about the current or prospective operations of the issuer.[138] "The rule carefully balances the needs of controlling persons and holders of restricted securities for certainty with the needs of investors for information at the time they purchase. As was true with prior drafts, the balance is still in favour of investor protection . . . ."[139]

## V. SECONDARY DISTRIBUTIONS, THE MERGER REPORT AND BILL 154

### *Genesis of the Merger Report*

The Wheat Report was submitted to the Securities and Exchange Commission in March, 1969 and publicly released by the SEC without comment the following month. In April, 1969, the Ontario Securities Commission was requested by the Ontario Government to undertake a study of, among other things, private placements and exempt purchasers. The resulting study of the Ontario Securities Commission, the Merger Report, was submitted in February, 1970. The Merger Report was prompted, in part, by the secondary distribution problem outlined at the beginning of Part IV, the tremendous increase in business acquisitions and take-overs and "the potential for abuse through public distribution of securities in the guise of private or exempt placements."[140] It is probably the most comprehensive and relevant public analysis of Canadian securities legislation to date. In view of the similarity of problems, the experience available from and the proximity of the American

[137] Herbert S. Wander, *Rule 144 Adopted* (1972), 5 The Review of Securities Regulation 957 at 958.

See also, Securities Act of 1933 Release No. 5223 (January 11, 1972) at 6: "Secondly, a holding period prior to resale is essential, among other things, to assure that those persons who buy under a claim of a Section 4(2) exemption have assumed the economic risks of investment, and therefore, are not acting as conduits for sale to the public of unregistered securities, directly or indirectly, on behalf of an issuer."

[138] *Id.* at 960.

[139] *Id.* at 963. See, Stephen R. Miller and Richard S. Seltzer, *The SEC's New Rule 144* (1972), 27 The Business Lawyer 1047 and Harold P. Starr, *Suggested Rule 144 Checklist* (1972), 27 The Business Lawyer 1073.

[140] Merger Report, *supra*, note 5 at 1.

securities markets, it is not surprising that the thrust of the recommendations of the Merger Report is basically similar to that contained in the Wheat Report. While it is clear that there has not been any conscious parallelism, the similarity of fundamental concepts indicates that Canadian securities problems and their solutions have progressed along patterns similar to those experienced in the United States.[141]

The Merger Report also based its proposals to solve the secondary distribution problem upon the creation of two classes of companies for securities purposes: "reporting companies" and "non-reporting companies". Generally a "reporting company" would be one that filed a "cornerstone prospectus" with the Ontario Securities Commission containing "full, true and plain disclosure" of all material facts relating to the affairs of the company and that subsequently continued to maintain such a prospectus-standard of disclosure by publicly up-dating its material corporate information through filing quarterly unaudited financial reports, timely amendments relating to changes in material facts previously disclosed and annual statements incorporating and up-dating on one document the prior changes and containing audited financial statements.[142] The Merger Report recommended that companies presently required to report under Parts X and XII of the Ontario Securities Act be considered "reporting companies" as well as all companies whose securities become listed on The Toronto Stock Exchange or whose securities are distributed in Ontario by a prospectus in the future.[143] A further distribution of treasury securities to the public by a "reporting company" would be effected by filing a short form prospectus or offering circular disclosing "salient facts" about the company and the purpose of the issue. It would contain the appropriate certificates of the issuer and the underwriter and be subject to review and acceptance by the Ontario Securities Commission.[144]

*"Reporting Issuer" Under Bill 154*

Following the Merger Report recommendations, Bill 154 purposes that companies or "issuers"[145] may become "reporting issuers"[146] by filing a pre-

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[141] See, Manuel F. Cohen, *International Securities Markets: Their Regulation* (1971), 46 St. John's Law Review 264 at 266: "Securities regulation in every country is, of course, a reflection of national experience and needs."

[142] Merger Report, *supra,* note 5 at paras. 2.21 and 2.22.

[143] Merger Report, *supra,* note 5 at para. 2.35. As noted earlier, *supra,* note 74, it was recommended that the distinction between distributing "equity shares" and other types of securities be abandoned. This recommendation is adopted in Bill 154.

[144] *Id.* at para. 2.28.

[145] An issuer includes a "person" or company that has outstanding, issues or proposed to issue a security: Bill 154, s. 1(1)15. "Person" includes all types of unincorporated associations: s. 1(1)21.

[146] Bill 154, s. 1(1)29.

liminary cornerstone statement[147] and cornerstone statement with the Ontario Securities Commission and obtaining receipts therefor.[148] Companies that are now subject to the proxy solicitation and financial disclosures requirements of the Ontario Securities Act are not automatically entitled to the status of reporting issuers under Bill 154 and the resultant privileges flowing from that status. The status is statutorily permissive, upon satisfying certain conditions, and is attained by having a final receipt issued by the Ontario Securities Commission for the filing of a cornerstone statement. However, in view of the real limitations imposed by Bill 154 by not being a reporting issuer, all issuers with securities distributed to or to be distributed to the public will be required to become and maintain their status as reporting issuers.

As noted earlier,[149] not every issuer may be able to become a reporting issuer under Bill 154. If an issuer "does not meet such financial requirements and conditions as are specified in the regulations", then the Director will be required to refuse the issuance of a receipt for the cornerstone statement.[150] This is a surprising extension of the function of the Ontario Securities Commission and goes far beyond the regulation of the distribution of securities to the public by the application of a full disclosure policy. Such a "blue sky" regulation would be in addition to the residual discretion of the Ontario Securities Commission presently contained in section 61 of the Ontario Securities Act and to be continued by Bill 154.[151] Technically, the Director could exercise his residual discretion and refuse to issue a receipt for a cornerstone statement even though the issuer satisfied the requisite "financial requirements and conditions". It is anticipated that this would happen only in extreme and unique situations. The importance of this addition is in direct relation to the benefits of being a reporting issuer under Bill 154: only reporting issuers are to be entitled to distribute securities to the public in the normal manner through an offering circular and only purchasers of securities of reporting issuers acquired pursuant to the main distribution exemptions will be freely entitled to resell such securities.[152] In other words, it is proposed by Bill 154 that those issuers that cannot meet "such financial requirements and conditions" will not be able to use the normal methods of financing.

Under Bill 154, a reporting issuer must file a new cornerstone statement within 170 days from the end of its last completed financial year consolidating and up-dating all material facts relating to its affairs. It would appear

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[147] While the "preliminary cornerstone statement" must comply with the regulations in form and content (s. 60) and a receipt is issued for its filing (s. 61), it appears to serve no functional purpose other than as a draft of the cornerstone statement, open to public inspection (s. 68), presumably even if a cornerstone statement is not finally accepted for filing. The preliminary offering circular however, continues the real function of the preliminary prospectus by permitting the solicitation of expressions of interest during the waiting period: s. 72(2).

[148] Bill 154, s. 59. The form and content of a cornerstone prospectus will be set forth in the regulations: s. 62(1)(b).

[149] See text relating to note 54 *supra*.

[150] Bill 154, s. 64(1)(b).

[151] *Id.* s. 64(1) with respect to cornerstone statements and s. 80(1) with respect to offering circulars.

[152] *Id.* s. 69(a), s. 93(3) and s. 93(4). See notes 159 and 191 *infra*.

that the new cornerstone statement is not subject to review by the Ontario Securities Commission in the same manner as the original cornerstone statement and is simply filed annually.[153] Once the status of a reporting issuer is achieved, it must be continued and presumably compliance and cease trading orders would issue upon failure to file new cornerstone statements pursuant to the statutory requirement.[154] Bill 154 does not grant authority to the Ontario Securities Commission to exempt a reporting issuer from this provision if the laws of the jurisdiction to which it is subject contain substantially similar requirements and on condition that material so filed, such as a Form 10-K with the Securities and Exchange Commission,[155] is filed with the Ontario Securities Commission as the new cornerstone statement.[156]

Separate and distinct from its obligations to refile a current cornerstone statement annually, a reporting issuer will be required to file annual audited comparative financial statements within 170 days from the end of its latest completed financial year and quarterly unaudited comparative interim financial statements within 30 days from the end of each quarter, including the fourth quarter.[157]

*Distributions to the Public*

The basic concept of the "reporting company" or "reporting issuer" is easily understandable. It is the consequences recommended by the Merger

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153 *Id.* s. 67. Cf. s. 91 of Bill 154 relating to filing a new offering circular where distribution is still in progress 12 months from the filing of the preliminary offering circular.

Presumably the disclosures contained in the new cornerstone statement would come under review when an offering circular was filed.

In addition, in order to be assured of the co-ordination of the continuing disclosure system, the Ontario Securities Commission may require evidence at the time of filing an offering circular that the reporting issuer has complied on a timely basis with all the reporting requirements of Bill 154. See, Securities Act of 1933 Release No. 5196 (September 27, 1971).

154 *Id.* see s. 145 and s. 146. See, Ontario Securities Commission Policy No. 3-14. In *SEC* v. *Realty Equities Corp.*, CCH Fed. Sec. L. Rep. #93,545 (D.C. 1972), a permanent injunction was granted against the defendant corporation which had been delinquent in filing periodic reports under the Securities Exchange Act of 1934 from failing subsequently to file such reports on time.

155 See text relating to note 88 *supra.*

156 Cf., s. 132(1) (c) (ii) of the Ontario Securities Act, *supra*, note 101 and s. 102(1)(c)(ii) of Bill 154.

In addition, the Ontario Securities Commission should have jurisdiction, similar to that of the Securities and Exchange Commission, to relax the reporting requirements of Bill 154 where a reporting issuer's operations and activities have ceased or are severely curtailed and where such a reporting issuer advises its shareholders of its financial condition and inability to provide the required information: Securities Exchange Act of 1934 Release No. 9660 (June 30, 1972).

157 Bill 154, s. 98 and s. 100. Corporations that are not reporting issuers but that have outstanding securities (not just equity shares) in respect of which a prospectus, statement of material facts or securities take-over bid circular has been filed with the Ontario Securities Commission or whose shares are listed on The Toronto Stock Exchange will be required to file the annual audited comparative financial statements but will file semi-annual unaudited comparative financial statements instead of the quarterly unaudited financial statements: see, s. 96(1)(b) and s. 99 of Bill 154.

