

Bill 85, Quebec's New Securities Act

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The authors provide a basic account of Bill 85, Quebec's new securities legislation, highlighting what they perceive to be its most important features. While providing references to other provinces' enactments and to federal proposals which influenced the new *Securities Act*, the authors suggest that in a number of respects Bill 85 is among the most innovative of recent legislation on the regulation of the securities markets. They also suggest that Bill 85 could serve as a model for reform in other provinces. Together with an analysis of the new statutory regime of civil liability introduced through the *Act*, the authors discuss the implications for securities regulation in Quebec of the Civil Code and the *Charter of the French Language*.

Dans le cadre d'une analyse du projet de loi 85, les auteurs font ressortir ce qu'ils considèrent comme les points saillants de la nouvelle loi québécoise sur les valeurs mobilières. Après avoir fait référence aux autres lois provinciales de valeurs mobilières et à l'avant-projet de loi fédéral, qui ont influé sur la nouvelle *Loi sur les valeurs mobilières*, les auteurs indiquent que le projet de loi 85 constitue à plusieurs égards l'une des lois les plus innovatrices sur les valeurs mobilières. Ils énoncent que le projet de loi 85 pourrait servir de modèle de réforme dans d'autres provinces. En plus d'analyser le nouveau régime statutaire de responsabilité civile instauré par la loi, les auteurs examinent les retombées du Code civil et de la *Charte de la langue française* sur la réglementation en matière de valeurs mobilières.

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Introduction

On 6 April 1983, the 1982 *Securities Act* of the Province of Quebec (the "new Act")¹ came into force. Known, as is most Quebec legislation, by its bill number, Bill 85 is firmly in the tradition of North American securities legislation. It is long: 354 sections, arranged under eleven titles or parts. It is supported by an implementing regulation which (in its English form) occupies 119 pages of the *Gazette officielle du Québec*.² It is complex: in the tradition of securities legislation in the rest of Canada, it represents an attempt to make more comprehensive, and to update, the intricate scheme it replaced. And it is a mix of involved drafting of statute and regulation with grants of large discretionary authority to an expert administrative agency, officially styled the Commission des valeurs mobilières du Québec (the

¹S.Q. 1982, c. 48, repealing the *Securities Act*, R.S.Q. 1977, c. V-1. There is a cross reference table between the old *Act* and the new *Act* at 3 CCH Can. Sec. L. Rep. para. 60-000.

²O.C. 660-83, 30 March 1983, G.O.Q. 1983.II.1269.

"CVMQ"). With Bill 85, Quebec joins Ontario³, Alberta⁴ and Manitoba⁵ in having recently "modernized" its securities legislation. All have done so along somewhat similar lines.

Bill 85 is nonetheless also a milestone in Canadian securities regulation. It is probably the most innovative of the recent Canadian *Acts*. It also shows the greatest diversity of influences. Its drafting owes most to the Ontario *Act*, but it has also been much influenced by the federal *Proposals for a Securities Market for Canada*,⁶ more than any other provincial *Act* to date. It also appears to have been influenced by present and proposed securities law in the United States. And of course it has been drafted against the background of Quebec's Civil Code, although the Code's direct influence is the least of all the sources mentioned.

The purpose of this article is to provide a basic account of the new *Act*, highlighting what we see to be its most distinctive features. We believe that there is much in Bill 85 which the observer inside and the observer outside Quebec will find of interest. For securities lawyers, our aim is to provide a convenient inventory of the major changes the new *Act* has brought, as well as references to background reading which they might find helpful. We are no more sophisticated than that: it is too early yet to catalogue the day-to-day practical problems which legislative reform like this invariably brings. For non-specialists, our aim is to provide them with an idea of the basic structure of the new *Act*, from which more detailed understanding can begin. For securities specialists in Quebec much of what we will say will be well known or trite. But, given the national markets for securities in this country — both for newly issued (the primary market) and for previously issued securities (the secondary market)⁷ — and the relative importance of Quebec

³The *Securities Act*, R.S.O. 1980, c. 466, first enacted as *The Securities Act, 1978*, S.O. 1978, c. 47. There is a table of concordance between this *Act* and the old Quebec *Act* in 2 CCH Can. Sec. L. Rep., para. 50-000a and between this *Act* and Bill 85 in (1982) 4 OSC Bull. 274A-317A (No. 10).

⁴*Securities Act*, S.A. 1981, c. S-6.1, as am. S.A. 1981, c. B-15 and S.A. 1982, c. 32.

⁵*The Securities Act, 1980*, S.M. 1980, c. 50/S50, as am. S.M. 1980-81, c. 26. This *Act* has yet to be proclaimed in force.

⁶P. Anisman, W. Grover, J. Howard & J. Williamson, *Proposals for a Securities Market Law for Canada* [:] *Draft Act* (1979), vol. I [hereinafter *Proposals*, vol. I]; *Proposals for a Securities Market Law for Canada* [:] *Commentary* (1979), vol. II [hereinafter *Proposals*, vol. II]; and Consumer and Corporate Affairs Canada, *Proposals for a Securities Market Law For Canada* [:] *Background Papers* (1979), vol. III [hereinafter *Proposals*, vol. III]. Individual papers in the latter volume bear their own dates, and the date is given where a paper is cited. The influence of the *Proposals* on an early draft of Bill 85 is noted in Anisman, *The Proposals for a Securities Market Law for Canada: Purpose and Process* (1981) 19 Osgoode Hall L.J. 329, 348-50.

⁷See Anisman & Hogg, "Constitutional Aspects of Federal Securities Regulation" (1978), in *Proposals*, vol. III, *supra*, note 6, 139 and references therein.

in those markets, securities lawyers outside the province need to be concerned about this law. And, given the pervasiveness of the securities laws, which apply to all businesses from the smallest to the largest, non-specialists need to be concerned to acquire a feel for this law as well.

I. A Capsule History of Quebec Law

A. *Previous Legislation*

It is worth reviewing in short form the major legislative landmarks in the evolution of securities regulation in Quebec leading to Bill 85. This will enable us to present briefly the highlights of the new legislation. Subsequent Parts of this article will address those highlights and related matters in much more detail.

The first measure intended to regulate disclosure in securities trading in Quebec came in March 1924, with legislation requiring that a corporation wishing to issue bonds, shares or other securities file certain documents.⁸ The more important of these documents were a financial information statement and a copy of every estimate, prospectus or other representation in writing made by the corporation or upon its instruction which contained a statement of the profits likely to be realized. The financial information statement, certified by the auditors and sworn by the directors of the corporation, contained modern prospectus-type information including details of previous issues of securities and the remuneration of directors. Failure to file these documents deprived the issuing corporation of its right to sue the purchasers of its securities for the price of them. The directors involved would themselves be accountable for any payments made on account of the price. Securities listed on Canadian exchanges and certain foreign exchanges were exempt, as were securities issued in an isolated sale transaction. An amendment to the legislation, also passed in 1924, imposed fines for defaulting corporations and imprisonment for their directors.⁹

As the required documents only had to be filed with the Secretary of the Province, the 1924 legislation "had little practical effect since once the information was filed nothing more could be done and the facts did not have to be publicized".¹⁰ As a further measure of control, the province's *License Law*, which had introduced registration requirements for brokers

⁸See the *Securities Sale Act*, R.S.Q. 1925, c. 228, ss 3 and 4 (adopted as *An Act respecting the issue and sale of shares, bonds and other securities*, S.Q. 1923-24, c. 64 adding ss 6119 (f)-(j) to the *Joint Stock Companies' General Clauses Act*, R.S.Q. 1909, S. 5957.)

⁹S.Q. 1923-24, c. 65.

¹⁰Porteous, *The Securities Act* (1945) 5 R. du B. 328. See also J. Williamson, *Securities Regulation in Canada* (1960) 13.

in 1906, was amended in 1928 to prohibit brokers from offering securities where the applicable disclosure requirements had not been met.¹¹

After an inter-provincial conference held in Toronto in 1930, in the wake of the stock market collapse, Quebec followed the general trend and passed that year its *Security Frauds Prevention Act*, modelled on the Ontario legislation of 1928.¹² In 1933, however, Quebec led the other provinces¹³ by further requiring, when the proceeds of an issue were to be turned over to the issuer, that brokers not trade securities before a copy of the last prospectus filed under the *Companies Information Act*¹⁴ had been deposited with the Registrar, together with a declaration of the prices and commissions in connection with such issue.¹⁵ In 1935, the *Security Frauds Prevention Act* was further amended and became the *Securities Act*.¹⁶ In 1955 Quebec adopted its new *Securities Act*,¹⁷ which was substantially similar to the Ontario legislation of 1945.¹⁸ It was by the 1955 *Act* that the CVMQ was created.

These acts reflected two main themes in the prevention of securities market abuses in Quebec. One was the principle, derived from the law of the United Kingdom, of full, true and plain disclosure. The other was the "blue sky" approach, derived from American state securities legislation, which entailed the discretionary authority of public officials based on a review of the merits of an issue to prevent an issuer gaining access to the province's public securities markets.

The modern era of Quebec securities regulation really began with the *Securities Act* of 1955. During the last two decades, the shortcomings of the *Act* became apparent,¹⁹ despite a series of amendments from 1965 to 1981²⁰ aimed at bringing it in line with then current trends. Notwithstanding the

¹¹See the *Quebec License Law*, S.Q. 1900, c. 12, as am. S.Q. 1906, c. 9, s. 50 and S.Q. 1928, c. 14.

¹²*An Act for the prevention of fraud in connection with securities*, S.Q. 1930, c. 88; see Williamson, *supra*, note 10, 24 and F. Wegenast, *The Law of Canadian Companies* (1931) 699.

¹³Williamson, *supra*, note 10, 27.

¹⁴R.S.Q. 1925, c.228 (replacing the former version of c. 228 as provided for in S.Q. 1930, c. 87).

¹⁵*An Act to Amend the Security Frauds Prevention Act*, S.Q. 1933, c. 85, s. 2.

¹⁶S.Q. 1935, c. 72 as am. S.Q. 1938, c. 82 as consolidated by R.S.Q. 1941, c. 282. For a comparison of its provisions with *The Securities Act, 1945*, S.O. 1945, c. 22, see Porteous, *supra*, note 10, 334-5.

¹⁷S.Q. 1954-55, c. 11. See also Mackenzie, "Securities Legislation and Practice" in McGill University Faculty of Law, *The W.C.J. Meredith Memorial Lectures* (1966) 21, 22.

¹⁸*The Securities Act, 1945*, S.O. 1945, c. 22. See Williamson, *supra*, note 10, 30-4 for a review of the Ontario *Act*.

¹⁹See Caron, *Aspects du droit des valeurs mobilières* (1975) 17 McGill L.J. 233, 290-1; Côté, *The Underwriter's Civil Liability and Investor Protection* (1975) 10 R.J.T. 137, 177.

²⁰S.Q. 1965, c. 80; S.Q. 1971, c. 77; S.Q. 1973, c. 67 (mainly on insider trading); S.Q. 1975, c. 76, s. 2; and c. 83; S.Q. 1979, c. 14, c. 37 and c. 81, s. 20, para. 32; S.Q. 1981, c. 9, s. 22.

obvious weaknesses of the *Act*, the CVMQ was able to modernize the supervision and control of securities trading in the province to a substantial extent, by utilizing its extensive discretionary authority. For example, the preliminary prospectus was unknown under the *Act*, although it had been introduced into Ontario in 1966. The CVMQ tolerated its use in Quebec²¹ even before Bill 85 elevated the document to formal statutory recognition.

Another example of the Commission's use of its discretionary authority is *Projet d'instruction générale no 31*.²² Although never issued in final form, this statement served as a guideline for exemptions from prospectus requirements in a way which paralleled those of the 1978 Ontario securities legislation.²³ For instance, it indicated that the Commission would exercise its discretionary authority under the old *Act* to exempt certain limited distributions of securities from the prospectus requirements. This "seed capital" exemption is now to be found in section 47 of Bill 85.

B. *The New Act*

The purpose behind Bill 85 was, in part, to bring the securities law of Quebec into harmony with the legislation of other provinces.²⁴ Further, the new *Act* is distinguished from the 1955 legislation by a better organization of the text.²⁵ It also no longer reflects, as the 1955 legislation tended to do, a mere translation into French of the Ontario *Act*²⁶ which directly inspired it. However, this now makes translating the *Act* into English much more difficult, and the official translation is not an altogether happy one. As well, there are new concepts in the *Act* without ready equivalents in the other provinces' legislation.

For the Commission the new *Act* represents the granting of a series of new powers, some of which are unknown to regulators elsewhere in Canada.

²¹There was no policy statement to that effect, but in its reply to a filing of a preliminary prospectus, the Commission would give its agreement in the following standard form letter: "The Director of Filings grants you the permission required under Section 70 of the Securities Act (R.S.Q., c. V-1). This permission will expire as soon as a decision will have been made concerning the final prospectus".

²²(1981) XII Bulletin hebdomadaire (no 47).

²³*An Act to revise The Securities Act*, S.O. 1978, c. 47, s. 71(1)(p) and s. 14(g) of *Regulation*, R.O. 190/80.

²⁴CVMQ, *Avant-projet d'une nouvelle loi sur les valeurs mobilières* (14 mai 1980), Annexe A, para. III.

²⁵See, for instance, Charbonneau, *La Commission des valeurs mobilières du Québec* (1977) 20 Can. Pub. Admin. 87, 115 and notes 168-9, where it is stated that at one point the offences were to be found in twenty-six different places in the *Act*.

²⁶The linguistic concern as regards the *Securities Act* can be traced back to 1973, when an attorney and member of the Quebec Securities Commission contributed to a lexicon prepared by the Office de la langue française on exchange and securities market terms. The Commission also issued its translation of the term "debentures" in (1974) V Weekly Bulletin (No. 9).

In anticipation of the new *Act* there had been some substantial internal reorganization of the Commission. For the first time in Quebec the Commission has discretion to deny the benefit of the statutory exemptions otherwise granted by the new *Act*.²⁷ In the category of powers granted to the Commission which are not expressly dealt with in the legislation of other provinces is the discretion of the Commission to draw up policy statements²⁸ in the course of its functions.²⁹ In addition, the members and personnel of the Commission are subjected by the new *Act* to very strict rules of conduct.³⁰ Rather more innovatively, Bill 85 gives a measure of substantial flexibility to the internal organization of the Commission and allows for devolution of its functions on a scale not to be found elsewhere in Canada.³¹

The modernization of securities regulation in Quebec can be said to lie for the most part in four features of Bill 85. The first of these is the provision of civil recourses for the defrauded investor, something absent from the old *Act*. Bill 85 contains civil sanctions for the failure to provide certain disclosure documents, and for the use of documents which contain misrepresentations.³² These sanctions include the right to rescind a purchase contract,³³ to have the price revised and to sue for damages.³⁴ There is also a provision, new to Quebec securities legislation, creating civil liability for improper insider trading.³⁵

A second important feature of the new *Act* is the prompt offering qualification system which permits the use of a simplified prospectus incorporating by reference data about the issuer already filed with the Commission.³⁶ This is designed to permit seasoned issuers to qualify new issues faster and more efficiently than before.

A third important feature of the new *Act* is the almost complete removal of the concept of "public", which under the old *Act* was crucial to the

²⁷S.Q. 1982, c. 48, ss 48 and 49.

²⁸*Securities Act*, S.Q. 1982, c. 48, s. 274.

²⁹*Securities Act*, S.Q. 1982, c. 48, s. 276.

³⁰S.Q. 1982, c. 48, ss 300 and 301.

³¹*Securities Act*, S.Q. 1982, c. 48, s. 307.

³²*Securities Act*, S.Q. 1982, c. 48, ss 30, 36.

³³See, for instance, Côté, *supra*, note 19, 148-50, 154-8, 162-5.

³⁴*Securities Act*, S.Q. 1982, c. 48, ss 214, 215, 218, 219, 223 and 225.

³⁵*Securities Act*, S.Q. 1982, c. 48, s. 228.

³⁶*Securities Act*, S.Q. 1982, c. 46, ss 84-88, preceded by CVMQ, *Instruction générale provisoire no 33*, (1982) XIII Bulletin hebdomadaire (no 38) 1.2.2; available in other provinces through policy statements: Ontario, *Policy Statement No. 5.6* and *Notice*, 2 CCH Can. Sec. L. Rep. para. 54-936, 54-890e; Alberta, *Policy Statement No. 3-23*, 1 CCH Can. Sec. L. Rep. para. 24-535; British Columbia, *Policy Statement No. 3-40*, 2 CCH Can. Sec. L. Rep. para. 29-997g; Manitoba, *Policy Statement No. 3-12*, 2 CCH Can. Sec. L. Rep. para. 34-999d; Saskatchewan, *Policy Statement No. 3-09*, 3 CCH Can. Sec. L. Rep. para. 69-310.

application of the requirement for a prospectus and for the licensing of issuers. This is to remove much of the uncertainty that used to exist about the applicability of those requirements.

