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Book Review: M.Gillen "Securities Law in Canada" (Carswell, 1992)

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Securities Law in Canada by Mark R. Gillen (Scarborough, Ontario, Carswell, 1992, xxxvii and 483pp., $78.00 (bound), $48.00 (paperback))

As a neophyte securities law teacher, I approached Professor Gillen's book, *Securities Law in Canada*, in hopeful anticipation. Would it be the useful, up-to-date teaching tool, suitable for students with little or no background in the area, that is seriously

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lacking in the Canadian securities law bibliography? I was not disappointed. The book is a very readable, well-organized and comprehensive overview of a subject often considered overly technical and abstruse by students.

By and large the book follows the established format of a basic securities law course. After two very useful introductory chapters on the nature of securities markets, which provide a helpful set of definitions,[1] Chapter 3 provides a brief description of the history of Canadian securities regulation, a discussion of its avowed purposes, and an account of the major sources of provincial regulation. Chapters 4 to 11, along with Chapter 14, outline the substantive requirements for the valid issuance of a prospectus,[2] the potential liability consequences of doing so, continuous disclosure obligations for issuers, exemptions from the prospectus requirement, insider trading, takeover and issuer bids, and enforcement mechanisms. In short, the book integrates a wide swath of statutory and regulatory material in a careful and concise manner.

Each of the chapters is coherently organized and is characterized by crisp language and clear explanations. As an example, let us consider the structure and content of Chapter 6 dealing with continuous disclosure. The chapter recognizes that on-going reporting obligations "are at the heart of modern securities regulation in Canada" and are also "essential" to an understanding of the operation of the "closed system" in the regulatory scheme.[3] It opens, therefore, with a discussion of the purposes and benefits of a continuous disclosure approach to regulation, followed by a brief rendition of the difficulties of such an approach.[4] Next, a preliminary conceptual matter, the definition of a "reporting issuer", on which the application of the continuous disclosure requirements depends, is dealt with. The chapter then proceeds to identify and describe the various ongoing disclosure requirements imposed on reporting issuers:[5] (i) financial state-

[1] Including: different kinds of securities, the characteristics of different types of shares, the ways in which securities can be distributed and traded, the concept of efficiency and methods for valuing securities.

[2] For an account of the types of prospectus that deviate from the model of the "long-form prospectus", see Chapter 8.

[3] Chapter 6, p. 143. The "closed system" refers to the possibilities provided in the statute for exempting issuers from having to comply with the prospectus requirement. This topic is discussed in Chapter 7.

[4] These issues are taken up in more detail in Chapter 9.

[5] Along with, where relevant, a discussion of the possibilities of obtaining exemptions from these specific obligations.

ments; (ii) proxy circulars; (iii) insider reports, and (iv) timely disclosure of material information.

Professor Gillen quite properly pays closest attention to the ambiguities involved in the last of these requirements. As he points out, the inadequacy of statutory direction here, as in other areas of securities law, is supplemented by a policy statement of the Canadian Securities Administrators,[6] and a good account is provided of the terms of National Policy 40. However, from a student's point of view, discussion of some examples to show the difficulties of making materiality judgments, perhaps drawn from Securities Commission decisions, or even a more elaborate treatment of the issues raised by the *Calpine*[7] case would have been useful. Finally, the chapter canvasses the range of sanctions which can be mobilized where continuous disclosure requirements have not been complied with, or have been complied with inadequately.

Professor Gillen returns to the arguments in favour of and against a mandatory disclosure scheme in Chapter 9.[8] Economists have long been interested in measuring the effects of a mandatory disclosure regime on the pricing of new-issue securities and on the risks involved in investing in them. He argues convincingly that the empirical studies he summarizes "do(es) not resolve the question of the effect of mandatory disclosure" and that further study is required. This point is of heightened importance in the Canadian context. Since one purpose of the existing research is to test the hypothesis that mandatory disclosure increases public confidence in the securities markets, another approach is to examine empirically the characteristics of investors in the market place. Professor Gillen proceeds to canvass arguments concerning the ineffectiveness of the mandatory disclosure system based on: (i) an inappropriate emphasis on unsophisticated investors in the design of the rules; (ii) the usefulness or otherwise of the specific information provided for by the rules; and (iii) the adequacy of market discipline and non-regulatory incentives in ensuring

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[6] He also rightly points out that the legal authority for this practice is questionable.

