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THEORETICAL ASPECTS OF SECURITIES REGULATION: AN APPRAISAL OF CANADIAN "AMPHIBIANISM"

Dr. Md. Anowar Zahid

1. Introduction

In the domain of securities law scholarship there has always been a debate on how a securities market should be regulated. This has given rise to two antagonistic theoretical approaches: merit review, and full disclosure. The former underlies the state level securities regulation and the latter the federal level regulation in the United States of America. The merit review theory, which is also called the blue sky theory[1], was first considered in the United Kingdom and later developed in the US in the very early eighteenth century. The disclosure theory took its ground in the UK and later was borrowed in the US. Today all over the world the disclosure theory has become most popular. Canada has, however, taken a middle path. There the securities law, in general, requires issuers offering securities to the public for distribution (e.g., sale of securities from treasury, or resale after redemption) to make full disclosure of information to the public concerning securities so that the investing public can make informed investment decision. Once full and true disclosure has been made the regulatory authority grant approval to the issue. Despite full disclosure, however, they may decline approval to the issue in public interest in general and on some specified grounds in particular, e.g., providing unscrupulous consideration to promoters, financial incapability to carry out business, unacceptability of professionals engaged in preparing financial reports, etc. Canada has adopted this middle-path regulatory approach, termed as "amphibianism", for the protection of the investing public and thereby to promote the capital market. This paper will evaluate the Canadian approach keeping the possibility in mind that other jurisdictions as well as international securities market regulators may consider it to improve respective market regulation.

2. Merit Review Theory

This theory posits that securities regulator or any other government authority like the registrar of joint stock companies assess the 'economic viability of the security and underlying enterprise before allowing the

1. See, *infra* note 4.

issue to be offered to the public'.[2] If they consider that the sale of securities would jeopardize public interests, they can refuse approval to it. This is a paternalistic way of investor protection. For the first time England tried this theory, but rejected later. The Commission that was entrusted with the task of examining its merits submitted their observation as follows:

> Your Committee may observe that they have dismissed from their consideration every suggestion for a public enquiry by the registrar or other official authority, into the soundness, good faith and prospects of undertaking at this or any other stage of a company's formation. To make any such investigation into the position of every new company complete or effectual would demand a very numerous staff of trained officers, and lead to great delay and expense, while an incomplete or perfunctory investigation would be worse than none. It would be an attempt to throw what ought to be the responsibility of the individual on the shoulders of the State, and would give a fictitious and unreal sense of security to the investor, and might also lead to grave abuses.[3]

Later the theory received recognition, for the first time, in the US state of Kansas in the 1911 when Kansas was ridden with rampant fraudulent business practices in general and in securities business in particular, which are known as "blue sky" practices.[4] People of Kansas were largely agriculturists and ignorant even of simple business methods, which gave fraudulent businessmen an opportunity to exploit the people so much so that they could, so to say, 'sell building lots in the blue sky in

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2. R.A. Robertson, 'In search of the perfect mutual fund prospectus', (1999) 54 Bus. Law. 461, at p. 468-469.

3. One Clause of the Report Cd. 7779, 1895 quoted in T. Mulvey, 'Blue sky law', (1916) 36 Can. Law Times 37, at p. 45.

4. It is not certain when and how the term "blue sky law" did actually originate. But the frequent use of the term in different literature leads to the conclusion that it refers to anti-fraud law. In a study of the primary materials in this connection, Macey and Miller discovered that the earliest use of "blue sky" was from 1910. They quoted a press release issued by then Kansas Banking Commissioner, J.N. Dolley, (who is called the father of Blue Sky Law) as complaining that "enormous amount of money the Kansas people are being swindled out of by these fakers and 'blue-sky' merchants.' ": Letter from J.N. Dolley (Dec. 16, 1910), *reprinted in* Brief for Appellees at p. 33, *Merrick* v. *N.W. Halsey & Co.*, 242 U.S. 568 (1917) (No. 413) in J.R. Macey and G.P. Miller, "Origin of the Blue Sky Law", (1991) 70 Tex.L.Rev. 347 at 360 n. 59. The authors vetted some other materials, but failed to find the exact time and place of the origin

simple'.[5] Many unsophisticated securities investors lost huge amount of money in securities trading. In order to address this issue the Populist Party that won the general election in 1910 appointed J.N. Dolley, a former banker, the Bank Commissioner. He initially established a department in his office to carry out investigation into publicly offered securities. In this process when securities issuer applied to the Commissioner office for registration of the securities, the Commissioner, empowered by a statute[6], made a detailed examination of the state of affairs of the issuer and its securities. If he was satisfied that the issuer was not solvent or did not intend to do a fair and honest business, or in his judgment did not promise a fair return on the stocks, bonds or other securities offered for sale and the proposed security was not sound, he could refuse the permit[7] and thereby save the people from losing money in fraudulent or "blue sky" concerns.[8] A company, if registered, was obliged to submit semi-annual reports and to maintain various records with the Commissioner who could cancel the registration for "sufficient" cause.[9] Thus the Commissioner 'fathered the paternalistic approach to state security regulation'.[10]

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of the term. At last they reached the conclusion, though "highly speculative", that

> the phrase could not have been newly minted in 1910 without some explanation appearing in the historical record. Since the term evidently came out of Kansas, it seems most likely that it had long been in use there to describe some other type of fraudulent conduct outside the securities area, most likely fraudulent land promotions during pioneer days, and was simply borrowed for the context of securities fraud laws. (at p.360)

5. T. Mulvey, *supra* note 3, at p. 37.
6. "An Act to provide for the Regulation and Supervision of Investment Companies and providing penalties for the violation thereof" effective from 15 March 1911 T. Mulvey, *Canadian Company Law*, (Montreal: John Lovell & Son Ltd., 1913) at p.733
7. *Kan. L. 1911*, c. 133, s.5, quoted in L. Loss and E. M. Cowett, *Blue Sky Law*, (Boston: Toronto: Little, Brown and Co., 1958) at p. 8 n. 24.
8. J.N. Dolley revealed that "I estimate that it (Kansas Blue Sky Law) has saved the people of this state at least six million dollars since its enactment". : The report of the State Banking Commissioner, published Sept. 1, 1912, quoted in Mulvey, *supra* note 3, at p. 38. But "(t)here were no statistics or other evidence in the office of the Bank Commissioner in May, 1913, upon which such a statement could be founded". Mulvey, *ibid.*, at p. 39.
9. J.P. Williamson, *The Securities Regulation in Canada*, (Toronto: University of Toronto Press, 1960), at p.12.
10. Loss and Cowett, *supra* note 7, at p.9.