The final important feature of Bill 85 is that it authorizes the Commission to vest securities market professionals with greater responsibility for the functioning of the market and the activities of their fellow professionals. To achieve this the *Act* provides that self-regulatory organizations must be recognized by the Commission and that certain surveillance powers can be delegated to them. It may be that the new *Act* has also significantly recast the requirement for persons trading in securities to obtain a license, by adding that, for the requirement to apply, such persons must (in effect) not only be trading but doing so in the course of a business.³⁷ However, this "carrying on business" addition is far from clear, which goes to illustrate one of the semantic problems with the new *Act*.³⁸

II. The New Regime: Its Closed System

In Title II, "Distribution of Securities", and the related *Regulation*, Bill 85 provides for a closed system presided over by a Commission endowed with the power to control access to the public capital markets in Quebec. This is by far the most complex part of the *Act*, but its main objective, simply stated, is to ensure adequate disclosure for investors in the *primary* securities market.

"Distribution" is the controlling term of this section of the new *Act*. It determines the boundaries of the system and is defined separately in section 5 to cover primary market transactions and certain other transactions seen to be similar. Section 11 of the *Act* follows the lead of the Ontario, Manitoba and Alberta *Acts* in requiring that every person who proposes to make a "distribution" of securities file a prospectus with the Commission and obtain consent to its use. Likewise, a dealer who receives an order for a security in distribution, and is not acting solely for the applicant, must send to him a copy of the prospectus and any amendment within two working days of the subscription or purchase. The investor has until two days after receipt of the prospectus to withdraw from the transaction for any reason. This feature, new to Quebec securities law, is borrowed from the Ontario model.³⁹

³⁷S.Q. 1982, c. 48, s. 148.

³⁸See text following note 261, *infra*.

³⁹*Securities Act*, S.Q. 1982, c. 48, ss 29 and 30. On the Ontario provision, see V. Alboini, *Ontario Securities Law* (1980) 414-22.

Once the "distribution" is proposed and the detailed prospectus requirements, to be found mainly in the *Regulation*,⁴⁰ are met, the Commission may signal its consent by issuing a receipt ("visa") or, exercising the powers granted in section 5, withhold its consent even if all the disclosure requirements are met. These section 5 powers are granted in terms rather more explicit than those of the old *Act*⁴¹ and clearly establish both the Commission's general capacity to govern access to the public capital markets and its specific ability to exercise this power on the basis of a consideration of the merits of an issue.

However, this picture, drawn from the *Act*, is somewhat misleading in a number of respects. First, there is a large number of exemptions from the prospectus requirement covering those situations where prospectus disclosure and merit review are considered altogether unnecessary or unduly burdensome. Then, in other situations, the prospectus disclosure requirements are significantly reduced, for similar reasons. Finally, the merit review part of regulation is subsidiary in practice to the disclosure aspect. Its significance is probably greatest for unseasoned or junior issuers and for issuers whose offerings have novel features. For those issuers, the Commission may require certain special disclosures of changes in their business or in the terms of the issue as a condition of access to the market.

A. "Distribution"

The scope of the term "distribution" is central to the operation of the closed system. "Distribution" is defined to cover four types of transaction. All would be familiar to an observer acquainted with provincial legislation following the Ontario *Act*. Two types of distribution relate directly to the primary market: an issuer or its agent obtaining or endeavouring to obtain "subscribers or purchasers" for securities of the issuer; and an issuer giving its securities, issued for the purpose, as collateral, say for a line of credit.⁴² The "subscribers or purchasers" language might possibly be read to cover those cases where an underwriter takes title to newly issued securities for the purpose of resale under the underwriting arrangement — even apart from other provisions which cover this *explicitly*, where an underwriter

⁴⁰See *Securities Act*, S.Q. 1982, c. 48, s. 13; *Regulation*, O.C. 660-83, 30 March 1983, G.O.Q. 1983.II.1269, Title II, Chapter I and Schedules I-VI.

⁴¹See *Securities Act*, R.S.Q. 1977, c. V-1, s. 67, para. 6, as am. S.Q. 1979, c. 14 and S.Q. 1979, c. 79. It was not doubted that this permitted the type of merit review referred to in the text.

⁴²*Securities Act*, S.Q. 1982, c. 48, s. 5, "distribution", subparas (1) and (4). But note in relation to subpara. (4) the exemption in s. 56 of the *Act*.

registered in *Quebec* is used.⁴³ This is in fact the commonest form of new issue offering arrangement for a prospectus-qualified issue.

In addition to these major types of "distribution" are those where a subscriber or purchaser who obtained a security under a statutory prospectus exemption endeavours to obtain or obtains a purchaser of such securities⁴⁴ and where a person endeavours to obtain or obtains for the first time a purchaser for the securities of a formerly "closed company", which securities have not previously been the subject of a prospectus.⁴⁵ These limbs of the "distribution" exemption can be seen to institute the "closed system" when it is realized that none of the four limbs, and none of the exemptions (with an exception to be noted), require that the subscribers or purchasers sought or obtained be the "public", or non-"public", as the case may be. The prospectus requirement of the old *Act* was conditioned on an offer or sale to the public,⁴⁶ and extended to offers to resell by persons who purchased pursuant to an exemption only where the initial sale did not constitute a sale to the public.⁴⁷ The difficulties of determining the application of the scheme created by the term "public"⁴⁸ are thus swept away. Furthermore, there are now direct statutory limitations on persons purchasing under an exemption from acting as conduits through which securities can move from the issuer to persons not covered by any exemption.⁴⁹ In this last respect the only control under the old *Act*, as mentioned, was that it caught the *first* distribution to the public.⁵⁰

The breadth of all of this can be better understood when it is appreciated that "securities", as the subject of a "distribution", includes much more

⁴³Firm underwritings are covered explicitly in s. 5, "distribution", subpara. (2) and s. 55. On the variety of underwriting arrangements in Canada, see D. Johnston, *Canadian Securities Regulation* (1977) 135-9 and D. Johnston, F. Buckley, P. Dey & D. Drinkwater, *Canadian Securities Regulation[:] Supplement 1982* (1983) 16-7.

⁴⁴*Securities Act*, S.Q. 1982, c. 48, s. 5, "distribution", subpara. (2).

⁴⁵*Securities Act*, S.Q. 1982, c. 48, s. 5, "distribution", subpara. (3). "Closed company" is defined in s. 5 as a company whose constituting documents prohibit the distribution of its securities to the public, restrict the free transfer of its shares and limit the number of its shareholders to fifty, excluding present or former employees of the company or its subsidiary. Compare the definition of "private company" in the old *Act*, R.S.Q. 1977, c. V-1, s. 1(13). The old definition is much the same, but not identical.

⁴⁶R.S.Q. 1977, c. V-1, s. 67, first para.

⁴⁷See the "première vente, offre de vente ou distribution dans le public" language in L.R.Q. 1977, c. V-1, s. 67, al. 1, as am. L.Q. 1979, c. 14 and L.Q. 1979, c. 79.

⁴⁸On those difficulties, see Simmonds, "The Prospectus Closed System in Ontario and Its Context" in L. Sarna, ed., *Corporate Structure, Finance and Operations* (1982) vol. II, 1, 17-9 and references there.

⁴⁹On this concern see Emerson, "Business Finance under the 'closed system' of the Ontario *Securities Act*: Statutory Scheme and Pitfalls" in *Special Lectures of the Law Society of Upper Canada, 1982 [:] Corporate Law in the 80's* (1982) 29, 37-8.

⁵⁰See *supra*, note 47.

than corporate shares or debentures. Section 1, which delimits the scope of the *Act*, apparently is meant to function like the definition of "security" in section 1(11) of the old *Act*. In particular, both list a number of items which include non-corporate investment opportunities. Bill 85 replaces the old *Act's* requirement of "document evidencing...a right, share or interest in the capital, assets, earnings or profits" of an issuer with the item "investment contract". This in turn is defined in terms borrowed from American case law under both federal and state securities laws.⁵¹ Similar terms are also to be found in Canadian judicial⁵² and administrative decisions⁵³ on the provincial *Acts* which use "investment contract". These decisions indicate that such exotica as interests in beef breeding programmes⁵⁴ or the maintenance of special commodities markets⁵⁵ are now more clearly covered in Quebec. The more recent Canadian decisions evidence some unease with the American approaches to "investment contract".⁵⁶ The concern seems to be that preoccupation with those approaches causes one to lose sight of the more direct question whether this is the type of scheme for which disclosure and merit protection are required. In Quebec, that concern, if it was seen to be warranted, could be addressed through the exercise of the power, in section 1(9) of Bill 85, to make *Regulations* to bring "any other form of investment" within the scope of the *Act*. However, this may be rather too cumbersome a way of dealing with the rapidly changing markets for exotic investment instruments.

In one respect the "distribution" scheme of Bill 85 is significantly narrower in its application than that of either the old *Act* or the present *Acts* of Ontario, Manitoba and Alberta. Bill 85 does not define "distribution" to include a disposition by a person holding a control position in the issuer.⁵⁷ Only one of the justifications usually given for including such dispositions seems significant under the new *Act*. This is the probability that resales by control persons may be large transactions likely to be "accompanied by

⁵¹*Securities Act*, S.Q. 1982, c. 48, s. 1 (closing para.), and compare Iacobucci, "The Definition of Security for Purposes of a Securities Act" (1978) in *Proposals*, vol. III, *supra*, note 6, 284 (dealing with federal securities law and the test in *SEC v. W.J. Howey Co.* 328 U.S. 293 (1946)) and 294-6 (dealing with state securities law and the risk capital test of *State Commissioner of Securities v. Hawaii Market Center, Inc.* 485 P. 2d 105 (Supreme Court of Hawaii, 1971)).

⁵²*Re Securities Act, R.S.O. 1970, c. 426 and Amendments thereto, Pacific Coast Coin Exchange of Can. Ltd. et al* [1978] 2 S.C.R. 112, (1977) 80 D.L.R. (3d) 529 [hereinafter *Re Pacific Coast*, cited to S.C.R.].

⁵³See, e.g., *Re Shelter Corporation of Canada* [1977] OSC Bull. 6 (January).

⁵⁴*Re Farmex Enterprises Inc.* [1974] OSC Bull. 50 (March).

⁵⁵*Re Pacific Coast, supra*, note 52.

⁵⁶See, e.g., *Re Pacific Coast, supra*, note 52 and *Re International Technology Transfer Limited Carrying on Business as Raymond Lee of Canada* [1978] OSC Bull. 119 (June).

⁵⁷See, e.g., the *Ontario Securities Act*, R.S.O. 1980, c. 466, s. 1(1)(11)(iii), which should, however, be read with the exemption in s. 71(7).

significant selling efforts which a mandatory disclosure document delivered to investors [like a prospectus] might counter".⁵⁸ The other justifications — that control persons can be presumed to have access to inside information; that they can "manage" the issuer's news; and that their transactions represent significant investment information in themselves⁵⁹ — are addressed sufficiently by special disclosure provisions elsewhere in the *Act*. Those provisions, covered in the next Part, deal with insider trading and with major changes in the affairs of widely-held issuers. A better way of dealing with the large resale problem than a simple prospectus requirement, and one which is not restricted to the transactions of control persons, is perhaps to include in the definition of "distribution" all large secondary market transactions. Then the required disclosure document could be tailored to the character of the distributor and his transaction. A scheme like this is suggested by the federal *Proposals*.⁶⁰ In fact it is understood that the CVMQ may implement a set of controls something like this through its power in section 270 of the new *Act* to regulate "representations" ("démarchage", probably better translated as "solicitations", as it is in the definition of "dealer" discussed below) with a view to transactions in a security.⁶¹

B. Exemptions

As was seen, any issue of securities to anyone requires qualification by the CVMQ, a process which is expensive and time consuming: thus the exemptions from this requirement are important. There are over forty-five such exemptions spelt out in the new *Act*.⁶² In addition, there is a special set of rules, again in the form of exemptions, which apply to resales by persons who acquired securities under an exemption and which will be considered separately. The number of exemptions precludes treatment here of all but those which are most significant in terms of practical impact and variation from the old *Act*.

1. Private Placement Exemptions

In dollar value terms, the "private placement" exemptions, in sections 43 to 45 and 51, are the most important of all. These include exemptions for distributions to "sophisticated" (typically, institutional) or governmental

⁵⁸See Simmonds, *supra*, note 48, 20.

⁵⁹*Ibid.*

⁶⁰Although its *Draft Act* does not go this far: see *Proposals*, vol. II, *supra*, note 6, 74-5; compare Grover and Baillee "Disclosure Requirements" (1976) in *Proposals*, vol. III, *supra*, note 6, 416-7, 438-9 and 462.

⁶¹See CVMQ, *Projet d'instruction générale Q-12*, (1983) XIV Bulletin hebdomadaire (no 30) 1.2.2.

⁶²*Securities Act*, S.Q. 1982, c. 48, ss 3 and 441-63; see also *Regulation*, O.C. 660-83, 30 March 1983, G.O.Q. 1983.II.1269, ss 101-15.

purchasers. Other private placement exemptions cover distributions of "gilt-edged securities" (*valeurs de premier ordre*)⁶³ or non-convertible (to voting securities) debt, in both cases in amounts of at least \$100,000 per investor. They parallel similar exemptions in the Ontario, Manitoba and Alberta *Acts*, but diverge in some respects from them. The new exemptions go well beyond those of the old *Act*, particularly in the addition of the \$100,000 purchaser exemption. Much of the difference is apparent only and is accounted for by the limit on the reach of the old *Act* to transactions with the "public". One of the approaches to the definition of "public" stressed the relevance of whether the offerees were sophisticated investors with access to information.⁶⁴ At least some of the exempt private placement distribution would, under the old *Act*, not have fallen within the prospectus requirement initially because the distribution would not have been to the "public". However, put at its lowest, not all the transactions covered by the exemptions of the new *Act*, particularly the \$100,000 purchaser one, would necessarily involve sophisticated investors with access to information equivalent in coverage, currency and quality to a prospectus. Thus, some would have attracted the prospectus requirement of the old *Act*, without any offsetting private placement exemption.

There is a concern that Bill 85's \$100,000 private placement exemption unduly compromises investor protection because it does not discriminate between those who need some mandatory disclosure and those who do not. This concern is reflected in the equivalent Ontario and Alberta exemptions, which require an "offering memorandum" where the offering is advertised.⁶⁵ This document describes the business and affairs of the issuer for the assistance of prospective investors in the distribution. There is no provision for such a document under the new *Act*,⁶⁶ which is of particular interest as Ontario may be about to upgrade its "offering circular" requirements.⁶⁷ The problem with the offering circular in Ontario is that, as explained in Part V below, prospectus-like civil liability attaches to the document. In practice, then, many of them have approached the statutory prospectus in content. This substantially detracts from the advantages of speed and low cost that

⁶³See definition in *Securities Act*, S.Q. 1982, c. 48, s. 57.

⁶⁴See Simmonds, *supra*, note 48, 17-9 and references there on their major approaches. In Quebec in recent times at least the number of offerees was of at least equivalent importance.

⁶⁵See the *Securities Act*, R.S.O. 1980, c. 466, s. 71(1)(d) read with R.R.O. 1980, Reg. 910, s. 21(2). See also the *Securities Act Regulations*, Alta Reg. 15/82, ss 15-7.

⁶⁶See, however, the provision for notice to the Commission under s. 46 of the new *Act* and under *Regulation*, O.C. 660-83, 30 March 1983, G.O.Q., 1983.II.1269, s. 102.

⁶⁷See *An Act to Amend the Securities Act*, Bill 176, 2d Sess., 32d Legis. Ont. 31 Eliz. II, 1982, cl. 22(2) (new s. 71(1)(d)), cl. 1(7) (new s. 1(1)(26)(a)) and cl. 44 (new s. 126(a)). This bill died on the order paper, but a new version is expected soon.

have made the private placement exemptions so popular.⁶⁸ It should be noted that Quebec's exemption, unlike Ontario's, requires that the security have some investment quality: it must be "gilt-edged" or debt not convertible to voting securities, which offers some protection to investors.⁶⁹ But at least in relation to debt, this is probably not enough: a better compromise might be that contained in the federal *Proposals*.⁷⁰ There, a distribution under its \$97,000 exemption must be limited to fewer than fifty purchasers and must not be accompanied by any advertising or selling or promotional expenses, with some exceptions. This focuses attention on the offerees and the purchasers, who after all are the major concern, not the issuer.

