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THE DISCRETION OF THE DIRECTOR
OF THE ONTARIO
SECURITIES COMMISSION

By Jeff Cowan

A. INTRODUCTION: SECURITIES REGULATION, THE DIRECTOR
AND DISCRETION

A necessary concomitant of governmental management of the economy
is the regulation of the issuance and sale of securities to the public. Ostensibly,
the function of public distribution of securities is to raise new capital to
finance business activity, and as such, it is deemed to serve legitimate and
necessary economic and social purposes. Securities legislation is designed to
reinforce this mechanism of modern capitalism; its broad objective is to create
and maintain public confidence in capital markets and to enhance the position
of the securities industry in the economic life of the province. Securities
regulation may be broadly defined as “any kind of requirement that some positive action be taken either before one of a designated class of
persons engages in the securities business or before a given security may be
offered or sold”. In Ontario, this type of regulatory system is established by
The Securities Act, and it is administered and enforced by the Ontario
Securities Commission.

The nature and the administration of the Act in general have been the
subject of considerable attention in other forums, and it is only necessary

Mr. Cowan is a member of the 1975 graduating class of Osgoode Hall Law School.
1 See H. M. Bateman, State Securities Regulation (1973), 27 Southwestern L.J. 759
at 762.
2 Report of the Committee of the Ontario Securities Commission on
Problems of Disclosure for Investors by Business Combinations and Private Placements,
(Toronto: Queen’s Printer, 1970), para. 2:02. [Hereinafter cited as the Merger Study] H. S. Bray,
“Recent Developments in Securities Administration in Ontario”, in J. Ziegel, ed., Studies in
Canadian Company Law, Vol. I (Toronto: Butterworths, 1967) at 419; J. G. K. Strathy,
3 Report of the Ontario Attorney General’s Committee on
Securities Legislation in Ontario, (Toronto: Queen’s Printer, 1965) at para. 8:03 [Hereinafter cited as the Kimber Report].
5 R.S.O. 1970, c. 426, as amended S.O. 1971, c. 31; 1972, c. 1; 1973, c. 11.
6 Ibid, s. 2(1). Hereinafter cited as the Commission or the O.S.C.
7 See generally, J. C. Baillie, Protection of the Investor in Ontario (1965), 8 Canadian
Public Administration 172 and “Securities Regulation in the Seventies”, J. Zeigel,
Studies in Canadian Company Law, Vol. II (Toronto: Butterworths, 1973) at 343; W.
V. R. Smith, Securities Regulation in Ontario (1968), 4 Texas Int’L L. Forum 454; R. C.
Meech, Prospectus and Registration Requirements (1972), L.S.U.C. Annual Lectures
211; Bray, supra, note 2. For background to the present Securities Act, see supra, note 3.
here to delineate the basic types of regulatory functions that are incorporated in it. These may be briefly stated as the licensing of people engaged in the securities business, the registration of securities to be offered to the public, the investigation and prosecution required for enforcement of the Act, and the continuous disclosure of investment information. Each function reflects a different philosophical approach to the objective of investor protection.\(^8\)

It has been said that “the most important functions of the Ontario Securities Commission lie in the area of registration of members of the securities industry and the administration of prospectus requirements”.\(^9\) Central to the thesis of this article is the notion that the “teeth” of the regulatory requirements of *The Ontario Securities Act* concerning registration and prospectuses (sections 7 and 61) are to be found in the discretionary powers of the Director of the O.S.C. contained in these sections.\(^10\) His substantive control of access to both the securities business and the capital markets comprises the core of securities regulation in Ontario.

The Director\(^11\) is the administrative head of the Commission,\(^12\) and is regarded as a crucial figure in the administration of the Act.\(^13\) The functions of the Director are set out in section 4, and they include those given to him by the Act as well as those assigned to him by the Commission. While we are only concerned with the Director’s powers under sections 7 and 61, it is worthwhile to note that the O.S.C. has allocated to him the authority, under sections 104(2), 116(1), 132(1) and 144, to grant exemptions in whole or in part from the provisions of the Act relating to proxies and proxy solicitation, insider trading, and financial disclosure, and to make orders suspending trading in securities when it is in the public interest.\(^14\)

The essential attribute of the Director’s power is the specific discretion given to him by statute.\(^15\) *The Securities Act*, according to one highly regarded commentator, “bristles with discretions”\(^16\) while another author states that “the real problem in the field of securities regulation lies in the exercise of

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\(^8\) Supra, note 4 at 19; see also Bray, *supra*, note 2 at 421.

\(^9\) Baillie, *supra*, note 7 at 175.

\(^10\) Smith, *supra*, note 7 at 462.

\(^11\) Sec. 1(1)6 of the *Securities Act* defines ‘Director’ as “the Director or any Deputy-Director of the Commission”. For the purposes of this paper, the Director will refer to any one of these people.

\(^12\) Supra, note 5, s. 4. The chief executive officer is the Chairman of the O.S.C. pursuant to s. 3(1).


discretion by a public official. A more extreme view speaks of "the shocking strictness and breadth of administrative discretion in the regulation of the flow of capital and of investment opportunities available to the public". While dogmatic assertions may be made about the damaging extent of governmental interference in the capital markets, they also are directed at fundamental principles of representative democracy, as evidenced by a recent newspaper editorial on the subject of the discretion of the O.S.C.:

What the Commission may consider to be in the public interest may not coincide with what is, in actual fact, in the public interest. That judgment should always be made by the elected representatives of the people. . . . the power to determine what is in the public interest . . . should be taken away from the Ontario Securities Commission and restored to the government where it belongs.

Discretion has been defined as the "power to make a choice between alternative courses of action". One commentator has described it as the "room for decisional manoeuvre possessed by the decision maker", while another viewed it as a process involving a determination that may be reached, "in part at least, upon the basis of considerations not entirely susceptible to proof or disproof". It may be conferred explicitly by statute, be implicit in a lack of legislative standards, or it may result from the vagueness, ambiguity or conflict in applicable rules and policies.

Apart from these various conceptualizations, it is an accepted doctrine that some discretion is indispensable to any scheme of regulation. This is especially true in the complex field of securities, where a substantial degree of flexibility is needed for proper regulation of the vagaries of the market place, and where a detailed and complicated statute "must inevitably prove unwieldy and incapable of adaptation to changing standards". Thus, the Legislature has delegated to the O.S.C., and more particularly to the Director, wide powers of decision-making. Discretion is a means of balancing administrative imperatives of speed, efficiency, and the development of expertise against the perceived ideal of the "rule of law" as expressed by statute and the need for certainty upon which people may base their investment transactions. The discretionary powers contained in The Securities Act comprise a mechanism that is implicitly designed to protect the public investor while ensuring that those it regulates are not unduly hampered in the performance of their economic function.

17 Smith, supra, note 7 at 475.
18 Bateman, supra, note 1 at 765.
24 Baillie, supra, note 7 at 210.
Theoretical concepts and philosophical insights into the nature of discretion and decision-making are necessary for a proper understanding of the subject, but they are beyond the scope of this paper. What it seeks to examine is the scope of the discretion of the Director under sections 7 and 61, the relationship between the exercise of this discretion and its purpose, and possible alternatives for structuring it.

B. SCOPE OF THE DIRECTOR’S DISCRETION: REGISTRATION


Section 6 of The Securities Act prohibits any person or company from trading, or being connected with a trade, in securities unless they are registered and "such registration has been made in accordance with the Act and the regulations". This prohibitive section and the sanctions for non-compliance constitute the binding force behind the Director’s power over registration. However, despite the all-embracing nature of this section, the wide range of exemptions from this requirement, found in sections 18 and 19, allow one to avoid being subject to the discretion of the Director.

The discretionary power of registration is contained in section 7(1):

The Director shall grant registration or renewal of registration to an applicant where in the opinion of the Director the applicant is suitable for registration and the proposed registration is not objectionable.

The purpose of a similar section of securities legislation was considered by the Privy Council in Lymburn v. Mayland, wherein it noted:

There is no reason to doubt that the main object sought to be secured in this part of the Act is to secure that persons who carry on the business of dealing in securities shall be honest and of good repute, and in this way to protect the public from being defrauded.

In addition, the O.S.C. has repeatedly emphasized that registration is a representation that the registrant “will deal fairly with the public”.

Functionally, it seems obvious that a screening mechanism is necessary for the control of access to the securities business if these objectives are to be achieved. Thus, discretion is exercised at the outset by requiring the Director

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25 For a recent and extended discussion of the relevant jurisprudence on the subject, see D. Gifford, Decisions, Decisional Referents, and Administrative Justice (1972), 37 Law & Contemporary Prob. 3-11, and S. Wexler, Discretion: The Unacknowledged Side of Law (1975), 25 U.T.L.J. 120.

26 S. 137 (summary conviction offence), and s. 143(1) (injunctive relief).

27 For a summary, see P. Dey, Exemptions Under the Securities Act of Ontario (1972), L.S.U.C. Annual Lectures at 127.


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to approve all registrants, in lieu of a more simple and authoritative certification system for applicants who meet prescribed minimum standards, to be followed, when required, by disciplinary action. This task is not without its costs in terms of time and manpower, which are derived from the large number of registrations with which the Director and his staff must be concerned on an annual basis. While a significant portion of these represent renewals or reclassifications of registration, there are still a considerable number of new registrants to be evaluated each year. However, the alternative would be more burdensome, for in addition to the requirements of the certification process, the investigation and enforcement facilities of the Commission would require expansion. Protection of the investing public necessitates restrictions on access to the securities business, rather than reliance on the facilities and sanctions possessed by the Commission to enforce acceptable behaviour once a person or company is registered.

In examining the scope of the Director's discretion, it is important to note that section 7 is phrased affirmatively. If the applicant meets the standards of the section, the statute stipulates that the Director "shall" grant registration. Thus, he is not delegated absolute discretion, although it is obvious that there is a large amount of room for discretion in determining what is "suitable" and "not objectionable". What is not clear is the issue of the onus of proof, which may oftentimes be instrumental in tipping the balance in favour of or against an applicant. In practice, it appears that once the applicant has completed the relevant forms, the task of the Director and his staff is to assess the information and to discern any reason why the person is not suitable or the registration is objectionable. Nevertheless, once he has made a decision, and it is challenged, the onus is clearly on the applicant to demonstrate his or her suitability.

Other sections of Part II of the Act (registration) are operative in limiting the Director's discretion. The requirement of a hearing before registration may be refused and the provision for written reasons are seen by many commentators as an effective limit on an arbitrary exercise of discretion. However, these prerequisites concern only procedural standards that are applicable, and fail to deal with the need for elaboration of substantive standards necessary to guide the Director and the applicant in determining his or her suitability.

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30 This preventative duty notion regarding the role of registration is illustrated in Tuina Investments Ltd., [1968] O.S.C.B. 35.