Report and proposed to be implemented by Bill 154 that are to flow from an issuer being a "reporting issuer" or a "non-reporting issuer" that are important. The heart of the Merger Report is its analysis of and recommendations relating to the secondary distribution problem and to the benefits derived from the use of the exemptions to the prospectus requirements of the Ontario Securities Act for reporting issuers and non-reporting issuers. As a basis for its proposals to solve the secondary distribution problem, the Merger Report recommended that the concept of a sale "to the public" be discarded on the premise that the legislation intends to protect everyone. The Merger Report proposed that the term "distribution to the public" be re-defined as a "distribution" as follows:[158]

> i. trades that are made for the purpose of *distributing* securities of a company not previously *issued*, or
> ii. trades in previously issued securities where the securities form all or a part of or are derived from the holdings of any person, company or any combination of persons or companies holding a sufficient number of any of the securities of a company to materially affect the control of such company, provided that any person, company or any combination of persons or companies holding more than 20% of the outstanding equity shares in a company shall, in the absence of evidence to the contrary, be deemed to materially affect the control of such company. . . . (emphasis added)

Accordingly, giving effect to such proposed amendment, section 69 of Bill 154, the proposed successor to section 35 of the Ontario Securities Act, provides that "no person or company shall trade in a security . . . where such trade would be in the course of distribution of such security . . ." *unless the issuer is a reporting issuer* and a preliminary offering circular and offering circular have been accepted for filing by the Ontario Securities Commission.[159]

The Merger Report was of the view that the fundamental purpose of the Ontario Securities Act is to be exhaustive and all-inclusive and to protect "virtually everyone excepting those that it specifically exempted from its

[158] Merger Report, *supra,* note 5 at para. 3.21 and para. 4.14. The substance of this recommendation is incorporated in s. 1(1)10 of Bill 154.

In para. 8.01, the Merger Report stated that "in Chapter III we consider the concept of 'public' in the light of the present legislation, concluding in paragraphs 3.20 and 3.21 that the inclusion of the word 'public' in the definition of 'distribution' was redundant. This conclusion is based on the premise that the legislation intends to protect everyone."

[159] An issuer may become a "reporting issuer" under Division A of Part XIII of Bill 154 simply for the purpose of attaining that status and the benefits that flow therefrom. One of the main benefits under Bill 154 is, however, that being a reporting issuer is a condition precedent to being entitled to distribute securities to the public pursuant to an offering circular under Division B of Part XIII. A company that proposes to distribute securities to the public for the first time by a firm underwriting through an investment dealer in the ordinary course must first become a reporting issuer. This does not appear to have been a recommendation of the Merger Report: see, para. 3.24 (a) thereof. Bill 154 as tabled does not provide a desirable flexibility to a non-reporting issuer to make an initial distribution of securities to the public pursuant to a prospectus-type document that would be at the same time a cornerstone statement and an offering circular. Delay and duplication of documentation and procedure may be avoided for non-reporting issuers if the qualification of the cornerstone statement and the offering circular may be proceeded with simultaneously and the initial offering circular contain virtually all the material set forth in the cornerstone statement. On this basis the Director would be required to issue a receipt for a preliminary offering circular before issuing a receipt for the (final) cornerstone statement.

protective umbrella."[160] If the purpose of the prospectus and disclosure protection afforded by section 35 of the Ontario Securities Act is to embrace "everyone", except those specifically exempted, then there is substantial doubt that such purpose is achieved at the present time in view of the existing definition of a "distribution to the public". As the Ontario Securities Act is now drafted, a prospectus is not required unless there is a "distribution to the public", which in turn by statutory definition only includes trades that are made "to the public".[161] Accordingly, and relying on section 19(3) of the Ontario Securities Act solely for an exemption from the registration prohibition of section 6, in appropriate circumstances a company could issue at the present time treasury securities having an aggregate cost of at least $97,000 to a single corporate purchaser by a purely private and non-public trade and not come within the prohibition of section 35 and thereby not be required to file a Form 11 under the regulations to the Ontario Securities Act.[162] However, such securities, not being "previously distributed to the public",[163] could not be resold under existing law "to the public" by such a private purchaser without a prospectus, an appropriate exemption from the prospectus requirements or a section 59 ruling. It would follow, however, that the private purchaser could trade such non-publicly distributed or "restricted" securities provided that that trade was similarly not "to the public".

As noted by the Merger Report,[164] there has not been a satisfactory judicial review of the concept of the "public" in Canada as that term is used in relation to securities regulation. The existing Anglo-Canadian case law does support, however, a distinction in law between a non-public or private trade and a trade "to the public"[165] and the view that "whether or not there

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160 Merger Report, *supra*, note 5 at para. 3.14.

161 Ontario Securities Act, *supra*, note 101, s. 1(1)6a. Both parts of s. 1(1)6a only apply to trades that are made for the purpose of distributing securities "to the public". By contrast, the registration prohibition contained in s. 6(1)(a) of the Ontario Securities Act is all-inclusive and applies to every trade in a security.

162 Ontario Regulation 794/70, as amended, s. 11.

163 Ontario Securities Act, *supra*, note 101, s. 1(1)6a(i).

164 Merger Report, *supra*, note 5 at paras. 3.10 to 3.14.

165 See, *Nash* v. *Lynde*, [1929] A.C. 158 (H.L.); *Regina* v. *Empire Dock Limited* (1940), 55 B.C.R. 34 (Co. Ct.); *Regina* v. *Piepgrass* (1959), 23 D.L.R. (2d) 220 (Alta. C.A.); *Regina* v. *Golden Shamrock Mines Ltd. et al.*, [1965] 1. O.R. 692 (C.A.) and *Regina* v. *McKillop*, [1972] 1. O.R. 164.

In addition, see a reasonably full discussion on the concept of the "public" in David L. Johnston, *Differences Between Companies With Public Securities Offerings and Companies Without Public Securities Offerings* (1970) at pp. C-23 to C-31 in Special One-Day Programme, The Business Corporations Act, 1970, November, 1970, The Law Society of Upper Canada.

See also, *Lee* v. *Evans* (1964), 112 C.L.R. 276 (H.C. of A.) en banc. Barwick C.J. stated at 285-286: ". . . the basic concept is that the invitation [to the public], though maybe not universal, is general; that it is an invitation to all and sundry of some segment of the community at large. This does not mean that it must be an invitation to all the public either everywhere, or in any particular community. How large a section of the public must be addressed in a general invitation for it to be an invitation to the public in the relevant connexion must depend on the context of each particular enactment and the circumstances of each case. But within that sufficient area of the community the invitation must be general . . .".

was an offering to the public is a finding of fact."[166] The jurisprudence in the United States is clearer and recognizes trades "not involving any public offering." Such trades are exempt and will continue to be exempt from the registration statement or prospectus requirement of the Securities Act of 1933.[167] The rationale of Rule 144, as noted earlier, is to set forth objective rules pursuant to which a "distribution" is not considered to take place.

On the above analysis of the Ontario Securities Act, there exists the genesis for the creation of a class of "restricted", lettered or non-publicly distributed security that cannot be freely traded "to the public" without filing a prospectus but which can be traded to and within a closed group of "non-public" purchasers. Accordingly, based on the premise that the word "public" was redundant, "to clear away the confusion which now surrounds the concept of 'public' " and to avoid the concept of "letter stock", the Merger Report recommended that, except in section 19(2) of the Ontario Securities Act, the word "public" be deleted.[168] In the view of the Merger Report, the result of the deletion of the phrase "to the public" and the revised definition of "distribution" set forth above would be that *"every issue* of a security by a company and *every trade* in any security by a person defined in branch ii of 'distribution' would be a 'distribution' subject to prospectus disclosure (if the company is not a reporting company) or offering circular disclosure (if the company is a reporting company) by section 35 [of the Ontario Securities Act] unless a specified exemption from such disclosure is available in section 58(1), or pursuant to a section 59 order."[169] (emphasis added)

It appears clear that the Merger Report would interpret the verb "distribute" as contained in section 1(1)10(i) of Bill 154 as synonymous with "issue" on the premise that the legislation intends to protect everyone. This premise that the Ontario Securities Act intends to protect everyone is legally doubtful. Even under proposed section 1(1)10(i) of Bill 154, a "distribution" occurs only if there is a trade in securities not previously issued "for the purpose of *distributing*" those treasury securities. Accordingly, one questions whether a company can "issue" securities without "distributing" them and thereby, in certain limited cases, not be engaged in a "distribution" requiring an offering circular under section 69.[170] If such is the case, and assuming the appropriate registration exemption is available in section 38 of Bill 154, in appropriate circumstances a purchaser of treasury securities that were "issued" but not "distributed" may not be restricted by the pro-

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[166] Hugh J. MacDonald J. A. in *Regina* v.*Piepgrass* (1959), 23 D.L.R. (2d) 220 (Alta. C.A.) at 227. To the same effect, see Warrington J. in *Sherwell* v. *Combined Incandescent Mantles Syndicate Limited* (1907), 23 Times Law Reports 482 at 483.

The Merger Report also recognized that all trades were not per se "to the public": paras. 3.16 to 3.17 and 6.05 to 6.08.

[167] Securities Act of 1933, *supra,* note 10, s. 4(2). See, I Loss, *supra,* note 6, Ch. 3C, 2(a).

[168] Merger Report, *supra,* note 5 at para. 3.15.

[169] *Id.* at para. 3.21(a).