2. Small Issuer Exemptions

Those exemptions of the new *Act* which are of particular interest to small issuers, on whom the burden of the prospectus qualification process might be expected to bear hardest, are also significant. There are four such exemptions. One is for a distribution of the issuer's securities to its employees and senior executives or those of an affiliate, subject to preparation of an offering notice for examination by the Commission and distribution to investors.⁷¹ This is very similar to an exemption under the old *Act*,⁷² and is paralleled in Ontario, Manitoba and Alberta,⁷³ except that Quebec's exemption entails more control by the Commission. The second exemption, in section 47 of the new *Act*, is for a distribution to no more than twenty-five subscribers,⁷⁴ provided that certain conditions are met. Those conditions are: that each subscriber be acting for his own account; there be a written contract of subscription containing the prescribed terms; the distribution take no more than six months; it be made without advertisement; and that the promoter of the transaction, except a registered dealer, not have been involved in a similar transaction within the previous twelve months. There was no exemption like this in the old *Act*.⁷⁵ Again the "public" requirement covered some of the same ground, but particularly notable

⁶⁸See Dey, *Remarks to the Association of Fellows of the Canadian Securities Institute* (1983) 6 OSC Bull. 218, 223-5(No. 3).

⁶⁹See *Securities Act*, S.Q. 1982, c. 48, s. 51 read with s. 57.

⁷⁰See *Proposals*, vol. I, *supra*, note 6, s. 6.02(2) read with s. 6.02(3)(a).

⁷¹*Securities Act*, S.Q. 1982, c. 48, s. 52(5).

⁷²R.S.Q. 1977, c. V-1, s. 28, third para.

⁷³*Securities Act*, R.S.O. 1980, c. 466, s. 71(1)(n); *The Securities Act, 1980*, S.M. 1980, c. 50, s. 71(1)(m); and *Securities Act*, R.S.A. 1980, c. S-6.1, s. 107(1)(h).

⁷⁴For distributions of "tax shelter securities" the limit is fifty subscribers: see s. 47, first and third paras.

⁷⁵But see *Projet no 31*, *supra*, note 22.

in the new *Act* is the lack of sophistication or access qualifications for purchasers under the exemption.⁷⁶ The other recent provincial statutes with corresponding "limited offering" exemptions all have such qualifications.⁷⁷ The difficulty in determining if such qualifications are met has been a major criticism of those *Acts*.⁷⁸ Unlike the other provincial legislation, the new *Act* restricts the exemption to non-"reporting issuers". "Reporting issuer" is a term describing an issuer which, generally speaking, having qualified a prospectus for a new issue in the past, is now subject to the continuous disclosure regime.⁷⁹ In this way the start-up or "seed capital" nature of the exemption, which is the practical reality in the other provinces except Alberta, is made clear. It is made clearer still by a feature which the new *Act* shares with those other *Acts*, except Alberta's: the exemption can be used only once in an issuer's lifetime.

There are two other exemptions of particular interest to small issuers. One is for "isolated transactions" (so far as issuer, subscriber and any subsequent purchaser are concerned) in debt securities.⁸⁰ This exemption had a counterpart in the old *Act* which, however, was not restricted to debt, and did not require that the transaction be isolated beyond the issuer's perspective.⁸¹ This new provision, coupled with the uncertainties of the term "isolated",⁸² cuts back on the exemption's apparent utility. The second exemption is for a security issued by "a closed company in conformity with its constituting documents".⁸³ A closed company by definition must in those documents "prohibit any distribution to the public"⁸⁴ which reintroduces for this purpose the difficulties of ascertaining who is the "public". It was a feature of the corresponding exemption in the old *Act* that it did *not* require this.⁸⁵

The overall result is a need for further exemptions for small issuers in Quebec if this type of enterprise is to be encouraged:⁸⁶ the simplest reform

⁷⁶But see *Regulation, O.C. 660-83*, 30 March 1983, G.O.Q. 1983.II.1269, s. 103, where subscribers are required to state in the subscription contract that, *inter alia*, they are capable of basing their investment decision on information presented by the issuer.

⁷⁷See the *Securities Act*, R.S.O. 1980, c. 466, s. 71(1)(p); *The Securities Act, 1980*, S.M. 1980, c. 50, s. 71(1)(o); and the *Securities Act*, R.S.A. 1980, c. S-6.1, s. 107(1)(p) and (q).

⁷⁸See, e.g., Buckley, *Small Issuers under the Ontario Securities Act, 1978: A Plea for Exemptions* (1979) 29 U.T.L.J. 309, 349.

⁷⁹See *Securities Act*, S.Q. 1982, c. 48, s. 5, "reporting issuer", also returned to in the text below.

⁸⁰*Securities Act*, S.Q. 1982, c. 48, s. 3(9).

⁸¹*Securities Act*, R.S.Q. 1977, c. V-1, s. 69(a) read with ss 28(i) and 1(13).

⁸²See Buckley, *supra*, note 78, 323-4.

⁸³*Securities Act*, S.Q. 1982, c. 48, s. 3(2).

⁸⁴See *supra*, note 45.

⁸⁵See Buckley, *supra*, note 78, 325.

⁸⁶Compare the conclusions of Buckley, *supra*, note 78.

would be to adopt the limited offering exemption of the federal *Proposals*, which is like Quebec's but which differs from it in at least two important respects.⁸⁷ The federal *Proposals* provide that the exemption may be used more than once, and that the securities commission can make regulations to impose further requirements if, for example, experience with the costs of protecting investors through this concession to small business prove to be too high.

3. Resale Under Exemption

All of the exemptions in the new *Act* discussed in detail here, except the exemption for distributions to employees and the limited offering exemption, are available not only to an issuer, but also to a purchaser who acquired his securities under an exemption. In addition, the purchaser can resell outside the exemption system if he can meet certain conditions, which vary depending on the exemption under which he acquired his securities. For purchasers under all exemptions, there are two common conditions: no effort must be made "to prepare the market or create a demand for the securities being distributed";⁸⁸ and the issuer must be a "reporting issuer" not in default of the requirements applicable to that status.⁸⁹ The latter condition is most significant, for an issuer is a "reporting issuer" only if, as mentioned, having qualified a prospectus, it is subject to the continuous disclosure scheme's requirements described in the next Part of this article.⁹⁰ Thus, like Ontario, Manitoba and Alberta, Quebec is seeking to prevent the creation of large secondary markets for securities in respect of whose issuer there is no substantial mandatory information flow.⁹¹

There are further resale conditions for a purchaser under the "sophisticated purchaser", government purchaser, \$100,000 purchaser or limited offering exemption. The purchaser must have held the securities for periods ranging from six months, for "gilt-edged" securities, through to eighteen months, for securities neither gilt-edged nor listed on "a recognized stock exchange".⁹² By contrast, a purchaser under the exemption for distributions to employees is not subject to a holding period requirement — unless and to the extent that the issuer has not been a reporting issuer for at least twelve

⁸⁷See *Proposals*, vol. I, *supra*, note 6, s. 6.03.

⁸⁸*Securities Act*, S.Q. 1982, c. 48, s. 62.

⁸⁹*Securities Act*, S.Q. 1982, c. 48, ss 58, 60 and 61.

⁹⁰See s. 5, "reporting issuer", and s. 68.

⁹¹See *Securities Act*, R.S.O. 1980, c. 466, s. 71(4), (4a), (5a), (5b) and (7); *The Securities Act*, S.M. 1980, c. 50, s. 71(4), (5) and (7); and *Securities Act*, R.S.A. 1980, c. S-6.1, ss 109, 110 and 112.

⁹²*Securities Act*, S.Q. 1982, c. 48, s. 58. All the active stock exchanges are "recognized" in Quebec for this purpose.

months prior to the original exempt transaction.⁹³ The difference is best explained by the perceived differences in the risk that the relevant purchaser (by reference to the size of his transaction) might be acting as a conduit of securities from issuer to the public.⁹⁴ All of this follows directly from the Ontario, Manitoba and Alberta models.⁹⁵

4. Special Distribution Disclosure Regimes

Rather more distinctive is the provision in the new *Act* of two special distribution disclosure regimes, one of which has been brought about by administrative adaptation in the other provinces, the other of which has no counterparts as yet. The more important of the two is the simplified prospectus scheme.⁹⁶

a. *The Simplified Prospectus Scheme*

This scheme was originally the basis of what is now known nationally as the "Prompt Offering Prospectus" (POP) scheme.⁹⁷ Under the new *Act*, the only provincial legislation to give the scheme formal statutory expression, a distributor which has been a reporting issuer for at least twelve months and has filed a "permanent information record"⁹⁸ prepares a simplified prospectus. This prospectus is significantly shorter than an ordinary one largely because it incorporates by reference both the latest permanent information record (which is to be updated annually) filed with the Commission, and any intervening continuous disclosure filings.⁹⁹ As well, the Commission has undertaken to shorten drastically the time taken by the review process¹⁰⁰ — to the point where in theory a simplified prospectus financing can be as fast and, in document preparation if not printing or other terms, no more expensive than a private placement of equivalent size. Quebec provides access to this system on much more liberal terms than the other provinces which have adopted it: in those provinces the issuer must have attained a substantial size, in terms of the value of its listed non-preferred equity (at least \$100 million), and the value assigned to its consolidated shareholders' equity (at least \$100 million) or after tax income (at

⁹³*Securities Act*, S.Q. 1982, c. 48, s. 61.

⁹⁴See Johnston, *supra*, note 43, 232.

⁹⁵See references in *supra*, note 91.

⁹⁶*Securities Act*, S.Q. 1982, c. 48, ss 18 and 19.

⁹⁷See references in *supra*, note 36.

⁹⁸The contents requirements for which are discussed in the Part III of this article.

⁹⁹Compare Schedule I with Schedule IV in *Regulation*, O.C. 660-83, 30 March 1983, G.O.Q. 1983.II.1269.

¹⁰⁰See CVMQ, *Policy Statement No. Q-1*, 3 CCH Can. Sec. L. Rep. para. 65-001.

least \$15 million).¹⁰¹ Alternatively, a debt issue in those provinces must have a certain minimum investment rating.¹⁰² This is unnecessary in Quebec.

A feature of the POP system in all provinces, which American experience with the analogous integrated disclosure system has shown to be important, is the potential civil liability of the underwriter of a POP issue.¹⁰³ The underwriter in effect undertakes prospectus-like civil liability of the sort described in Part IV below, for the contents of the continuous disclosure documents incorporated by reference into the simplified prospectus. For an issuer wishing to insure that it can take advantage of the speed of the POP system, this seems to mean involving the underwriter in the preparation of the relevant continuous disclosure document, including most importantly the annual report — thus cementing a “house/underwriter” relationship¹⁰⁴ and bringing closer the day when it is established that the same type of civil liability attaches to continuous disclosure documents as now attaches to prospectuses under the new *Act*.¹⁰⁵

b. *The Abridged Prospectus*

The other special disclosure scheme in the new *Act* permits the filing of an “abridged prospectus” in lieu of the regular document.¹⁰⁶ This is apparently designed to facilitate smaller financings: by virtue of the *Regulation* under the *Act*, it is only available for distributions of up to \$5 million. This is in line with other recent initiatives in Quebec to encourage more small businesses to try the public capital market in the province.¹⁰⁷ The abridged prospectus presently has no counterpart in the Canadian *Acts*,¹⁰⁸

¹⁰¹Compare O.S.C., *Policy No. 5.6*, 2 CCH Can. Sec. L. Rep., para. 54-936, section B, with the *Securities Act*, R.S.O. 1980, c. 466, ss 18 and 84. *Policy 5.6*, section A.5 is misleading in this respect.

¹⁰²See references in *supra*, note 36.

¹⁰³Compare Nicholas, *The Integrated Disclosure System and Its Impact Upon Underwriters' Due Diligence: Will Investors Be Protected?* (1983) 11 Sec. Reg. L.J. 3, 18-20 with the remarks of Dey, *supra*, note 67, 221-3.

¹⁰⁴Competitive pressures in the market for underwriting new issues cut the other way, of course: see Nicholas, *supra*, note 102, 25ff.

¹⁰⁵See Dey, *supra*, note 68, 222-3.

¹⁰⁶*Securities Act*, S.Q. 1982, c. 48, s. 65 and *Regulation*, O.C. 660-83, 30 March 1983, G.O.Q. 1983.II.1269, ss 66-70.

¹⁰⁷Gouvernement du Québec, *Budget 1983-84*, Discours sur le budget, 22-4 (Budget speech delivered by Mr. Jacques Parizeau, Minister of Finance, 10 May 1983); also reproduced in Assemblée nationale du Québec, *Journal des Débats*, 33^e législature, 4^e session, t. XXVII, 974ff.

¹⁰⁸The closest is probably the exchange offering prospectus (replacing the “statement of material facts”) for distributions through the facilities of a stock exchange. See Dey, *Remarks to the Financial Post Conference on Risk Capital*, (1983) 6 OSC Bull. 1571, 1575 (No. 15).

and is apparently inspired by American federal securities law.¹⁰⁹ A comparison of the full and abridged prospectus requirements in the *Regulation* discloses that it appears substantially simpler to comply with the provisions governing the abridged prospectus.¹¹⁰ This apparent difference is reduced by the requirement that both documents “[s]tate any other material fact that is likely to affect the value or the market price of the securities being distributed”.¹¹¹ As the usual civil liability for a prospectus attaches to the content of an abridged prospectus, it remains to be seen how significant in practice this special disclosure scheme will become for smaller issues. Furthermore, small issuers might be deterred by the *consequences* of going public through a prospectus, albeit an abridged one. The major consequence is becoming a reporting issuer and thus subject to the continuous disclosure scheme. We suggest a re-definition of reporting issuer in the next Part of this article which addresses this problem. However, for all of this, we see the new Quebec abridged prospectus scheme as a step in the right direction.¹¹²

C. Conclusion

Overall, a major concern about the new Quebec scheme, as with all similar provincial schemes, is the weight of required disclosure. There are data that suggest it does not produce sufficient investor benefit to justify the load. We return to this point in our Conclusion. The complexity of the legislation provides a lesser concern. With the scheme's expanded list of exemptions, and the involved controls over resales, it is complex indeed. But the comparative simplicity of the old scheme, with its “public” and first-sale-to-the-public elements, was in large part illusory, and the new *Act* has probably made the application of the prospectus requirement significantly more certain.

III. The Continuous Disclosure Regime

In terms of volume and value of trading the secondary securities market is much more significant than the primary trade in securities.¹¹³ Securities reform in recent years has probably paid greater attention to investor protection in this area than in the area of prospectus qualification.¹¹⁴ The new

¹⁰⁹See (1982) 17 C.F.R. §230. 251-64.

¹¹⁰*Cf. Regulation, O.C. 660-83*, 30 March 1983, G.O.Q. 1983.II.1269, Schedule I with Schedule VI, and also ss 69 and 70.

¹¹¹*Regulation, O.C. 660-83*, 30 March 1983, G.O.Q. 1983.II.1269, Schedule I, item 40 and Schedule VI, item 22.

¹¹²For a partially dissenting view, see *Proposals*, vol. II, *supra*, note 6, 79 (“greatest investor need for information is likely in connection with first issues by smaller entities”).

¹¹³See, e.g., Williamson, “Canadian Capital Markets” (1978) in *Proposals*, vol. III, *supra*, note 6, 18-9.

¹¹⁴Shinnonds, *supra*, note 48, especially references at 5, n.15.

Act builds on law made in and under its predecessor, as well as the recent reforms in Ontario.

There are five components of the continuous disclosure system in the new *Act*. "Reporting issuers" must disclose, through a press release which must also be filed with the Commission, material changes "likely to have a significant influence on the value or market price of the reporting issuer and...not generally known" — as those changes occur.¹¹⁵ Reporting issuers must file with the Commission both quarterly financial statements and annual reports.¹¹⁶ The latter must also be sent to certain registered security holders.¹¹⁷ The management of such issuers who call meetings of holders of voting securities must solicit proxies; and every one who solicits proxies must prepare a circular to be sent to those security holders and filed with the Commission.¹¹⁸ "Insiders" of reporting issuers must disclose through filings with the Commission changes in their control over securities of the issuer.¹¹⁹ And reporting issuers who wish to utilize the simplified prospectus (or POP) system must file and annually update a permanent information record.¹²⁰ This record must contain certain prescribed information, as well as all of the other continuous disclosure material the issuer files. In terms of the old *Act*, and Commission practice under it, only the proxy and permanent information record provisions are novel. In terms of the Ontario legislation, if not the practice under it, only the provisions respecting the permanent information record are original.