31 In 1974, there were 4,785 registrants, compared to 5,169 in 1973, and 4,683 in 1972. These numbers are, of course, subject to the general rate of prosperity in the securities industry, and to the fact that many are renewals or reclassifications. Source: O.S.C.B., March 1975 at 64: Ont. Ministry of Consumer and Commercial Relations, Statistical Review 1972-73.


33 S. 7(2).

34 S. 5(5).

35 See generally, supra, note 7.

36 It has been noted that these hearings may "more closely resemble an investigation than a hearing", with the use of hearsay evidence and at times refusal by the Commission to disclose the source of its information: C. R. Thomson, Concepts and Procedures in Hearings before the O.S.C. (1972), L.S.U.C. Annual Lectures at 95.
The Director has no power to cancel or suspend any registration, as this function is performed by the Commission.\(^{37}\) From the perspective of the registrant, however, this a negligible distinction, as the O.S.C. may act under this power with reference only to the vague standard of the "public interest".\(^{38}\)

The actual registration process functions according to a scheme of classification. Section 6 delineates four major classes that are required to be registered for trading in securities: dealers, advisers, underwriters, and salesmen. These main categories are defined in section 1(1), and those of dealer and adviser are further classified into sub-categories\(^{39}\) according to differences in function and membership in recognized self-regulatory organizations.\(^{40}\)

Considerable amounts of information as to personal history and business experience are elicited by requiring registrants to complete and execute forms according to their classification.\(^{41}\) Applications for registration as salesmen require as well a certificate from the intended employer testifying as to the proposed registrant's good character and reputation.\(^{42}\) Salesmen also provide three references,\(^{43}\) to whom letters are sent by the Director's staff. After a routine check with the police, an interview,\(^{44}\) and occasionally consultation with relevant regulatory bodies,\(^{45}\) registration is usually granted. Having regard to the size of staff and the number of registrations processed, the occasional oversight can be expected.\(^{46}\) The emphasis on regulation of salesmen by such requirements and the need to pass approved courses of instruction\(^{47}\) are justified, it appears, by reference to the need for protection of the investing public.\(^{48}\)

The Director is explicitly given discretion in section 7(3) to restrict a registration by imposing terms and conditions. General conditions of registra-

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\(^{37}\) S. 8(1).


\(^{41}\) R.R.O. 1970, Reg. 794, s. 3.

\(^{42}\) Id. s. 3(5).

\(^{43}\) Id., Form 5, item 12.

\(^{44}\) For an explanation of the pre-registration interview procedure, see *Douglas George Murdock* [May 1967] O.S.C.B. 25.

\(^{45}\) Baillie, *supra*, note 7 at 244, 274.

\(^{46}\) See, e.g., *E. P. Loughrey*, [Jan. 1967] O.S.C.B. 27 and *Murdock, supra*, note 44, where in cancelling a registration for a false application, the Director noted that "applications are not delayed pending the return of routine police check", so that honest applications would not suffer by delay.

\(^{47}\) O.S.C. Policy 3-06.

tion are provided in the regulations in an attempt to ensure that all classes of principal registrants will have the continued ability to serve their clients. These relate to minimum free capital requirements, bonding or insurance requirements, proper maintenance of business records and accounting procedures, audit requirements and procedures, and for dealers, participation in a compensation or contingency trust fund. The regulations require that registrants must be given notice of any proposed changes in these conditions, and that they be afforded an opportunity to be heard before the changes are approved by the Commission. Thus, in this specific instance of minimum conditions, the Director is unable to exercise his discretion without reference to explicit standards.

Additional discretion is allocated to the Director in Part II in that he may require further information or material to be submitted by an applicant; he must approve the new employment of salesmen upon termination of employment with a registrant, he may refuse registration for an insufficient period of residency in Ontario, and he may recommend that a refund of the fee or such part thereof "as he considers fair and reasonable" be made in the case of refusal or cancellation of registration.


In analyzing the scope of the Director's discretion under the current Act, it is useful to examine the development of legislative approaches to the issue of registration.

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40 Reg. s. 6. These are provided with greater detail in Reg. ss. 6a-6e, and in O.S.C. conditions of registration made pursuant to s. 6 of the regulations (see supra, note 39 at appendices). It is worth noting that the Director is given discretion within these rules, e.g. s. 6(1)(b) and s. 6(3)(a) and (b). However, it appears that conditions cannot limit the rights of persons other than the registrants, such as their creditors; see Campbell v. Prudential Trust Co. and Superintendant of Brokers, [1944] 3 W.W.R. 456; 3 D.L.R. 69 (B.C.C.A.).

50 R.R.O. 1970, Reg. 794 s. 6(7).

51 S. 12.

52 S. 6(4).

53 S. 14. See N. S. Organ, [April, 1952] O.S.C.B. at 4; S. Kellman, [Nov., 1952] at 12. Non-resident ownership of registrants is now subject to restrictions — R.R.O. reg. 794 as amended ss. 6(a)-6(g), O.R. 95/74. This applies only to new entrants into the investment community, for under the "grandfather exception" (s. 6a(g)), non-resident controlled registrants as of July 14, 1971 are permitted to continue to hold that status, subject to certain conditions (s. 6(d) ). This follows from the Report of the Securities Ownership Committee of the Ontario Securities Commission, supra, note 40, which rejected the compulsory Canadianization of existing non-resident registrants. The Commission is delegated the discretionary power to exempt applicants from these requirements (ss. 6(d)(3), 6(e)(3), s. 6(g) ). For cases where the O.S.C. has exercised this power see J. R. Timmons & Co., [1971] O.S.C.B. 167; Laidlaw Securities Can. Ltd., [1973] O.S.C.B. 100. Exemptions were denied in First Boston (Can.) Ltd., [1971] O.S.C.B. 140, and DuPont Glore Forgen Can. Ltd., [1974] O.S.C.B. 133.

54 S. 17.

Ontario's first statute governing the field of securities was *The Securities Frauds Prevention Act* of 1928 which was designed to prevent fraud and to require registration of brokers and salesmen. Registration was automatic within ten days of filing unless the Attorney-General objected, and he was allowed to order that an application should or should not be granted "for any reason which he may deem sufficient". This Act was consolidated in 1930 when wider grounds for suspension of registration were incorporated. An amendment in 1937 instituted the O.S.C. and allocated to it the responsibility for registration.

In 1945, the first modern provincial *Securities Act* was established. The discretion of the O.S.C. was extended to the granting, denial, cancellation or suspension of registration, and the power of registration was similar to that of the present Act, except that the authority belonged to the Commission. This was to remain with the O.S.C. until 1962, when the Director was assigned the power to grant or deny registration under the same terms as he possesses today, as well as the authority to suspend or cancel a registration if such action was in the public interest. Thus, the Director had an even greater discretion at that time than he now possesses. The 1966 *Securities Act* granted power to him to restrict registration upon such terms and conditions as are now applicable under section 7(3).

It was not until 1968 that the Director's authority to cancel registration was transferred to the Commission. Since that time, no change has occurred. Thus, the legislative history of the registration provisions indicates that the present day discretion exercised by the Director is substantially more restricted than that of his predecessors. Whether this trend is to be continued in the new *Securities Act* (Bill 98) is a subject that will be discussed in the concluding portion of this article.

### 3. Other Securities Legislation

The Ontario Act is generally regarded as a model for other provinces to follow in order to ensure a uniform legislative approach. It is not surprising, then, to find that in the provinces which have adopted similar legislation the appropriate administrator has the same power that the Ontario Director possesses under section 7(1). Although acting under different legislation, the Registrars of the Northwest and Yukon Territories have similar authority.

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56 S.O. 1928, c. 34.
57 Id., ss. 4(1), 8(1)(a).
58 S.O. 1930, c. 39, s. 9(1).
59 S.O. 1937, c. 69, ss. 3(1), 2.
60 S.O. 1945, c. 22.
61 Id., s. 9.
63 S.O. 1966, c. 142, s. 7(3).
64 S.O. 1968, c. 123, s. 6.
65 Williamson, *supra*, note 55 at 30-34.
66 S.B.C. 1967, c. 45 as amended, s. 8; R.S.A. 1970, c. 333, as amended, s. 7; R.S.M. 1970, c. 5-50, as amended, s. 7; S.S. 1967, c. 81, as amended, s. 7.
67 N. W. T. Ord., 1971, c. 17, s. 6; N. Y. T. Ord., 1970, s. 5.
However, it is interesting to note that, with the exception of Manitoba, all of these jurisdictions permit the administrator to cancel and suspend a registration. Only in Manitoba is there a two-tiered decisional process, similar to the Ontario scheme, which divides jurisdiction between denial and revocation of registration.

To the east of Ontario, the administrator is possessed of even more discretion. In Quebec, “the granting or renewal of registration is at the discretion of the Director”. In the Maritime provinces, the appropriate public official may order that registration shall not be granted, “for any reason which he may deem sufficient”. In Newfoundland, an order denying registration is not subject to review “in any way by any court”.

It is obvious that the Director of the O.S.C., in comparison with his other provincial counterparts, possesses a more limited scope of discretion than one would first imagine. Historically, the legislature has tended to limit this power. The Director has no power to cancel or suspend registration, and his discretion may be operative only when an applicant is not suitable or if the registration would be objectionable. This does not remove, however, the fact that there are no standards, by statute or regulation (apart from the residency and ownership requirements mentioned earlier) that guide the Director’s determination of what is suitable or objectionable under section 7.

With this in mind, it is useful to note that in the United States the drafters of the Uniform Securities Act have attempted to remedy a similar situation. Under section 204(a) of that Act, the administrator has discretion to grant, deny, suspend, or cancel registration only upon the application of a double-standard test. To make an order denying registration, he must be found to be within one or more specific grounds allowing such an order. These grounds include a variety of explicit standards ranging from misleading applications, previous convictions, dishonesty or unethical practices, to insolvency and incompetency. While the administrator may exercise considerable discretion, it is structured; even if the applicant came within one of the specific standards, the administrator must still make a finding that this order would be in the public interest. This is not the situation in Ontario, where the applicable standards are only discernable by examining the exercise of the Director’s discretion in specific instances.
C. SCOPE OF THE DIRECTOR’S DISCRETION: PROSPECTUSES


Section 35(1) of the Act prohibits any person or company from trading in a security where such trade would be in the course of a distribution to the public until there has been filed with the Commission a prospectus for which a final receipt has been obtained from the Director. While the Director has no discretion with respect to the issuance of a receipt for the preliminary prospectus required by section 35,74 his main grant of authority is found in section 61(1), whereby he controls the issuance of the necessary receipt for the final prospectus. Under this section, “the Director may in his discretion issue a receipt for any prospectus filed under this part”, unless it appears to him that paragraphs (a) to (f) of the section are applicable. These paragraphs set out various situations, i.e., non-compliance with statutory requirements (e.g. the “full, true and plain disclosure of all material facts” found in section 41(1)), unconscionable consideration, failure to execute an escrow agreement, etc., in which it is prescribed that a receipt for a prospectus should not issue.