[170] A similar question was asked during the period from 1947 to 1971 when the various Securities Acts of Ontario defined a "primary distribution to the public" as including trades made "for the purpose of distributing to the public securities issued by a company and not previously distributed." See, R.C. Meech, Q.C., *Prospectus and Registration Requirements,* in Special Lectures of the Law Society of Upper Canada 1968 at 224.

posed statutory definition of "distribution" from reselling such securities in the public market unless he controlled or was part of the control group of the issuer within section 1(1)10(ii) of Bill 154. However, any such purchaser would have to safeguard against becoming a statutory "underwriter"[171] and would have to satisfy any additional investment intent imposed by his registration exemption[172]. It would appear that the above line of reasoning would negate the blanket prohibition sponsored by the Merger Report that every *issue* of previously unissued securities required an offering circular, an exemption or a ruling.

In section 2(11) of the Securities Act of 1933, an "underwriter" is defined as a "person who has purchased from an issuer with a view to, or offers or sells for an issuer in connection with, the distribution of any security . . .". The word "distribution" in s. 2(11) is not defined but is regarded by the Securities and Exchange Commission "as more or less synonymous with 'public offering'".[173] Accordingly, under United States practice, a purchaser of previously unissued securities is not an "underwriter" if he purchases such securities from an issuer with a view to investment. While this view appears *prima facie* consistent with the remark of the Merger Report that the inclusion of the word "public" in the definition of "distribution" is redundant[174], there is a significant difference because the Merger Report's view is that every issue is per se a trade to the public and thereby a "distribution".

*Use of Exemptions*

Assuming, however, the implementation of the changes proposed by the Merger Report and Bill 154, and the real prohibition against distributing previously unissued securities without an offering circular, the Merger Report and Bill 154 contemplate a consistent and interwoven framework to solve the secondary distribution problem based upon the concepts of "reporting issuers" and continuous disclosure. As referred to earlier, the secondary distribution problem is, quite properly, of great concern to the Merger Report. While always cognizant of the problems of liquidity in the Canadian equity market and not wishing to place further restrictions on it, the Merger Report noted, however, that the use of the present sections 19(1)3 and 19(3) of the Ontario Securities Act to avoid the prospectus requirements of the Act raised the possibility that exempt persons may be used as conduits for distributing securities to the public.[175] This result may ensue at the present

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171 "Underwriter" is defined in s. 1(1)35 of Bill 154 as a person or company who purchases securities "with a view to, or who as agent for an issuer offers for sale or sells securities in connection with, a distribution of such securities . . .". To avoid becoming an "underwriter" and to avoid a "distribution" of previously unissued securities on the initial trade by the issuer, a purchaser would have to purchase such securities for investment and not with a view to distribution. This approach would incorporate the United States experience of "lettered stock". See note 108 *supra.*

172 See, for example, Bill 154, s. 38(1)3, s. 38(1)11 and s. 38(3).

173 I Loss, *supra,* note 6, at 551.

174 See note 158 *supra.*

175 Merger Report, *supra,* note 5, at para. 3.10.

time because, subject to satisfying its original investment intent,[176] an institution, exempt or private purchaser of securities under section 19(1)3 or section 19(3) is, in normal circumstances and subject to not being a member of the control group, freely entitled to resell securities purchased under those exemptions into the secondary public market without any information being made available to the public investor about the issuer or its affairs at the time of resale. The Merger Report viewed securities acquired under these exemptions in usual circumstances as having been "previously distributed to the public"[177] and, accordingly, freely available for resale.[178]

The Merger Report recommended that the right to use the sections 19(1)3 and 19(3) prospectus exemptions be conditioned upon the issuer being a "reporting company", upon a timely amendment disclosing the details and purpose of the issue being filed with the Ontario Securities Commission within ten days of the receipt of the subscription and upon the filing of Form 11 signed by the purchaser.[179] In addition, such institutions, exempt and private purchasers would not be entitled to resell any securities so purchased without filing an offering circular unless the issuer was, presumably at the time of resale, a "reporting company", there were no special sales efforts relating to such resales and such purchaser held the securities for a minimum period of 28 days from the filing of the timely amendment.[180] If the issuer is a "reporting company", presumably both at the time of sale and at least 28 days after the purchase, then, subject to satisfying his original investment intent and not being categorized as an "underwriter", the purchaser under sections 19(1)3 or 19(3) would then be free to resell.[181]

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[176] Assuming that there is a "distribution to the public", the section 19(1)3 or section 19(3) exemptions from the prospectus requirements of section 35 of the Ontario Securities Act, *supra,* note 101, are available only where the purchaser purchases as principal "for investment only and not with a view to resale or distribution": section 58(1)(a), 58(1)(b) and 19(3) of the Ontario Securities Act. The "investment intent" required under these sections and as certified by the purchaser in his Form 11 filed with the Ontario Securities Commission has not been analyzed as in the United States; see, I Loss, *supra,* note 6, Ch. 3C, 2(b).

The Toronto Stock Exchange has not set a fixed period of time during which section 19(1)3 or section 19(3) purchasers of securities of listed companies must hold in order to establish investment intent. However, where the proposed purchaser's investment practice is not well known to the Exchange, the Exchange will require that the securities be held in escrow by a financial institution for a six month period. See, The Toronto Stock Exchange Members' Manual, Division G, Part II.

[177] Ontario Securities Act, *supra,* note 101, s. 1(1)6a(i). As noted earlier, *supra,* note 162, a trade to a purchaser referred to in s. 19(1)3 or s. 19(3) may not per se be a trade "to the public".

[178] Merger Report, *supra,* note 5 at para. 3.18 and para. 5.18.

[179] *Id.* at para. 5.23(1)(a). Para. 5.25(1) and (2) appear inconsistent with para. 5.23(1) whether a non-reporting issuer would be entitled to use the s. 19(1)3 and s. 19(3) prospectus exemptions.

[180] In para. 5.23(3) the Merger Report indicated that the timely amendment would be "approved by the board, signed and certified and filed immediately following closing." Accordingly, the exempt purchaser would be required to hold, on this basis, for a minimum statutory period of 28 days.

[181] *Id.* at para. 5.25. See also para. 3.21(b) where it is indicated that this result would be achieved by deeming a trade in a security purchased pursuant to the above exemptions as a "distribution" unless the conditions referred to above were satisfied.

The philosophy of permitting such prima facie freedom is based on the fact that under the proposed integrated and continuous disclosure system applicable to such "reporting companies", current material information about the issuer would be available to the public investor at all times thereby providing the quality and degree of information in the trading markets not presently available at the time of resale by the "non-public" purchaser. Accordingly, the defect in the present structure that large quantities of securities may be distributed to the investing public without adequate disclosure through the use of conduits, such as exempt or private purchasers, is remedied by linking both the availability of such exemptions for the issuer and the right of resale for such purchasers to the concepts of the "reporting company" and continuous disclosure. Conversely, on the Merger Report proposals, it would follow that a "non-reporting company" would be prevented from selling securities to an institution, exempt or private purchaser without a prospectus or a section 59 ruling. The rationale behind this latter proposal is not clear. The investing public is properly protected as long as the regulatory authority has the right to supervise the degree of disclosure at the time of resale to the investing public and to prevent resales when such public disclosure is not adequate. Many private financing situations may be envisaged where securities of a "non-reporting company" should be permitted to be traded to an institution or private purchaser that is perfectly willing to accept that the securities are "restricted" and not freely salable without requiring the issuing "non-reporting company" to become a "reporting company", to file a prospectus or obtain a section 59 ruling prior to making a trade.

The Merger Report also recommended that the right of a shareholder to resell securities without a prospectus that were distributed to him pursuant to certain other section 19(1) prospectus exemptions be dependent upon the issuer having the status of a "reporting company". Securities distributed to shareholders pursuant to section 19(1)8 of the Ontario Securities Act or to employees pursuant to section 19(1)10 should, in the view of the Merger Report, be freely resold by such holders only if the issuer is a "reporting company" and not less than 28 days have elapsed from the filing of a timely amendment with respect to the initial trade.[182] It would appear that in applying the "need to know" test the Merger Report decided that neither the shareholders nor the employees of the issuer required a prospectus standard of disclosure in connection with the trades to them but that the purchasing public did on resale. Contrary to the conclusion reached as to the availability of section 19(1)3 or section 19(3) exemptions for "non-reporting companies", the Merger Report recommended that section 19(1)8 and section 19(1)10 exemptions should be available for "non-reporting companies" provided resale by such shareholders or employees was restricted.[183]

The Ontario Securities Commission subsequently shifted the emphasis of the recommendations of the Merger Report in connection with the avail-

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182 *Id.* at para. 8.06 and para. 8.07.

183 The Merger Report states that resales by the shareholders or employees acquiring securities of "non-reporting companies" under these exemptions be "prohibited": para. 8.12(2) and (3). It is assumed that resales would always be allowed if a prospectus or offering circular were filed or a section 59 ruling obtained.

ability of the exemption from the prospectus requirements for rights issues made to shareholders pursuant to section 19(1)8(iii) of the Ontario Securities Act. As noted above, the Merger Report recommended that both "non-reporting companies" and "reporting companies" should be entitled to use the exemption as at present but that only security holders of "reporting companies" should be entitled to resell without a prospectus 28 days after the filing of a timely amendment. On October 14, 1971, the Ontario Securities Commission issued its policy No. 3-22 relating to applications for exemptions under section 19(1)8(iii) and for rulings under section 59. Such policy statement stated that, where the proposed issuer is a "non-reporting company", the Ontario Securities Commission "may object to any disclosure short of an acceptable prospectus under section 19(1)8(iii) unless and until the issuer and its insiders" assume the respective responsibilities under Parts X, XI and XII of the Ontario Securities Act relating to proxies and proxy solicitation, insider trading and financial disclosure. The Ontario Securities Commission thereby indicated its intention to deny the section 19(1)8(iii) exemption to "non-reporting companies" and has subsequently refused on occasion to find that the information filed by "non-reporting companies" under such section was satisfactory to permit a rights issue for the reasons set out in the policy statement. As noted subsequently, Bill 154 adopts the proposals of the Merger Report with respect to the availability of the prospectus exemption for rights issues by "non-reporting companies", coupled with a prohibition on the resale of the securities so distributed without an offering circular or a ruling.[184] If such a restriction on the resale of such securities of "non-reporting companies" is enacted, the continuance of Ontario Securities Commission Policy No. 3-22 would be a virtual denial of such statutory exemption for "non-reporting companies" and, accordingly, may be ultra vires.