A. *The Reporting Issuer*

The term "reporting issuer" is crucial to the application of the continuous disclosure scheme.¹²¹ The idea here is to include within the scheme all entities for whose securities there is likely to be a significant secondary market. In conformity with the Ontario *Act*¹²² there are broadly three classes of issuers which the *Act* identifies for this purpose. One is issuers that have qualified a prospectus, or filed a securities exchange take-over bid circular, with the Commission. Another is issuers that have been listed on a stock exchange in Quebec (that is, The Montreal Exchange). The third is issuers that are the result or remnant of a business combination, one of the parties

¹¹⁵*Securities Act*, S.Q. 1982, c. 48, ss 73 and 74; see also the penal liability provisions, ss 187-9, and ss 226-33 regarding civil liability. We do not discuss in this article the closely related provisions respecting mutual funds.

¹¹⁶*Securities Act*, S.Q. 1982, c. 48, ss 75-80.

¹¹⁷*Securities Act*, S.Q. 1982, c. 48, s. 77.

¹¹⁸*Securities Act*, S.Q. 1982, c. 48, ss 81 and 82.

¹¹⁹*Securities Act*, S.Q. 1982, c. 48, ss 89-103.

¹²⁰*Securities Act*, S.Q. 1982, c. 48, ss 84-8.

¹²¹See *Securities Act*, S.Q. 1982, c. 48, ss 68-72.

¹²²See *Securities Act*, R.S.O. 1980, c. 466, s. 1(1)38.

to which was a reporting issuer.¹²³ By comparison with the old *Act*¹²⁴ what is probably most notable about this new approach is the removal of the former restriction of continuous disclosure requirements to *corporate* issuers: some limited partnerships (*sociétés en commandite*) are listed on The Montreal Exchange, for example. Bill 85's coverage may be criticized as being both too broad and too narrow. It is not clear that a significant secondary market always or usually forms after a prospectus-qualified issue is made.¹²⁵ Also, not every issuer for whose securities a significant secondary market exists will be caught: consider an out of Quebec issuer which has never raised capital in the province or obtained a Montreal Exchange listing.¹²⁶ The federal *Proposals* have a better criterion: whether the issuer has listed any class of its securities on a recognized exchange, or has at least three hundred "public security holders".¹²⁷

The requirement to disclose certain material changes as they occur, to be found in section 73 of the new *Act*, follows from the Commission's former *Policy Statement No. 24*.¹²⁸ This *Statement* required disclosure of "material facts" or "material changes",¹²⁹ on pain of Commission intervention by, for example, a cease trade order. While this *Policy Statement* has now been withdrawn, its learning remains of value in two respects. First, the *Policy Statement* indicates some types of circumstances which would require disclosure to be made, such as "proposed take-overs" or "material discoveries...which would materially affect earnings upwards or downwards".¹³⁰ These help, but it remains a difficult task to determine when disclosure must be

¹²³For these three classes, see *Securities Act*, S.Q. 1982, c. 48, s. 68.

¹²⁴See the *Securities Act*, R.S.Q. 1977, c. V-1, ss 113(a) and 157(b).

¹²⁵See *Proposals*, vol. II, *supra*, note 6, 66-7, which notes that advantages of the broader coverage are greater "ease" of application "and the cost savings when a prospectus containing most of the required information [for any initial continuous disclosure filing] must be prepared in any event".

Former Commission policy was that issuers which went public should secure a listing on The Montreal Exchange: see *Proposals*, vol. II, *supra*, note 6, 63-4. The point in the text suggests that reinstatement of such a policy might be unwise.

¹²⁶Yontef, "Insider Trading" (1978) in *Proposals*, vol. III, *supra*, note 6, 633.

¹²⁷See *Proposals*, vol. I, *supra*, note 6, ss 2.38 and 4.02, read with s. 4.01(b), "public security holder".

¹²⁸Q.S.C. (1974) V Weekly Bulletin (No. 19) [hereinafter *Policy Statement No. 24*].

¹²⁹Although it is not entirely clear, the term seems to have been meant to trigger the disclosure requirement at least as often as the provision of the new *Act*. If anything, *Policy Statement No. 24* may have covered more situations (compare "might reasonably be expected to affect materially"/"qui peut vraisemblablement influer d'une manière appréciable" in *Policy Statement No. 24*, *supra*, note 128, 1.2 with "likely to have a significant influence on"/"susceptible d'exercer une influence appréciable sur" in s. 73 of the new *Act*).

¹³⁰*Policy Statement No. 24*, *supra*, note 128, 1.2.4.

made, especially when circumstances are in flux.¹³¹ In particular, all of the instances in the *Policy Statement* are matters of the internal affairs of the issuer. But it appears that the *Policy Statement*, and even more clearly Bill 85, also include "external" events. This differentiates the Quebec provision from the Ontario legislation,¹³² and would require the disclosure of, say, a proposed but unannounced change in the tariff structure affecting the issuer's foreign competitors and likely to improve dramatically the issuer's competitive position. The other respect in which the *Policy Statement* helps is to remind issuers that sometimes they must make it known that a material change of the sort section 73 covers has *not* occurred.¹³³ Such a time is when unusual or sudden market activity in the issuer's securities is inexplicable in terms of matters known to the issuer.

The disclosure requirement of section 73, as of the *Policy Statement*, is capable of operating to the detriment of the issuer or its security holders without an offsetting benefit to the market place. The classic example is delicate take-over negotiations, which could be soured by premature revelation. The *Act* clearly provides, as previous practice of the Commission did, for an issuer to keep matter confidential where it has "reasonable ground to believe that disclosure would be seriously prejudicial to the interests of the issuer and that no transaction in the securities of the issuer has been or will be carried out on the basis of the information not generally known".¹³⁴ A problem with this formulation is the self-policing feature.¹³⁵ A better solution to the dilemma would have the issuer telling the Commission that a change has occurred without specifying it. Then the Commission could closely monitor trading activity in the issuer's securities, especially its insiders' trading reports. This is the federal *Proposals*' solution.¹³⁶

B. *Periodic Disclosure*

As well as these "timely disclosure" obligations, reporting issuers must make periodic, mainly financial, disclosure. Where the old *Act* required unaudited semi-annual financial statements,¹³⁷ the new *Act* moves to quarterly ones, following the requirements applied by The Montreal Exchange

¹³¹A recent widely publicized instance which nicely illustrates the interpretive problems created arose out of the attempt by Norcen Energy Resources Limited to gain control of the Hanna Mining Company. See *Norcen Investigation* (1983) 6 OSC Bull. 759, 761 (No. 8).

¹³²See Alboini, *supra*, note 39, 532.

¹³³See *Policy Statement No. 24*, *supra*, note 127, ss 6.1-6.2.

¹³⁴S.Q. 1982, c. 48, s. 74. Compare *ibid.*, Section 7.

¹³⁵Contrast the *Securities Act*, R.S.O. 1980, c. 466, s. 74(3) (issuer files report with Commission marked "confidential" together with reasons for non-disclosure).

¹³⁶See *Proposals*, vol. I, *supra*, note 6, s. 7.03(2) and *Proposals*, vol. II, *supra*, note 6, 112.

¹³⁷R.S.Q. 1977, c. V-1, s. 116.

to listed issuers.¹³⁸ Where the old *Act* required audited annual financial statements, the new *Act* requires an annual *report*.¹³⁹ The annual report will contain the yearly financial statements, audited and with the previous year's statements for comparison; but it will also contain certain other matter prescribed by the *Regulation*. This matter is narrative, and at present¹⁴⁰ comprises, most importantly, a brief description of the issuer's activities over the financial year and management's discussion of the financial results. This represents for Canada the first such direct control of the narrative contents of what in practice is probably the major medium of communication between management and shareholders. The importance attached to this communication is exemplified by the requirement under the *Act* that the annual report not simply be filed, but also sent to "every registered holder of the issuer's securities, other than debt securities".¹⁴¹ The greater attention to the non-financial contents of the document is evidently inspired by the federal *Proposals*¹⁴² and the American Law Institute's *Federal Securities Code* project.¹⁴³

C. *The Proxy Information Circular*

The other important medium of communication between management and shareholders is the proxy information circular, which the old *Act* did not regulate. The circular requirements, outlined in Schedule VIII to the *Regulation*, are very similar to those under the Ontario scheme.¹⁴⁴ Thus,

¹³⁸Montreal Exchange, Rule V, s. 9160, 3 CCH Can. Sec. L. Rep., para. 86-818. See *Securities Act*, S.Q. 1982, c. 48, s. 76. It is somewhat inconvenient for issuers that the period for filing quarterly in Quebec is forty-five days, which compares with sixty days under *Securities Act*, R.S.O. 1980, c. 466, s. 76.

¹³⁹S.Q. 1982, c. 48, s. 77. The annual report must be filed within 140 days of the end of the issuer's financial year, while the annual financials, which form part of the report, must be filed earlier, within 90 days of the end of the financial year in accordance with s. 75. Again, the latter period is shorter than the corresponding 140 day period under Ontario's *Securities Act*, R.S.O. 1980, c. 466, s. 77.

¹⁴⁰See *Regulation*, O.C. 660-83, 30 March 1983, G.O.Q. 1983.II.1269, s. 119. The Canadian Institute of Chartered Accountants presently requires some narrative matter as incidental to the financial statements: these requirements are picked up by the corporations laws of some Canadian provinces and by the *Federal Act*.

¹⁴¹Compare the approach described in *Proposals*, vol. II, *supra*, note 6, 110-1. Note also *Regulation*, O.C. 660-83, 30 March 1983, G.O.Q. 1983.II.1269, s. 120, dealing with "management reports" if used. This section draws on the 1978 report of the Adams committee to the CICA and the subsequent 1981 report jointly sponsored by the CICA and the Financial Executives Institute: see CVMQ, *Notice* [:] *Management Report* (1981) XII Bulletin hebdomadaire (no 46).

¹⁴²The federal *Proposals* also provide for control over the narrative portion of the quarterly financial reports: see *Proposals*, vol. I, *supra*, note 6, s. 7.02.

¹⁴³See The American Law Institute, *Federal Securities Code*, (1980), vol. I, §602(a), comment (2).

¹⁴⁴See *Regulation*, R.R.O. 910/80, Form 30.

particulars of the matters to be voted upon must be given, together with separate specifications if those matters include appointment of an auditor or election of directors. The relevant types of voting security holders must be identified, including those with "significant" single holdings which control more than 10 *per cent* of the voting rights attached to any class of the issuer's securities. The aggregate remuneration of senior executives must be set out, and the interests of management in matters to be voted upon must be described.

D. *Insider Trading Reports*

Probably of rather more interest to investors are the requirements with respect to the reporting of transactions by insiders. "Insider" is defined in much the same way as in the old *Act*.¹⁴⁵ The new *Act* covers senior executives of the issuer, of its subsidiaries or of an insider of the issuer; persons exercising control over more than 10 *per cent* of the voting rights attached to the outstanding securities of the issuer; and, what is novel under the new *Act*, the issuer itself and its subsidiaries.¹⁴⁶ Also new to Quebec securities law is a provision making senior executives of an issuer which becomes an insider of a reporting issuer (as by a take-over bid) insiders of the reporting issuer for up to the previous six months.¹⁴⁷ Insider trading information, taken from the filed reports, is published in the Commission's *Bulletin hebdomadaire*, and appears to be as closely followed in Quebec as in the other provinces in which such information is available. Like the old *Act*¹⁴⁸ Bill 85 requires reports to be filed within ten days of the end of the month in which the transaction occurred, and within three days of the transaction if it brought the holdings of a person up to or over 20 *per cent* of the voting rights attached to the issuer's outstanding securities.¹⁴⁹ The new *Act* does go further than the old, and further than the Ontario *Act*, by requiring an insider trading report to be filed within ten days of a transaction if it resulted in a change of control of more than 1 *per cent* since the last reported position.¹⁵⁰ Alberta, however, goes even further — there *any* change must be reported within the "accelerated" ten-day period.¹⁵¹ In both Quebec and

¹⁴⁵Compare *Securities Act*, S.Q. 1982, c. 48, s. 89 with *Securities Act*, R.S.Q. 1977, c. V-1, ss 157(c) and 158(a).

¹⁴⁶It should be noted that the 10% voting rights class of insider is somewhat differently — and possibly more widely — worded under the old *Securities Act*, R.S.Q. 1977, c. V-1, s. 157(c)(iii).

¹⁴⁷*Securities Act*, S.Q. 1982, c. 48, s. 94. Compare *Securities Act*, R.S.O. 1980, c. 466, s. 1(9), which has the same effect.

¹⁴⁸Compare *Securities Act*, R.S.Q. 1977, c. V-1, s. 162 with *Securities Act*, S.Q. 1982, c. 48, s. 97.

¹⁴⁹*Securities Act*, S.Q. 1982, c. 48, s. 99. See also s. 100 regarding subsequent 5% changes.

¹⁵⁰*Securities Act*, S.Q. 1982, c. 48, s. 97(1).

¹⁵¹*Securities Act*, S.A. 1981, c. S-6.1, s. 147(2).

Alberta, but not Ontario, a person, insider or not, other than the offeror, who, during a take-over bid, acquires at least 5 *per cent* of the target class or series of securities (Quebec), or who acquires voting securities of the target reporting issuer "carrying at least 5 *per cent* of the (total) voting rights attached (to such securities)" (Alberta), must report this by ten a.m. of the next working day (Quebec), or within three days (Alberta).¹⁵² All of these accelerated reporting requirements, particularly Alberta's, are likely to be of great utility in a marketplace characterized in recent years by considerable take-over bid activity.

However, Quebec's new reporting requirements taken as a whole probably go too far in requiring reports of transactions regardless of size. They therefore catch transactions which are not likely to be of interest to investors and do not signal any improper insider trading activity.¹⁵³ Both American federal securities law and the federal *Proposals* contain small transaction exemptions which are worthy of consideration for Quebec.¹⁵⁴

E. The Permanent Information Record

The new *Act's* permanent information record may prove to be of great use for investment analysis. It is the maintenance of this record which permits the use of the simplified prospectus system. Thus, the *Act* here provides for an important form of integration of the continuous disclosure and new issue disclosure schemes. This integration has been accomplished by discretionary administrative action in the other provinces.¹⁵⁵ As was seen, Quebec allows any reporting issuer which has satisfied the requirements attaching to that status for one year to have access to the system. The issuer's market capitalization, consolidated shareholders' equity or after tax income and the investment rating of its debt are relevant only to determining the contents of the distinctive document forming part of the permanent information record. This document, which must follow Schedule IX of the *Regulation*, serves to provide on a continuing basis much of the information that would otherwise appear only in a prospectus (if filed), or, in a different form, be scattered across the discrete continuous disclosure filings. The most important part of the Schedule IX requirements are for details representing the business of the issuer, consolidated financial information of certain sorts going back up to five years, an analysis of the issuer's financial position and operating results, its important subsidiaries, its senior executives, its dividends and the markets where the issuer's shares, other

¹⁵²*Securities Act*, S.Q. 1982, c. 48, s. 143; *Securities Act*, S.A. 1981, c. S-6.1, s. 149(1). The Quebec Commission has indicated that it will endeavour to give these publicity quickly.

¹⁵³See *Proposals*, vol. II, *supra*, note 6, 120-1.

¹⁵⁴*Ibid.*

¹⁵⁵See references in *supra*, note 36.

than its preferred shares, are traded. The amount of information Schedule IX requires is increased if the issuer does not meet the criteria which in the other provinces determine access to this disclosure system. Schedule IX otherwise has the same requirements as those provinces' policy statements set out for their "Annual Information Forms".¹⁵⁶

F. Conclusion

Overall, Quebec, more than any other province to date, appears to have moved in the direction of a two-tiered information system. In one tier, made up of the documents required to be sent to security holders, namely the annual reports and managements' proxy information circular, disclosure is meant at least as much for the lay investor as for the securities professional. The other tier, made up of the filings comprising the timely disclosure and insider trading reports, and the Schedule IX document which anchors the permanent information record, is likely to be of greater interest and utility to the securities professional who advises others or manages their portfolios. Through the Schedule IX document this tier offers the prospect of an integrated continuous disclosure record approximating a prospectus in coverage and currency. In this respect the Quebec legislators appear to have been inspired by the federal *Proposals*,¹⁵⁷ as well as by a recognition that investment information does not have to be directly known to the investor to be helpful. The *Proposals* indicate the possibility that the second level of disclosure could relatively easily include "soft" data, particularly financial forecasts. These are the sorts of data that have given regulators concern in the past, lest they be misinterpreted by the lay investor — although financial forecasts are now specially regulated in Quebec, so that they may appear in both levels of disclosure.¹⁵⁸ The further question whether the continuous disclosure regulatory effort is in fact worth the costs to issuers is examined in our Conclusion.