The scope of this discretion may be measured in monetary terms. In 1974, the total value of accepted prospectuses amounted to nearly two billion dollars, while in 1973 it was over one and one-half billion dollars.75 However, various factors tend to reduce any notion of unlimited authority. One is the wide range of exemptions from the prohibition of trading without a prospectus (section 35(1)), found in section 58, which incorporates by reference many of the section 19 exemptions from registration. The importance of these exemptions is reflected in pecuniary terms as well, for in 1974 the value of private placements was slightly more than half that of the total value of accepted prospectuses.76 Further evidence of restrictions on the Director’s discretion may be found in the number of section 59 applications for O.S.C. rulings that a trade shall be deemed not to be a distribution to the public, in order to avoid the prospectus requirement.77

The legislative purpose of the prospectus requirements is not easily discernible. The general attitude envisages a compromise between the “full, true, and plain disclosure” philosophy illustrated by the English and American federal legislation, and the more discretionary “blue sky” theory which is prevalent in American state legislation.78 Specifically, it appears that section 61 is designed to enable the Director, in the exercise of his discretion, to regulate substantively the content and quality of the prospectus.79 It is only by means of an analysis of this section and of the decisions of the Director

74 S. 35(2).
76 Id. For the first six months of 1975, the proportion of private placements decreased, representing $758,493,000 out of total financing of $2,927,595,000, O.S.C.B. August 1975 at 194.
77 In 1974, 81 applications were made, compared with 109 in 1973. Id.
78 See Bray, supra, note 2 at 451. For a classic comparison of the conflicting philosophies see L. Loss, supra, note 55 at 121-29.
79 See Baillie, supra, note 7 at 175, 223.
that any relationship between the purpose and exercise of the discretion can be established.

While the Director is given wide discretionary power over the acceptance of prospectuses, one may question whether it is as broad as that which exists in section 7. Upon a closer reading of section 61(1), it seems obvious that the Director has no choice but to refuse to issue a receipt if any of the circumstances enumerated in paragraphs (a) to (f) exist.\(^8\) The Act provides fairly specific standards to guide the Director in refusing a final prospectus, while none are available under the registration provisions of section 7. The Legislature has apparently placed a greater priority on clarifying for capital financiers conditions of eligibility for a final receipt for a prospectus than it has on indicating to applicants for registration the parameters of what is "suitable" and "not objectionable".

However, since the Director may, in his discretion, issue a receipt, it seems reasonable to assume that he is not restricted, in refusing a prospectus, to paragraphs (a) to (f), and that he is free to elaborate alternative grounds.\(^8\) One commentator has viewed this proposition with concern, stating that it relates the jurisdiction of the Director to his subjective feelings, and that it places on him the responsibility for deciding new criteria, other than the circumstances spelled out in the section, upon the basis of which to exercise his discretion. Accordingly the Ontario Securities Commission generally assumes that it has a discretion only as to the existence of the circumstances spelled out in section 61 and that when no such circumstances exist the prospectus must ordinarily be accepted for filing.\(^8\)

While both interpretations have their merits, it appears that the former conclusion is borne out by the recent decisions of the O.S.C., which will be discussed later.

The actual forms and filing requirements for both preliminary and final prospectuses are set out in the Act (sections 38 to 53), the regulations (sec-

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\(^8\) See Emerson, *supra*, note 55. It is important to note the inconsistency which appears when one compares this with s. 62. Under the latter section, if it appears that any of the grounds set out in s. 61 exist after the filing of a prospectus and the issuance of a receipt, then the O.S.C. *may* order all trading to cease, while the Director appears to have no alternative but to refuse in these situations.

\(^8\) See Smith, *supra*, note 7 at 469-71 for a more detailed presentation of this point. The *Merger Study, supra*, note 2, noted at para 2.05 that "through provisions such as section 61 of the Act the Ontario Legislation provides a residual discretion. Emerson notes that a restructured form of discretion concerning acceptance of prospectuses was proposed in s. 15.23(1) of the Draft Canada Business Corporation Act, to be found in R. W. Dickerson et. al., *Proposals for a New Business Corporations Law for Canada* Vol. II, (Ottawa, 1972) at 139: *Id.*, at note 51. This would limit the administrator to a decision whether or not the statutory prohibited situations existed and any refusal would have to be based on such circumstances. The portion of the Draft Act dealing with prospectuses is not incorporated in the new *Canada Business Corporations Act*, S.C. 1974-75, c. 33 (to come into effect on proclamation). Section 186 of the Act merely requires a company under federal jurisdiction to send to the Director a copy of any prospectus that is filed.

\(^8\) Baillie, *supra*, note 7 at 220.
tions 12 to 43, forms 13-16) and various policy statements (O.S.C. Policy 3-04, Uniform Act Policy 2-02, 2-03). These, and the procedure involved, comprise a complicated field which has been discussed and criticized by others. Generally speaking, upon filing, the prospectus will be assigned to a review team comprised of lawyers, accountants, and other staff, to ensure compliance with the myriad of rules and regulations. Consultation with technical experts and financial analysts may occur in the case of unusual filings, and “deficiency” letters and more informal advice are given to issuers in an attempt to avoid any problems concerning compliance with the Act. If the Director does make an adverse determination under section 61, it must be made in writing, and only after the person or company who filed the prospectus has had a prior opportunity to be heard.

The success of this system is reflected in the fact that in 1971 (the last year for which figures are available), of 536 prospectuses accepted, there were 90 hearings under section 61(2) which resulted in only 5 orders being made under either that section or section 40(1) (preliminary prospectus). These statistics lead one also to the conclusion that despite the scope of the Director’s discretion, it is rarely used to the detriment of issuers seeking to raise capital.

A detailed examination of prospectus requirements is beyond the scope of this paper, but it is illustrative to delineate the other discretionary powers that the Director may exercise with respect to this process. He has the authority to stop the trading permitted under section 36(2) in the case of a defective preliminary prospectus, to require or permit the omission of financial data from the prospectus, or to dispense with or require certain certificates to be filed. He has control over the designation of classes of issuers and the requisite forms which must be filed and it is specifically stated that “no inference shall be drawn from the items of disclosure called for by the various prospectus forms that in any way qualifies or limits the discretion granted to the Director ... by the Act.”

The foregoing merely illustrates the statutory extent of the Director’s discretion, and while analysis of its substantive content is necessary to gauge the impact of its exercise, it is useful first to compare its scope with that exercised in the past, and that which is exercised by other administrators.

80 See Bray, supra, note 2 at 427-30; Baillie, supra, note 7 at 222; Meech, supra, note 7 at 211; and B. Lockwood, Procedures in Cross-Country Prospectus Clearance and Regulation by Policy Statement (1972), L.S.U.C. Annual Lectures at 111.

84 For a sophisticated analysis of this type of administrative action in the U.S., see W. J. Lockhart, SEC No-Action Letters: Informal Advice as a Discretionary Administrative Clearance (1972), 32 Law & Contemp. Prob. 95.

85 S. 61(2).

86 S. 40(1).

87 S. 43(1), 44, 45, 49.

88 S. 46(1), 50(2), 52(5).


90 Id. s. 22(2).

A legislative history of section 61 is not as helpful as the examination of section 7. No statute speaks to the issue of prospectuses until 1945, when the Commission, in the interest of full, true and plain disclosure, was given the same power now possessed by the Director, with the exception that paragraphs (e) and (f) of the current section concerning trust agreements and prospectuses of finance companies were not present. This has remained unchanged to date, except in so far as the latter two grounds for refusal have been added, and in that the Director has replaced the O.S.C. as the initial statutory decision-maker.

3. Other Securities Legislation

In comparison with other provincial securities acts, the Director's discretion under section 61(1) is not as wide as it may seem. Some provinces make no allowance for refusal of a prospectus, and three have substantially the same provisions as the Ontario Act. The Saskatchewan legislation provides that the Commission "may in its absolute discretion issue a receipt" except where certain situations arise, while Quebec's administrator is allowed to grant such permission where "it deems it expedient". In Nova Scotia and Prince Edward Island the Registrar may suspend the effectiveness of a prospectus if it is "incomplete, inaccurate or unsatisfactory". The widest discretion of all resides in the New Brunswick authority which may issue a certificate if the prospectus contains and provides for "a fair, just and equitable plan" for the transaction of a business. The same official "shall have absolute discretion in the granting of any certificate . . . and shall refuse to grant such certificate if in his . . . discretion he . . . is of the opinion that it would not be in the public interest".

While section 61(1) is structured to a degree by paragraphs (a) to (f), and is not as wide or unfettered a power as that possessed in other Canadian jurisdictions, it is still unsatisfactory when compared with its equivalent in the Uniform Securities Act. Under Section 306 of that Act, the administrator may deny effectiveness to a registration statement only where such an order is in the public interest and it falls within one or more of the substantive grounds for refusal. These include incomplete or misleading provision of information, wilful violation of the Act, illegality of the enterprise, unreasonable amounts of compensation, profit or options, or where the offering would work or tend to work a fraud. The discretion is structured much more affirmatively and explicitly than under the Ontario Act, although it must be recognized that...

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92 S.O. 1945, c. 22, s. 52.
93 S.O. 1962-3, c. 131, s. 15(1); S.O. 1966, c. 142, s. 61(1).
94 Northwest and Yukon Territories.
95 B.C., Alta., Manitoba.
96 S.S. 1967, c. 81, as amended, s. 68.
97 R.S.Q. 1964, c. 273, as amended, s. 50.
98 R.S.N.S. 1967, c. 280, as amended, s. 17; R.S.P.E.I. 1951, as amended, s. 11.
99 R.S.N.B. 1952, c. 205, as amended, s. 14. Newfoundland's Act allows its registrar to refuse to endorse the registration statement "in any case where he deems it to be in the public interest", s. 13(1).
these substantive grounds for refusal are subject to a very broad and discretionary interpretation.

D. SCOPE OF THE DIRECTOR'S DISCRETION: A COMPARISON

Before turning to an examination of the substantive standards by which the Director exercises his discretion in determining the suitability of a registrant or prospectus, a brief discussion of other forms of discretion allocated by provincial legislation is useful for comparative purposes.

For the purposes of brevity, this analysis is limited to provincial administrators who perform a licensing function as opposed to the mere administration of an act. It also excludes those adjudications performed by tribunals, Ministers of the Crown, or the Cabinet.

Under legislation enacted prior to 1970, the Commercial Registration Appeal Tribunal was established to supervise the registration and conduct of people engaged in various occupations. Separate specific Acts govern each occupation, but since they follow a uniform pattern, it is useful to illustrate the general process of registration and the discretion allocated to the appropriate administrator. Each Act appoints a registrar and requires registration as a condition for carrying on the business of a real estate or business broker, collection agent, mortgage broker, car dealer, itinerant salesman, upholstered or stuffed article manufacturer, or a wholesale distributor of paperback or periodical literature.