The Merger Report dealt in a similar way with resales of securities acquired pursuant to the other main exemptions from the prospectus requirements of the Ontario Securities Act in its attempt to prevent the use of such exemptions as conduits for the distribution of securities into the public trading markets without adequate disclosure of material corporate information about the issuer and the securities. The Merger Report was of the view that the right to resell securities purchased pursuant to the revised exemptions now enacted as sections 19(1)9, 19(1)9a and 19(1)9b of the Ontario Securities Act,[185] as a result of the recommendations of the Merger Report,[186] should be restricted unless, where the issuer was a "reporting company", 28 days had passed since a timely amendment was filed in respect of the trade and there were no special selling efforts relating to the resale, or, where the issuer was a "non-reporting company", a cornerstone prospectus was filed.[187]

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[184] Bill 154, s. 93(1)(d)(iii) and s. 93(3).

[185] *The Securities Amendment Act, 1971*, S.O. 1971, c. 31, s. 3(2).

[186] Merger Report, *supra*, note 5 at paras. 6.22 and 6.23.

[187] *Id.* at para. 6.21. In the case of reporting companies combining to form a new entity, a cornerstone prospectus for the new entity would be required. The shareholder of a "non-reporting company" would also have the right to obtain a section 59 ruling.

The Merger Report proposed that the right to use the exemptions set out in section 19(1)9, 19(1)9a and 19(1)9b would not be conditioned upon the issuer being a "reporting company" presumably, because, applying the "need to know" test, the shareholder of a company that is participating in a merger or acquisition to which those sections would apply would obtain sufficient disclosure in the merger or acquisition process.[188] The restriction on resale is based on the need to advise investors generally of the material facts of the transaction before permitting the securities issued in the merger and acquisition process to be freely resold.[189]

*Bill 154*

Bill 154 proposes to continue all the exemptions presently contained in the Ontario Securities Act from the prospectus requirements of that statute as exemptions from the offering circular requirements of Bill 154.[190] Bill 154 does not, however, condition the right to use any such exemptions upon the issuer of the securities being a "reporting issuer". The exemptions are equally available to "non-reporting issuers".[190a] In this aspect it does not adopt the recommendation of the Merger Report that the institutional, exempt and private placement purchaser exemptions not be available to an issuer unless it is a reporting company. This is a beneficial change.

It appears, however, that because of the unnecessarily severe restrictions on the right to resell securities purchased pursuant to the offering circular exemptions proposed by Bill 154 that "non-reporting issuers" will be virtually unable to use the exemptions in ordinary situations. This results from the basic recommendation of the Merger Report, adopted by Bill 154, that *every trade in securities purchased* pursuant to the main offering circular exemptions is a *distribution* unless the *issuer* of the securities,

(a) is a reporting issuer,

(b) files with the Commission an amendment to its latest cornerstone statement, containing the details and purpose of the issue of the securities and the sizes and numbers of the purchases, not later than ten days after the receipt of the subscription for such securities and twenty-eight calendar days have elapsed since the date of such filing; and

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[188] *Id.* at para. 6.19 and para. 6.26.

[189] *Id.* at para. 6.20.

[190] Bill 154, s. 93(1) and s. 94(1). Bill 154 proposes adding a new exemption relating to sales from control groups: s. 93(1)(k).

At the present time, s. 58(1)(a) of the Ontario Securities Act requires institutional and exempt purchasers to purchase under s. 19(1)3 "as principal for investment only and not with a view to resale or distribution." Bill 154 proposes to limit these qualifications to purchases by exempt purchasers: s. 93(1)(a)(v). Presumably banks, trust companies and insurance companies purchasing under s. 93(1)(a) of Bill 154 would not be required to satisfy these conditions. This was not recommended by the Merger Report: para. 5.22(1).

[190a] The use of the adjective "purchased" in s. 93(3) of Bill 154 must mean that it applies to resales by shareholders who have acquired their securities pursuant to the exemptions therein referred to. This is consistent with para. 3.21(b) of the Merger Report. To restrict the availability of the exemptions in s. 93(1) to "reporting issuers" would be unworkable.

(c) makes no special effort whether directly or indirectly to trade the securities and no commission or other remuneration is paid or given to others in respect of such trade except for normal brokerage fees.[191]

Accordingly, Bill 154 proposes that where the issuer of the securities does not satisfy the conditions set forth in clauses (a) to (c) above, at the time of the sale of the securities to the purchaser pursuant to the exemptions therein referred to, the purchaser is restricted from reselling such securities unless the issuer becomes a reporting issuer and an offering circular is filed relating to the offering,[192] unless the securities acquired are listed and posted for trading on The Toronto Stock Exchange and are sold through the Exchange pursuant to a statement of material facts,[193] unless the securities form part of the control group of the issuer, are listed and posted for trading on such Exchange and are sold through the Exchange "by way of isolated trades not made in the course of continued and successive transactions of a like nature"[194] or unless an appropriate ruling is obtained from the Ontario Securities Commission.[195]

These are severe and apparently continuing restrictions on the right to resell securities purchased from an issuer pursuant to such exemptions at a time when the issuer is a "non-reporting issuer". Accordingly, the usefulness of such exemptions for "non-reporting issuers" is drastically limited because the number of investors prepared to purchase or acquire securities under such conditions is sharply reduced. For instance, institutional, exempt and private purchasers,[196] purchasers pursuant to a rights issue,[197] purchasers pursuant to private agreements with less than 15 shareholders,[198] purchasers selling assets valued at not less than $100,000,[199] promoters[200] and employees[201] will not be inclined to purchase securities whose resale rights are so limited. Similarly, it would appear that unless all the companies participating in a statutory amalgamation, arrangement or merger[202] are "reporting issuers" or unless the offeror making a take-over bid is a "reporting issuer",[203] there would be little reason for shareholders to approve or accept exchanges of securities so restricted.

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191 Bill 154, s. 93(3). In a classic understatement, the Ontario Securities Commission has noted that "the advantages [of the exemptions] to a reporting issuer become clear in section 93". Ontario Securities Commission Weekly Summary for the week ending June 29, 1972, Supplement "X", at 18.

192 *Id.* s. 69.

193 *Id.* s. 94(1)(b).

194 *Id.* s. 94(1)(c).

195 *Id.* s. 95.

196 *Id.* s. 93(1)(a) and (b).

197 *Id.* s. 93(1)(d)(iii).

198 *Id.* s. 93(1)(f).

199 *Id.* s. 93(1)(g).

200 *Id.* s. 93(1)(h).

201 *Id.* s. 93(1)(i).

202 *Id.* s. 93(1)(e)(i) and (ii).

203 *Id.* s. 93(1)(e)(iii).

As drafted, it is difficult to understand how a "reporting issuer" can comply with all of the requirements of section 93(3)(b) above for all of the exemptions. A "subscription" is not received by the issuer in every case, especially in connection with declarations of stock dividends, distributions on a winding-up or reorganizations[204] or in connection with share exchanges on statutory amalgamations, arrangements or mergers.[205] An appropriate amendment should be made to this clause to refer to the filing of the amendment "after the receipt of the subscription for or the commitment to distribute, issue or exchange such securities, as the case may be, . . ." Similarly, the restrictions in section 93(3)(c) above may be more applicable to the conduct of the purchaser in reselling the securities acquired than to the conduct of the issuer in issuing them pursuant to an exemption. What is meant by "no special effort" and "normal brokerage fees" in that clause in relation to an issuer negotiating a trade under an exemption in section 93(1) of Bill 154, for instance, under section 93(1)(a) or section 93(1)(b)?

Except in connection with the resale of securities acquired pursuant to statutory amalgamations, statutory mergers, take-over bids, private share exchanges or the issuance of shares for assets, the restrictions proposed in Bill 154 relating to the resale of securities of "non-reporting issuers" purchased or acquired pursuant to the main prospectus or offering circular exemptions follow the recommendations of the Merger Report. The Merger Report was generally of the view that in such circumstances "in the case of a non-reporting company resale would be prohibited."[206] However, in connection with the right to resell securities received in connection with statutory amalgamations, statutory mergers, take-over bids, private share exchanges or the issuance of shares for assets, the Merger Report hinted at a more flexible but equally protective condition on the right to resell securities of "non-reporting issuers" so acquired. The Merger Report proposed that resales by recipients of securities of "non-reporting companies" should be prohibited until a cornerstone statement is filed or, in other words, until the issuer becomes a reporting issuer.[207]

This approach deserves consideration. As presently proposed by Bill 154, if the issuer is not a "reporting issuer" at the time of sale of the securities pursuant to the main exemptions, every trade by the purchaser of the securities so purchased is a distribution.[208] This restriction on resale appears to continue even if the issuer subsequently becomes a "reporting issuer" and full and continuous disclosure is thereby made of the affairs of such issuer to the public trading markets. If such an issuer subsequently becomes a "reporting issuer", then it is submitted that public investors generally are not prejudiced if the holder of securities acquired when the issuer was a "non-reporting issuer" sells such securities into the trading markets a reasonable time after the issuer becomes a "reporting issuer" and there are no special selling efforts

204 *Id.* s. 93(1)(d)(i) and (ii).

205 *Id.* s. 93(1)(e)(i) and (ii).

206 Merger Report, *supra*, note 5, at paras. 5.25 and 8.12.

207 *Id.* para. 6.21(1)(b).