IV. Take-over Bids

Like the old *Act*, Bill 85 deals with take-over bids for securities of an issuer and also bids whereby an issuer proposes to purchase back part of its outstanding capital (issuer bids). An issuer bid,¹⁵⁹ an invitation to make an offer to sell, the acceptance of an unsolicited offer to sell and an exchange of securities for the same purpose as a take-over bid generally speaking all

¹⁵⁶On those forms, see the references in *supra*, note 36.

¹⁵⁷See *Proposals*, vol. II, *supra*, note 6, 108.

¹⁵⁸See *ibid.*, 68. See also CVMQ, *Policy Statement Q-11, "Financial Forecasts"*, 3 CCH Can. Sec. L. Rep. para. 65-011.

¹⁵⁹*Securities Act*, S.Q. 1982, c. 48, ss 144-7.

come within the scheme of regulation for take-over bids.¹⁶⁰ References in this section to take-over bid rules are thus also to the issuer bid rules, unless otherwise indicated.

The purpose of these provisions is to protect offerees against having to make a hurried decision in a high pressure context with inadequate information. What is notable about Bill 85 is the expanded scope of the definition of a take-over bid, as under recently proposed amendments to the Ontario *Act*; the variations in the exemptions from the application of the provisions; the circular that directors of an offeree are now obliged to send; and finally the more onerous conditions under which an offer must be conducted or may be withdrawn.

The definition of a take-over bid in Section 110 of the new *Act* is formulated in terms of an offer for the purpose of "obtaining or securing a dominant position in the offeree issuer". "Dominant position" is further defined in the same section as a holding of more than 20 *per cent* of the "voting securities of the offeree issuer". Unlike the old *Act*, this position is to be determined taking account of, for example, securities convertible to voting securities.¹⁶¹ Perhaps more important is that a dominant position is no longer limited to voting *shares*.¹⁶² It now covers any voting securities, such as shares in a limited partnership.

A. *Exemptions from Take-over Bid Regulation*

There are four exemptions from the regulatory scheme. One is a stock exchange exemption which had a counterpart in the old *Act*.¹⁶³ The last paragraph of section 116, read with sub-section (1), exempts from the application of the take-over bid requirements the purchase of securities on a stock exchange recognized by the Commission for this purpose, but also establishes a quantity limit for the exemption. In no case may purchases exceed 5 *per cent* of the total voting securities in any thirty day period and 10 *per cent* in any one hundred and eighty day period unless there is an offer to all holders made in accordance with exchange rules. These quantity limits are new, and are attempts to define more sharply what transactions are tolerable in the interests of ensuring the proper functioning of the market, particularly taking account of the normal activities of an institutional investor. The relevant stock exchange (The Montreal Exchange) can propose a different rule with appropriate conditions, which would have to be approved

¹⁶⁰*Securities Act*, S.Q. 1982, c. 48, ss 113 and 114.

¹⁶¹*Securities Act*, S.Q. 1982, c. 48, s. 111.

¹⁶²*Securities Act*, R.S.Q. 1977, c. V-1, s. 1(18). Section 112 of the new *Act* triggers the application of the rules where at least one "security" holder has his address in Quebec according to the records of the "offeree issuer".

¹⁶³*Securities Act*, R.S.Q. 1977, c. V-1, s. 131(f), "exempt offer".

by the CMVQ after a public hearing.¹⁶⁴ As the 5 per cent rule is common to all the major Canadian exchanges,¹⁶⁵ consultations among them would have to take place on new rules concerning take-over bids. Relatedly, there is a new exemption, under section 116(3), for bids off the exchange involving no more than 5 per cent of the total voting securities, provided that there have not been acquisitions under the exchange exemption or this one totalling more than 5 per cent. Purchases on over-the-counter markets will thus be governed by section 116(3).

B. Limited Bid Exemptions

Another exemption from the regulatory scheme concerns take-over bids not made to security holders in general. This limited bid exemption had a counterpart in the old *Act*¹⁶⁶ and under Bill 85 applies to take-over bids made to no more than fourteen holders, regardless of their residence, by way of separate agreements. Bill 85 imposes an additional condition — that the bid price not exceed 115 per cent of the average closing quotation of the securities referred to during the ten days of stock market activity preceding the bid. This exemption differs substantially from the corresponding Ontario provision, which is not subject to a 115 per cent bid price ceiling. However, in that province a bid over the 115 per cent level entails subjection to the requirement to make a follow-up offer to the remaining security holders:¹⁶⁷ in Quebec a bid over the prescribed level which is not otherwise exempted falls under the full regulatory scheme. The Quebec position is thus also distinct from that in Alberta,¹⁶⁸ where the limited bid exemption has no bid premium ceiling. In effect, Quebec has chosen to directly regulate the payment of a premium for a control block of securities, but in a different fashion from the Ontario rules.¹⁶⁹

Finally, as under the old *Act*, the Commission is entitled to exempt any take-over bid from the requirements of the *Act* — including situations involving the section 116 exemptions where not all their conditions are met

¹⁶⁴*Securities Act*, S.Q. 1982, c. 48, ss 177 and 178.

¹⁶⁵See 3 CCH Can. Sec. L. Rep.: Montreal Exchange, Rule VIII, s. 12001, "normal course purchase", para. 87-701; Toronto Exchange, By-Laws, Part XXIII, Stock Exchange Take-over Bids, s. 23.01(6), "normal course purchase", para. 90-126; Vancouver Exchange, Rule 975.01(6), "normal course purchase", para. 94-514(e).

¹⁶⁶*Securities Act*, S.Q. 1982, c. 48, s. 116(2) and 116(3) and *Regulation*, O.C. 660-83, 30 March 1983, G.O.Q. 1983.II.1269, s. 187. Compare *Securities Act*, R.S.Q. 1977, c. V-1, s. 131(f).

¹⁶⁷See Alboini, *supra*, note 39, 685-7.

¹⁶⁸*Securities Act*, S.A. 1981, c. S-6.1, s. 132(1)(c).

¹⁶⁹See Alboini, *supra*, note 6, 643-4, 715, 721-8. The Chairman of the O.S.C., Peter Dey, has commented on the "constructive" Quebec approach; see *Remarks to the Society of Financial Analysts*, (1983) 6 OSC Bull. 1313, 1320 (No. 13).

and where it finds that such an exemption would not be detrimental to the protection of investors.¹⁷⁰

C. Information Circulars

The take-over bid must be sent to security holders and must be accompanied by a take-over bid circular and the circular of the offeree's directors. The purpose of these documents is to provide information relevant to a decision of a security holder. The contents of the circulars are prescribed in the *Regulation* and must be certified by the board of directors,¹⁷¹ and in the case of both take-over bid circulars and exchange bid circulars, the information required is substantially the same as that specified by the old *Act*.¹⁷² The exceptions include some additions¹⁷³ and the compulsory mention of the statutory civil remedies to be discussed in the next Part. The Commission also has discretion to approve communication of the bid and the circulars in any manner. Newspaper advertisement, for instance, would be useful in case of postal disruption. This rule is more flexible than that of the Ontario *Act* where the only way to send the circular of the board and of the senior executive officers is by mail,¹⁷⁴ although the possibility exists there of an exemption order being obtained.

The old *Act* required directors of the offeree issuer to issue and send a circular only if they had a recommendation to make. Bill 85 renders mandatory the preparation of a circular by the board of directors, who must send it out within ten days from the date of the bid irrespective of whether or not they recommend its acceptance or rejection.¹⁷⁵

Under the old *Act*, any person other than the offeror who acquired the securities sought during either a take-over bid or an issuer bid would be

¹⁷⁰*Securities Act*, S.Q. 1982, c. 48, s. 263.

¹⁷¹*Regulation*, O.C. 660-83, 30 March 1983, G.O.Q. 1983.II.1269, s. 170, Schedule XI, item 20 and Schedule XIV, item 21. See also *Canada Business Corporations Regulations*, SOR/79-316, ss 59-62.

¹⁷²*Regulation*, O.C. 660-83, 30 March 1983, G.O.Q. 1983.II.1269, Schedule XI, items 11, 13, 15-9 and 21.

¹⁷³*Regulation*, O.C. 660-83, 30 March 1983, G.O.Q. 1983.II.1269, Schedule XI, item 3(4), formerly R.R.Q. 1981, c. C-11, r. 1, s. 36(a)(iv), no longer requires knowledge of the directors and senior executives, whereas item 4, formerly s. 36(b), now requires such knowledge; the delay of the right of cancellation, formerly seven days under s. 36(e), is now ten days by written notice (item 7); item 9 has waived the former requirement of s. 36(g) that the information be given where a reasonable inquiry was possible; item 20 and s. 182 now require mention of the approval and publication of the circular, where s. 37 formerly required that its contents be certified and signed.

As to the exchange bid circular, the requirements are more specific than under the *Securities Act*, R.S.Q. 1977, c. V-1. See *Regulation*, R.R.Q. 1981, c. V-1, r. 1, s. 38.

¹⁷⁴*Securities Act*, R.S.O. 1980, c. 466, s. 96(6). See Alboini, *supra*, note 39, 746.

¹⁷⁵*Securities Act*, S.Q. 1982, c. 48, ss 121 and 122.

required to disclose its acquisition only if he could be brought within the insider class. Practical experience with the operation of the Ontario *Securities Act* in the course of certain take-over bids¹⁷⁶ has since demonstrated the need for the special accelerated reporting requirements mentioned in the previous Part of this article. These apply to issuer bid situations also¹⁷⁷ and should act as a deterrent to collusion between persons trying to block a take-over. More recent cases have demonstrated that the acquisition of a block during a bid is a material fact which should be disclosed to the public on the exchange on the following day.¹⁷⁸

D. *Substantive Provisions Respecting Terms of an Offer*

Besides the provisions on disclosure of information in the offer, there are also substantive provisions covering the terms of the offer. These are designed to relieve shareholders from the need to act before they have had a chance to assess the information and to come to a reasoned decision with respect to the sale of their shares. These provisions also prevent shareholders from being locked into an offer for too long a time without payment. Thus, as under the old *Act* and the Ontario *Act*, there are rules setting a timetable for dispatch of the offeror's circular, deposit of offeree's securities and duration of the bid; and rules respecting over-tendering, payments and changes in circumstances affecting the bid. As well, there are now rules against selling against the bid, which have no counterparts in the old *Act* or the Ontario one. Under these rules, the sale by the offeror of securities of the class or series sought during the entire duration of the bid is prohibited.¹⁷⁹ The example has been given of an offeror having abandoned a bid and "selling his holdings into the market at prices influenced by the bid", or of the offeror "tendering securities in a competing bid prior to withdrawing his bid while those who deposited securities under his bid are unable to sell to the competing bidder".¹⁸⁰

Some of the rules in Bill 85 which have counterparts in the old *Act* and the Ontario *Act* nonetheless diverge from those models. Thus, the number of conditions that may be attached by offerors to their bids to take account of changed circumstances has been increased from two to four. Section

¹⁷⁶See *An Act to Amend the Securities Act*, Bill 176, 2d Sess., 32d Legis. Ont. 31 Eliz. II, 1982, cl. 41.

¹⁷⁷See the French version of Bill 85, *Loi sur les valeurs mobilières*, L.Q. 1982, c. 48, art. 143, which refers to "offre publique", which covers both a take-over bid and an issuer bid. Also compare the English and French versions of the heading under Title IV between ss 109 and 110.

¹⁷⁸See Alboini, *supra*, note 39, 663-9. Under Bill 85 see *Regulation, O.C. 660-83*, 30 March 1983, G.O.Q. 1983.II.1269, s. 189.

¹⁷⁹*Securities Act*, S.Q. 1982, c. 48, s. 129.

¹⁸⁰Alboini, *supra*, note 39, 710-1.

126(1) of Bill 85, which had its counterpart in the old *Act* and the Ontario *Act*, permits the offeror to reserve the right to withdraw the take-over bid where the minimum number of securities sought has not been tendered. Unlike its predecessor, section 126(2) does not limit the unforeseen and material change against which an offer may be withdrawn to acts of the management of the offeree corporation.¹⁸¹ Section 126(3) introduces to Quebec law an exemption which allows an offeror to withdraw his bid where the approval of a public body is required.¹⁸² Section 126(4) introduces an exemption which allows the withdrawal of the bid where the offeror is prevented from doing so by the effect of a general law.

E. Conclusion

Overall, the provisions of the new *Act* on take-over bids are largely — but not entirely — the same as those found in the Ontario *Act*. Thus, the major changes that have been introduced have broadened the application of the rules to all types of securities and to persons in a special relationship, or acting as a group, while narrowing the availability of the limited bid exemption. In addition, offeree security holders will be provided with increased information with which to come to a reasoned decision, while benefiting from the new statutory civil liability rules in Bill 85.

V. Market Controls

The rules under Bill 85 are to be enforced by the CVMQ itself, through broad powers of intervention in securities trading, as well as through the courts. We focus here on civil liability, where the new *Act* breaks new ground in Quebec, and the administrative sanctions, where the new *Act* augments the formidable arsenal in the old *Act*.

A. Civil Liability

Bill 85 expressly imposes three types of civil liability where the old *Act* had none. However, under the old regime the civil law provided a number of recourses, which are to be continued under the new *Act*.¹⁸³ The first type of statutory liability deals with transactions made without the specified disclosure documents. The second type of liability is for false statements contained in disclosure documents, and the third type deals with insider trading. With respect to the first two types of liability, but not the third, there are

¹⁸¹See *Securities Act*, R.S.Q. 1977, c. V-1, s. 132 and *Securities Act*, R.S.O. 1980, c. 466, s. 89(1)(12)(c). Of course, the offeror's change of mind is not sufficient: for instance, the imposition of quotas under the *Export and Import Permits Act*, R.S.C. 1970, c. E-17, could constitute a material change for a particular enterprise.

¹⁸²See, e.g., *Transport Act*, R.S.Q. 1977, c. T-12, s. 39.

¹⁸³*Securities Act*, S.Q. 1982, c. 48, "Explanatory Notes" (Title VIII).

civil law analogues. What is particularly notable now are the differences the provisions of the new *Act* will make, as well as the uncertainties those provisions create.

1. Liability for Lack of Disclosure

The first type of statutory civil liability is a recognition of the jurisprudence of the Quebec Cour d'Appel on the delivery of the prospectus¹⁸⁴ and of the civil law rule that a breach of a statutory provision gives rise to delictual liability,¹⁸⁵ and consequently, it would seem, relief in damages. However, there is no jurisprudence illustrative of this damages liability. Section 214, which gives buyers the right to have the transaction set aside for lack of a prospectus, now expresses what was considered a little-tested possibility at civil law.

Thus, where a prospectus has not been delivered as required under Bill 85, the person selling the security can be sued for rescission or, if the subscriber or purchaser has disposed of the security, revision of price, in addition to damages. Damages can be claimed from: the issuer, the holder whose securities were distributed without prior filing of a prospectus; from the senior executives of the issuer or of the holder; or from the dealer responsible for the distribution. Where a prospectus has been filed but has not been received by the subscriber or purchaser, his right is limited to damages against the dealer required under section 29 to send him the prospectus. While the right of rescission given to the purchaser or subscriber offers investors a fixed recovery, the return of the price, revision of the price and damages are in the discretion of the court for assessment. The measure of those is unclear, and is returned to below.

Section 214 does not mention documents other than a prospectus. Thus it does not cover, for example, a notice offering securities exempted under section 52 and required to be prepared, filed and sent to prospective purchasers under section 53, which is returned to in Part VI. However, it is noticeable that the exemptions of section 52 appear to be conditional upon the preparation and sending of circulars to the persons contemplated by the distribution.¹⁸⁶ Thus the failure to provide the circulars would deprive the

¹⁸⁴Y. Renaud & J. Smith, *Droit québécois des corporations commerciales* (1974), vol. II, 1189-90.

¹⁸⁵Newman, *Breach of Statute as a Basis for Responsibility in Civil Law* (1949) 27 Can. Bar Rev. 782. There is also the possibility of absolute nullity: *Gaston Pelletier v. René Pelletier and Les Aliments Maxi, Inc.*, C.P. (Kamouraska, 250-02-000624-79) 18 June 1981.