The legislation avoids the problem of discretion discussed under section 61(1) of the Securities Act, in that all applicants are entitled as of right to a licence unless the applicant's financial position is such that he cannot reasonably be expected to be financially responsible, or if his past conduct affords reasonable grounds for the belief that he will not carry on business in accordance with law and integrity. Thus, there is no discretion to refuse a licence unless the specific grounds exist, and the onus is clearly on the administrator to justify a refusal by reference only to these statutory standards. This does not avoid the problem, however, that the standards as to financial responsibility and business integrity are just as vague as those in section 7 of The Securities Act.

In other areas, administrative discretion is quite circumscribed or non-existent. Statutes may provide that upon completion of a prescribed form and

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100 E.g. Private Hospitals Act, R.S.O. 1970, c. 361, s. 3(1) — licence granted by the Ontario Hospital Services Commission.

101 E.g. Nursing Homes Act, R.S.O. 1970, c. 302, s. 5.

102 E.g. Private Sanitaria Act, R.S.O. 1970, c. 363, s. 2(4).


105 See e.g., Consumer Protection Act, R.S.O. 1970, c. 82, s. 5(1).
the payment of a fee, registration shall be granted.\textsuperscript{106} Other legislation, however, is more discretionary, in that registration may be refused if it would be “against the public interest”;\textsuperscript{107} or if it is unsuitable and the applicant is not “of good character”.\textsuperscript{108} Not surprisingly, the situations in which the broadest possible discretion is conferred are those relating to matters of health and safety. In these occupational fields, the director or registrar may refuse to issue a licence “for any reason that he considers proper”.\textsuperscript{109}

In summary, it seems that the discretion of the Director of the O.S.C. is not as broad as one would think if it is placed within the overall regulatory framework of the province. By itself, it may appear to be of substantial scope, yet in an historical and comparative context it occupies a moderate position with regard to its nature and scope. However, it does represent a problem in that few substantive standards have been made explicit in an effort to guide this discretion. What follows is a discussion of how the Director has exercised his discretion, the relationship between this and the purpose of the discretion, and how, if at all, it can be better structured in the public interest.

E. EXERCISE OF THE DIRECTOR’S DISCRETION

1. Registration

It has been noted in the preceding discussion that the purpose of the registration requirements and conditions is to ensure that those engaged in the securities industry are of sufficient solvency and competence to create and maintain public confidence in the capital markets. The statutory power of registration is discretionary and need have reference only to vague standards of suitability. Not surprisingly, this creates difficulties for those seeking registration, for although a considerable amount of procedure and policy is based upon comparatively few provisions of The Securities Act, one of the greatest difficulties facing an applicant is the general lack of publicity given to administrative policy.\textsuperscript{110}

Neither the statute, regulations, nor the policy statements give any substantive clue as to what is encompassed within the meaning of section 7. Naturally, if an applicant is found to be in contravention of a statutory condition such as the maintenance of minimum free capital, or of an explicit policy, such as dual registration, refusal of registration can be expected.\textsuperscript{111}

\textsuperscript{106} See e.g., Mining Act, R.S.O. 1970, c. 274, s. 25; Operating Engineers Act, R.S.O. 1970, c. 333, s. 7(1).
\textsuperscript{107} See e.g., Private Investigators and Security Guards Act, R.S.O. 1970, c. 362, s. 8(1).
\textsuperscript{108} See e.g., Maternity Boarding Houses Act, R.S.O. 1970, c. 264, s. 5.
\textsuperscript{109} See e.g., Dead Animal Disposal Act, R.S.O. 1970, c. 105, c. 5(2); Meat Inspection Act, R.S.O. 1970, c. 266, s. 3(2).
\textsuperscript{110} Williamson, \textit{supra}, note 54 at 245.
\textsuperscript{111} See e.g., Fisher-Johnson Management Ltd. [1968] O.S.C.B. 138. The cases that are discussed \textit{infra} are not always those of the Director per se. Several are decisions of the O.S.C. in which decisions of the Director are reviewed. I am indebted to N. M. Chorney’s published \textit{Index to Canadian Securities Cases 1949-1974} (Toronto: Law Society of Upper Canada, 1975) which proved to be an invaluable aid in sifting through the decisions of the Commission and Director over the past two and a half decades.
Occasionally conditions will be imposed that are referable to a specific policy. Thus a professional football player was granted a renewal of registration on the condition that it be suspended during the football season. Registration was deemed to require his full time attention, and it was felt that the demands placed on a professional athlete detracted from the standards set out in Commission policy on the registration of part-time salesman. The conclusion that can be drawn from this type of case is that where there are regulations or policies that are explicit, the Director will normally feel that he is bound by the declared policy, even if that policy is found to be lacking in merits or practicability.

The contentious issue that remains is the nature of the non-explicit standards that guide the Director's discretion in determining the suitability of an applicant. For the purposes of this discussion, it is necessary to regard those decisions which involve a denial of registration as opposed to its suspension or cancellation. Our emphasis is on the Director's control of access to an occupation, and not on the Commission's control of conduct once one is registered. An analysis of the many Commission decisions would undoubtedly be of benefit in determining what standards guide its interpretation of the public interest as a ground for revocation. This analysis could then be compared with the Director's decisions granting or refusing renewal of registration, yet that is beyond the scope of this paper. Besides, rarely does it seem that the Director refuses renewal, as that function is usually performed by the O.S.C. when it considers "fitness for continued registration". The Commission, and the securities industry, in its own self-interest, are both concerned with the conduct of those engaged in the occupation. Yet rarely is attention drawn to the important question of access to the securities business and the benefits accruing therefrom.

Past conduct in securities transactions is undoubtedly a factor in the decision of the Director of whether to grant registration. Often this occurs when a salesman's registration is terminated by a change in employers and he applies for the transfer of that registration to another principal registrant. The consequences of a refusal by the Director are of significant impact, as they effectively bar the salesman from future employment in the business.

Two decisions are of particular interest. In James Jeffrey Forsythe, a salesman had lost his registration by operation of section 6(4) through no fault of his own. However, his application for transfer of registration was refused. The Director found that Forsythe had engaged in a violation of The

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114 [R. J. Hodgson & Co. Ltd.] (1969) O.S.C.B. 190. See infra in the text at F. I(i) for a discussion of the O.S.C. review of this decision which, in effect, amended the policy which the Director felt was binding on him.
115 See e.g., United Investment Services Ltd., supra, note 38 at 20-31; and A. E. Ames & Co., supra, note 38.
116 S. 6(4).
Securities Act by obtaining subscriptions for shares of a private company, by whom he was employed, from several acquaintances and friends. The Director reviewed Forsythe’s past conduct in the securities business and found it wanting in three respects: an unsteady employment record, failure to disclose motor vehicle convictions, and a previous incident concerning the misleading placement of trading orders for speculative mining shares on behalf of clients, for which he had been subjected to Toronto Stock Exchange disciplinary hearings. It was felt that, taken separately, these incidents might not have resulted in refusal of registration, yet the cumulative effect was an impression of indifference, on Forsythe’s behalf, towards his obligations and responsibilities. On these grounds it was held that he was not suitable for registration. One may seriously question whether these grounds were really relevant at all, as past traffic violations cannot be reasonably related to one’s suitability to sell securities, nor should Forsythe have been penalized again for an event for which he had been previously disciplined. Had the Director wished to rely on a more established ground for refusal of the application, he could have easily made reference to the numerous decisions in which a failure to disclose previous convictions was sufficient to sustain a denial of registration.

In another similar situation, registration was refused to a salesman when his employer had voluntarily given up its registration pending an investigation of it by the O.S.C. Refusal was made on the grounds that the salesman had taken part in an unqualified primary distribution of securities, and had engaged in deceptive and manipulative practices. He had participated in a two-priced offering of unqualified securities, relying on assurances of its validity by his superiors, and thinking that a non-solicitation letter initiated by himself would obviate the need for a prospectus. As a result of his reliance and, no doubt, his naiveté as to the nature of the transaction, he was barred from future employment by the Director.

Other cases that deal with past conduct in the securities field as a grounds for denial of registration are more clear cut. Thus, when the principal of an

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Obviously, the Director is concerned with the honesty of the applicant, which is the reason why any false information is usually treated as a reason for refusal (see e.g., Allen Joseph Long, [Oct. 1965] O.S.C.B. 9) and a lack of frankness and candour concerning previous activities and convictions is suspect (William Bruce Brown, [March 1965] O.S.C.B. 6). One of the reasons given for the interviewing of salesmen applicants before the registration is that it helps to ensure that there will be no misunderstanding concerning the information re past convictions that is required on the application form: see Richard William Eastcott, [Sept. 1965] O.S.C.B. 10.


120 For the Commission’s resolution of the dispute, see infra, text at F-I(i).
applicant company was subject to a preliminary injunction issued by the American Securities and Exchange Commission, the Director relied on the evidence and findings in that action to refuse registration. In another case, where previous misconduct by the control person of an applicant had resulted in a denial of exemptions and a stop order concerning shares of a mining company in which he was involved, registration was refused. Oblique reference was made by analogy to section 9, the inference being that since no material circumstances had changed, “further” application for registration was not to be allowed. This form of reasoning militates against the onus placed upon the Director, in section 7, in that he “shall” grant registration if the applicant is suitable. In effect, rather than the Director showing the unsuitability of the applicant, the would-be registrant had to affirm its suitability, and prove that it was “not objectionable”.

A less certain ground for denial that is occasionally enunciated is the lack of competence or financial responsibility. As a matter of principle, an undischarged bankrupt is not adjudged to be a suitable person to deal with and advise the public. Other cases have refused registration or renewal on the basis of the applicant's ignorance of the securities business, although this is now largely remedied by the educational requirements for registration of salesmen. Registration as a securities adviser was denied when the applicant was unable to comprehend or answer questions relating to an engineer's report. These decisions show that suitability encompasses not only the general character of the applicant, but also his or its demonstrated technical and financial competence.

The most vague decisions are those that assess suitability for registration on the basis of general character, reputation or business ethics. While this necessarily entails examination of the past conduct of the applicant, it is not restricted to the securities field. Several cases are illustrative of this approach. Each is also instrumental in revealing how the Director and the O.S.C. have no qualms about going beyond the corporate structure of the applicant and examining the conduct and character of its principals.