[7] The B.C. Court of Appeal decision in this case, noted in the book at p. 164, has now been overturned by the Supreme Court in *Pezim v. British Columbia (Superintendent of Brokers)* (1994), 114 D.L.R. (4th) 385, [1994] 2 S.C.R. 557.

[8] In this reviewer's view, a closer integration of the empirical evidence described in Chapter 9 with the discussion of the rules themselves in Chapters 4 and 6 might have served to give students a better appreciation of the policy issues involved.

adequate information. The alternative argument that market failure problems *require* a mandatory disclosure regime is also discussed. Although the author ultimately takes no position on the relative weight to be attached to these arguments, he performs a valuable service in alerting students to the fact that legal rules are often established and applied in conditions of uncertainty as to their ultimate effects.

What follows is an undoubtedly idiosyncratic list of things that are particularly useful about this book. As mentioned, the definitions chapter (Chapter 1) provides clear explanations so as to demystify securities market jargon. The book breaks down provincially-based blinkers by providing in the footnotes to the text, a useful cross-referencing system for similar provisions in different provincial statutes and regulations, and also points out substantive differences in provincial regulation.[9] Chapter 13 provides an excellent overview of the nature and regulation of mutual funds, a topic of obvious and increasing importance as securities markets continue to institutionalize. Chapter 7 is to be especially commended for its assistance in guiding students through the maze of exemptions from the statutory prospectus requirements, by categorizing them according to their underlying objectives. The book also contains a useful index and a comprehensive bibliography of secondary material for those wishing to pursue particular issues further.

On the other hand, there are a few problematic omissions or superficialities of treatment which detract from the comprehensiveness of the book. Its utility as a reference tool is somewhat diminished by the absence of a table of cases, especially for provincial Securities Commission decisions. More substantively, a number of major provincial policy initiatives are inadequately addressed. For example, the discussion of the requirements imposed on issuers by virtue of OSC Policy 5.10 is too abbreviated to give an adequate sense of its significance to corporations and regulators.

This policy obliges issuers to provide regular information in the form of an Annual Information Form (AIF) incorporating a Management's Discussion and Analysis (MDA) component.[10] Professor Gillen briefly discusses the AIF in the context only of POPs (Prompt Offering Prospectuses) and Shelf Prospectuses,

[9] See for example Chapter 6, footnotes 22 (at p. 149) and 96 (at p. 166).

[10] The AIF requirement was first adopted by the OSC in (1989), 12 O.S.C.B. 4275. The AIF requires issuers to provide various items of information, including the jurisdiction of incorporation of the issuer and the identity of its subsidiaries, a narrative description of the issuer's business, and selected consolidated financial information. See Policy 5.10 for further details concerning the contents of the AIF and the MDA.

types of short-form prospectuses primarily only available to senior issuers who have already built up an adequate disclosure record.[11] However, the only mention of the MDA component of Policy 5.10 is in the concluding chapter of the book, with little detail being provided. The specific obligations imposed by Policy 5.10 have resulted in some confusion for issuers and their legal advisors, as evidenced by the close, on-going monitoring of the contents of these documents undertaken by the OSC for some time after the introduction of the policy.[12] Expanded discussion of the controversial and innovative MDA requirements, the importance with which they are viewed by regulators, as well as the arguments for and against their existence, might have been a valuable addition to Chapter 6, dealing with continuous disclosure.