Soon after the official acceptance of the blue sky theory in Kansas other states of the US borrowed it in the area of their securities regulation. The theory gained popularity even beyond the national territory, namely in Canada pioneered by Manitoba in 1912. Later other provinces followed its suit.

3. Disclosure Theory

The disclosure theory postulates that the sale of securities by a corporation be allowed without governmental or administrative interference provided full disclosure of information concerning the securities is made to the prospective investors. The first and foremost end served by this theory is to provide information to the investors and thereby to make them independent in making their investment decision in light of the information disclosed by the issuer. The government or government agent entrusted with the responsibility of overseeing the securities markets, namely the securities commission, is required to ensure that such disclosure is made. It does not, in a paternalistic manner, determine the merit of the offerings and thereby does not decide for the investors as to whether investment should be made or not:

> [A]dministrators focus on whether the registration statement is misleading in any material respect or whether it omits any material information. They may demand that the issuer change the level of disclosure but may not affect the terms of the offering. Once the information contained in the registration statement is complete, accurate, and not misleading, the administrators must approve the registration statement, regardless of their opinion of the terms of the offering.[11]

The concept of corporate disclosure dates back to the 19th century English history of company law following the repeal of the *Bubble Act, 1720*[12] in 1825[13] which was the 'first attempt at a Company

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11. G. Gorder, "Compromise Merit Review- A Proposal for Both Sides of the Debate", (1984) 60 Wash. L. Rev. 141, at p. 143 note 14.

12. 6 Geo. 1, c. 18, cited in L. C. B. Gower, *Principles of Modern Company Law*, 5th ed. (London: Sweet & Maxwell, 1992), at xlvii.

13. Securities regulation in the sense of provisions concerning the licensing of brokers was first introduced in 1285 by a statute of Edward I. By the end of 17th century share trading and stock-broking were common in London. In 1697 the legislature passed 'An act to restrain the number and ill practice of brokers and stock-jobbers.' : 8 & 9 Wm. 3 (1697) c. 32, quoted in L. Loss, *Fundamentals of Securities Regulation*, (Boston and Toronto: Little, Brown and Company, 1983) at p. 1. During first and second centuries of the 18th century mushroomed the number of companies. Of them the most influential was the South Sea Company

Act'[14] in England. In fact, the *Joint Stock Companies Act of 1844*[15] was first to provide for the 'modern prospectus requirement'[16] and thereby to introduce a mechanism of disclosure as a 'safeguard against fraud'.[17] Through this legislation '(m)odern securities regulation began in England'.[18] For the next four decades no significant development took place. In 1889, when a question arose as to a director's liability for

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which was granted monopoly by the British Government to trade with South America and the Pacific Islands. The company flotation boom is popularly called the "south sea bubble". Fraudulent stock promotion by such companies (including the South Sea Companies) were rampant. In order to check this "gambling mania" the Parliament, instigated by the South Sea Company, passed the *Bubble Act* in 1720. Gower, *ibid.* at p. 25. It declared mischievous undertakings void and illegal (s. 18), and imposed penalties on brokers dealing in securities of illegal companies (s. 21). see, Gower, *ibid.* at p. 26. However, the passage of the *Bubble Act* left an adverse impact on the business of South Sea Company alongside the business of other speculative enterprises, though the real purpose of this statute was 'not to tone down a speculative boom in shares of other joint stock companies but to reduce their competition with South Sea Company for public funds'. G.R.D. Goulet, *Public Share Offerings and Stock Exchange Listings in Canada* (North York, Ontario: CCH Canadian Limited, 1994), at p. 83. The public lost confidence in the stock market, which caused a meteoric fall of the share prices of the South Sea Company. The Company could not recover from this position and ultimately it along with its contemporaries burst out like bubbles in the sea. A poem reflects on the fate of the South Sea Company and its contemporaries, and their effect on the then society as follows:

> The Bubbles now are banished from the Light,
> And hide their heads in Realms of Endless Night.
> Life vanishes away like to a Dream
> And what is now become of the South Sea Schemes.

A Gideonette ,*The Art of Stockjobbing*,(London: 1746, G.L.P.C., XVIII-46-3, quoted in Armand Budington, *The English Business Company after the Bubble Act 1720-1800*, (New York: The Commonwealth Fund, 1938) at p. 24.

14. Gower, *supra* note 12, at p. 26.
15. 7 & 8 Vict. C. 110 & 111.
16. Loss, *supra* note 13, at p. 2. The Bill of the 1844 act was prepared by William Gladstone, then President of the Board of Trade, who can be called the father of modern company law as it introduced three basic principles. First, it provided for incorporation by registration instead of special act or charter. Second, it distinguished company from private partnership requiring companies consisting of more than 25 members to register. Third, it provided for full publicity of information. : See Gower, *supra* note 12 at 39.
17. Gower, *supra* note 12, at p. 39.
18. Williamson, *supra* note 9, at p. 4.

misstatement in a prospectus, the House of Lords held that it was a good defence for the director that he (the director) believed, in good faith, in the truth of the statements, however unreasonable.[19] In the following year the *Directors' Liability Act*[20], which was passed to respond to the said liability decision, provided for liability of directors and promoters for any loss, resulting from an untrue statement in a prospectus, sustained by any subscriber of securities on the faith of the prospectus. Thereafter followed the *Companies Act of 1900*[21], which contained greater disclosure requirements. This Act, after amendment in 1907, was replaced by the *Companies (Consolidation) Act of 1908*[22] further widening the scope of disclosure. The purpose of this legislation was to 'to afford the investing public a means of ascertaining the true inwardness of flotations and by means of annual statements and reports of directors and auditors to disclose to the shareholders from time to time the methods by which the affairs of the company are conducted'.[23]

Subsequently the US chose this theory as the basis of the federal securities regulation statute, namely the *Securities Act of 1933*.[24] The erstwhile President Franklin D. Roosevelt underlined that '(t)here is ... an obligation upon us to insist that every issue of new securities to be sold in interstate commerce shall be accompanied by full publicity and information, and that no essentially important element attending the issue shall be concealed from the buying public.'[25] The ultimate purpose is to 'to protect the public with least possible interference to honest business'.[26] As such, through disclosure of information an open and transparent market would be established where the potential investors, in order to own a security, would compete with each other to reach an "equilibrium price". This "equilibrium price", also called "accurate price"[27], 'should

19. *Derry* v. *Peek* (1889), 14 A.C. 337 (H.L.).
20. 53 & 54 Vict. C. 60.
21. 63 & 64 Vict. C. 48.
22. 8 Edw. 7, C. 69.
23. *Supra* note 3.
24. 15 U.S.C. 77a (1995).
25. *77 Cong. Rec.* (March 29, 1933), at p. 955 (Message from President Franklin D. Roosevelt).
26. *Ibid.*
27. See, R. A. Robertson, "In Search of the Perfect Mutual Fund Prospectus", (1999) 54 Bus. Law. 461 at pp. 468-69.