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121 Larenim Securities Ltd. [1971], O.S.C.B. 12.  
123 Nevertheless, several decisions clearly indicate that the onus is placed upon the applicant to affirm his suitability: see Frederick William Jackson (June 1965) O.S.C.B. 2; David Joseph Scanlon (July-August 1965) O.S.C.B. 13; Percy Brand (March 1964) O.S.C.B. 6. For decisions that deal generally with the grounds upon which reinstatement or re-application will be allowed, see Harry Price (June 1964) O.S.C.B. 3, and Northern Securities Company (May 1964) O.S.C.B. 1.  
125 David L. Rotenberg (Sept. 1967) O.S.C.B. 28; J. F. Simard Co., [May 1967] O.S.C.B. 8; William Bruce Fyles, [May 1965] O.S.C.B. 5. Where registration was refused on the grounds of the applicant's lack of knowledge (rather than lack of character), it has been decided that the refusal does not prohibit re-application once sufficient knowledge has been obtained: see Edward Mervin, (June 1965) O.S.C.B. 5.  
126 Supra, note 47. Registration is occasionally suspended for salesmen where knowledge and competence fall below a minimum standard until they pass the Canadian Securities Course: see William Ritchie Williamson [1971] O.S.C.B. 135.  
In *Maris Investments Ltd.*,\(^{128}\) an application for registration as an underwriter was refused. The Director was quite honest in stating that he knew of no guidelines that had evolved to help him in determining registration of this class of registrants, so that his approach would be founded on his understanding of the general intent of the legislation, and on the application of ‘normal’ standards. This suggests that the Director is not hostile to the idea of the elaboration of specific standards to guide him in the exercise of his discretion.

At issue in this case was the fact that the principal of the applicant possessed a history of involvement in a number of mining companies as a promoter as well as the control of two underwriting firms. Registration was refused because of the appearance of a conflict of interest between his position as an underwriter and an insider of the companies, the implication being that this could possibly work to the detriment of the companies’ shareholders. No evidence was adduced regarding any dishonesty, illegality or misleading practices, nor was there any finding of such by the Director. Some of the companies with which the principal was associated had been under investigation, but no charges had been filed. The evidence, other than that of his corporate involvement, went solely to reputation, as normal inquiries by Commission staff had revealed a negative reaction by the financial community to the applicant. This was confirmed by the principal himself on review, when he admitted his reputation as a “sharp operator” resulted from his “staying away from those people who make you a good fellow on Bay Street.”\(^{129}\)

The *Maris* decision represents clearly the application of arbitrary standards by the Director in his determination of the applicant’s suitability. Although this was reversed by the O.S.C. on review, and although the Director could have narrowed his decision to the conflict of interest holding, the decision reflects an inconsistency between the purpose and exercise of his discretion. If the purpose of registration is the protection of the public investor and the regulation of the securities industry, it is hard to reconcile with a decision that implicitly seeks to protect the financial community from people whom it regards as dangerous. It is also difficult to reconcile this decision with cases wherein evidence indicating questionable conduct, inadequate and misleading documentation of accounts, and use of brokerage facilities to maintain the appearance of public activity in trading, was held to fall short of fraud and that therefore no action was necessary on the part of the Director.\(^{130}\)

In *Tuina Enterprises Ltd.*,\(^{131}\) registration as an underwriter was refused after an examination of the applicant’s control person’s business life for nine


\(^{129}\) Id. at 80.

\(^{130}\) *E. T. Lynch & Co.* (1968), O.S.C.B. 164. See also *Re Larrimore Securities Ltd.* (1956), 4 D.L.R. (2d) 727 (Ont. C.A.), where, on appeal, a decision was reversed because registration had been refused because the applicant had been refused membership in the Broker-Dealers Association of Ontario. The decision of the Commission in *Maris* is much closer to the common-sense principle elaborated in *David Scanlon* [July-August 1965] O.S.C.B. 13, namely that the good character of the applicant may normally be assumed unless an unacceptable standard of business morality has been established.

years revealed that he was "a man who, when occasion demands, is likely to be loose with his words, to show a good deal less than strict regard for the truth, or to fall short in other ways of the standards required by proper business ethics".

The examination of past business conduct was deemed to be necessary in assessing suitability, and it stressed three particular incidents in which the principal was responsible for the dissemination of misleading information. Each instance by itself was declared to be insufficient as a grounds for refusal, yet it was felt that they represented a pattern which indicated that he was "a man who does not see clearly enough the line that divides proper from improper business conduct". It was on this basis that registration was refused.

The decision of the Director in Sigma Securities Ltd.,122 raises a corollary point concerning reputation and business ethics as general grounds for refusal. Again, registration as an underwriter was refused in that the principal involved had, during the speculation surrounding the Windfall Mines case, bought shares in that company, and upon their subsequent decrease in price had allocated the loss to several public companies which he controlled or in which he possessed an interest. The principal had authority to speculate with the funds of at least some of the companies, yet the Director was concerned with the sinister implication of the facts. Registration was refused because he felt the applicant had clearly demonstrated his "inability to deal fairly and ethically" with the public companies with which he was involved. This finding was made even though it was accepted that the applicant's conduct was no different than that of the part of the financial community within which he operated.

One cannot, nor should one, categorize each and every specific ground for refusal of registration. This is amply demonstrated by the cases in which the Director has resorted to varying standards and has attached differing weights to the applicable standards. Nevertheless, despite the fact that the discretion of the Director has been circumscribed to some extent by statute, regulation, or policy, his decisions have exhibited a pattern of decision-making which is free from any fixed, explicit standards that might otherwise be applicable. While some discretion is necessary for proper administration of the Act, in order that the integrity of the decisional process be preserved it is necessary for him to make his objectives and applicable standards as completely explicit as possible. Otherwise, it is suggested, the exercise of his discretion may be influenced or even dictated by considerations that are alien to the purposes for which the discretionary powers were originally conferred. The problem, as Wexler reminds us, is not so much the existence of the discretion, but the manner in which it is exercised.123

2. Prospectus

It has been suggested above that the purpose of section 61(1) is to enable the Director to regulate substantively access to the capital markets of

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123 Supra, note 25 at 173.
this province. This observation must be tempered by the fact that due to the wide range of available exemptions from prospectus requirements, and the very small numbers of orders actually made under this section, it seems that in practice there is little real concern about the extent of potential power exercisable by the Director. However, even its occasional exercise brings into focus the conflict between the permissible extent of governmental regulation of business affairs in the public interest and the possible effect of depriving the economy of a productive enterprise that failed at the outset because of administrative interference.

In its Bulletin of September 1972, the Commission noted that “under section 61(1) the Director has discretion in a proper case to refuse to issue” a receipt for a prospectus (emphasis added). An analysis of several decisions made pursuant to the section is helpful in illustrating the Director’s view of a proper case for refusal.

In most of the reported cases, a final receipt was refused because one of the situations described in paragraphs (a) to (f) of section 61(1) existed. Thus, a prospectus which fails to comply substantially with the requirements of the Act or regulations, which is misleading, or which conceals or omits material facts necessary in order to make the prospectus not misleading, will be refused.

In Prima Mining and Metal Co., a prospectus was refused because the vendor-promoter’s consideration was considered to be excessive, contrary to section 61(1)(b). The decision is exemplary in that it makes explicit the tests utilized by the Director in determining: (a) when the administrator will examine a bargain between a company and a promoter to see if the section is applicable, and (b) what factors are relevant in deciding that the consideration paid is excessive. While one may disagree with the content of the applicable tests, the exercise of the Director’s discretion was made by reference to readily discernible standards, although it required a disputed situation to arise before they could be elaborated.

In two other decisions, receipts were not issued because it was felt that the proceeds of the sale of the securities, together with the resources of the company, would be insufficient to meet the stated purposes of the prospectus (section 61(1)(c)). Yet these decisions involved the Director in more than mere determinations of the sufficiency of resources, apart from the fact that sufficiency is a relative term capable of varying value judgments. While in both cases the available proceeds and resources would have been undoubtedly

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135 S. 61(1)(a)(ii): see e.g. Great Divide Exploration Ltd. (July-August 1965) O.S.C.B. 10.
insufficient, the Director went beyond the literal words of the section and exam-
ined the substantive content of the proposed financings. He found that they both involved too much investor risk in proportion to the actual equity con-
tribution of the promoters. Put in other terms, the potential profits of the ap-
plicants were considered to be unconscionable in relation to the risk that the public investors were asked to assume. Without reference to or elaboration of any policy governing this type of situation, the Director switched from the application of statutory quantum standards to discretionary merit ones.

The most contentious decisions involve a refusal by the Director in situa-
tions other than those outlined in section 61(1). We have noted above that a clear understanding of the interpretation of section 61(1) is difficult. The Legislative has conferred a discretion upon the Director, and has specified certain circumstances in which it must be exercised in a prescribed manner. Apart from this, however, there are no guidelines to assist the Director or those filing prospectuses. Mr. Justice Kelly, in his *Windfall Mines Ltd. Report*, adequately summarized the situation:

In the absence of a clear delineation of its purposes, responsibilities and powers, over the years, the Securities Commission has, by administrative practice, established a workable control over the issue of securities of those companies required by the Securities Act to file prospectuses. This has been accomplished by a self-
conferred extension of the power exercisable . . . to reject prospectuses.  

In one case, a prospectus was refused because the proposed issuer's name was so similar to that of another that it was felt that the investing public might be confused. However, like the *Prima Mining* decision, this was decided consistently with a proper exercise of discretion. All the factors that were considered, i.e. the distinctiveness of the names, and the extent to which they had become known, the length of time the names had been used, the nature of the business, etc., were made explicit, so that in the future, at least, any applicant would be able to be apprised of the relevant standards that would govern the situation.

Two cases show the extent to which the Director, in the exercise of his discretion, is prepared to proceed in regulating the substantive content of businesses that wish to raise capital funds in Ontario. In *United Security Fund*, a prospectus receipt was refused because the declared intention of the company's management was the use of up to one-third of its assets to purchase government-insured, mortgage-backed securities. It was held that such an investment policy was inconsistent with what the perceived principles of mutual funds were felt to be, namely, diversification and liquidity. Because

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130 *Report of the Royal Commission to Investigate Trading in the Shares of Windfall Oils and Mines Ltd.* (Toronto: Queen's Printer, 1965) at 95 (emphasis added). This was acknowledged by the Commission itself in *Great Pine Mines Ltd.* [Feb. 1966] O.S.C.B. 7 at 10; where it noted “that the Legislature having failed to specify the grounds upon which the director could and the grounds upon which he could not exercise what is on its face an unfettered discretion to refuse to accept a prospectus, the Commission has, lacking the guidance of the Legislature, been forced to work out those grounds for itself”.


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diversification was lacking in the expressed intent of the company’s investment policy, it was decided that it was not in the public interest to accept the prospectus. While the decision may reflect an approach towards proper investment policy for mutual funds, it is inconsistent with the Commission’s statutory policy of full, true and plain disclosure, in that it offers no incentive to company management to disclose their true corporate purposes.

A similar arbitrary decision is found in the case of Shopper's Investment Ltd.¹⁴² There, the proposed prospectus of a residential mortgage finance company was refused on the ground that the security held by a trustee under a trust agreement for debenture holders of the company was insufficient in relation to the risks inherent in mortgage financing. This was decided despite expert evidence that the mortgages were sound investments with no problems of foreclosure or collection of payments. Also ignored were the claims by the company that it had and was planning to inject new equity into the company, that the debenture trust deed did not allow for the redemption or reduction of capital without the approval of the debenture holders, and that such a requirement as proposed by the Director (increased security) would so reduce the profit margin that the businesses would be unfit to continue.