Another significant Ontario-focused regulatory innovation which receives little substantive consideration is Policy 9.1.[13] This policy creates a procedural scheme to be followed by issuers who wish to engage in, among other things, related party transactions or going private transactions. At the time of its introduction, the policy was a major source of controversy because of the unprecedented requirements it was said to impose on issuers contemplating such transactions. Some detail concerning the proposed obligations here would have enhanced the coverage and relevance of the book. Presumably, the rationale for the absence of detail about Policies 5.10 and 9.1 has to do with their then specificity to the Ontario regulatory regime, but they may well be a portent of things to come in other jurisdictions.[14]

Paradoxically, one of the book's strengths may also be a

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[11] See Chapter 8, at pp. 225-26 and p. 235.

[12] See Office of Chief Accountant, *1991 Report on Management's Discussion and Analysis* (1991), 14 O.S.C.B. 5848 and OSC *Guide to MDA Disclosure* (1993), 16 O.S.C.B. 375.

[13] The current version of this policy was first published in draft form in (1990), 13 O.S.C.B. 2075. The policy is referred to in passing in a footnote (note 148) in Chapter 11, dealing with takeover bids, at p. 353.

[14] In the interval since Professor Gillen's book was published, the legal status of policies like 9.1 and possibly 5.10 may have become questionable. This results from the recent case of *Ainsley Financial Corp. v. Ontario (Securities Commission)* (1993), 106 D.L.R. (4th) 507, 14 O.R. (3d) 280 (Gen. Div.), and the events which followed. The decision in this case that the OSC had no jurisdiction to issue mandatory policies was quickly followed by the establishment of a provincial Task Force on Securities Regulation, which issued its final report, *Responsibility and Responsiveness: Final Report of the Ontario Task Force on Securities Regulation* in June 1994 (Toronto, Queen's Printer). Legislation to enact the recommendations of the Task Force has very recently been proclaimed by the Ontario Legislative amending the Securities Act, R.S.O. 1990, c. S.5.

weakness. The effort to find consistency, which a trans-provincial perspective contributes to the discussion of securities law, makes it difficult to pay attention at the same time to variations in the *institutional* aspects of securities regulation, and in particular to discuss in detail the role of particular provincial agencies and self-regulatory organizations in interpreting and applying the written rules. In writing this book, Professor Gillen's intention was to analyze the content of the statutes and regulations comprising the body of securities law, supplemented, where relevant, by agency policy statements. It is perhaps unfair to criticize an author for not writing a book he did not intend to write. However, a more pervasive acknowledgement of the importance of institutional discretion in interpreting statutory and regulatory language,[15] and of the role of interest group politics in framing the contents and application of regulatory policy, would have added a valuable dimension to students' understanding of this regulatory terrain. The absence of such an approach reinforces the view which permeates legal textbooks that technical rules are free of value-laden assumptions and that institutional politics and practices do not play a constitutive role in the deployment of legal rules to reinforce particular visions of the marketplace.

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The Ontario Personal Property Security Act, Commentary and Analysis, by Jacob S. Ziegel and David L. Denomme (Aurora, Canada Law Book Inc., liv and 679 pp., $115).

In 1991 a volume of this Journal was devoted to Essays in Honour of Jacob S. Ziegel, its Editor in Chief.[1] In one of those essays a commentator observed that "Professor Ziegel is most certainly the 'father' of the modern Canadian personal property security law" and that "[w]ithout his ceaseless efforts over the last 25 years, most if not all Canadian common law jurisdictions would still be in the 'dark ages' in terms of development in personal property security law".[2] The commentator went on to point out the significant role Professor Ziegel played on key committees that have shaped this legislation.[3] Over the years his publications

[15] An infamous example is the statutory invocation and agency interpretation of the "public interest".

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[1] (1991), 19 C.B.L.J.

[2] R.C.C. Cuming, "Personal Property Security Law: The New Kids on the Block", *ibid*, at p. 191.

[3] *Ibid.*