208 Bill 154, s. 93(3)(a).

relating to the sale. A reasonable time after an issuer becomes a "reporting issuer", there would be equality of material corporate information concerning the affairs of such issuer in the public trading markets available to investors generally and accordingly, there would be no need to restrict the holder of securities acquired when the issuer was non-reporting from reselling such securities freely in normal brokerage transactions. The position of such a holder would be analogous to that of a control person and the added exemption could be drafted on a basis similar to s. 93(4) of Bill 154.[209]

*Control Persons*

The recommendations of the Merger Report relating to the right of a "control person"[210] to sell his securities are beneficial.[211] Under the proposed definition of a distribution, *every trade* by a control person is a distribution.[212] However, the increased rights of sale for control persons proposed by the Merger Report outweigh the tightened terms of the definition.[213] As recommended by the Merger Report a control person may trade his securities and a purchaser of such securities is freely entitled to resell if the issuer of the securities is a "reporting issuer", the control person disclosed his control position to the Ontario Securities Commission 28 days prior to the sale, the control person sells in ordinary brokerage transactions without special selling efforts and files a report of the sale with the Ontario Securities Commission within three days.[214] However, it would appear that the adjective "purchased" in section 93(4) of Bill 154 should be deleted to achieve the recommendation of the Merger Report. Otherwise it would appear that the control person would be free to sell under section 93(i)(k) of Bill 154 but the purchaser would be restricted on resale unless the conditions of section 93(4) of Bill 154 were satisfied at the time of the trade from the control person to the purchaser.

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[209] For example, "notwithstanding subsection 3, a trade in a security purchased pursuant to an exemption in clauses a to j of subsection 1 when the issuer of the securities was not a reporting issuer is not a distribution if

(a) the issuer of the securities,
  (i) becomes a reporting issuer;
  (ii) files with the Commission in its cornerstone statement or by way of amendment thereto the details and purpose of the issue of the securities and the sizes and numbers of the purchasers and twenty-eight calendar days have elapsed since the date of such filing: and
(b) the holder of such securities makes no special effort whether directly or indirectly to market the securities and no commission or other remuneration is paid or given to others in respect of such trade, except for normal brokerage fees."

[210] A "control person" is defined in s. 93(5) of Bill 154. The definition does not specifically refer to s. 1(1)10(ii) of Bill 154 but a person who would be in the control group for the purposes of s. 1(1)10(ii) is a control person under s. 93(5).

[211] See, Merger Report, *supra*, note 5, at para. 4.15.

[212] Bill 154, s. 1(1)10(ii).

[213] At the present time, under s. 1(1)6a(ii) of the Ontario Securities Act, *supra*, note 101, only a trade by a control person "for the purpose of distributing such securities to the public" is a distribution.

[214] Cf. Bill 154, s. 93(1)(k) and s. 93(4). The words "for the purpose of distributing such securities" in s. 93(1)(k) are confusing. By s. 1(1)10(ii) any trade in securities by a control person is a "distribution".

In addition to the above rights, a control person would continue to be able to sell securities, where they are listed and posted for trading on The Toronto Stock Exchange, through the facilities of the Exchange "by way of isolated trades not made in the course of continued and successive transactions of a like nature."[215] This is a useful exemption and would have the added benefits that the issuer of the securities does not need to be a "reporting issuer" and there are no special statutory filing requirements.

*Corporate Practice*

In connection with the use of the exemptions recommended by the Merger Report and proposed by Bill 154, certain changes in financing and corporate practice may ensue. For instance, purchasers of securities pursuant to the exemptions set out in section 93(1) of Bill 154 will consider it advisable to require that the purchase agreement include conditions or covenants that the issuer become a "reporting issuer" before the closing of the transaction, comply with the provisions of section 93(3) of Bill 154 and maintain its status as a "reporting issuer" in order to entitle such purchasers to resell the securities they receive without an offering circular or a section 95 ruling. In view of the fact that purchasers of securities of "non-reporting issuers" purchased pursuant to the main offering circular exemptions would not in turn have the right to use the exemptions in section 93(1), they may attempt to obtain a covenant in the purchase agreement requiring the issuer to file a cornerstone statement and offering circular qualifying their securities for sale at their demand or to assist fully in obtaining and satisfying the conditions of a section 95 ruling.[216] Similarly a purchaser of securities from a control person under section 93(1)(k) of Bill 154 as presently drafted would require that the provisions of section 93(4) be complied with in order to obtain full rights of resale.

*Comparison of Bill 154 and Rule 144*

Two points should be noted in comparing in a general way the recommendations of the Merger Report and the proposals of Bill 154 with those of the Wheat Report and Rule 144 adopted by the Securities and Exchange

[215] Section 58(2)(c) of the Ontario Securities Act, *supra,* note 101, is proposed to be continued by s. 94(1)(c) of Bill 154.

[216] In its release adopting Rule 144, the Securities and Exchange Commission made a strong plea for private placees to protect themselves against the difficulties of holding "restricted securities" by bargaining for and obtaining registration rights when they originally acquire "restricted securities." See, Herbert S. Wander, *Rule 144 Adopted* (1972), 5 The Review of Securities Regulation 957 at 962. See also, Denis T. Rice, *Potential Effects of Pending Securities and Exchange Commission Rules on Private Financing and Business Acquisitions* (1971), 23 Stanford Law Review 287, and Stephen R. Miller and Richard S. Seltzer, *The SEC's New Rule 144* (1972), 27 The Business Lawyer 1047 at 1055.

The proper remedy for breach of a covenant to become a "reporting issuer" would be specific performance because damages would inadequately compensate the plaintiff. The New York Supreme Court has held that a corporation's agreement to issue shares and to register them on the next registration statement filed by the corporation must be specifically performed: *Middlemark* v. *Nytronics Inc.,* CCH Fed. Sec. L. Rep. #93,372 (1971).

Commission. Firstly, the Merger Report recommended that essentially private purchasers, including institutions, exempt and private purchasers, acquiring securities of "reporting companies" without a prospectus would be required to wait for the relatively short period of 28 days from the date of filing a timely amendment by the issuer in respect of the sale before being entitled to resell the securities of the "reporting company" without filing a short form prospectus or offering circular.[217] The Wheat Report expressed concern that even under the expanded continuous disclosure system for "reporting companies" that "the use of ostensible private purchasers as conduits for the sale of securities to the public without registration be prevented" and therefore recommended that private purchasers of securities of "reporting companies" should be required to hold for a period of one year before being entitled to resell publicly without registration.[218] The Securities and Exchange Commission increased this mandatory holding period to two years[219] in order to prevent the initial purchasers from acting as conduits for the sale to the public of unregistered securities. During such two year period, the United States purchaser may resell the "restricted securities" by a transaction which is not a "public offering", provided that the resale is not of such a character as to make the initial sale a public offering, and may also resell without regard to Rule 144 in certain other limited ways.[220] Under the proposals of Bill 154, the Ontario exempt purchaser could only resell the securities of the reporting issuer during the 28 calendar day period if an offering circular were filed, certain limited exemptions were available or a section 95 ruling obtained.[221] However, this short 28 day period certainly does not hamper liquidity in the Canadian markets and, assuming the existence of a high standard and constant flow of continuing and effective disclosure from "reporting companies" of material corporate facts into the trading markets for the benefit of the investing public as a basis for the operation of the system, the problems of adequate disclosure to the purchasing public at the time of resale would appear to be solved. However, the view of the Merger Report in this regard is most generous and expresses great optimism on the results of the future operation of the timely and continuous disclosure system for "reporting issuers."[222] This is especially so in view of the noticeable lack of analysis in the Merger Report of the quality and degree of financial and corporate disclosure to be provided by the periodic reports and the methods and means of disseminating to the investing public the facts contained in the files of the Ontario Securities Commission.

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217 Merger Report, *supra,* note 5 at para. 5.25; Bill 154, s. 93(3). The Merger Report cautioned against purchasers acquiring securities pursuant to the exemtpions from being classified as "underwriters" by quick resales: para. 5.26.

218 Wheat Report, *supra,* note 1 at 199-200.

219 Securities Act of 1933 Release No. 5223 (January 11, 1972). See notes 136 and 137 *supra.*

In addition, the United States "reporting company" must be subject to the reporting requirements of the Securities Exchange Act of 1934 for at least 90 days before Rule 144 can be used: Rule 144(c)(1) and *Willkie Farr & Gallagher,* CCH Fed. Sec. L. Rep. #78,740 (April 12, 1972).

220 Herbert S. Wander, *supra,* note 216 at 961.

221 See references to notes 192-195 and 217 *supra.*

222 Merger Report, *supra,* note 5 at para. 5.26.

Secondly, both the Wheat Report and Rule 144 imposed a limit on the quantity and method of sale of "restricted securities" that could be publicly distributed without registration by private purchasers of "reporting companies" after the two year holding period. Essentially, and without detailing the aggregating concepts, for over the counter securities an amount equal to 1% of the outstanding shares can be sold every six months by normal brokerage sales and, for listed securities, sales in each six month period are limited to an amount equal to the lesser of 1% of the outstanding securities or the average weekly volume for the four weeks prior to the filing of a notice of sale.[223] Under the Merger Report, a control person or a purchaser of securities of a reporting issuer pursuant to the main exemptions may resell the securities after 28 days from the filing of a timely amendment disclosing the control position or the exempt sale, as the case may be, provided that the control person or the issuer "in offering his securities for sale makes no special effort, direct or indirect, to market the securities, and offers no special inducement to the broker to effect sales apart from the commission normally payable on such transactions."[224] It would appear that this may in practice impose a quantity restriction on resale bearing some relation to the breadth and depth of the market for such securities, the number of securities to be sold and their impact upon the market.[225]

The differences in emphasis between the recommendations of the Wheat Report and the Merger Report on the secondary distribution problem may be rationalized to some extent by the proposition that the Wheat Report concentrated more on the status of the seller because of the essentially private nature of the transaction between the issuer and the purchaser. As noted earlier, the Securities and Exchange Commission was concerned that such purchasers from reporting companies not be "acting as conduits for sale to the public of unregistered securities, directly or indirectly, on behalf of the issuer."[226] On the other hand, the Merger Report appears to have been satisfied that the needs of the investing public for disclosure at the time of resale by the exempt purchaser would be adequately satisfied by the operation of the integrated disclosure system. It is the status of the seller that is specially involved in the recommendations of the Wheat Report and the provisions of Rule 144 relating to the mandatory two year holding period and the quantity restrictions on resales during a six month period.[227] The size of the offering limitation is certainly of

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223 Wheat Report, *supra*, note 1, at 190-199; Herbert S. Wander, *supra*, note 216 at 959-960 and text relating to note 136 *supra*. All sales under Rule 144 must be made through ordinary brokerage transactions and without special sales solicitations or payments. The Wheat Report was concerned that large blocks of securities might be disposed of by means of extra selling efforts.