A closer examination of the reasons of the Director is in order. It is clear that the prospectus did not fall within any of paragraphs (a) to (f) in section 61(1). The only possibility for refusal on those grounds is found in section 61(1) (f) (ii), which requires refusal only if the securities offered by a finance company “are not secured in such manner, on such terms and by such means as are required by the regulations”. Nowhere in the regulations nor in any policy statement is there any requirement for a fixed percentage of security to be held.

The only conclusion that can be drawn from these cases is that the Director, in exercising his discretion under section 61(1), is not limited to those situations described in the section as proper grounds for refusal. This broad reading of his discretion is consistent with the statutory analysis of the section offered earlier in this paper. It is also clear that whatever might have been the legislative purpose of section 61, it has been interpreted by the Director as encompassing substantive regulation of security issuers. Since the Director is free to refuse or accept a prospectus, except in the limited statutory situations, his decision will necessarily reflect a choice of policy. What subjects the above-named decisions to criticism is the fact not that the policies reflected in the decision were without merit, but simply that they were not made explicit.

Two recent decisions in which the Commission has reviewed the Director’s refusal of a prospectus add strength to the above argument. In Royal Trust Managed Funds¹⁴³ the Director declined to accept a multiple prospectus which would enable the applicant to continue distribution of three mutual funds. In the past, mutual funds under common sponsorship and management, although each possessing status as a separate legal entity, were allowed to be

¹⁴³ Supra, note 127.
qualified by a multiple prospectus. In September of 1974, the Commission announced a policy that would prevent the intermingling of issues, but in deference to those who had relied on past practice, it indicated that the policy would not be enforced until January of 1975.

After examining the three funds, the Commission was of the opinion that the multiple prospectus should be refused on the statutory ground that it did not meet the requirements of the Act (section 61(1)(a)(i)), in that it did not contain adequate disclosure of the separate and distinct purposes and investment powers of each mutual fund. But the Commission went beyond this, and indicated that:

If we are in error in finding that multiple prospectuses do not meet the requirements of the Act we nevertheless think that there are enough differences in these funds to warrant the Director exercising his discretion and requiring separate prospectuses.144

This explicit recognition of the residual discretion of the Director to refuse a prospectus on non-statutory grounds is also contained in the Commission's decision in Galaxy Goldmines Limited.145 The Director had refused to accept the applicant company's prospectus on the ground that insufficient effort had been expended on several unpatented mining claims possessed by the applicant to ascertain if they merited the solicitation of public investment monies in order that an exploration programme contained in the prospectus might be carried out. He felt that the public investors were being asked to assume most, if not all, of the risk inherent in such a scheme, in return for which the vendor-promoters were assured an immediate and substantial profit.

In reviewing the Director's decision, the Commission felt that refusal of the prospectus would be properly based on the unconscionable consideration that would be given to the promoters. Instead of restricting the Director to the express statutory grounds of refusal, however, the Commission noted with benign approval that he had "exercised his residual discretion... he found that it was against the public interest to permit an offering to the public".146

Not only did the O.S.C. introduce a new, non-statutory ground for refusing a prospectus, it also exhibited a near-cavalier attitude to the applicant's indignant complaint that the Director "was applying a new and unwritten policy". While acknowledging that no written policy existed, it nevertheless indicated that the applicant was expected to be aware of such a circumstance:

The crucial point is that neither of the interested parties in this issue are...
protected nor served by this type of decision-making. A traditional view would argue that the issuer is being harmed in that it has no guidelines upon which to base its investment and capital-acquisition decisions. Yet it is necessary to remember that the public interest is ostensibly represented by the Director. It is in the interest of accountability to the public that policy governing the capital structure of the economy is openly elaborated and subjected to scrutiny.

It is important, in discussing the Director's discretion, that one is aware of the relative implications of the application of a "merit standard" philosophy to the acceptance of a prospectus.\footnote{148} By this term we refer only to those cases in which a decision is based on non-statutory grounds, such as in Shoppers Investments Ltd., which imply that an administrative evaluation is made of the merits and risks inherent in the proposed offering. Many criticize the validity of a regulatory approach that incorporates a broad power of discretion, and several disadvantages are often put forth.

To a large extent the success of a merit standard approach is dependent upon the competence and reliability of the Director and his staff. If emphasis is to be placed on detailed analysis of merit content, then it is argued that there can be little chance for the effective detection or restraint of illegal or fraudulent offerings. Put in other terms the discretion of the regulatory process would be centered upon determining the potentiality of success and not in the prevention of fraud, the result being a regulatory morass that would not give protection where it is most needed.\footnote{149}

Related to this point is the argument that if the Director is required to perform the very technical and complicated task of assessing the particular merits of a financial proposal, he is susceptible to errors of judgment in his assessment of potential risk and gain. Investment decisions are motivated by a variety of objectives, and it is argued that it is unreasonable to expect an administrator to determine matters such as a common denominator ratio of risk and reward. Practically speaking, although there may be explicit representation to the contrary,\footnote{150} there will undoubtedly arise in the mind of the investor the impression that a prospectus approved by the Director has the "stamp of validity . . . it would not otherwise have".\footnote{161}

It also appears that such an approach will only lead to greater pressure for increased statutory exemptions in an attempt to avoid the rigours of administrative examination. In that this could possibly occur, the whole purpose of the discretionary power is lost.

American commentators have argued that the original "blue sky" laws, in which the Ontario legislation finds its roots, have outgrown the historic

\footnote{148 For a general discussion of the disadvantages, see Bateman, supra, note 1 at 766-79; and H. S. Bloomenthal, Blue Sky Regulation and the Theory of Overkill (1969), 15 Wayne L. R. 1447. For an opposing viewpoint, see J. F. Hueni, Application of Merit Requirements in State Securities Regulation (1969), 15 Wayne L. R. 1417.}
\footnote{149 Bloomenthal, id. at 1481, Bateman, id. at 476.}
\footnote{150 See National Policy Statement No. 13; s. 77 Securities Act.}
\footnote{161 Baillie, supra, note 7 at 192.
rationale of their origin. This analysis attributes the discretionary statutes to populist economic philosophy which had evolved to protect western agrarian interests from exploitation by the eastern financial capitals in a time of federal abeyance of legislative initiative. With the development of federal true disclosure requirements, it is argued that the necessity for a wide discretion in assessing prospectuses has vanished.\textsuperscript{182}

The strongest arguments against this form of regulation are found in two related concepts. The first is one which seeks to stop the extension of paternalistic governmental regulation of an individual's economic right to access to the capital markets. The uncertain and ill-defined limits of authority, and the awesome control over the flow of investment capital according to an administrator's perception of the public interest is seen by one noted commentator as "overkill" which lacks rationality and seeks to undercut the economic purposes of securities legislation.\textsuperscript{183} This view advocates that the rationality of the market place is superior to that of an administrator.\textsuperscript{184}

A more sophisticated analysis examines the economic impact of the merit standard approach.\textsuperscript{185} The conclusion drawn from it suggests that the discretionary format may result in important and often dangerous economic consequences concerning the development of new enterprises. Substantive regulation of prospectuses, it is claimed, places limitations on the financing of new businesses, the retention of promoter control, and the ultimate capitalist objective of sufficient justification for economic entrepreneurship. More to the point, the merit standard theory is attacked because it results "in a clear tendency to discriminate against new enterprises in favour of older, established business",\textsuperscript{186} and thus can be instrumental in the restraint of potential competition.

The proponents of the merit standard approach\textsuperscript{187} contend that mere reliance on disclosure underestimates the economic self-interest of promoters and issuers, and places too much emphasis on the competence of the average investor to fully appreciate the implications of the complicated material found in a prospectus. Rather than stressing the vagaries of administrative decision-making, their concern is with the ability of the investor to make rational investment decisions. The discretionary approach is seen to be neither unnecessary, out-dated, nor paternalistic. More to the point, it is suggested that the intelligent exercise of discretion is required if a more realistic attitude is to evolve concerning the need to balance the interests of the security industry, which

\textsuperscript{182} Bateman, supra, note 1 at 776; Loss, supra, note 55 at 27; Loss & Cowett, supra, note 4 at 7-10.
\textsuperscript{183} Bloomenthal, supra, note 148 at 1493.
\textsuperscript{186} Bateman, supra, note 1 at 778.
because of its dependence on the steady flow of capital cannot claim to be a fully disinterested party, against those of the public.

It seems that the Ontario practice represents somewhat of a balance between these two positions. The adverse implications of the discretion allocated to the Director are no doubt existent in theory, yet practice to date has shown that the arbitrary imposition of merit standards occurs only occasionally. Evasion of meritorious evaluation can be accomplished by the use of the exemptions available. Protection from administrative abuse of power can be afforded by the elaboration of equitable and reasonable standards that can be applied consistently, and which will not impede unduly the participants in the capital market structure, yet which will enable the administration to be accountable to the public for its policies and decisions.

An analysis of the nature, scope and exercise of the Director’s discretionary power over registration and prospectuses leads one to the conclusion that there exists a lack of coherence in the regulation of securities in this province. There is no clear consistency between the legislative intent of The Securities Act and the administrative interpretation of its purpose and powers. In a broader context, there is no assurance that the policies currently formulated and implemented by the O.S.C., with their significant economic impact, are not at variance with other public policies of the government. This is largely the result of a failure to make applicable substantive standards that govern decision-making completely explicit. How the exercise of the Director’s discretion and its consequences can best be made to conform to reasonable guidelines is the subject of the remainder of this article.

F. FORMAL CONTROL OF DISCRETION

In seeking methods by which discretion may be structured, it is important to be aware of several general considerations. First, it should be recognized that the greater the scope of discretion possessed, the more it is imperative that the disparate interests that will be affected by a decision are presented to the decision-maker. Rarely has the O.S.C. seemed to be formally aware of all the

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158 See, e.g. the discussion of the discretionary powers contained in s. 61(1) in Rivalda Investment Corp. Ltd. (Dec. 1965) O.S.C.B. 2: “this power must be exercised with caution. The Director or the Commission, should not, except in the clearest of cases, impose their judgment on the merits of an issue, in place of the judgment of the investing public. The decision to purchase securities offered for sale must be that of the purchaser. However, there are situations where the Director and the Commission are entitled ... to require that certain safeguards be adopted for the benefit of the public”. Emerson feels that the O.S.C. “has exercised its discretion cautiously, responsibly and not restrictively, [supra, note 55 at 45]; Baillie notes that it has “confined the scope of its interference to policies and rules that few serious observers would claim to be detrimental to the operations of the security industry”, [supra, note 7 at 232, emphasis added].

159 A summary and exposition of this general concept are to be found in Jowell, supra, note 21. Many of the ideas expressed in the following paragraphs are derived from Prof. Jowell’s article. See also, Davis, supra, note 20, Wexler, supra, note 25, and A. D. Sofaer, Judicial Control of Informed Discretionary Adjudication and Enforcement (1972), 72 Cal. L. R. 1293.
implications that arise from the formulation of standards in the adjudication of individual cases.