¹⁸⁶*Securities Act*, S.Q. 1982, c. 48, s. 53; *Regulation*, O.C. 660-83, 30 March 1983, G.O.Q. 1983.II.1269, s. 111, which applies to all notices.

distribution of the exemption and engage the sanction detailed in section 214.¹⁸⁷

It is important to note that section 214 liability is not based on fraud, misstatement or the like. The plaintiff may have purchased precisely what he intended to purchase and be fully informed about the issuer, but he may nonetheless seek rescission, revision of price or damages. The spectre of a host of plaintiffs demanding their money back in a declining market will both encourage extreme care in the initial decision whether or not a security is exempted and discourage prefling "solicitations", intentional or otherwise. There is no defence of honesty and reasonable behaviour like that made available to issuers and holders of securities by the federal *Proposals*. Such a defence could have alleviated the strict liability of section 214; however, the final result even with the *Proposals*' defence might not have been much different, since it has been observed that the courts might put a heavy burden of proof on defendants invoking it.¹⁸⁸

Tied to this first rule of civil liability is the statutory right of a purchaser and a subscriber in a distribution to unilaterally rescind the contract in two instances. One is exercisable up to two days after the prospectus is received. Unlike the corresponding Ontario provision, however, under the new *Act* delivery of a preliminary prospectus (which in Quebec is not, generally speaking, a mandatory document) prior to the order for the securities cuts off the withdrawal right.¹⁸⁹ The Quebec position seems to be best explained as an added inducement to generate, and distribute widely, preliminary prospectuses. A subscription or purchase may also be unilaterally rescinded where securities have been distributed beyond the valid life of a prospectus, that is, one year. This period may also be extended for a further year, under certain conditions.¹⁹⁰ Such rescission will take effect upon receipt by the dealer of a notice sent within thirty days of the purchaser's or subscriber's knowledge of the offence.

Section 215 further extends the recourses of section 214 to cover two situations arising in the course of a take-over bid and an issuer bid. A tender of securities made without the circular as required under Title IV gives the right to an action in rescission of the agreement or revision of price against the offeror who has failed to prepare a circular. In addition, the offeror and its senior executives may be sued in damages. The shareholder who has not received the circular that has been prepared may seek damages from the offeror and its senior executives.

¹⁸⁷*Securities Act*, S.Q. 1982, c. 48, ss 52 and 53.

¹⁸⁸*Proposals*, vol. II, *supra*, note 6, 273.

¹⁸⁹See references in *supra*, note 39.

¹⁹⁰*Securities Act*, S.Q. 1982, c. 48, ss 33 and 34.

2. Liability for False Statements

The second type of civil liability arises under sections 217 through 225, and applies to any misleading statement of a material fact as well as any pure omission of a material fact¹⁹¹ contained in a prospectus (whether simplified, abridged or long form),¹⁹² a permanent information record incorporated by reference in a prospectus,¹⁹³ an offering notice,¹⁹⁴ a circular,¹⁹⁵ drafted by either the board of directors or the senior executives¹⁹⁶ and any other document authorized by the Commission for use in lieu of a prospectus.¹⁹⁷

At civil law, fraud gives rise to contractual liability sanctioned by the nullity of the contract or revision of the price and to delictual liability for damages.¹⁹⁸ An agreement to subscribe for securities newly issued to the public is, like other contracts of sale,¹⁹⁹ governed by the Civil Code, and can be annulled for the fraud of the corporation, its authorized representatives or its board of directors, but not for the fraud of third parties, unless the corporation had knowledge of such fraud.²⁰⁰ A simple omission will constitute fraud where it makes what was said misleading.²⁰¹ It should also be noted that the general principles of contractual liability will also admit an action based on statements contained in a prospectus, outside the fraud or negligence context, as in the case of a promise that has not been executed. In such instances, plaintiff's recourse is in damages.²⁰²

¹⁹¹*Securities Act*, S.Q. 1982, c. 48, s. 5. The absence of a definition of "material fact", which differs from the Ontario *Act*, has raised some concern. The provision has nevertheless been adopted as is on the basis that it was justified by the need for the expression to adapt to the varying contexts of the sections of Bill 85 in which it is used (see Assemblée nationale du Québec, Commission permanente des institutions financières et coopératives, *Journal des Débats*, t. XXVII, B-10740). But in the absence of qualification, as that of section 13 of the new *Act* for example, the applicable criterion might be one of civil law and could also vary depending on whether the recourse is rescission for error or fraud or for revision of price or damages.

¹⁹²*Securities Act*, S.Q. 1982, c. 48, ss 217 and 219.

¹⁹³*Securities Act*, S.Q. 1982, c. 48, s. 221(1).

¹⁹⁴*Securities Act*, S.Q. 1982, c. 48, s. 221(2).

¹⁹⁵*Securities Act*, S.Q. 1982, c. 48, ss 222 and 223.

¹⁹⁶*Securities Act*, S.Q. 1982, c. 48, s. 225.

¹⁹⁷*Securities Act*, S.Q. 1982, c. 48, s. 221(3).

¹⁹⁸J.-L. Baudouin, *Les obligations* (1983) para. 162.

¹⁹⁹*La cie rurale de lumière électrique v. Cauchon* (1924) 36 B.R. 532.

²⁰⁰*Bonhomme v. Bickerdicke* (1899) 17 C.S. 28, 46-7 (Cour de révision). Cf. arts 991, 993 and 1473 C.C.; Côté, *supra*, note 19, 144, and Demers, *Prospectus Liability and Investor Protection in Quebec Law* (1977) 18 C. de D. 745, 750.

²⁰¹Demers, *supra*, note 200, 759-60.

²⁰²*Ibid.*, 782-3.

As a fraud is also considered a delict,²⁰³ any defrauded investor or purchaser could seek damages under the general principles of delictual liability of the Civil Code from any person who had participated to any degree in a fraud.²⁰⁴ In this field every person, whether a subscriber to newly issued shares or a purchaser on the open market,²⁰⁵ who sustained damages is entitled to relief²⁰⁶ by establishing the causal link between fault or omission and damage. This causal link will probably have to be reliance on the prospectus.²⁰⁷ In addition to rescission, other remedies for fraudulent statements and omissions are damages and revision of the price. For negligent but not fraudulent statements, the only remedy is damages to compensate the loss.²⁰⁸

Where the fraud is such that the plaintiff would have nevertheless contracted, but on less onerous conditions had he known the truth,²⁰⁹ plaintiff is entitled not to rescission²¹⁰ but to revision of the price. Such revision is much narrower, of course, than a general damages award, where recovery would not be limited to the difference in price but would also include other items such as all additional expenses and expert costs.²¹¹

As under the first type of rules governing disclosure, an interesting feature of sections 217 and 222 of Bill 85 is that they provide liability without fault. Also Bill 85 embodies the feature of Quebec civil law which allows a person the right to retain his contract and sue for damages in cases of fraud.²¹² However, appreciation of the measure of compensation remains difficult. The new *Act* does not set forth the limits to an award of damages such as those found under the Ontario *Act* and the federal *Proposals*.²¹³

²⁰³Baudouin, *supra*, note 198, para. 164.

²⁰⁴*Bonhomme v. Bickerdicke*, *supra*, note 200, 46-7. If more than one person participated in the fraud or had knowledge of the false representations, all would be jointly and severally liable under art. 1106 C.C.

²⁰⁵But see Demers, *supra*, note 200, 762 on how the Quebec courts have relied on *Peek v. Gurney* (1873) L.R. 6 H.L. 377, (1873) 43 L.J. Ch. 19, [1861-73] All E.R. Rep't 116, to limit the recourse to a subscriber only.

²⁰⁶Article 2261(2) C.C.

²⁰⁷Baudouin, *supra*, note 200, paras 158-61. But see Simmonds, "Directors' Negligent Misstatement Liability in the New Scheme of Securities Regulation in Ontario" in L. Sarna, ed., *Corporate Structure, Finance and Operations* (1980) 291, 329-30.

²⁰⁸Article 1053 C.C.; see Côté, *supra*, note 200, 781.

²⁰⁹Article 993 C.C.

²¹⁰Baudouin, *supra*, note 198, para. 166.

²¹¹*Ibid.*, para. 165.

²¹²Wegenast, *supra*, note 12, 733-4; see Côté, *supra*, note 19, 147 and Baudouin, *supra*, note 198, para. 164-5.

²¹³See, e.g., *Proposals*, vol. I, *supra*, note 6, ss 13.02(3)(b) and 13.10(4), and *Securities Act*, R.S.O. 1980, c. 466, s. 126(6), (7) and (9).

Under the new *Act*, the plaintiff may be a subscriber during the distribution period,²¹⁴ a shareholder who tenders his securities in response to a take-over or issuer bid,²¹⁵ a purchaser from a holder in a secondary distribution²¹⁶ and — where the misrepresentation is in a circular of the board of directors or of senior executives — all the holders of securities of the offeree issuer at the time of the bid.²¹⁷ The panoply of defendants to such a lawsuit include every person whose securities were distributed,²¹⁸ the offeror²¹⁹ and its senior executives,²²⁰ the dealer under contract with such issuer or holder²²¹ and every other expert (including a lawyer) who, with his consent, has prepared an opinion containing a misrepresentation appearing in the prospectus or circular.²²² In addition, any misrepresentation contained in a circular or notice of the board of directors and senior executives will entitle all the holders of securities of the offeree issuer to an action in damages against the signatories of the document.²²³

In an action for damages for misrepresentation only one defence is available to persons other than the issuer, the holder and the offeror²²⁴ unless it is shown that the plaintiff knew of the misrepresentation at the time he acquired or tendered his securities.²²⁵ This defence, in sections 220(1) and 224(1), permits a qualified defendant to show that “he acted with prudence and diligence”.²²⁶ These provisions are complicated by the fact that the defence seems likely to be applied differently depending upon whether the person asserting the defence acted in the capacity of expert or non-expert and upon the nature of the allegedly false item with respect to which he is being sued.²²⁷

3. Liability for Improper Insider Trading

The third type of rule of statutory civil liability concerns the use of privileged information. Insiders, as described above, and other persons who by reason of their affiliations²²⁸ have a special relationship with an issuer

²¹⁴*Securities Act*, S.Q. 1982, c. 48, ss 217 and 219.

²¹⁵*Securities Act*, S.Q. 1982, c. 48, ss 222 and 223.

²¹⁶*Securities Act*, S.Q. 1982, c. 48, ss 217 and 219. See Alboini, *supra*, note 39, 860.

²¹⁷*Securities Act*, S.Q. 1982, c. 48, s. 225.

²¹⁸*Securities Act*, S.Q. 1982, c. 48, s. 218.

²¹⁹*Securities Act*, S.Q. 1982, c. 48, s. 223.

²²⁰*Securities Act*, S.Q. 1982, c. 48, ss 218 and 223.

²²¹*Securities Act*, S.Q. 1982, c. 48, s. 218.

²²²*Securities Act*, S.Q. 1982, c. 48, ss 219 and 223. These sections do not appear to exclude the liability of persons mentioned in ss 218 and 222.

²²³*Securities Act*, S.Q. 1982, c. 48, s. 225.

²²⁴*Securities Act*, S.Q. 1982, c. 48, ss 220(1) and 224(1).

²²⁵*Securities Act*, S.Q. 1982, c. 48, s. 217, second para., and s. 220(2).

²²⁶*Securities Act*, S.Q. 1982, c. 48, s. 220(1). Will the test be replaced by the civil law notion of “bon père de famille”?

²²⁷See Alboini, *supra*, note 39, 863-77, on the differently worded Ontario *Act*.

²²⁸*Securities Act*, S.Q. 1982, c. 48, ss 89, 94, 95, 189, 190 and 191.

are subjected to civil liability where they trade in securities of the issuer with knowledge of or where they inform others²²⁹ concerning "a material fact not yet known to the public that could affect the value or the market price of securities of an issuer".²³⁰ Any profit so realized by these "insiders"²³¹ will be recoverable for the benefit of the issuer of such securities²³² and of the mutual fund²³³ or of the client for whom a portfolio is managed.²³⁴ Where directors of the issuer or of the mutual funds have not shown diligence in instituting proceedings or during the proceedings,²³⁵ this action may be instituted or continued at the initiative of certain other persons. They are any persons who held securities of the issuer or of the mutual funds at the time of the offence or the Commission.²³⁶ In addition, an action once started may be joined by such persons or the Commission.²³⁷

In addition, section 226 provides a civil remedy to a purchaser who suffered a prejudice by reason of his dealing with a person in a special relationship with an issuer who carries out a transaction in securities with knowledge of privileged information that is not publicly known. To be compensated for damages resulting from the trade, the purchaser need only establish that the special relationship party²³⁸ had knowledge of the privileged information at the time of the transaction.

As a defence under either of these provisions, the defendant may prove that he had grounds to believe that the privileged information was known to the public. His other defences are that, at the time he had the privileged information, he was already participating in a plan under which securities could be acquired or that he was in a situation where he had to disclose the privileged information in the course of business, without any ground to believe that it would be used or disclosed contrary to sections 187, 188 or 189.

4. Conclusion on Civil Liability

Bill 85 thus makes it easier for an injured investor to get relief for harm suffered in the stipulated types of securities transaction. The strict liability character of the provisions means that the plaintiff need only prove violation

²²⁹*Securities Act*, S.Q. 1982, c. 48, ss 226 and 227.

²³⁰*Securities Act*, S.Q. 1982, c. 48, s. 5, definition of "privileged information".

²³¹*Securities Act*, S.Q. 1982, c. 48, s. 228 does not include persons listed in s. 189.

²³²*Securities Act*, S.Q. 1982, c. 48, s. 228(1).

²³³*Securities Act*, S.Q. 1982, c. 48, s. 228(2).

²³⁴*Securities Act*, S.Q. 1982, c. 48, s. 228(2).

²³⁵*Securities Act*, S.Q. 1982, c. 48, s. 231.

²³⁶*Securities Act*, S.Q. 1982, c. 48, s. 229.

²³⁷*Securities Act*, S.Q. 1982, c. 48, ss 230 and 233.

²³⁸*Securities Act*, S.Q. 1982, c. 48, ss 89, 94, 95 and 189-91.

of a provision of the *Act* causing loss (or benefit) to have a contract annulled or the price revised, all without proving reliance. Furthermore, statutory recognition in securities law of recourses in damages which previously were only a matter of general civil law should raise investor and issuer consciousness of the possibility of civil liability for securities malpractice.

Despite these provisions, the civil law remains significant because most importantly it will cover areas not touched by the statutory regime, such as false statements in annual reports and a confidential offering memorandum. For, in contrast with the position in Ontario, prospectus-type express civil remedies are not extended to a confidential offering memorandum, when used in a private placement in Quebec.

What is of particular interest in all of this is the lack of litigation under the civil law. It therefore remains to be seen, even with the raising of consciousness of civil liability which the statutory provisions may produce, what practical differences the new regime makes. It may well be that the most important difference it does make is to induce added caution in the preparation of disclosure documents, particularly those incorporated by reference in the simplified prospectus.

B. Administrative Sanctions

A rather more significant sanction in terms of its actual incidence is likely to be the intervention of the CVMQ in the market place to deal with abuses. Under the old *Act*, the Commission could order investigations, a cessation of security trading, an asset freeze, and its "power of death", appointment of an administrator of a corporation. Under the new *Act*, all of these types of powers are carried forward. The scope of some has been expanded.

The cease trading order can now clearly be issued against an adviser.²³⁹ Under the old *Act*, only where a cease trading order was violated could the Commission apply to the Superior Court for an injunction.²⁴⁰ It may now do so for any infringement of a provision of the *Act* and *Regulation*, its decisions and the decision of one of the Commissioners and members of the Commission's staff. Since such an order will take effect from the time the person is notified or becomes aware of it,²⁴¹ a person dealing in securities while a cease trading order stands is given a defence of due diligence.

In addition, the Commission now has what the old *Act* did not confer, but Ontario's legislation long has conferred — a discretion to refuse the

²³⁹*Securities Act*, S.Q. 1982, c. 48, ss 265 and 266.

²⁴⁰*Securities Act*, R.S.Q., 1977, c. V-1, s. 80(4); *Securities Act*, S.Q. 1982, c. 48, s. 268.

²⁴¹*Securities Act*, S.Q. 1982, c. 48, s. 267.

benefit of an exemption whenever the Commission considers it is necessary to protect investors.²⁴²

In all, the administrative sanctions at the Commission's disposal make it a very powerful agency. These powers are probably necessary in order to deal with the rapidly changing securities markets. The CVMQ itself has in the past recognized the danger of abuse of these powers. The *Act* provides further protection: the right to revise its own decision, and the right of persons affected to an appeal, to a hearing and to reasons for decisions.²⁴³

VI. Licensing of Persons

Bill 85 carries forward from its predecessor the traditional mechanism of requiring dealers to be licensed. This control technique is designed to ensure that securities market professionals are honest, competent and financially responsible.²⁴⁴ One of the changes that Bill 85 brings is to change the wording of the requirement, and perhaps focus the requirement more sharply. Another is that the new *Act* introduces a comprehensive scheme for the recognition of professionals' self-regulatory organizations, and for the delegation to them of a number of important functions.