224 Merger Report, *supra*, note 5 at para. 4.15 and para. 5.25(1). See Bill 154, s. 93(3)(c) and s. 93(4)(b)(ii).

225 For comments on the Wheat Report and Rule 144 quantity limitations that support the Merger Report proposals, see, Hugh L. Sowards, *Private Placements and Secondary Transactions: The Wheat Report Proposals For Reform*, 1970 Duke Law Journal 515 at 521.

226 See note 137 *supra*.

227 See, Homer Kripke, *The SEC, the Accountants, Some Myths and Some Realities* (1970), 45 New York University Law Rev. 1151 at 1162-64.

concern to the public investor because it prevents a dislocation of the normal trading markets by block offerings or through special efforts. However, this concern of the public investor is probably adequately safeguarded in the Merger Report and Bill 154 proposals by preventing resales where special sales efforts or unusual broker compensation is involved. Nevertheless, the efficiency of the operation of the continuing disclosure system for reporting issuers and the meaningful and effective dissemination to the trading markets of material corporate information periodically filed by such companies with the Commissions was clearly more unreservedly assumed by the Merger Report and is so reflected in Bill 154.

## VI. TIMELY AND EFFECTIVE DISCLOSURE

Disclosure is not useful to the investing public if the information disclosed is not current. "It is axiomatic that informational reports intended to promote the objective of informed public markets should be as timely as circumstances permit".[228] There are two basic aspects to this side of the integrated and continuous disclosure system. Firstly, there are the statutory time limits within which the periodic reports must be forwarded to shareholders and filed with regulatory authorities and the material therein subsequently disseminated to the public investor and, secondly, there are the "timely disclosure" policies of the securities commissions and exchanges relating to the timely disclosure of the current material affairs of the company.

### *Periodic Reports*

Reference has already been made to the existing statutory requirements under United States securities law with respect to filing the Form 10-K annual report within 90 days of the end of the fiscal period, with respect to filing the Form 10-Q quarterly report within 45 days of the end of each quarter and with respect to filing the Form 8-K current report within 10 days of the end of the month in which a material event occurs.[229] The present requirements of the Ontario Securities Act are significantly less onerous and therefore less informative than those imposed on companies subject to the reporting requirements of the Securities Exchange Act of 1934. The annual comparative financial statements of companies subject to Part XII of the Ontario Securities Act need only be filed within 170 days of the end of the fiscal period.[230] In this regard it is interesting to note that the Wheat Report found that 98% of all companies with securities listed on the New York Stock Exchange and a significant number of companies with securities listed on the American Stock Exchange published annual reports to shareholders for 1967 within 90 days or less following fiscal year-end.[231] The Merger Report did not recommend that this existing 170 day period of the Ontario Securities Act be shortened and Bill 154 proposes to maintain this rather lengthy period for the filing of

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228 Wheat Report, *supra,* note 1 at 331.

229 See text commencing with note 85 *supra.*

230 Ontario Securities Act, *supra,* note 101, s. 120(1).

231 Wheat Report, *supra,* note 1 at 352.

annual comparative financial statements.[232] It is, nevertheless, a proper question whether this 170 day statutory period is too long to maintain the relevancy and currency of the financial information when many issuers, for one reason or another, take full advantage of this period. Companies subject to Part XII of the Ontario Securities Act are also presently required to file with the Ontario Securities Commission comparative unaudited semi-annual financial statements containing certain pertinent information for such six-month period.[233] Bill 154 proposes that this requirement be continued for corporations that are not reporting issuers and the present 60 day filing period has been maintained.[234] The Merger Report recommended that these semi-annual statements be replaced by quarterly unaudited statements for reporting issuers but did not recommend the period within which such statements should be filed.[235] Bill 154 adopts this recommendation and proposes that corporations that are reporting issuers be required to file quarterly comparative unaudited financial statements with the Ontario Securities Commission within 30 days of the end of each quarter.[236] This 30 day statutory filing period for these quarterly unaudited statements is reasonable and consistent with requiring disclosure of material financial corporate events on a timely and current basis in order to maintain an equality of essential information in the secondary trading markets within the continuous disclosure system. This equality of information in the trading markets is the base upon which the liberalized proposals to solve the problems of secondary distributions and sales by control persons are based. The recommendation for this 30 day filing period adds weight to the arguments in favour of reducing the present 60 day period under the corresponding policy of The Toronto Stock Exchange for the filing of quarterly unaudited statements for listed companies.[237]

In addition to the unaudited quarterly reports, the Merger Report recommended that the Ontario Securities Act be amended to require the filing of timely amendments,[238] presumably analogous to the Form 8-K current reports noted earlier.[239] The Merger Report indicated that the timely amendment report may be required when a material change occurs between quarterly reports which makes untrue or misleading any statement of a material fact contained in any report then on file with the Commission and suggested that specific items requiring the report be contained in the legislation.[240] This recommendation has been adopted in part in the proposed legislation. Bill 154 proposes that a reporting issuer must file an amendment to its cornerstone statement within 10 days "where a material change occurs in the affairs of a reporting issuer, that makes untrue or misleading any statement of a

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232 Bill 154, s. 98.

233 Ontario Securities Act, *supra*, note 101, s. 130(1).

234 Bill 154, s. 99.

235 Merger Report, *supra*, note 5 at para. 2.32

236 Bill 154, s. 100.

237 The Toronto Stock Exchange Members' Manual, Division G, Part I, s. 1.02 (December, 1968).

238 Merger Report, *supra*, note 5 at para. 2.22 and para. 2.29.

239 See note 91 *supra*.

240 *Id.* at para. 2.30.

material fact" contained in the cornerstone statement.[241] A similar provision requires an amendment within 10 days to an offering circular where such a material change occurs during the period of distribution of a security.[242] Bill 154 does not contain, however, specific circumstances that lead to the filing of an amendment as suggested by the Merger Reort. It would appear that the Form 8-K precedent would be useful in selecting some of the specific events that should trigger a requirement to file a timely amendment. While both the timely disclosure policies and a statutory provision requiring a filing when a "material change occurs that makes untrue or misleading any statement of a material fact" contained in information currently on file are useful in defining generally the scope of the event, it would be helpful if particular matters were specified by regulation in view of the ambiguity of the concept of materiality and the resulting unevenness of subjective interpretation it is given.

*Timely Disclosure*

The present and proposed statutory requirements relating to the filing of periodic reports are supplemented by and must be viewed in conjunction with the "timely disclosure" policies of the Ontario Securities Commission and The Toronto Stock Exchange. The present policies, issued in October, 1968, are substantially similar and refer to each other.[243] The policy of the Ontario Securities Commission states that "compliance with the requirements of the Exchange by companies whose securities are listed thereon will normally be viewed as compliance with the Commission's policy herein".[244] Both the timely disclosure policy of the Commission and of the Exchange require prompt disclosure of any "material change in the affairs of the company which might reasonably be expected to affect materially the value of the security".

The test of materiality is, for the purposes of these policies, whether the prompt disclosure to the public of the favourable or unfavourable facts would have an impact on the market price of the security.[245] In addition to covering

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241 Bill 154, s. 66.

242 *Id.* s. 84.

243 Bulletin, Ontario Securities Commission, (November, 1968); The Toronto Stock Exchange Members' Manual, Division G, Part I, s. 1.01 (October 4, 1968). See, J. R. Kimber, Q.C., and L. Lowe, *The Toronto Stock Exchange*, Special Lectures of the Law Society of Upper Canada 1972 at 201.

244 Ontario Securities Commission Uniform Act Policy No. 2-12 (April, 1971, amended December 6, 1971).

245 The Toronto Stock Exchange's policy is based firmly on the market impact test of materiality. "Generally, in deciding whether the change is likely to materially affect the value of the securities, the effect of the change on the change in the market price of the securities is the best test. If it can be reasonably expected that the announcement of the change would result in a sudden change in the price of the security, management should conclude that the change is one that materially affects the value of the security and an announcement should be made": The Toronto Stock Exchange Members' Manual, Division G, Part I, s. 1.01.

The timely disclosure policies of the Securities and Exchange Commission are also based on whether the material event — favourable or unfavourable — might reasonably be expected to have an influence on the market price of the securities. See, Alan B. Levenson, *The Role of The SEC As A Consumer Protection Agency* (1971), 27 The Business Lawyer 61 at 69.

the market impact test of materiality, the timely disclosure policy of the Ontario Securities Commission has enumerated certain specific changes or developments which it considers material and concerning which disclosure is to be made. Such changes or developments include actual or proposed changes in control of the company, actual or proposed acquisitions or dispositions of material assets, proposed take-overs, mergers, consolidations, amalgamations or re-organizations, material discoveries, changes or developments in the company's resources, technology, products or contracts which could materially affect the earnings of the company upwards or downwards or indicated changes in earnings upwards or downwards of more than recent average size and changes in dividends.[246]

The healthy concern of the Ontario Securities Commission for "timely" disclosure is evidenced by the amendment to Uniform Act Policy No. 2-12 in December, 1971[247] listing certain of the specified material changes which it stated "must be discussed with the Commission prior to disclosure to the investing public . . . ." The awkwardness of wording in expressing what has subsequently been stated publicly and informally as the intent of the amendment required the Commission to issue Ontario Securities Commission Policy No. 3-23[248] to interpret the amendment. In effect, the Commission said it wished to be "advised of the proposals", even by telephone, on a confidential basis prior to their public disclosure "so that it may be prepared to stop trading, if necessary, in order to afford an opportunity for the information to be released and disseminated", especially where it appears the market is responding to rumours and not to fact.[249] Failure to timely disclose material events has caused the Ontario Securities Commission to issue cease trading orders pending the necessary disclosure being made and disseminated to the public.[250]

The current timely disclosure policies of the Ontario Securities Commission and The Toronto Stock Exchange were preceded by substantially similar policies issued by the New York Stock Exchange.[251] As stated by a Vice-President of the New York Stock Exchange, the "Exchange's disclosure policy, or any disclosure policy for that matter seeks to avoid any disruption of orderly market process by assuring that all investors have equal access to material information."[252] A double-barrelled test of assessing the probable impact on the market of corporate changes or developments suggested by the New York

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[246] Ontario Securities Commission Uniform Act Policy No. 2-12.