Secondly, it is equally necessary to assess the inherent advantages and disadvantages of legal control of discretion. This may be done in a strategic sense by examining the effectiveness of particular legal techniques to achieve the desired result, or it may be done by reference to functional criteria, assessing whether the particular problem is amenable at all to legal control. Some situations may be so complex, involving a myriad of relationships and interfaces, that each decision necessitates an intricate balancing of competing interests and values. Thus, it may be quite difficult to regulate the securities industry in the public interest while at the same time attempting to prevent impediments to the free flow of capital. In addition, some decisional situations may be unique, non-recurring, or not referable to a consensus, making decisions even more discretionary.

Thirdly, it is insufficient if procedural standards are utilized to structure discretion where substantive standards are incapable of elaboration. This leads to “symbolic reassurance”, a process by which various myths, such as regulation in the public interest, are invoked “to achieve the quiescence of a potentially critical public”.160

One cannot afford to ignore the “reality of discretion” as it exists in the securities field. While it is possible to provide some minimum substantive standards, it would be naive to contemplate a neat set of rules, guidelines or decisions that are capable of coping with inconsistent policies or the natural variations of factual situations that are continually presented to the administration.161

With these caveats in mind, one can examine possible techniques for bringing coherence to the exercise of discretion by the Director. While discretion has been seen to be necessary by the Legislature because of the complexity of the securities field, the proper functioning of securities regulation requires that the integrity of administrative decision-making be justified by the formulation and application of rational standards.

Basically, there are two possible methods, neither of which is capable to exclude discretion. One is adjudication, or the judicialization of decisions; the other is rulemaking, which legalizes decisions.162 An examination of the extent to which both of these techniques are utilized by the Director and the O.S.C. is necessary for any analysis of the discretionary powers contained in The Securities Act.

1. Adjudication

Adjudication is inherently an incremental ad hoc approach. It declares rules in specific cases, and enables the administrator to gain essential experi-


161 Wexler, supra, note 25 at 139, 159.

162 Jowell, supra, note 21 at 180.
ence before standards of general application can be formulated. It is flexible in that the standard or standards applied can be examined in their own specific situation, without the danger of distorting a general policy.

To a large extent, the exercise of discretion by the Director is accomplished by adjudication. Each of his decisions under sections 7 and 61 is made not by reference to a firm set of rules, but by the application of vague standards of acceptability. Such a process has several prerequisites. The situation must be capable of resolution by adjudication, and the decision must be made on the basis of some general guidelines that can be applicable to future cases, or the integrity of the decisional process suffers. The examination of various cases above indicates that there has been no real formulation of widely-known general rules or standards, a practice which removes the Director's function from the ideal situation described here.

Instead, the O.S.C. and the Director rely upon procedural techniques to promote administrative decisional integrity. The sections of the Act providing for review (section 7(2), 61(2)) and establishing rules as to hearings (section 5) are an attempt to guarantee participation by the applicant in the decision-making process. These rules provide a greater possibility for scrutiny, accountability, and isolation from political or private interest group pressures, yet say nothing about the content of the rules or standards that are utilized.

(i) O.S.C. Review

The main procedural control of the Director's discretion is found in the provisions for the review of his decisions by the Commission. Its ostensible purpose is to ensure that he acts within the scope of the Act and in accordance with the rules of natural justice. The review section (28(1)) is quite broad, and enables any person or company "primarily affected" by a decision of the Director, upon notice to the O.S.C., to request and be entitled to a hearing or review. The use of the word "review" is important, as the power of review is usually considered to be wider than an appellate power. This is substantiated by section 28(2) which, in effect, allows the Commission to substitute its judgment for that of the Director.

The empirical impression that one gains from a review of the cases is that the Commission usually upholds the decision of the Director. Whether this result is a function of organizational loyalty, or is simply derived from agreement as to the substantive merits of a particular case is a matter of conjecture. It does, however, reflect the Commission's perception of its role in review.

Two cases in which the O.S.C., under section 140(3), reviewed decisions of the Toronto Stock Exchange (T.S.E.) are illustrative of the Commission's

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163 Williamson, supra, note 55 at 257.
164 Oddly enough, the part of the Act in which this section is found is entitled 'Appeals'.
view of its function. These cases are applicable in that they raise the issue of the extent to which the O.S.C. will review the exercise of discretion by one of its statutory subordinate decision-makers. Some care must be taken in comparing the Director with the Stock Exchange, for both exercise different functions, and occupy different positions in the securities administration.

In Edward Williams v. T.S.E.,¹⁶⁶ the Exchange had refused the applicant status as an approved person. The O.S.C. held that the standards of the two authorities concerning acceptability could be different,¹⁶⁷ and that there were no grounds upon which it could interfere with the discretion of the T.S.E. unless their standards were not consistent with the Commission’s view of the public interest.

In Lafferty, Harwood Partners, Ltd.,¹⁶⁸ the O.S.C. did not consider it a proper exercise of their jurisdiction to substitute their judgment for that of the Exchange merely because they may have disagreed with the decision or would have given different reasons. It was felt that only if there was an error of law, or if new material evidence was available, would interference be proper.

Once this hurdle of deference is cleared, and the O.S.C. does seek to review a decision of the Director, what functions are served thereby and how can the discretion of the Director be structured? One important function, even if a decision is upheld, is that the O.S.C. can be instrumental in making the relevant policy explicit and enunciating relevant factors which will be utilized in future cases.¹⁶⁹

Sometimes the O.S.C. will amend or modify a Director’s order or ruling to reduce its sharpness or perceived unfairness. Thus the Commission may uphold a decision refusing a prospectus, but allow the issuer to submit a revised one.¹⁷⁰ In the Webb decision (supra), the O.S.C. regarded the mitigating factors in the case (reliance on superiors, unblemished record, and resulting unemployment) and allowed the applicant to re-apply upon successful completion of the Canadian Securities Course. However, this type of reasoning fails to take cognizance that the re-application allowed merely subjected the applicant to the Director’s discretion for a second time, although the Director may have felt bound to grant registration in those circumstances.

The reversal of a decision may have salutary effects as well. Those decisions of the O.S.C. which have reversed a ruling of the Directors for his insufficient reasons undoubtedly will force the administrator to make the applicable policy more explicit.¹⁷¹ In a recent appeal from a refusal of the Director to

¹⁶⁷ This seems to be an implied recognition by the Commission of the decision in Re Larrimore Securities Ltd., supra, note 130 and discussion therein.
¹⁶⁹ E.g., Japan Fund of Canada Ltd., supra, note 140. See also Prima Mines Ltd., supra, note 137, where the O.S.C. stated: “The principle applied in this case will be equally applicable in a large number of other cases.”
grant release of shares from escrow, the O.S.C. stated that when such a condition is imposed,

Its purpose should be clearly set out by the Director . . . for the subsequent guidance of the Commission . . . In addition, where a decision is rendered refusing an application . . . it would be helpful . . . if reasons could be prepared for the benefit of both the appellant and the Commission.272

Thus, in the Maris case,173 the O.S.C. approved the application for registration of an unpopular “sharp operator”. It stated that as there had been no specific complaints or charges against the applicant, that he was an experienced person familiar with the requirements of the Act, that he had provided a useful economic function in the exploration and development of mining resources, and that he was anxious to establish a good reputation, there should be no reason to refuse registration. However meritorious this decision may be, it seems that this type of decision is aimed more at correcting individual cases of injustice than at establishing criteria which may guide decision-making.

A final benefit of review by the O.S.C. is that specific policy may be changed. In C. J. Hodgson Ltd.,174 the Director had refused registration as an investment counsel to an applicant company controlled directly and indirectly by the principals of another company registered as an investment dealer and broker. This was based on the established O.S.C. policy governing dual registration. The applicant submitted that a separate corporate identity and registration was required so that the clients of the controlling company could deduct for tax purposes fees charged to them for counselling services provided by the parent company. On review, and after consultation with the Department of National Revenue, the Toronto Stock Exchange, and the Investment Dealers Association, separate registration was allowed, in that a valid business reason existed for this variance from established policy. Consequently, the Commission explicitly amended the dual registration policy in its written reasons to exclude investment dealers and brokers from its ambit.

(ii) Judicial Review

Section 29(2) of The Securities Act provides that any person or company “affected” by a decision of the O.S.C. may appeal to the Supreme Court of Ontario. Because express provision is made for judicial review, it is not necessary for this article to examine the applicability of the Judicial Review Procedure Act to the Commission.175

Before examining the role of the courts in reviewing and checking the Director’s discretion, it is necessary to insert a warning as to its ultimate efficacy. The time, expense, and unfavourable publicity involved in such a

173 Supra, note 128.
174 Supra, note 114.
process are often significant deterrents, especially if the person must, by the necessity of his occupation, be subject to the continuing scrutiny of the Director. This is especially evident in the case of a refusal of a prospectus; the issuer's interest is capital financing, not litigation, and often it will seek alternative means of financing. Coupled with the broad discretion of the Director and the cost of litigation, it is not surprising that "the cases where a company stands and fights in an attempt to sell its securities are few and far between".  

Other doctrinal barriers may be present to block appellate review. Section 29(2) does not give an absolute right of appeal as does section 28(2). A fair amount of authority supports the notion that the courts confine themselves to a review of the exercise of a judicial or quasi-judicial discretion, and do not regard the exercise of an administrative discretion as coming within the scope of their supervision. Under this view, review is subject to a classification of function, and it would be necessary to categorize the power of decision under sections 7 and 61 as judicial or administrative. The classification approach involves the application of several different tests of function which vary according to different commentators. There is little agreement on the significance of the distinction, the meanings attributed to the terms judicial and administrative have been inconsistent, and the difference between the two appears to be only one of degree. Many believe that this approach is a means by which courts can rationalize a decision based upon non-conceptual grounds, and one which can be used to signal a court's intent to supervise an agency or to refrain from doing so.

Although the classification of function test is thought to be of dwindling practical significance it has been repeatedly applied by Ontario courts to the exercise of discretion by the O.S.C. Past decisions have relied upon the test enunciated in Re Ashby that "the distinguishing mark of an administrative tribunal is that it possesses a complete, absolute and unfettered discretion, and having no fixed standard to follow, it is guided by its own ideas of policy and expediency". Thus, it has been held that the Commission exercises an ad-

170 Loss & Cowett, supra, note 4 at 64. See also Mofsky, supra, note 154 at 274, footnote 3. Nevertheless, while a right of appeal may be somewhat illusory due to the broad nature of the Director's discretion, many will argue that a right of appeal will at least ensure that it is not exercised in a discriminatory manner or in such a fashion that general societal values are abused. Dickerson et al, supra, note 81 at 137; P. W. Hogg, The Supreme Court of Canada and Administrative Law, 1949-71 (1973), 11 O.H.L.J. 187 at 189. Professor Hogg's views are set out in detail in Judicial Review in Canada: How Much Do We Need It? (1974), 26 Admin. L. R. 337.