A. Registration Requirements

Section 148 of the new *Act* requires that before a "dealer" (*courtier*) or "adviser" (*conseiller en valeurs*) may "carry on business" (*exercer son activité*) he must be registered as such. Section 149 extends a similar requirement to the representatives of a "dealer" or "adviser". The term "dealer" is defined²⁴⁵ to include: a securities intermediary "even when acting as principal for his own account"; a person who distributed a security "without the benefit of a prospectus exemption, except an issuer who retains the services of a registered dealer"; and a person "soliciting purchasers for securities".²⁴⁶ The term "adviser"²⁴⁷ is defined as a person who provides

²⁴²*Securities Act*, S.Q. 1982, c. 48, s. 264.

²⁴³*Securities Act*, S.Q. 1980, c. 48, ss 310 and 317-24. See LeBel-Chevalier, *Les pouvoirs discrétionnaires de la Commission des valeurs mobilières du Québec dans l'exercice de sa compétence et les contrôles possibles de ses décisions* (1983) 43 R. du B. 849. Against this background, the importance of s. 353, which overrides the *Canadian Charter of Rights and Freedoms*, Part 1 of Schedule B, *Canada Act 1982*, 1982, c. 11 (U.K.), is much reduced.

²⁴⁴See Connolly, "The Licensing of Securities Market Actors" (1978) in *Proposals*, vol. III, *supra*, note 6, 1392.

²⁴⁵*Securities Act*, S.Q. 1982, c. 48, s. 5, "dealer".

²⁴⁶Presumably the negative inference from the first clause of the "distribution" limb — that every person who distributes *with* the benefit of a prospectus exemption, but as an "intermediary", or a solicitor of purchasers, is not caught — is not meant to be drawn. See especially the exemption in s. 157, which would make no sense if that inference *were* meant to be drawn.

²⁴⁷See *Securities Act*, S.Q. 1982, c. 48, s. 5, "adviser".

securities advice or who manages a portfolio of securities under a mandate. The Commission will verify that the candidate or its senior executives have "the competence and integrity to ensure the protection of investors" and that the candidate has "adequate financial resources to ensure the viability of his business".²⁴⁸

The *Regulation* provides for a number of categories of licensee (or as Bill 85 calls him, "registrant") and, with the *Act*, sets conditions for each category.²⁴⁹ The principal conditions, which for the most part are based on those contained in Commission *Policy Statements*²⁵⁰ under the old *Act*, go to educational background, financial responsibility, record-keeping and client service. Thus, for registration, a dealer or adviser (if a natural person) and its representatives must have "adequate professional training".²⁵¹ A dealer or adviser must have a certain minimum level of "net free capital".²⁵² All dealers and some advisers must have prescribed insurance or bonding coverage, while some dealers must also participate in a contingency fund approved by the Commission.²⁵³ Prescriptions, which vary in detail with the category of registration, are made with respect to the accounting and other records a registered dealer or adviser must keep.²⁵⁴ Dealers and advisers must determine that recommendations they propose to make correspond to "the investment objectives and financial position" described to them by their client (a "know-your-client" rule).²⁵⁵ In addition, all dealers and some advisers must place responsibility for opening new accounts with a senior executive resident in Quebec,²⁵⁶ and clients must be provided with certain *per* transaction, on request and periodic information.²⁵⁷ Finally, a registered dealer or adviser must have a principal establishment in Quebec, and its

²⁴⁸*Securities Act*, S.Q. 1982, c. 48, s. 151. The discretion set out in the Ontario *Act* in s. 25(1) is in a wider form, but in practical administration probably comes to the same thing.

²⁴⁹See *Regulation*, O.C. 660-83, 30 March 1983, G.O.Q. 1983.II.1269, ss 190-4 (categories) and ss 203-49 (conditions); *Securities Act*, S.Q. 1982, c. 48, ss 158-68.

²⁵⁰CVMQ, *Policy Statement No. 17* (1979) X Bulletin hebdomadaire (no 3); QSC, *Policy Statement No. 18*, (1972) III Weekly Summary (No. 58); and QSC *Policy Statement No. 21* (1973) IV Weekly Summary (No. 40), as amended.

²⁵¹See *Regulation*, O.C. 660-83, 30 March 1983, G.O.Q. 1983.II.1269, s. 205.

²⁵²See *Regulation*, O.C. 660-83, 30 March 1983, G.O.Q. 1983.II.1269, ss 207-12. Neither the new *Act* nor the *Regulation* indicate how this is to be calculated; but see *Policy Statement No. 21*, *supra*, note 250.

²⁵³See *Regulation*, O.C. 660-83, 30 March 1983, G.O.Q. 1983.II.1269, ss 213 and 214 (insurance, bonding) and s. 215 (contingency fund).

²⁵⁴See *Regulation*, O.C. 660-83, 30 March 1983, G.O.Q. 1983.II.1269, ss 220-4.

²⁵⁵See *Securities Act*, S.Q. 1982, c. 48, s. 161.

²⁵⁶See *Regulation*, O.C. 660-83, 30 March 1983, G.O.Q. 1983.II.1269, s. 231.

²⁵⁷See, e.g., *Securities Act*, S.Q. 1982, c. 48, s. 162; and *Regulation*, O.C. 660-83, 30 March 1983, G.O.Q. 1983.II.1269, ss 243, 239 and 245.

registered representatives must be Quebec residents.²⁵⁸ Registration continues until it is cancelled, subject to the annual payment of fees.²⁵⁹ And the Commission may at any time revoke or suspend registration, or subject it to special conditions or restrictions, where it is of the opinion that the registrant has not complied with the *Act* or the *Regulation* or "where the protection of investors requires it".²⁶⁰

Some of the detail in the regulatory scheme just outlined represents a variation on the schemes of both the old *Act* and Ontario model.²⁶¹ However, the greatest degree of innovation is represented by the scope of the provisions. Under the old *Act* and the Ontario *Act*, any person who traded in a security had to register, and "trade" was defined broadly as: any disposition for value or attempt to so dispose; any underwriting; and any act to carry out these or defined as a trade by the *Regulation*.²⁶² On the face of it this would have required even traders in an isolated transaction or ones dealing through a registered broker on a stock exchange to register. However, the old *Act* provided a licensing exemption for isolated trades, although it did not provide one, as the Ontario *Act* does, for trades through a licensed person.²⁶³ Thus, a person who frequently sold securities through a licensed broker on a stock exchange would have had to obtain a license, although there was in such cases the possibility of an exemption by special order of the Commission,²⁶⁴ and, in any event it is understood that the Commission did not interpret the licensing requirement to apply when a licensed person was involved.

Under the new *Act* it is possible that the view of the federal *Proposals* in this area was adopted, that the licensing system, with its expertise, capitalization and record requirements, made the most sense where the trader was in the business of trading.²⁶⁵ Certainly that is what the English version of the *Proposals* suggests.²⁶⁶ However, the French language of Bill 85 is much less clear, and the definition of "dealer" is unlike the corresponding

²⁵⁸See *Regulation*, O.C. 660-83, 30 March 1983, G.O.Q. 1983.II.1269, ss 203 and 204.

²⁵⁹See *Regulation*, O.C. 660-83, 30 March 1983, G.O.Q. 1983.II.1269, s. 199.

²⁶⁰See *Securities Act*, S.Q. 1982, c. 48, s. 152.

²⁶¹See, e.g., *Regulation*, O.C. 660-83, 30 March 1983, G.O.Q. 1983.II.1269, s. 199 (indefinite registration) and compare *Securities Act*, R.S.Q. 1977, c. V-1, s. 35(1) (registration to be renewed annually).

²⁶²See the *Securities Act*, R.S.Q. 1977, c. V-1, s. 24 read with s. 22 and *Securities Act*, R.S.O. 1980, c. 466, s. 24, read with s.1(1)(42) and subject to the exemptions set out in s. 34.

²⁶³Compare the *Securities Act*, R.S.Q. 1977, c. V-1, ss 28 (especially s. 28(b)) and 29 with *Securities Act*, R.S.O. 1980, c. 466, s. 34 (especially s. 34(1), (2) and (10)).

²⁶⁴*Securities Act*, R.S.Q. 1977, c. V-1, s. 29, third para.

²⁶⁵See *Proposals*, vol. II, *supra*, note 6, 128.

²⁶⁶See *Proposals*, vol. I, *supra*, note 6, s. 8.01.

ones in the *Proposals*,²⁶⁷ this material would suggest that, to the contrary, there is no "carrying on business" element in the licensing requirement. For impersonal trades on a stock exchange which are not part of a "distribution", there is probably no difference between the two readings: there is no solicitation and the intermediaries (the brokers) will be licensed. For a person endeavouring to sell his securities off the exchange but not doing so as part of a "distribution" or a business, there might be the new isolated trade exemption, already mentioned, in any event. But this exemption will not always be available, as where he is selling off a block of securities in small lots: in the view that there is no "carrying on business" element, and if no other exemption were available,²⁶⁸ he would have to obtain a license. At least this would not be necessary if the trader left the entire task of resale to a licensed broker: on our reading of the definition of "dealer", the Ontario exemption for trading through a licensed person which is not in the new *Act* is unnecessary under it. A licensing requirement with such scope for an occasional trader makes little sense. Our discussion here nicely illustrates the types of issues created by the new semantics of Bill 85.

Bill 85 has also varied the list of registration exemptions found in former Quebec and present Ontario laws. This may in part at least be in response to the major criticism of the Ontario exemptions made in the federal *Proposals*.²⁶⁹ The Ontario *Act* features substantial duplication of the prospectus exemptions in the registration exemptions;²⁷⁰ yet it is far from clear that, simply because an investor does not need the protection of a prospectus, he does not need the protection of the licensing scheme. The point can best be appreciated by considering the \$100,000 private placement prospectus exemption. Unlike the Ontario *Act*, there is no licensing exemption in Bill 85 for that situation. Otherwise, the new *Act* more or less²⁷¹ follows the more discriminating approach of the *Proposals*.

²⁶⁷See *Proposals, ibid.*, ss 2.07 and 2.14. The French version of *Proposals*, s. 8.01 uses "faire affaires" for "carry on business".

²⁶⁸He might apply to the Commission for an exemption by special order under s. 263 of the new *Act*.

²⁶⁹See Connelly, *supra*, note 244, 1286-7 and compare the *Securities Act*, R.S.O. 1980, c. 466, s. 34 with *Proposals*, vol. I, *supra*, note 6, s. 8.06. Many of the exemptions of the Ontario *Act*, like the isolated trade exemption, are undoubtedly rendered unnecessary in any event by the carrying-on-business scope criterion; see *Proposals*, vol. II, *supra*, note 6, 138.

²⁷⁰Compare *Securities Act*, R.S.O. 1980, c. 466, s. 34 with ss 71 and 72.

²⁷¹One notable deviation is Bill 85's provision of a licensing exemption for federal and provincial government debt securities. This is open to criticism: see Connelly, *Proposals*, vol. III, *supra*, note 6, 1291.

B. *Self-regulatory Organizations*

Another commendable borrowing from the federal *Proposals* is the scheme in the new *Act* for the recognition and utilization of self-regulatory organizations in the securities trading field.

Traditionally, a significant amount of autonomy was granted to these bodies, pre-eminently the Montreal Stock Exchange (as it then was) and the district of the Investment Dealers Association which covered Quebec. The rationale was pragmatic: their autonomy represented a delegation of decision-making to organizations better able to discipline their members than a government agency.²⁷² But this state of affairs also posed risks of narrow self-interest activity and of oppression of a minority of members by the majority. Perception of this problem led in 1971 to the assumption by the Commission of control over the Montreal Stock Exchange beyond the previous rather limited requirement that the Exchange keep records of all transactions on it.²⁷³ The Exchange had to be recognized by the Commission which, when it was of the opinion that the public interest so required, could take any decision, make any order or give any direction respecting how the Exchange was to be run, its rules or decisions, floor trading or quoted securities, ascertainment that a listed issuer was complying with the securities laws and the information to be obtained from the Exchange, its members or listed issuers. Any persons affected by the conduct of the Exchange could apply to the Commission for redress.²⁷⁴ It is notable, however, that such jurisdiction was never asserted over the Investment Dealers Association or other self-regulatory organizations.

This situation has changed under Bill 85. The jurisdiction over stock exchanges is extended to "a securities clearing house" and any "professional association [which] wishes to] regulate transactions in securities by its members".²⁷⁵ Together with stock exchanges, all of these "self-regulatory organizations" must be recognized by the Commission, and fall under its supervisory jurisdiction.²⁷⁶ This scheme, which is inspired by the federal *Proposals*,²⁷⁷

²⁷²See Dey & Makuch, "Government Supervision of Self-Regulatory Organizations in the Canadian Securities Industry" (1978) in *Proposals*, vol. III, *supra*, note 6, 1435-9.

²⁷³See *An Act to amend the Securities Act*, S.Q. 1971, c. 77 and Dey & Makuch, *supra*, note 267, 1431.

²⁷⁴*Securities Act*, R.S.Q. 1977, c. V-1, s. 110. Strictly, any exchange operating in the province fell under these rules — and until its merger in 1974 with the MSE, there was one other exchange in Quebec, the Canadian Stock Exchange: see R. Forbes & D. Johnston, *Canadian Companies and The Stock Exchange* (1980) 8.

²⁷⁵See *Securities Act*, S.Q. 1982, c. 48, s. 169.

²⁷⁶See *Securities Act*, S.Q. 1982, c. 48, s. 169 (recognition); ss 177-86 and 317-23 (supervisory jurisdiction).

²⁷⁷See *Proposals*, vol. II, *supra*, note 6, Part 9 (Self-Regulatory Organizations).

is much more comprehensive than those in almost all the other provinces, which generally speaking only deal in this way with stock exchanges.²⁷⁸

Two further matters distinguish the Quebec legislation in this area. The new *Act* permits the Commission to delegate to a self-regulatory organization all or any part of the administration of the licensing system.²⁷⁹ This is possible to some extent under the Ontario *Act* as was also the case under the old *Act*.²⁸⁰ The major instance of this delegation in Quebec was the performance of regular audits by stock exchanges of member registrants. The new Quebec provision is notable for its forthrightness and its breadth.²⁸¹ The other distinguishing characteristic of the new *Act* is its stipulation of standards for recognition and for organization operations.²⁸² The standards are in terms of financial resources as well as admission to membership, rules respecting access to services and the provision of disciplinary procedures for breach of the organization's rules or of the *Act* or the *Regulation*. The *Act* also requires that rules of the organization that have the effect of limiting competition must be submitted to the Commission for special approval. This second matter has no counterpart in the other legislation, although it goes far to recognizing practice so far as stock exchanges are concerned.²⁸³ Both of these matters were evidently inspired by the federal *Proposals*.²⁸⁴

C. Conclusion

The licensing schemes in Canada appear to have worked fairly well.²⁸⁵ Quebec's new scheme raises some interpretation problems, but when coupled with the provisions for self-regulatory organizations the scheme embodies a number of useful advances. The provisions respecting self-regulatory organizations at least should serve as the new enacted Canadian standard in the area.

²⁷⁸See, e.g., *Securities Act*, R.S.O. 1980, c. 466, s. 22. But see *Securities Act*, S.A. 1981, c. S-6.1, as am. S.A. 1981, c. B-15 and S.A. 1982, c.32, Part 17.

²⁷⁹See *Securities Act*, S.Q. 1982, c. 48, s. 170. See also *Securities Act*, S.A. 1981, c. S-6.1 as am. S.A. 1981, c. B-15 and S.A. 1982, c. 32, s. 183.

²⁸⁰See, e.g., *Securities Act*, R.S.O. 1980, c. 466, ss 19, 20 and 72(1)(b); *Securities Act*, R.S.Q. 1977, c. V-1, ss 81-93.

²⁸¹Compare it, however, with *Proposals*, vol. I, *supra*, note 6, s. 9.05 (which is even broader). See generally *Proposals*, vol. II, *supra*, note 6, 155-6.

²⁸²See *Securities Act*, S.Q. 1982, c. 48, ss 174-6. Note the special position of securities clearing-houses in s. 175, last para.

²⁸³Consider the recent unfixing of stock exchange commission rates by securities commission order: see Beck & Reschenthaler, *Ending Securities Commission Fee Regulation: Rationale and Economic Effects* (1983) 7 C.B.L.J. 377.

²⁸⁴See *Proposals*, vol. I, *supra*, note 6, ss 9.05 (delegation) and 9.03 (standards).

²⁸⁵See Connelly, *supra*, note 244, 1392.

VII. National Issues and the *Charter of the French Language*

The new *Act* has achieved a great degree of integration with the Canadian securities legislation environment, so that the same basic documents may now be filed throughout the country. The language issue however remains a major problem. The new *Act* has no contributions to make here, but the Commission has recently issued a policy statement concerning the application of the province's language regime to the new *Act's* disclosure documents. It is therefore appropriate to review that regime and to discuss that policy statement here.