reflect as nearly as possible the security's "intrinsic value"'.[28] In other words, if a security's price reflects its fundamental value, it will be called an accurately priced security. Such a security, in turn, ensures 'that (investment) capital is properly allocated, and this is good for society in general'.[29]

4. Canadian Model- "Amphibiansim"

Historical Account of Theoretical Layout of Canadian Securities Regulation

Securities regulation in Canada started in the guise of corporate legislation in late 1870s.[30] Particularly, Ontario introduced securities regulation in 1891 by adopting the English *Directors' Liability Act of 1890.*[31] In 1897 it required the delivery of financial statements to the shareholders.[32] In 1907 *Ontario Companies Act*[33], based on the English *Companies Act of 1900*[34], was passed. It provided for wider scope of prospectus disclosure compared to the English act.[35] In 1912 the Ontario act introduced, among others, a provision of public offerings by underwriters.[36] After 1912, as mentioned earlier, the "blue sky" legislation was added to the disclosure legislation of Canada. Manitoba introduced it through the passage of the *Sale of Shares Act of 1912*[37], which was 'an exhibition of paternalism'[38] for other provinces of Canada. That "exhibition" impacted on the subsequent legislation of other provinces, such as Ontario incorporated blue sky provisions in the *Security Frauds Prevention Act of 1928.*[39] Those provisions concerned deterrence of fraud in security trading, and licensing of traders leaving the issuing aspect of new security outside of the company law area.[40]

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28. A. R. Rodier, "Prospectus Disclosure Under the Proposed Securities Act in Ontario: Problem in a Changing Environment", (1985) 23 U.W.O.L.Rev.21, at p. 23.
29. Robertson, *supra* note 27, at p. 468.
30. Goulet, *supra* note 13, at p. 84.
31. *Ibid.* at p.85.
32. *Ibid.*
33. S.O. 1907 c. 43.
34. 8 Edw. 7, C.48 cited in Gower, *supra* note 12.
35. Goulet, *supra* note 13, at p.85..
36. *Ibid.*
37. S.M. 1912, c. 75.
38. Mulvey, *Canadian Company Law*, (Montreal: John Lovell & Son Ltd., 1913) at p.734.
39. S.O. 1928, c. 24.
40. Goulet, *supra* note 13, at p.88.

In 1945 a landmark development took place in securities legislation with the passage of the Ontario *Securities Act*[41] which provided for a full, true and plain disclosure provision[42] on the one hand, and also for the regulator's (the Ontario Securities Commission-OSC) *discretion* to enforce that provision, on the other.[43] The discretion provision, in addition to

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41. S.O. 1945, c. 22.

42. *OSA, 1945*, c.22, s. 49(1) lays down the disclosure provision as follows-

    No broker or salesman shall trade in any security either on his own account or on behalf of a person or company where such trade would be in the course of a primary distribution to the public of the security until,

    (a) a clear and concise statement in the form prescribed by the regulations dated and signed by every person who is, at the time of the filing, a director or promoter of the person or company issuing the security or an underwriter or optionee of the security, containing a *full, true and plain* disclosure of all material facts including details of all options and any other information that may be prescribed by the regulations, has been filed with the Commission and a written receipt therefor received from the registrar; (emphasis added). ...

43. *Ibid.*, s. 52 provides for the discretionary power of the OSC as follows:

    The Commission may in its *discretion* accept for filing any statement or correcting statement, balance sheet, profit and loss statement or report submitted for filing under section 49 and direct the registrar to issue a receipt therefor unless it appears to the Commission that,-

    (a) the statement or any balance sheet, profit and loss statement or report which is required to accompany the statement,
        (i) fails to comply in any substantial respect with any of the requirements of section 49;
        (ii) contains any statement, promise or forecast which is misleading, false or deceptive; or
        (iii) has the effect of concealing material facts;

    (b) an unconscionable consideration has been paid or given or is intended to be paid or given,
        (i) for promotional purposes; or
        (ii) for the acquisition of property; or

    (c) the proceeds from the sale of the securities which are to be paid into the treasury of the company, together with other resources of the company, are insufficient to accomplish the objects indicated in the statement; or disclosure, allowed the OSC 'to enter the realm of *substantive* regulation of issues of securities'.[44] Thus for the first time, through this enactment, a compromise between the disclosure and blue sky theories was made by the Ontario Legislature, which may be termed as the "Amphibianism".

After 1945 the most remarkable reform to the *Ontario Securities Act* occurred in 1966 at the backdrop of securities scandals[45] of 1960s. Before the amendment, several Commissions were formed to study different problems having bearing, direct or indirect, on the securities market.

(d) such escrow or pooling agreement as the Commission deems necessary or advisable with respect to securities issued for a consideration other than cash has not been entered into.

This discretion provision has been retained in the subsequent amendments of the act with some additional situations of exceptions. A literal interpretation of the section may lead to the conclusion that if the exceptional situations existed, the OSC would not have any discretion, rather it must refuse to accept the prospectus: see Baillie, 'The Protection of the Investor in Ontario', (1965) 8 Can. Pub. Adm. 172 at 220. This interpretation has some inherent problems with regard to the exercise of the discretion by the OSC director. Baillie, while interpreting the discretion provision contained in s 44 of the *OSA*, R.S.O. 1950, c.351 said, ' since many of the circumstances are matters of opinion rather than determinable fact, it makes jurisdiction dependent upon his own state of mind, although he is the person exercising the jurisdiction; and it places upon him the responsibility for deciding new criteria, other than the circumstances spelled out in the section, upon the basis of which to exercise his discretion.' Baillie, (1965) 8 Can. Pub. Adm. 172 at p. 220. Then he refers to the OSC's perception that 'it has a discretion only as to the existence of the circumstances' specified in the section. (at p.220). However, the purpose of such discretion is to 'insure from the outset that the public offering is being made on a fair and equitable basis'. : O.E. Lennox, 'Securities Legislation and Administration', in Law Society of Upper Canada, *Special Lectures- Company Law*, (Toronto: Richard De Boo Limited, 1950) 81 at p. 85.