[247] Ontario Securities Commission Weekly Summary for the week ending December 2, 1971.

[248] Ontario Securities Commission Weekly Summary for the week ending December 16, 1971.

[249] Ontario Securities Commission Bulletin (January, 1972).

[250] See, for example, Peel-Elder Limited, Ontario Securities Commission Weekly Summary for the week ending February 24, 1972 and Revenue Properties Company Limited, Ontario Securities Commission Weekly Summary for the week ending May 4, 1972.

[251] New York Stock Exchange Company Manual, Expanded Policy on Timely Disclosure A-18 (July, 1968).

[252] Philip L. West, *Timely Disclosure — The View From 11 Wall Street* (1970), 24 Southwestern Law Journal 241 at 246.

Stock Exchange is for the executive of the company involved to ask himself, "would this information prompt me to risk my own funds?", and secondly, if in doubt, disclose.[253]

The timely disclosure policies of both the Ontario Securities Commission and The Toronto Stock Exchange recognize that the interests of the company in maintaining confidential information concerning a proposed change or development might in certain cases cause harm to the company that would outweigh any possible damage to the investor from withholding the information. In such circumstances, for example the commencement of negotiations leading to a significant acquisition, the information need not be disclosed to the public at that time. However, it is essential that the corporate insiders who have the material information that is not being disclosed to the public for those reasons do not take advantage of the situation to trade in the securities of the company.

It is not within the scope of this material to deal with the problem of insider trading and the use by insiders of a corporation, their associates or affiliates, of "specific confidential information" for their own benefit in connection with transactions in securities of which they are insiders.[254] This matter is certainly a topic that must be fully dealt with at another time. However, the relationship between the problems of timely disclosure and improper use of confidential corporate information by insiders is direct and clear.[255] To the extent that information relating to material corporate changes or developments is fully disseminated to and absorbed by the investing public, it ceases to be confidential. Accordingly, the problem of improper insider trading under the Ontario Securities Act disappears upon public disclosure because the insider no longer possesses "confidential" information.

Compliance with timely disclosure policies, is, in most instances, good corporate practice in any event. Not only does timely disclosure of material changes avoid securities violations for trading by insiders, it satisfies the trading markets demands for corporate news, promotes corporate goals by creating publicity and avoids sanctions against the corporation, including suspension of trading, by either securities commissions or exchanges.[256]

*Effective Disclosure*

While "disclosure, again disclosure, and still more disclosure" has been the recurrent theme throughout American and Canadian securities legislation,[257] important and still unsolved questions have been posed about the

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[253] *Id.* at 242.

[254] Ontario Securities Act, *supra*, note 101, s. 113(1); Canada Corporations Act, R.S.C. 1970, c. C-32, am. S.C. 1969-70, c. 70, s. 100.4(1); Bill 154, s. 150(1).

[255] See, Louis Loss, *The Fiduciary Concept as Applied To Trading By Corporate "Insiders" In The United States* (1970), 33 The Modern Law Review 34; and *Securities and Exchange Commission* v. *Texas Gulf Sulphur Co., et al.*, 258 F. Supp. 262 (S.D.N.Y. 1966); aff'd in part and rev'd in part 401 F. 2d 833 (2d Cir. 1968) (en banc); cert. denied, 394 U.S. 976 (1969).

[256] See, Alan R. Bromberg, *Disclosure Programs for Publicly Held Companies — A Practical Guide,* 1970 Duke Law Journal 1139.

[257] I Loss, *supra,* note 6, at 21.

nature of such disclosure — disclosure to whom and how? Unless disclosure is effectively communicated to the investor, the fundamental purpose of the continuous disclosure system is not achieved. The problem of effective disclosure was raised almost immediately after the enactment of the Securities Act of 1933. A later Chairman of the Securities and Exchange Commission and a current Justice of the Supreme Court of the United States remarked that the average public investor would not find the complicated technicalities of a prospectus too helpful.

> But those needing investment guidance will receive small comfort from the balance sheets, contracts, or compilation of other data revealed in the registration statement. They either lack the training or intelligence to assimiliate them and find them useful, or are so concerned with a speculative profit as to consider them relevant . . . (however) even though an investor has neither the time, the money, nor intelligence to assimilate the mass of information in the registration statement, there will be those who can and who will do so, whenever there is a broad market. The judgment of those experts will be reflected in the market price. Through them investors who seek advice will be able to obtain it.[258]

While the ultimate usefulness of the disclosures contained in a prospectus is unchallenged, legislators and securities administrators have attempted over the years to increase the benefit of the prospectus by making it more concise, readable, intelligible and relevant for the average investor.[259] The proposals of Bill 154 are the logical development of this trend. Public offerings may be made only be reporting issuers[260] that have previously filed a cornerstone statement containing "full, true and plain disclosure of all material facts relating to the affairs of the issuer."[261] The reporting issuer must then file an offering circular "relating to the offering of such security",[262] which offering circular shall, "when considered together with the cornerstone statement and any other documents, reports or material filed with the [Ontario Securities] Commission in respect of an issuer, provide full, true and plain disclosure of all material facts relating to the security proposed to be issued."[263] To some extent, the concept of the offering circular incorporating by reference the public disclosures already on file is analogous to the Form S-7 short form registration statement of the Securities and Exchange Commission available for established issuers reporting under the Securities Exchange Act of 1934

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[258] William O. Douglas, *Protecting The Investor* (1933), 23 Yale Law Rev. 508 at 523-524.

[259] See, Kimber Report, *supra,* note 3, at Part V; Wheat Report, *supra,* note 1, at Ch. III; Merger Report, *supra,* note 5, para. 2.28 and Securities Act of 1933 Release No. 5276 (July 26, 1972).

The Securities and Exchange Commission is equally concerned with the quality of disclosure in the quarterly and other interim reports on operations by reporting companies and the need to supplement the statutory requirements to provide information needed for a proper understanding of the reports. See, Securities Exchange Act of 1934 Release No. 9559 (April 5, 1972).

[260] Bill 154, s. 69(a).

[261] *Id.* s. 59 and s. 62(1)(a).

[262] *Id.* s. 69(b).

[263] *Id.* s. 75(1)(a).

offering securities for cash.[264] The offering circular, however, would be mandatory for all issuers, irrespective of their size or for how long they have been reporting issuers. In view of the fact that Bill 154 states only that an offering circular shall comply as to form and content with the statutory requirements and the regulations,[265] it is not possible at the present time to determine whether the issuer and the underwriter have the right to include material in the offering circular that has been previously included in the cornerstone statement. The experience with the Form S-7 in the United States has been that issuers have included material in the prospectus that has exceeded the requirements of Form S-7,[266] and it is expected that similar results will follow with the use of the offering circular, especially for junior or recently established issuers.

In the United States, attempts have also been made to widen the area of dissemination of prospectuses to proposed investors during the pre-effective period[267] and the Wheat Report stated that, as a matter of policy, "to the extent practicable, all prospective investors in a first public offering should receive a copy of the preliminary prospectus a reasonable time in advance of the effective date and well in advance of the mailing to them of a confirmation of sale."[268] The Kimber Report re-affirmed that "it is essential that a prospective purchaser should have adequate opportunity to review the prospectus before a legal obligation to purchase arises,"[269] and the Ontario Securities Act continues the provision that a broker selling securities in the course of a distribution to the public is required to forward a copy of the prospectus to the proposed purchaser and that the purchase agreement is not binding on the purchaser if he advises such broker within two days of receiving the prospectus that he has decided not to buy the security.[270] Under Bill 154, some purchasers of a security in the course of a distribution have the right to request

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264 Form S-7 short form registration statement is available for an established reporting company under the Securities Exchange Act of 1934 that has complied with its financial and proxy requirements for at least three fiscal periods, that has consolidated net income after taxes of at least $500,000 for each of the last five fiscal years and that meets certain other conditions. See, Wheat Report, *supra,* note 1, at 74-77 and General Instructions to Form S-7.

The trend towards the increased use of the short form prospectus or registration statement is evidenced by amendments to Form S-16 under the Securities Act of 1933 which became effective August 15, 1972: Securities Act of 1933 Release No. 5265 (June 27, 1972).

265 Bill 154, s. 75(1)(b). The Ontario Securities Commission has indicated that it is intended that the offering circular should never be longer than eight pages: Ontario Securities Commission Weekly Summary for the week ending June 29, 1972, Supplement "X" at 17.

266 Wheat Report, *supra,* note 1, at 76.

267 *Id.* Ch. IV.

268 *Id.* at 114.

269 Kimber Report, *supra,* note 3, at para. 5.24.

270 Ontario Securities Act, *supra,* note 101, s. 64; see, Bill 154, s. 78. S. 78(2) of Bill 154 needs tightening up because it appears that a purchaser may be able to re-open his period of recission by requesting a cornerstone statement.

the underwriter to deliver a copy of the latest cornerstone statement of the issuer in addition to receiving a copy of the offering circular.[271]

The structure of the Ontario Securities Act and the special procedures required by the issuer and the underwriter to qualify securities for sale to the public on the occasion of a new issue enable the distribution of prospectuses or offering circulars to purchasers to be completed without difficulty. This direct communication to the public investor of the document containing the required disclosure at the time of a new issue is beneficial and, in the totality of the disclosure system, essential. If the offering circular under Bill 154 cannot include information contained in the cornerstone statement, it is doubtful that the present level of direct communication of disclosure will be maintained. This is not to say that the decision of the average public investor to invest or not to invest is in fact based solely on his evaluation of the technical financial and other information disclosed in the typical prospectus. At the very least, the delivery of the prospectus is direct disclosure of material facts and thereby optimum disclosure to the public investor and it accordingly provides him with the opportunity to make his own investment decision based on such facts. This is the maximum that the disclosure philosophy can provide and it can be achieved with relative ease on the special occasion of a new issue.