Ever since its coming into force in August of 1977, the *Charter of the French Language* has been a major constraint for issuers seeking distribution of their securities both within and outside the province of Quebec. As "brochures" or "similar publication",²⁸⁶ both the preliminary and final prospectus must be sent to corporate investors resident in Quebec in the French language or in both the French and English languages.²⁸⁷ Individuals may request brochures to be sent to them in the English language only.²⁸⁸ However, the latter exemption can hardly be relied upon, since the reason for the filing in Quebec of a prospectus for national issue is often the presence in the province of a relatively large number of substantial financial institutions. In the early days of the *Charter*, issuers were concerned as much with the adverse publicity which could have resulted from a breach of the language requirements applicable to brochures as they were with the fines to which they could have been liable under the *Charter's* penal provisions.²⁸⁹

A further concern was that the prospectus might be held to form part of a "pre-determined contract" for the purchase of securities. The prevailing opinion to this day is to the effect that a "pre-determined contract" which is not in the French language or in bilingual French and English form is, absent a request by the parties that it be drawn up in the English language

²⁸⁶A characteristic of a prospectus is "to call the attention of the public"; *French Gas Saving Co. v. The Desbarats Advertising Agency Ltd.* (1912) 1 D.L.R. 136, 145 (Que. K.B.), *aff'd*, (1912) 1 D.L.R. 147 (Que. K.B., App. Side).

²⁸⁷Compare *Charter of the French Language*, R.S.Q. 1977, c. C-11, s. 89, which states: "Where [the *Charter*] does not require the use of [French] exclusively, [French] and another language may be used together."

²⁸⁸*Regulation respecting the language of commerce and business*, R.R.Q. 1981, c. C-11, r. 9, s. 15.

²⁸⁹Under s. 205 of the *Charter of the French Language*, R.S.Q. 1977, c. C-11, a corporation may be liable to a fine of \$50 to \$1,000 for *each* offence, and to a fine of \$500 to \$5,000 for any subsequent offence.

only, susceptible of absolute nullity.²⁹⁰ At first, the Commission relied on issuers to obtain from their legal counsel guidance as to the language requirements applicable to prospectuses, both preliminary and final. While Bill 22 was still in effect,²⁹¹ it decided no longer to accept for filing any final prospectuses which were in the English language only. Then, in November of 1981, it also required that the preliminary prospectus be filed in French. The latter decision causes many more practical problems, since the preliminary prospectus evolves, from proof to proof, until the very day of its filing, whereas the final prospectus normally differs in editorial content from the preliminary prospectus only to the extent required by the deficiencies raised by the various securities commissions throughout the country.

Until the new *Act* came into force, the Commission tacitly agreed with the view that reporting issuers not carrying on business in Quebec were not required to send to their shareholders residing in the province their financial statements and proxy solicitation material in the French language.²⁹² Indeed, the *Charter* must be construed as requiring only those corporations carrying on business in the province to communicate upon request²⁹³ with their shareholders in the French language. This was most important to reporting issuers involved in "going private" transactions in the late 1970's, where lengthy proxy solicitation circulars were sent to shareholders with a view to amalgamations.

Financial statements, including annual reports, and proxy solicitation material of corporations not carrying on business in Quebec are not required to be in the French language because they are intended for the shareholders and are therefore not to be considered as "brochures and similar publications" which, by definition, are intended for the public. Relief from the language requirements of the *Charter* was also available to initiators of take-over bids by inserting in the letter of transmittal a bilingual "language acknowledgement clause" whereby the shareholders accepting the offer requested all documentation pertaining to the take-over bid to be drawn up

²⁹⁰This view is supported mainly by the wording of the Preamble and s. 55 of the *Charter* and by a parallel with the sanctions applicable to the language requirements of the *Consumer Protection Act*, R.S.Q. 1977, c. P-40, ss 4 and 106.

²⁹¹The predecessor legislation was formerly entitled *Official Language Act*, S.Q. 1974, c. 6.

²⁹²The Commission sent out a notice requesting all reporting issuers to communicate with their Quebec shareholders in French, but never enforced it.

²⁹³It was decided in *R. v. Sutton* (Cour des sessions de la Paix, Montreal, 27-028966-F20) that "fundamental language rights" granted under Chapter II of Title I of the *Charter*, such as that of a person to have business firms communicate with that person in French, must be exercised; that is, the person must require the French communication. As a result, many public corporations carrying on business in Quebec provide their Quebec shareholders with financial statements, including annual reports, and proxy solicitation material in the English language only, while making the French version available *upon request*. By the time such a request is received, the corporation has had time to prepare the French version.

in the English language only. In this way it was possible to comply with the provisions of the *Charter* applicable to "pre-determined contracts".

Since the coming into force of the new *Act*, the situation remains the same as regards both a preliminary and a final prospectus. However, in March 1983, the Commission issued a notice setting forth its interpretation of the requirements of the *Charter*, for the purposes of its application to all information documents filed with it.²⁹⁴

The notice first requires any prospectus, offering notice or information document replacing a prospectus to be drawn up in French. These offering notices are the ones referred to in earlier Parts of this article and required in connection with the distribution by an issuer to holders of its securities of an exchange, conversion or subscription right relating to its securities, with the distribution by an issuer of securities to its shareholders through a subscription plan and with the distribution by an issuer of securities of its own issue to its employees and senior executives or those of an affiliate.²⁹⁵ Information documents replacing a prospectus include the "information document" required in connection with options.²⁹⁶ The Commission will also likely consider as an information document replacing a prospectus a management proxy circular prepared in view of a meeting at which an amalgamation will be considered. And, although not specifically required to be in the French language by the Commission's notice, an "advertising document not prohibited by regulation"²⁹⁷ used in the course of a distribution is subject under the *Charter* to the same requirements as a prospectus.

The Commission further requires a French version of the documents forming part of the permanent information record to be prepared and filed at the latest when the reporting issuer files its short-form prospectus. These include all documents filed by the reporting issuer to comply with the continuous and periodical disclosure requirements of the new *Act*. Consequently, a reporting issuer not carrying on business in the province of Quebec must, if it is to avail itself of the prompt qualification system, prepare French versions of its interim financial statements, its annual reports and its proxy solicitation material.

This second item of the Commission's notice appears to fall somewhat short of the requirements of the *Charter*. To the extent that the permanent information record is available to the public before, during and after the filing of a short-form prospectus, it constitutes a publication and should be available in the French language irrespective of whether the reporting issuer

²⁹⁴CVMQ, *Avis*, (1983) XIV Bulletin hebdomadaire (no 12), 1.2.1.

²⁹⁵*Securities Act*, S.Q. 1982, c. 48, s. 52 (a change from s. 53).

²⁹⁶*Securities Act*, S.Q. 1982, c. 48, s. 67.

²⁹⁷This is permitted under *Securities Act*, S.Q. 1982, c. 48, s. 16(3).

has filed a short-form prospectus. Because the Commission's interpretation is not at all binding upon the Office de la langue française or the Commission de surveillance de la langue française, the bodies entrusted with the application and enforcement of the *Charter*, reporting issuers should perhaps file and update their permanent information record simultaneously in both the French and English languages. Practically, the lengthy process of preparing a French version of the disclosure documents mentioned above shortly before an issue would defeat the very purpose of the prompt qualification system, since it presumably would require more time than the drafting and printing of the short-form prospectus. The Commission clearly states in its notice that it will not review the permanent information record until it is filed in French. Such review must have taken place in order for the Commission to be bound by the five-day delay applicable to the review of short-form prospectuses.²⁹⁸

The third element of the Commission's notice requires that information appearing in the annual report and integrated in the short form prospectus by reference be drawn up in French. This appears to be somewhat redundant in view of the previous element.

Finally, the Commission's notice requires that there be a French version of the take-over bid circular, the management circular and the notice of a senior executive. This is an instance where the Commission has clearly exceeded the scope of the *Charter*. Indeed, the take-over bid circular, management circular or notice of a senior executive are not intended for the public, and thus none constitute publications required by the *Charter* to be available in the French language. Furthermore, the "language acknowledgement clause" in the letter of transmittal certainly complies with the provisions of the *Charter* dealing with pre-determined contracts.

In the preamble to its notice, the Commission states that it is not entrusted with any specific authority as regards the application of the *Charter*. Notwithstanding that, it has rendered at least one decision where it took it upon itself to decide which provisions of the *Charter* apply to a prospectus and to what extent.²⁹⁹ It then issued a notice setting forth language requirements beyond the scope of the *Charter*. All of the foregoing creates a confusing atmosphere somewhat disturbing for national reporting issuers whose

²⁹⁸See *Avis, supra*, note 294, 1.2.1.

²⁹⁹*Décision No. 6705 re: Ampal-American Israel Corporation* in CVMQ, (1982) XIII Bulletin hebdomadaire (no 30), 2.3.1. For decisions rendered on the subject by the Commission under the previous *Official Language Act*, S.Q. 1974, c. 6, see Charbonneau, *supra*, note 25, at his note 86.

Despite an unfavourable decision, the Commission subsequently allowed Ampal-American Israel Corporation to proceed with a prospectus drawn up in English only, on the condition that the next distribution be made in French, to which Ampal agreed: *Assemblée nationale du Québec, Commission permanente des institutions financières et coopératives, Journal des Débats*, t. XXVII, B-10754-5.

Quebec counsel have expressed different views as to the specific requirements of the *Charter*.

Conclusion

As we have attempted to demonstrate throughout this article, the new *Act* represents an integrated and self-contained legal framework regulating the securities industry and markets in the province of Quebec which improves in several respects on its predecessor. The new issue regulation scheme is better defined than ever before. The continuous disclosure system has benefited from careful rethinking. The civil recourses under the new *Act* create a scheme of statutory liability which will reduce reliance on the general liability provisions of the Civil Code. Furthermore, the extensive powers conferred upon the Commission under the new *Act* indicate a clear intent to ensure a greater effectiveness in market surveillance.

Unfortunately, the new *Act* does not achieve total integration with the remainder of Canada. As an apparently small, but practically troublesome example, the forty-five day delay within which a reporting issuer must file and send its interim financial statements to its shareholders residing in the province³⁰⁰ certainly imposes upon national issuers a constraint which, in addition to the language problems raised earlier, does not provide for the harmony that seems reasonable in this area. As well, the minor differences in the content of a Quebec prospectus can only be perceived as unfortunate in an environment which in the past few years has seen the acknowledgement of the need for uniformity represented by the National Policy Statements system.³⁰¹

On the other hand, we note the leadership asserted by the CVMQ in introducing legislation providing for delegation to self-regulatory bodies and for the prompt qualification system. It may be that, in the present federal context, the differences between the legislation in force from province to province will simply mirror the greater vitality of the regulatory authorities in each jurisdiction as they assert and express through legislation their own specific views of certain issues. We certainly do not suggest that uniformity is simply a "technical" goal.³⁰² However, in view of the national character of much of our securities market, we hope that the greater vitality of one of the most important jurisdictions in Canada from the securities point of view will some day result in a better *national* framework. In this respect,

³⁰⁰See *supra*, notes 138 and 139.

³⁰¹Compare Bill 85, *Regulation*, O.C. 660-83, 30 March 1983, G.O.Q. 1983.II.1269, Schedule I with Ontario *Regulation*, R.R.O. 910/80, Form 12 (prospectus forms) and *National Policy Statements Nos. 1-35* in 2 CCH Can. Sec. L. Rep., paras 54-838 *et. seq.*

³⁰²*Cf.* Macneil, *The Future of the Supreme Court of Canada as the Final Appellate Tribunal in Private Law Litigation* [:] *A View from the South* (1983) 7 C.B.L.J. 426, 431-2.

we offer some thoughts about what we consider to be a major issue facing securities regulation in those provinces which have so recently overhauled their legislation as Quebec has done. This issue is the future of disclosure requirements.

If there is a central theme to the new regime of securities regulation in Quebec, it is disclosure. As in the United States, with its scheme of federal securities regulation, and in Ontario, so in Quebec, recent reforms have largely been concerned with rationalizing the statutory primary market and secondary market disclosure schemes.³⁰³ We see this as raising three important issues. Put in the form of questions, those issues are: Does disclosure serve any useful purpose? Is it well-designed for the purposes it serves? Might there be too much (or too little) required disclosure? Our answers to these questions are uncertain, to a greater or lesser degree, and look towards the accumulation of more experience. In this respect we see the CVMQ as having an important role, one for which under the new *Act* it is well prepared.

The useful purpose served by requiring primary market and secondary market disclosure is that such disclosure enables people to make better investment decisions.³⁰⁴ While information about issuers of the sort the new *Act* requires would seem capable of serving this purpose, such a view assumes that this information is not otherwise going to be produced. The question could be asked whether issuers and others in the securities market-places in Canada could be expected to produce this information *without* the statutory requirements.³⁰⁵ The answer seems to be that there can be no assurance that they would, particularly in the case of issuers of mining and oil securities. However, more work of the sort already undertaken in the United States could be done, and we suspect that such work would show that the disclosure requirements should be much more selective than they are now.

Even if the requirement for the sort of information the new *Act* envisages is capable of making an important contribution to better investment decisions, this does not say whether the sort of information required is as well-suited to the purpose as can reasonably be expected. Here we raise the matter of how the investor can best benefit from required information. The prospectus scheme, until recently, embodied the view that its information should be delivered into the investor's hands, and implicitly assumed a large degree of autonomy in investor decision-making. The continuous disclosure system can be said to embody largely³⁰⁶ the view that its information

³⁰³See Simmonds, *supra*, note 48, 2-6.

³⁰⁴*Ibid.*, 8.

³⁰⁵*Ibid.*, 9, on which the following text draws.

³⁰⁶But see the "two-tiered" character of the scheme which Bill 85 recognizes.

is sufficiently made available by a filing in an office of public record. There it can be inspected and from there disseminated throughout the investment community. In this dissemination, licensed securities market professionals would likely play the greatest role, and, correspondingly, investor decision-making will largely be aided by such persons. The new prompt offering prospectus system, as we saw, applies this filtration idea to the prospectus area. This dichotomy in the regulatory scheme raises the question whether one model of investment decision-making is preferable to the other.

The answer to our question seems to be that, generally speaking, the aided investment decision-making model is better: "investors do not and should not decide to invest without expert financial advice".³⁰⁷ This does not mean that regulators should not concern themselves with what information gets into investors' hands. But it does mean that there should be "less simplification of complex information, fewer omissions of more speculative or uncertain matters (so-called 'soft' information). . . and consequential loosening of the rigidity in format and content of required disclosure documents".³⁰⁸ It also means close collaboration between the regulators and the bodies that concern themselves professionally with the types of data issuers can produce about themselves, bodies such as the Society of Financial Analysts and The Canadian Institute of Chartered Accountants.

The final question is one of a cost-benefit type and goes to whether too much or too little information is being required. Our own view is that too much is required of the smallest issuers now subject to the disclosure process. This is probably also true, but for different reasons, of the *largest* issuers. In the latter case, our point is that equivalent information seems likely to be generated in any event. In the case of the smallest issuers, this cannot be said; but the costs of regulation, in terms of burdening a vital innovative force in the economy, are probably too high.³⁰⁹ More information would be desirable to assist in the evaluation of both of the cases we make.

The CVMQ is in a position to work out better answers to our questions than those we have attempted to provide. Bill 85, as we have shown, permits the CVMQ to delegate responsibility on a scale which encourages it to make the best use of its personnel. The prompt offering system makes possible a more selective examination of prospectuses, and thus encourages the identification of particular industries and types of issuer for special analysis. Bill 85 goes even further, however: it requires the Minister charged with responsibility for the administration of the *Act* to report to the Government "on the implementation of this Act and on the advisability of continuing

³⁰⁷Simmonds, *supra*, note 48, 11.

³⁰⁸*Ibid.*

³⁰⁹See Buckley, *supra*, note 78, 321-2.

it in force and, as the case may be, amending it".³¹⁰ This legislative context, we suggest, should be read to encourage the sorts of regulatory impact studies and securities market conditions analysis which our questions call for.³¹¹ That kind of work should ensure a continuation of the process of worthwhile change in the law which Bill 85 well marks.

³¹⁰*Securities Act*, S.Q. 1982, c. 48, s. 352.

³¹¹Compare the similar views of an American observer after an analogous reform of federal securities legislation: Wheeler, *Securities Law Practice in the 1980s: An Appraisal*, (1981) 9 Sec. Reg. L.J. 3. For an illuminating analysis of the limits, technical and political, to this type of exercise, see Hartle and Trebilcock, *Regulatory Reform and the Political Process* (1982) 20 Osgoode Hall L.J. 643, especially 664-70.