44. Baillie, *ibid.*, at p.175.

45. Two events taking place in early sixties may be referred to. The first concerned the insider trading of Canadian Oil Company's shares before its takeover by Shell Oil in 1962 in absence of any law governing insider trading. Second, there was a decline in the price of shares of Windfall Oils and Mines Ltd. in July, 1964. The price fell from $5.60 to 80 cents in one day whereas it rose from 65 cents only at the beginning of that month 'amid rumours of an important mineral find in the area near Timmins, Ontario,... which proved false.' Both the events 'underlined the principle that a free and efficient marketplace could operate only in an atmosphere of full public disclosure'. Toronto Stock Exchange (TSE), *Toward an Ideal Market* (Toronto: TSE, 1983) at pp.15-16.

Those Commissions in their reports[46], despite the differences of their investigation areas, emphasized commonly on more disclosure provisions in the *OSA*, though they linked it (disclosure) to different regulatory objectives.[47] Thus disclosure was suggested as 'a testament to its versatility as a regulatory strategy'.[48] While underlining the importance of disclosure as a means of attaining the various regulatory objectives, all but the *Kimber Report* refused to concede a role to the OSC anything more than a facilitative one.[49] The *Kimber Report* advocated for broader discretionary powers of the OSC. For example, it suggested that the OSC be granted powers to refuse acceptance of a prospectus for filing by a company if it (the company) fails (a) to provide insider trading reports,[50] (b) to comply with the requirements of annual and interim reporting[51] and (c) to comply with proxy provisions.[52] It argued that the OSC should be given discretionary powers to enable it to function as an administrative agency,

46. *Report of the Royal Commission on Banking and Finance (Porter Report)*, (Ottawa: Queen's Printer, 1964), *Report of the Attorney General's Committee on Securities Legislation in Ontario (Kimber Report)*, (Toronto: Queen's Printer, 1965), *Report of the Royal Commission to Investigate Trading in the Shares of Windfall Oils and Mines Limited (Kelley Report)*, (Toronto: Queen's Printer, 1965), and *Report of the Royal Commission Appointed to Inquire into the Failure of Atlantic Acceptance Corp. (Hughes Commission)*, (Toronto: Queen's Printer, 1969). Porter Commission's main concern was to review the functioning of the financial system of Canada. Securities market was a component of the broad subject of inquiry. In its study the Commission focused on the development of the secondary securities markets with emphasis on the public confidence so that stock ownership increase. Kimber Committee was entrusted with a study to review the 'the provision and working of securities legislation in Ontario' in general and to look into the problems of takeover bids, insider trading, degree of disclosure, etc. in particular. The Kelley Commission was constituted to find out what caused the fall of share price of the Windfall Oils and Mines Ltd. in 1964, and whether there was any breach of the law. The Hughes Commission embarked on an inquiry into the activities and bankruptcy of the Atlantic Acceptance corporation.

47. The *Porter Report* connected it with increased ownership of shares and investor protection, *Kimber* with public confidence and market efficiency, *Kelley* with public protection and *Hughes* with public confidence and stability. M.G. Condon, *Making Disclosure: Ideas and Interests in Ontario Securities Regulation*, (Toronto: University of Toronto Press, 1998), at pp. 62-63.

48. Condon, *ibid.*, at p. 63.

49. *Ibid.*

50. *Kimber Report, supra* note 46, para. 2.31(e).

51. *Ibid.* ara. 4.07(f).

52. *Ibid.* para. 6.27(f).

which is responsible to bring about 'the enhancement of the position of the securities industry in the economic life of the province'.[53] Ultimately this recommendation was accepted by the legislature and relevant provisions were inserted into the *Securities Act of 1966*.[54] Thus "Amphibianism", introduced in 1945, and reinforced and confirmed in 1966, was retained as the theoretical base of modern securities law of Ontario and also of other provinces of Canada.[55]

Merit Review Provisions of Securities Legislation

Now the merit review provisions of the Ontario Securities Act may be looked at. Ontario provisions are being considered because Ontario is the biggest securities market of Canada and its law and policy are copied in the securities laws of other provinces.

In Ontario the distribution of securities (e.g., issuing securities from treasury, or resale of securities after redemption[56]) presupposes a prospectus to be accepted by the Ontario Securities Commission (OSC) unless filing of a prospectus is exempted by the statute or an exemption order has been granted by the OSC. Where an exemption is not available, an issuer must file a preliminary prospectus with the OSC with full, true and plain disclosure of material facts[57] and accompanied by requisite

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53. *Ibid.*

54. *OSA*, S.O. 1966, c.142. The *OSA* of 1966 has thus been commented to be 'the faithful conversion of the (Kimber) report's recommendations' H.S. Bray, 'Recent Developments in Securities Administration in Ontario: The Securities Act, 1966' in J.S. Ziegel, ed., *Studies in Canadian Company Law*, vol. I (Toronto: Butterworths, 1967) 415, at p.418. Following the 1966 *Ontario Securities Act* amendments have been effected to the securities legislation in other provinces. Hence, the *Kimber Report* is said to form the foundation of the modern securities regulation in Canada, 'even though it did not provide any greater degree of permanence or of uniformity than the earlier instance of Ontario's leadership in 1930'. : P. Anisman, 'The Regulation of Securities Market', in R. Cumming, ed., *Harmonization of Business Law in Canada*, (Toronto: University of Toronto Press, 1986), at p.78 (footnotes omitted)

55. For the brief history of adopting "Amphibianism" in other provinces of Canada, see Goulet, *supra* note 13, at p.83-89.

56. *OSA*, R.S.O. 1990 c.S5, s. 1(1) "distribution".

57. "Material fact" means 'a fact that significantly affects, or would reasonably be expected to have a significant effect on, the market price or value of such securities.' *OSA*, R.S.O c. S.5, s. 1(1) "material fact" The term is of undefined scope because whatever fact has actual significant effect or is likely to have such effect on the price or value of securities must be subject to disclosure. Whether a particular fact has such actual or probable effect depends on the circumstances of every particular case.

documentation including the board of directors' resolution approving it, technical reports, auditor's comfort letter and financial statements except the auditor's or accountant's report(s).[58] If it seems to substantially comply with the requirements of the securities legislation[59], the Director shall issue a receipt right away.[60] Thereafter the Director entrusts two members of the Corporate Finance Branch, usually prospectus lawyer and prospectus accountant, to review the preliminary prospectus and to determine whether it constitutes full, true and plain disclosure of all material facts.[61] After such review the issuer is given a comment letter requiring it to make corrections to defaults, if any. After removing the defaults, the issuer can file the final prospectus attaching supporting documents and receive the receipt for it.[62]

The OSC, after vetting, may give consent to the prospectus provided they are satisfied that the information required by the law has been furnished. It does not *normally* judge the merit of the securities proposed to be offered. There are, however, circumstances under which the OSC may go beyond the statutory requirement of disclosure and refuse receipting a prospectus in "public interest"[63] in general and on some defined grounds[64] in particular.