Whether the average public investor in fact bases his investment decision on his own judgment of the facts so disclosed to him by a prospectus and without professional aid is subject to some doubt and to confirmation by behavioural studies. It is virtually impossible for any individual not trained in current financial accounting, for instance, to understand the combined financial statements of companies participating in the acquisition and merger process of diversified businesses and accounting on the pooling of interests basis. The best educated guess today is that the average lay investor probably relies on professional investment advice to some degree in reaching investment decisions, even when he has a prospectus before him. Some commentators have even stated that "the concept that a prospectus enables the investor to act in informed fashion without professional aid is a delusion."[272]

As noted earlier, the need of the public investor for professional investment assistance to evaluate the required disclosures in reaching investment decisions has been recognized since 1933. The Wheat Report noted that:[273]

> It was recognized from the beginning that a fully effective disclosure policy would require the reporting of complicated business facts that would have little meaning for the average investor. Such disclosures reach average investors through a process of filtration in which intermediaries (brokers, bankers, investment advisers, publishers of investment advisory literature and occasionally lawyers) play a vital role.

However, that a prospective purchaser may be unable in today's complex

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[271] Bill 154, s. 78(1)(b). Bill 154 also provides that shareholders of reporting issuers may obtain copies of the cornerstone statement: s. 68(2). The cross-reference in s. 78(1)(b) to s. 68(2) of Bill 154 is confusing and limits the right to proposed purchasers who are already shareholders of the issuer.

[272] Homer Kripke, *The SEC, The Accountants, Some Myths and Some Realities* (1970), 45 New York University Law Rev. 1151 at 1165.

[273] Wheat Report, *supra*, note 1, at 52.

financial society to make an informed investment judgment based solely on the materials disclosed to him in a prospectus has lead a United States commentator to ask recently whether the basic purpose of the Securities Act of 1933 may not be based on false premises and to state, in the interests of investor protection, that "it may well be that we will have to resort to means of protection that go beyond the protection now afforded by the Federal statutory scheme."[274] As noted earlier, the Ontario Securities Act presently contains authority upon which to base any such additional safeguards for investor protection and Bill 154 proposes an extension of this authority.[275]

Even assuming the continued function of sophisticated interpreters of financial information and reliance on the "filtration process," the problems of determining the most efficient methods of disclosure of material corporate information to the public investor in the continuing and integrated disclosure system for reporting issuers has yet to be finally solved. Should all, some or none of the information contained in the periodic reports required to be filed by "reporting companies" be required to be communicated directly to the shareholder? How far should the continuing disclosure system, as opposed to disclosure at the occasion of a special offering, be based on direct disclosure policies and when and how far should reliance be placed on the "process of filtration" of material corporate information through professional security analysts? Some advocate direct disclosure as the main policy base, arguing "that *direct* communication is the key to effective disclosure . . . (that) unless there is direct transmission of disclosure material, there is not real communication."[276] On the other hand, if "only the filtration process can produce informed investment decisions"[277] direct communication of all material disclosed under the continual disclosure system may not only be impractical and costly but unnecessary. The Merger Report did not contemplate that all periodic reports filed by "reporting companies" would "be delivered to investors as a matter of securities law"[278] and, accordingly, impliedly recognized the need to rely on the operation of the "filtration process."

It seems clear that "in the total scale of *effective* disclosure, mere burial in the public file without any dissemination at all is obviously at the low end of the scale."[279] Similarly, the Wheat Report recognized that it would be impractical to expand the periodic reporting requirements of the Securities Exchange Act of 1934 without first improving existing means of communicating those reports[280] and devoted Chapter IX to a review of the "microfiche system". The Merger Report also noted that the continuing disclosure "system recommended is ineffective if the result is merely to fill filing cabinets in the Commission's offices."[281] No examination of the problem was made in the Merger

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[274] A. A. Sommer, Jr., *Random Thoughts on Disclosure as Consumer Protection* (1971), 27 The Business Lawyer 85 at 89.

[275] See text commencing at note 49 *supra.*

[276] Hugh L. Sowards, *The Wheat Report and Reform of Federal Securities Regulation* (1970), 23 Vanderbilt Law Rev. 495 at 499.

[277] Homer Kripke, *supra,* note 272 at 1165.

[278] Merger Report, *supra,* note 5 at para. 2.40.

[279] Cohen, *supra,* note 11 at 1352.

[280] Wheat Report, *supra,* note 1 at 34 and at 313.

[281] Merger Report, *supra,* note 5 at para. 2.46.

Report and only a short reference was made to a commercial service that might be available to supply copies of disclosure material on the public files.[282] Recently, however, the Ontario Securities Commission has commenced publishing in its Weekly Summary the information contained in Forms 11 and 12 under the regulations of the Ontario Securities Act, being the reports of sales of securities made to and subsequent resales made by institutional and exempt purchasers, vendors of assets in consideration for securities and private purchasers under the executions contained in sections 19(1)3, 19(1)9b and 19(3) of the Ontario Securities Act.[283] There would seem every reason for the Ontario Securities Commission to increase the public dissemination of disclosure material placed in its public files by the expanded use of its Bulletin and Weekly Summary and hopefully such trend will continue.

The problem of effective disclosure of material corporate information contained in filed public reports continues unresolved and the accessibility to and dissemination of such information must be dealt with in the foreseeable future.

## VII. SUMMARY

The Merger Report was of the view that when "the [present] regulatory scheme is examined as a comprehensive whole it becomes apparent that we are extremely close to a continuing disclosure system approximating in total a prospectus standard of disclosure."[284] There is little doubt that in Ontario the base has been laid for the creation of a co-ordinated disclosure system that, ideally, should operate so that the public files contain, at any given time, information substantially equivalent to a current prospectus — in quantity, quality, timeliness and accessibility — with regard to any security in which there is active investor interest.[285] The Vice-Chairman of the Ontario Securities Commission stated recently that Ontario is presently about two-thirds of the way there and that goals set out in the Merger Report are those towards which the Ontario Securities Commission is currently moving.[286] Bill 154 proposes to complete the statutory framework within which the integrated disclosure system will develop. Opponents to the creation of such integrated and co-ordinated disclosure system based on concepts of reporting issuers and the current availability of timely information concerning issuers and their securities appear non-existent.[287]

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282 *Id.* para. 2.47.

283 Ontario Securities Commission Weekly Summary for week ending April 27, 1972; Ont. Reg. 794/70, s. 11(1), as amended by Ont. Reg. 160/72.

284 Merger Report, *supra,* note 5 at para. 2.08.

285 Cohen, *supra,* note 11 at 1368.

286 Harry S. Bray, Q.C., March 4, 1972, Osgoode Hall Law School Corporate and Securities Law Programme.

287 The Merger Report itself has been labelled as a "Chaff Report", or at best shredded wheat, and criticized for failing "to come up with anything new or anything in any way tailored to the Canadian scene." See, Warren M. H. Grover, *A Comment on the Report of the Committee of the Ontario Securities Commission on the Problems of Disclosure Raised for Investors by Business Combinations and Private Placements* (1971), 23 Administrative Law Rev. 309.

The philosophy of disclosing material facts to the investing public is not new. The present objectives have evolved from the changed climate of opinion about the confidentiality of corporate information and from the needs of a rapidly expanding class of public investors for material and current facts upon which to base investment judgments. The integrated disclosure system also assists in solving the vexing problem of secondary distributions of securities to the public through the conduits of essentially non-public offerings without adequate disclosure to the investing public at the time of resale by the original purchaser. The integrated disclosure system needs many refinements, especially in the evolving areas of the quality of disclosure, including financial disclosure, effective disclosure and the accessibility of information. Some questions may be raised concerning the rights of an issuer to become a "reporting issuer" under Bill 154 based solely on full disclosure principles and concerning the lack of a meaningful holding period for securities of reporting issuers purchased pursuant to some of the exemptions of the offering circular requirements.[288] In addition, the present lack of a national securities authority in Canada, with the power to enforce compliance of uniform disclosure provisions throughout Canada, may hamper its effectiveness unless there is unique cooperation between provincial legislators and securities authorities.[289] Nevertheless the integrated disclosure system is a goal to be pursued and a vital aspect of disclosure to be expanded even if its complete refinement and efficiency cannot be foreseen. The very nature of the judicial process, founded on experience and the felt necessities of the time, does not allow man's syllogisms to be so easily translated into law. In the words of Mr. Justice Holmes, "the truth is, that the law is always approaching, and never reaching, consistency. It is forever adopting new principles from life at one end, and it always retains old ones from history at the other, which have not been absorbed or sloughed off. It will become entirely consistent only when it ceases to grow."[290]

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[288] See text relating to notes 55, 117, 137, 152 and 217 *supra*.

[289] The basic uniformity of present securities legislation in Ontario, Manitoba, Saskatchewan, Alberta and British Columbia and the cooperation evidenced in the establishment of the Canadian Provincial Securities Administrators' National Policies in April, 1971 are favourable portents.

The address of the Federal Minister of Finance, The Honourable John N. Turner, to The Investment Dealers' Association of Canada on June 16, 1972 indicates a revived interest of the Federal Government to assume an active role in the securities industry. Mr. Turner stated that in order to achieve an increased depth and breadth of our national capital markets, "we must move in an orderly way toward the development of a uniform national system of securities regulation and a national exchange system."

See also a report in The Wall Street Journal, July 7, 1972, that a survey of the Canadian investment community indicates several large dealers and institutions favour setting up some sort of national securities commission.

[290] Oliver Wendell Holmes, Jr., *The Common Law* (1881, Little, Brown & Co., 49th printing) at 36.