Public Interest

Section 61(1) of the *OSA* provides that 'the Director shall issue a receipt for a prospectus ... unless it appears to the Director that it is not in the public interest to do so.' But it does not define the term, "public interest". *Black's Law Dictionary* defines it to mean, *inter alia*, '(s)omething in which the public, the community at large, has some pecuniary interest, or some interest by which their legal rights or liabilities are affected.'[65] The power is bestowed on the OSC to decide 'what the public interest is and whether

58. See, for example, *OSA*, R.S.O. 1990, c. S.5, s. 54, *OSAR*, R.R.O. 1990, Regulation 1015, ss. 53-55.

59. *OSA*, *ibid.*, s. 54(1).

60. *Ibid.*, s. 55. This section reads thus- 'The Director shall issue a receipt for a preliminary prospectus forthwith upon the filing thereof'.

61. V. P. Alboini, *Securities Law and Practice*, 2d ed., (Toronto: Carswell, 1984), vol. I, at p. 15-9.

62. *OSA*, R.R.O. 1990, c. S.5, s. 61(1).

63. *OSA*, R.S.O. 1990 c. S.5., s. 61(1).

64. *Ibid.*, s. 61(2).

65. *Black's Law Dictionary*, *supra* note 172, *s.v.* "public interest".

the issuance of the given receipt is contrary to that public interest.'[66] For instance, in one case the OSC interprets the term to connote 'not only the interest of residents of Ontario, but the interest of all persons making use of Ontario capital markets.'[67] In this connection it may be noted that in forming its opinion as to public interest the OSC must take into account 'the exigencies of the individual cases that come before it'.[68]

Today the "public interest" phenomenon has become a cornerstone of the securities legislation in Ontario and in other provinces of Canada for the purpose of protecting the investing public. There are many cases in which the OSC has shown its concern and refused to accept prospectuses on this ground. Even before formal insertion of this provision the OSC exercised its discretion, under the previous *Securities Act*, in public's interest. In *Rivalda Investment Corporation Ltd.*,[69] a company proposed to seek funds from the public to invest in purchasing securities of speculative mining companies. The Directors of the company did not have any experience in the proposed business. The OSC considered them as the asset or liability of the company because '(u)pon their ability to assess the merits of the securities they propose to purchase will depend the success or failure of the company.'[70] Therefore, on the public interest ground it declined to accept the prospectus of the company until qualified directors were appointed. The OSC gave its reasonings as follows:

> The Securities Act is primarily a disclosure statute but Section 44(1) (now s. 61(1) and 61(2)) does give the Director a discretion in accepting prospectuses. This power must be exercised with caution. The Director or the Commission, should not, except in the clearest cases, impose their judgment on the merits of an issue, in place of the judgment of the investing public. The decision to purchase securities offered for sale must be that of the purchaser. However, there are situations where the Director and the Commission are entitled under the discretion in Section 44, to require that certain safeguards be adopted for the benefit of the public.

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66. Alboini, *supra* note 61, at p.15-29.
67. Per McKinlay J.A. in *Asbestos Corp.*, [1992] 15 O.S.C.B. 4973 at 4999, 58 O.A.C. 277, 97 D.L.R. 144, 10 O.R. (3d) 577 (Ont. C.A.).
68. *Ontario (Securities Commission)* v. *Mitchell*,[1957] O.W.N. 595 at 599, cited in *Gordon Capital Corp.* v. *Ontario Securities Commission* (1991), 1 Admin. L.R. (2d) 199, at 211 (Ont. Div. Ct.) (per Craig J.).
69. [Dec. 1965] *O.S.C.B.* 2.
70. *Ibid.*, at p.3.

> The inexperience of the Directors in the present case in our view calls for the imposition of some safeguards beyond that of disclosure. One hesitates to leave the responsibility for the investing of funds provided by the public solely in the hands of these inexperienced persons.[71]

That the *OSA* is not merely a disclosure statute was also upheld in subsequent decisions. In *Great Pines Mines Ltd.*,[72] for example, the OSC's power to issue policy statements[73] as guidelines for exercising its discretion was questioned. Could the OSC issue and maintain such policies under the discretion provision (section 44) of the then *Securities Act*? The OSC relied on *Rivalda* and said that it had the necessary authority in view of the broad discretion provided under section 44 and in the light of the purpose of protecting the investing public. Justice Kelly commented

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71. *Ibid.*, at 4.
72. [Feb. 1966] *O.S.C.B.* 7.
73. With regard to the Director's discretion under s. 61 various prospectus guidelines are laid down in Policy 5.1, which include the following:
    1. "Under s. 61(2)(c) of the *Securities Act* (Ontario) (the "Act") requires the Director of the Ontario Securities Commission to refuse to issue a receipt for a prospectus where it appears to him that proceeds received from the sale of securities to be paid to the treasury of the issuer, together with other resources, will be insufficient to accomplishing the purposes stated in the prospectus. One major resource is people. Sufficient of the directors and officers of the issuer should have knowledge and experience in the business for which funding is to be sought so that the Director will not conclude that the human and other resources are insufficient to accomplish the purpose stated in the prospectus. Where such knowledge and ability is not apparent in the directors and officers the Director may be satisfied where it is shown that the issuer has contracted for such services."
    2. "In a "best efforts" offering, the minimum subscriptions necessary to accomplish the purposes embodied in the prospectus must be specified. Section 27(1)7 [38(1)(7)] of the regulations made under the Act (the "Regulation") restricts this offering period to a maximum of 60 days or, with the consent of the Director and those already subscribing, for a longer period. During this period any subscriptions received must be held by a trust company or other acceptable depository who will, when the minimum amount necessary is received, turn it over to the issuer or will, if the minimum is not received within the time specified, return the money to the individual subscribers."
    3. "Where securities of a class may be partially redeemed or repurchased, the manner of selecting the securities to be redeemed or repurchased should be clearly stated."

such an authority to be 'a self-conferred extension of the power exercisable, under section 44'.[74]

In *United Security Fund*[75] the Deputy Director of Filings refused to issue a receipt because the proposed Fund lacked the basic principle upon which mutual funds are based, namely diversification and liquidity. On appeal the Commission held that

> We are of the view that it is not in the public interest to accept this prospectus. As presently framed the essential element of diversification is lacking. Liquidity, from the point of view of Canadian investor, is questionable. The decision of the Deputy Director Filings will therefore be affirmed.[76]

In *Loki Resources Inc.*[77], it was determined that the issuer had no resources, properties or prospects nor even any intention to acquire any. The Director, therefore, decided that in absence of any assets or business activities or any expectation therefor, any disclosure by the issuer would be meaningless. Similarly, existence of business was considered in *Inland National Capital Ltd.*[78] In that case the prospectus indicated, among others, that Inland Ltd. had limited assets with no plan for future. It also had debts and lack of funding. The OSC refused to issue receipt in the public interest interpreting the financial position as amounting to non-existence of business. In *Tricor Holdings Co. Inc.*[79] because the company was controlled by a convict, the Director refused to accept the prospectus. He based his decision on section 61(2)(e) which provides for refusal of receipting a prospectus when the past conduct of the issuer or an officer, director, promoter or controlling shareholder forms reasonable grounds for belief that 'the business of the issuer will not be conducted with integrity and in the best interests of its security holders'. On appeal the

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74. In *Great Pines, supra* note 72, the OSC quoted Justice Kelly from the *Report of the Royal Commission to Investigate Trading in the Shares of Windfall Oils and Mines Limited*, saying as follows:

> In absence of a clear delineation of its purpose, responsibilities and powers, over the years, the Securities Commission has, by administrative practice, established a workable control over the issue of securities of those companies required by The Securities Act to file prospectuses. This ha s been accomplished by a self-conferred ... extension of the power exercisable, under Section 44, to reject prospectuses. (at p. 95)

75. [Sept. 1971] *OSCB* 133.
76. *Ibid.*, at 134.
77. (Feb. 1984), 8 O.S.C.B. 583.
78. (1996), 19 O. S. C. B. 773.
79. *Tricor Holdings Co. Ltd.*, [October 1988] 11 *OSCB* 4059.

majority of the Commission upheld the decision of the Director.

It has been noticed in the preceding discussion that the OSC, legally empowered, does, in practice, exercise its discretion in giving approval to prospectuses in addition to its responsibility of ensuring the fulfillment of the disclosure requirement under the *OSA* because "public interest" constitutes 'the paramount consideration' for the OSC.[80] It does so always keeping in mind the tenet of investor protection. Thus it can be concluded, in the words of Alboini, that

> (In Ontario) (f)ull, true and plain disclosure of all material facts in accordance with the Act and Regulation does not guarantee the issuance of a receipt. The manner in which the Director has exercised his or her considerable discretion, and the existence of certain provisions in the Act and Regulation have resulted in the administration of the Act going beyond a purely disclosure approach and into the realm of a "blue sky" system.[81]

Specific Grounds of Exercising OSC Discretion

While a general discretion, as discussed above, has been conferred on the Director under s. 61(1) in the fashion of "public interest", s. 61(2) requires the Director to refuse a receipt for a prospectus under some specified circumstances. 'The Director is the judge of whether such circumstances exist, and this has the effect of conferring additional discretion upon the Director.'[82] A brief discussion of those grounds ensues below.

Material Non-compliance and Misstatement

Three situations come within this prohibition as contained in s. 61(2)(a) where the Director can refuse to accept a prospectus. In the first place, if the Director is of the opinion that the prospectus or any document accompanied by it does not comply, in any *substantial* respect, with any requirement of the *OSA* or *OSA Regulation*, the Director can exercise the refusal power.[83] The word "substantial" qualifies the situation, so minor non-compliance with any requirement of prospectus should not trigger the refusal of receipt. Information about the principal shareholders is, for example, a substantial requirement of the *OSA Regulation* forms. The non-fulfillment of this requirement may, therefore, be a ground of the Director's exercising of such power.

80. *Terence Edward Robinson*, [1996] 19 O.S.C.B. 2643, at p. 2669.
81. Alboini, *supra* note 61, at p.15-27
82. Alboini, *supra* note 61, at p. 15-32.2.
83. *OSA*, s. 61(2)(a).

Secondly, the Director may not receipt a prospectus where the prospectus or any document required to be filed therewith contains any statement, promise, estimate or forecast that is misleading, false or deceptive.[84] For instance, in *Farmers & Merchants Mutual Funds Ltd.*,[85] a prospectus was not accepted because the fact that a company had undertaken services as a trust company, while it was not legally a trust company, was misleading. Thirdly, the prohibition on accepting a prospectus applies when a prospectus or any document required to be filed therewith contains a misrepresentation.[86] In *M & M Porcupine Gold Mines Ltd.*,[87] a contract effecting disposition of certain property had been negotiated before filing the prospectus and entered into before the final prospectus was accepted, but the issuer did not include that fact in the prospectus. Therefore, the Director held the prospectus having the effect of concealing material facts and ordered cessation of the primary distribution based on the prospectus.

Unscrupulous Consideration

Section 61(2)(b) of the *OSA* requires the Director to refuse a prospectus on the ground that an unconscionable consideration has been paid or given, or is intended to be paid or given, for promotional purposes or for the acquisition of property. For instance, in *Harvard Growth Fund Ltd.*,[88] the Commission, on appeal, did not accept a prospectus for filing by a mutual fund company because it appeared to the Commission that a provision contained in it permitting the promoters to purchase shares at figure less than net asset value was unconscionable. The Commission took into consideration that the *OSA* is not exclusively a disclosure statute and that the mutual funds are primarily directed to those who are least experienced in assessing the merits of securities. It then assessed the

84. *OSA*, R.S.O. 1990 c. S.5, s. 61(2)(a).

85. [April 1962] O.S.C.B. 4. Also see *Great Divide Explorations Limited*, [July-August 1965] O.S.C.B. 10.

86. *OSA*, R.S.O. 1990 c. S.5, s. 61(2)(a). "Misrepresentation" is defined in *OSA*, R.S.O. 1990 c. S.5, s. 1(1) "misrepresentation" as

(a) an untrue statement of material fact, or

(b) an omission to state a material fact that is required to be stated or that is necessary to make a statement not misleading in the light of the circumstances in which it was made.

For the definition of "material fact", in this context, see note 57, *supra*.

87. [Dec. 1965] O.S.C.B. 10.

88. [Sept. 1965] O.S.C.B. 7.

unconscionability of the right granted to the promoters in the following words:

> One cannot say, at this moment, what the eventual benefit to the promoters may be, but there is an unlimited possibility for future benefit. ...
>
> In addition to the potential benefit the promoters may receive from the increase in the value of the fund, their profit also increases according to the number of the shares sold to the public. A portion of each dollar invested by the public accrues to the benefit of the promoters regardless whether the net asset value of the fund increases or not.[89]

Inadequate Proceeds

Under section 61(2)(c) the Director has the authority to determine whether the proceeds from the sale of securities proposed to be offered by the prospectus, together with other resources of the issuer[90], would be sufficient to accomplish the purpose of the issue as stated in the prospectus. If the Director considers the proceeds to be insufficient, the Director may reject the prospectus. Thus in *St. Anthony Mines Ltd*[91], where the issuer was carrying on a costly business, mining exploration, the Director estimated that though the funds then available were sufficient to complete the initial step of the proposed exploration, the money likely to be raised by the sale of the unissued shares would fall short of the requisite funding. As such the Director refused to accept the prospectus.

Pecuniary Condition and Previous Performance

The OSA empowers the Director not to receipt a prospectus in consideration of the financial condition[92] or the past conduct[93] of the issuer or an officer, director or promoter or a person or company or combination of persons or companies holding a sufficient number of securities to affect materially the control of the issuer. Prescribed prospectus form(s) asks for an account of the past and present state of the issuer's business and ownership of property, names and addresses and positions held, in the past and at present, by the directors and officers, etc. Beyond the disclosure of such information the Director will determine

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89. *Ibid.*, at 9.
90. Other resources include people, e.g., directors, officers of the issuer. See *supra* note 73, para. 1.
91. [Oct. 1966] O.S.C.B. 23.
92. *OSA*, R.S.O. 1990 c. S.5, s. 61(2)(d).
93. *Ibid.*, s. 61(2)(e).

whether the issuer or the persons specified can be reasonably be expected to be financially responsible in carrying out the business[94] or whether from their past conduct it can be expected that the issuer's business will be conducted with integrity and in the best interest of the security holders.[95] If the Director, after such determination, forms a negative impression, the Director may decline receipting the prospectus. In other words, the Director will resort to these provisions when 'it is relatively clear that the persons in question are experiencing financial difficulties, or have been subject to disciplinary or enforcement proceedings in securities or criminal matters'[96]. These provisions, 'derived from various consumer protection statutes in Ontario'[97], are meant to 'ensure a minimum standard of quality for the offering itself or the issuer offering the securities.'[98]

Required Agreements

There is an obligation on the issuer to disclose information concerning shares held in escrow. Despite that provision the *OSA* clothes the Director with power to look into whether there is any need of executing an escrow agreement. If the Director is of the opinion that such an agreement is required but has not been done, the Director may not issue a receipt until that agreement is not executed.[99] Thus in *Kolvox Communications Inc.*[100], the Director underlined the need of escrowing a substantial number of control block shares and refused to accept the prospectus until an agreement to that effect is accomplished. The Commission upheld that decision upon a review motion by the issuer. The Director can also exercise the refusal power on the ground that the issuer has not made an agreement to the effect of holding the sale proceeds in trust pending distribution of securities, albeit the issuer, in the Director's judgment, should have done such an agreement.[101] In the guise of this power the Director can, for example, require the issuer of a

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94. *Tricor Holdings. supra* note 79.
95. *Ibid.*, p. at 4091.
96. Alboini, *supra* note 61, at p. 15-37.
97. *Ibid.*, at p. 15-36.
98. *Ibid.*
99. *OSA*, R.S.O. 1990 c. S.5, s. 61(2)(f).
100. [March 1994] 17 *O.S.C.B.* 1521.
101. *OSA*, R.S.O. 1990 c. S.5, s. 61(2)(g).

best efforts offering[102] to escrow the proceeds until all or a minimum number of securities are sold.[103]

Unacceptability of Professionals

If any of the professionals like lawyers, engineers, accountants who have prepared or certified any report or valuation used in or in connection with a prospectus is not acceptable, the Director will refuse to accept that prospectus.[104] Though the Director has discretion, as seen above, to assess the financial fitness and past conduct of the issuer and certain persons involved in the issuer's business, this provision has given greater discretion to 'the Director to make subjective assessments about persons involved in the preparation of a prospectus, and (thereby) ...to refuse to issue a receipt for a prospectus'.[105] Thus if an audit is not done according to the generally accepted auditing standards (GAAS), that will be a ground of prospectus refusal.[106]

Conclusion

The OSC enjoys much discretion when it decides whether a particular circumstance merits the application of its discretion on any of the specified grounds. In addition, the "public interest" provision further expands this jurisdiction. In practice the OSC takes such a broader view in the application of this jurisdiction.[107]

Lest the OSC become unscrupulous or tyrannical in the exercise of this power, the Legislature has subjected the OSC decisions to judicial appeal. The *OSA* requires the Director to give the person or company filing the prospectus an opportunity to be heard before issuing a refusal order.[108] A person or company who is directly aggrieved by a decision of the Director may seek and be entitled to a hearing and review thereof by

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102. 'A "best efforts offering" is an offering of securities of an issuer by an underwriter, acting as agent, which agrees to use its best efforts to sell the securities, but which is not bound to purchase any securities for its own account and normally does not guarantee the successful placement of all of the offered securities'.: Goulet, *supra* note 13, at p. 565
103. *OSC Policy* 5.1.
104. *OSA*, R.S.O. 1990 c. S.5, s. 61(2)(i).
105. Alboini, *supra* note 61, at p. 15-40.
106. See, *Price Waterhouse*, [April 1990] 13 O.S.C.B. 1473.
107. Alboini, *supra* note 61, at p. 15-34.
108. *OSA*, R.S.O. 1990 c. S.5, s. 61(3).

the Commission.[109] Such a person or company may prefer an appeal to the Divisional Court from the review decision of the Commission.[110] Before refusal the Director may refer to the Commission for determination a question involving public interest under s. 61(1) or a new or novel question of interpretation under s. 61(2), which might result in such refusal.[111] Before referral, however, the Director should 'make every effort to resolve its comments (relating to the question) through discussion with those responsible for filing the prospectus. Only when it is clear that such discussion will not be productive, should consideration be given to (such) a referral'[112]. Upon referral the Commission, after holding a hearing of the parties, determines the question and refers it back to the Director for final consideration.[113] The Director must act upon the decision of the Commission subject to any order of the Divisional Court on appeal.[114]

5. Evaluation of Canadian Approach and Conclusion

As seen from the foregoing discourses, Canada has adopted a combined approach- disclosure and merit review- to its securities regulation. By disclosure rules it requires securities issuers to make full disclosure of information concerning securities so that investing public can make informed investment decision. It wants the investors to make their decision and bear risks involved in their investment. It seeks to protect the investor from risks resulting from omission or misstatement of material information, which is called "fraud risk"[115]- 'Publicity is justly commended as a remedy for social and industrial diseases. Sunlight is

109. *Ibid.*, s. 8.

110. *Ibid.*, s. 9.

111. *Ibid.*, s. 61(4).

112. *Chancellor Futures Fund II*, [Feb. 1980] O.S.C.B. 77, at pp. 77-78.

113. *OSA*, R.S.O. 1990, c. S.5, s. 61(7).

114. *Ibid.*, s. 61(8).

115. *Supra* note 11 at p. 145.

said to be the best of disinfectants; electric light the most efficient policeman'.[116]

In securities investment there are two broad types of risk- risk related to securities transaction (called transactional risk) and risk not related to transaction (called external risk). [117] The former consists of fraud risks and structural risks. Fraud risk, as mentioned above, results from information gap whereas structural risk arises from the terms of the investment offering itself, e.g., underwriting commission, voting rights, options and warrants.[118] And external risk includes the risk arising from factors, which are outside of transaction, for example, the possibility that the economy will enter a recession or that the "bear" will turn out the "bull" from the market or that a change will take place in the issuer's management.[119] As said before, disclosure philosophy envisages to safeguard investors from fraud risk. It advocates that investors bear

116. L.D. Brandeis, *Other People's Money and How the Bankers Use It*, (Washington: National Home Library Foundation, 1933) at p. 62. Brandeis has recently been cited as a justification of mandatory disclosure as a fraud prevention mechanism in Toronto Stock Exchange, *Interim Report of the Committee on Corporate Disclosure, Toward Improved Disclosure (1995)* (hereafter *Allen Report*), at p.24. But at the same time it is contended by some scholars that disclosure alone cannot prevent fraud. They referred to some major fraud cases that took place in USA after the 1933 and 1934 securities acts, e.g., *Re Equity Funding Corp. of America Securities Litigation*, 603 F.2d 1353; *Re OPM Leasing Services Inc.*, 769 F.2d 911.: see, for example, F.H. Easterbrook and D.R. Fischel, 'Mandatory Disclosure and the Protection of Investors', (1984) 70 Virg. L. Rev. 669, at p. 670. Most recently a critique goes to the extent of eclipsing the role of disclosure as a means of preventing fraud. For instance, at one place it says, 'Indeed, any effectiveness mandatory disclosure might have in preventing fraud occurs primarily because mandatory disclosure is coupled with a criminal prohibition against fraud.' : C.J.H. Donald, 'A Critique of Arguments for Mandatory Continuos Disclosure', (1999), 62 Sask. L. Rev. 85, online:QL (SASL), at para. 13. For critique of mandatory disclosure from Australian perspective, see J. Azzi, 'Disclosure in Prospectus' (Aug. 1991) Co. and Sec. L.J. 205 at p. 205.

117. *Supra* note 11 at p. 145.

118. *Ibid.*, at p. 146.

119. *Ibid.*

other investment risks, namely structural risk and external risk. It does not support the notion of "all-protection against all-risk", in other words paternalistic protection of investors because that will blunt their risk-bearing capabilities. If the investor are allowed to bear risk, they will be used to taking risks, and making profits and enduring losses. Various investment opportunities will be available to the investors from which they will make their choices according to their varying abilities to bear risk. In this way there will be investment competition in the market, which will cause economic development of a country.

The above is the beneficial aspect of the disclosure theory. It has limitations too. As aforesaid, the investor should bear structural and external risks, but to what extent? They may be expected to bear those risks that are "normal" structural and external risks. Paternalistic protection is not desirable against such risks. But should the regulatory authority let the investors bear risks that tend to jeopardize public interests? Or should they allow securities come to market where the investment project are sure to fail[120] or where the issuer is unscrupulous and is likely to flee market after raising funds by selling securities? The answers should be "no" because such risks are "unacceptable" from investor protection perspective and, therefore, should be precluded from coming to the market. This means that there should be, at least, limited paternalistic protection side by side of disclosure protection of investors. And this is what Canada has done. It has given the investor benefits of both theories. As such it calls for full, true and plain disclosure of information through prospectus concerning securities being offered to enable the investor to make investment decision and to take investment risks for profit. At the same time it empowers the regulatory authority to preclude securities from market in public interest and also on particular grounds, which the

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120. Absent paternalistic protection along with disclosure issuer may market bad securities at the expense investor loss. This is what happened in the US. While commenting on the US securities statute (which is completely a disclosure statute), Sommer called it a "rotten egg statute". He went on, 'You could sell all the rotten eggs you wanted if you told people fully how rotten they were. Alas, a lot of rotten eggs were sold under this statute and you suspect that a lot of them are continuing to be sold.' 'New Approaches to Disclosure in Registered Security Offerings- A Panel Discussion', (1973) 28 Bus. Law. 505 at p. 505

investor may not know just from the information given in the prospectus.[121] The rationale of Canadian approach may further be given in following words:

> In fact, there are no pure "merit" "disclosure" regimes as neither is capable of addressing all potential abuses. It would be unrealistic to expect a securities commission to do a "due diligence" examination of each company that wanted to raise money from the public to ensure that the enterprise was viable. Even if such an examination were made, if there were no detailed disclosure requirements, potential investors would not be able to determine whether the price of the public offering was attractive. It would be equally improbable that a securities commission in a disclosure regime would approve a prospectus that said, truthfully, that the promoters of the company intended to abscond with the proceeds of the public offering, or that the company's business enterprise had no hope of success.[122]

In modern securities regulation neither only-disclosure nor only-merit approach is desirable. The right approach may, as in Canada, be to combine the both. In this process investors will learn investing by taking the normal business risk of profit and loss just like the children who learn walking by walk-and-stumble process. If the children are kept on laps all the time, they will not learn walking. They must be allowed to walk and stumble and, through this process, to learn walking. At the same time it is the parents' responsibility to watch out if any life-threatening danger lies on their way, which they must remove to save the children's lives.

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121. Condon writes:

> A distinctive feature of the modern state is the extent of governance devolved onto specialized tribunals. Administrative statutes, which grant these tribunals their power, are characterized by the grant of significant discretionary powers to the relevant agency.

supra note 47, at pp. 89-90. Also see D.J. Galligan, *Discretionary Powers*, (Oxford: Newyork: Clarendon Press; Oxford University Press, 1986); B.P. Bellmore, 'The Ontario Securities Commission as an Administrative Tribunal' (1967) 5 Osgoode Hall L. J. 210; J.M. Evans, H.N. Janisch & D.J. Mullan, *Administrative Law: Cases, Text and Materials*, 4th ed. (Toronto: Edmond Montogomery, 1995). Patrick Moyer, 'The Regulation of Corporate Law by Securities Regulators: A Comparison of Ontario and the United States', (1997) 55(1) U.T.Fac.L.Rev. 43, online:QL (UTFL), para. 32 note 112

122. Toronto Stock Exchange, *Interim Report of the Committee on Corporate Disclosure, Toward Improved Disclosure (1995) (Allen Report)*, at p. 25.