178 Generally, see Reid, id., at chapter 4; de Smith, supra, note 20 at 57-77.

179 Id., at 58.

180 Id., at 74.

181 Id., at 58, Reid, supra, note 165 at 113; Hogg, supra, note 176 at 207.

administrative and not a judicial function when acting under the registration sections of the Act. A more recent case held that "the determination to receive a prospectus seems to be in the unfettered discretion of the Director . . . the Commission exercises the function of an administrative body and not of a judicial body when it accepts a prospectus and issues a receipt thereof," As a result, an injunction and prohibition were held not to lie against the O.S.C. as these remedies are only available against judicial bodies.

However, the decisions are inconsistent and conflict in many instances. Some have held that the O.S.C. is an administrative tribunal exercising quasi-judicial functions, and is therefore required to act in good faith, according to rules of natural justice, and cannot exceed its jurisdiction by an improper use of its discretionary power. This general issue is further confused by occasional cases which say that administrative functions must be performed judicially, or in a judicial spirit.

Assuming that this preliminary hurdle can be met by the contention that the appellate power of review is available regardless of the nature of the function being exercised, there remains the grounds on which a court will interfere with an administrator's decision. The scope of judicial review is determined by many factors: the words of the applicable statute, the context in which the power is exercised, the nature and purpose of the power, and the subject matter to which it is related, among others. The judicial review with which we are concerned is that dealing with the exercise of discretion, and not the state of the facts upon which the validity of the administrative action depends. For our present purposes, it is assumed that the Director acts within his jurisdiction when he refuses a registration or a prospectus, although we have indicated above that there exist situations in which he has acted without reference to statutory guidelines.

Generally speaking, the courts have taken a restricted view of the scope

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183 Re Securities Act & Gardiner, [1948] 1 D.L.R. 611 at 613. For other cases in which the O.S.C. was held to be an administrative tribunal, see Duplain v. Cameron (1960), 24 D.L.R. (2d) 619; O.S.C. v. Dobson (1957), 8 D.L.R. (2d) 604.

184 Voyageur Explorations Ltd. v. O.S.C., [1970] 1 O.R. 237 at 244.

185 De Smith, supra, note 20 at 337-422.


187 Re Larrimore Securities Ltd., supra, note 130.


of review available to them regarding the exercise of discretionary powers, even if a statutory right of appeal exists. Referring to The Securities Act, Aylesworth, J.A. has said:

In order to succeed upon an appeal brought under the relevant provisions of the statute, the appellant must demonstrate error in principle by the Commission or the decision it has made or perhaps as a facet of the same obligation, demonstrate a clear misapprehension by the Commission of the facts with which it had to deal upon its review. Further than that and assuming that on such an appeal to us, the appellant has demonstrated error in principle or such misapprehension of the facts, it remains for the appellant to satisfy this court that the order made by the Commission should not have been made.

The grounds upon which a discretionary decision may be quashed are well known, and while an analysis of their applicability to particular cases in securities regulation would be helpful, it is beyond the scope of the paper. They are set out by the authorities and include bad faith, unreasonableness, improper purpose, irrelevant considerations, failure to take into account relevant considerations, and fettering of discretion by rigid policy. All of these are relevant to the exercise of discretion by the Director, yet the reluctance of the courts to interfere make it unlikely that an appeal under section 7 or 61 would ever bear fruit, except perhaps in a case of obvious abuse.

Even if the court were to quash the decision, it is likely that it would substitute its opinion for that of the O.S.C. or Director, and would instead direct an administrative rehearing. This is despite a recent Supreme Court of Canada decision that classified an appeal section similar to section 29(1) as a general right of appeal not limited to affirmation or reversal of the Commission's decision. The effect of the section was held to be that the Court "on appeal, has the same discretionary power as has the Commission".

It has been said that few discretionary powers are absolute or unreviewable in that "there is always a perspective within which a statute is intended

190 Cautious dicta in three Privy Council decisions seem to be the basis for this approach. In these it was said that the discretion of the Minister of National Revenue was not to be interfered with unless he disregarded a principle of law — MNR v. Wrights Canadian Ropes Ltd., [1949] A.C. 109; had acted 'manifestly against sound and fundamental principles' — Pioneer Laundry v. MNR, [1940] A.C. 127 at 136; or he had acted in bad faith, arbitrarily, or under the influence of irrelevant considerations — MNR v. Fraser, [1949] A.C. 24 at 26. Related to this is the issue of delegation of discretionary powers, where the Courts have condoned the unqualified delegation of discretion to inferior tribunals. See e.g. Brant Dairy Co. v. Ontario Milk Commission (1973), 30 D.L.R. (3d) 559 (S.C.C.).


192 See Re Lee and C.A.S. of County of Ontario, [1971] 1 O.R. 474 (Ont. H.C.) where the court noted "It is trite law to say that the court will not compel a person to exercise their discretion in a particular way."


194 De Smith, id., at 261.
to operate and any clear departure from this is objectionable". However, with regard to The Securities Act, it is obvious that the courts are reluctant to interfere, and the suitability of this forum as a means to control the Director's discretion is highly dubious.

Since judicial review is of little practical benefit, it is necessary to assess critically the concept of adjudication and review as an effective means to structure discretion. The performance of the courts and the O.S.C. to date has provided only a superficial air of legitimacy to the decision-making process. It has allowed an incremental elaboration of policy on an ad hoc basis by a negative, ex post facto technique which relies on the accident of litigation. The vagueness of the applicable standards is such that those who wish to comply with the securities laws as they are administered in Ontario must have resort to specialists who, through their experience and skill, have developed the expertise necessary "to bring order out of the statutory and administrative morass". The inherent informality of the process has undoubtedly led to a great reliance on the Director, which places him in a position of informal power not contemplated by the legislation.

The adjudication process, because it is oriented to the settlement of specific disputes, is unsuitable as the primary technique by which effective and rational structuring of the securities business and the capital markets can take place. Its deficiencies necessitate an inquiry into alternative, positive means of controlling the discretion of the Director prior to or at the time of decision.

2. Rule-Making

The most obvious alternative to adjudication is the legalization of decision-making by subjecting the administrator's decision to predetermined standards and rules. Professor Davis has been the main proponent of this approach, advocating that unnecessary discretion should be eliminated and that necessary discretion should be properly confined, structured and checked by the use of "open" techniques such as explicit rules, plans, policies, reasons and decisions. He rejects as falsely optimistic the idea that a sharper delineation of statutory standards is the answer, and sees agency rule-making as the

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proper device for the control of discretion. While one may draw a distinction between the structuring and control of discretion, it is the suggestion of this paper that the proper task in securities regulation is making the applicable standards, as opposed to rules, explicit, not so much for the purposes of either controlling or structuring the Director’s discretion, but to enable critical scrutiny and analysis of the merits of the policy that they contain.

One must not regard rule-making as the panacea for abuse of discretion. It is subject to the general limitations previously outlined to the same extent as adjudication. Davis merely presents us with an ideal, “a situation in which a formally rational and systematic codification has eliminated as much ‘unfettered’ discretion (regardless of its outcome) as is possible, while incorporating that which is necessary in given situations into procedural and substantive provisions which establish its legality and justify its exercise”. The criticism of this approach must be recognized by anyone seriously concerned with the problem of discretion. Most agencies will provide themselves with the discretion they need as part of their own developmental process, as there are obvious consequences in the adherence to an extreme rule of law doctrine. Discretion is needed for individualized justice in those situations where while it might be sufficient for an administrator to be aware of the permissible limits of his authority, at the same time it is essential that his reaction is not rigidly determined in advance. While adjudication suffers from an ex post facto temporal orientation, rule-making has implicit limitations that are a function of its predetermination of conduct.

The traditional emphasis on legal procedures, including the elaboration of substantive standards, often fails to appreciate the political element inherent in administrative decision-making, so much so that some feel the only real solution is a political reorganization and decentralization of power. In addition, rule-making is often limited in its conception of the administrative process and organizational structure within which discretionary behaviour occurs.

However, rule-making does have its advantages in comparison to ad-

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200 Id., at 219.
201 H. T. Wilson, ‘Discretion’ in the Analysis of Administrative Process (1972), 10 O.H.L.J. 121 at 129.
202 For a discussion of the naiveté of the legal approach, see id. at 125-31. Edgar and Jean Cahn were among the first to recognize that more than legal theories were required to force bureaucracies to accept and maintain notions of responsibility and accountability. See The New Sovereign Immunity (1968), 81 Harv. L. R. 929. Wexler argues that the traditional justifications for rules, e.g. the values of certainty, predictability, objectivity, depersonalization and holding arbitrary authority in check, are not as great as traditional legal theory would have us believe. His prescription for this problem is the encouragement and development of intelligent and responsible “personal authority”. Supra, note 25 at 181.
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judication. It is not the antithesis of adjudication, for by providing specific standards against which official decisions may be measured, any inconsistency between decision and rule is subject to criticism and review. However, it is superior in that it is not dependent on the accident of litigation.

This approach is also conducive to the integrity of administrative decision-making as it may tend to ensure compliance with policy and may tend to remove the influence of improper criteria. It also may provide for greater accountability to and participation by interested parties, thereby increasing the acceptability of the system of regulation. Critical scrutiny may be initiated by the process and be directed at both the decision and the content of the applicable rule. Evidence of this approach is contained in section 6(7) of the regulations, explained above, yet there is always the danger that those who are regulated in the public interest often turn out to be the ones who finally determine the content of the rules. However, over-reliance upon rules may actually result in a situation where there are few, if any, opportunities for interested or affected parties to challenge or influence existing policy.

The administrator may benefit himself by the use of explicit standards. Specific guidelines allow for efficient planning, routinization, and allocation of agency resources with greater flexibility than by adjudication. They may enable the official to conserve his psychic and intellectual resources, preventing the expenditure of energy and anxiety arising from a constant re-examination of basic premises in the light of new conditions.

Any rule-making procedure must be concerned with the content, the relationship with the objectives sought, and the ultimate effects of the rules which are established. Attention must be given to ensuring that rigidity and legalism do not become dominant, to the extent that there is an irrational application of rules without regard to the organization's purposes.

The practice to date of the O.S.C. has been one which has followed the adjudicatory approach in the implementation of legislative policy as perceived by the Commission. An examination of the reported decisions has generally revealed a lack of specific policy guidelines indicating the considerations the Director deems relevant to the use of his statutory authority. Many commentators have reacted adversely to this, claiming that a great deal of policy is unstated and therefore unknown to the financial community which is the regulated interest. This narrow attitude ignores the fact that apart from the interest of the regulated, which is constantly being presented to and reinforced by the Director and the O.S.C., there is the broader public interest in the proper functioning of the capital markets which demands equal disclosure.

The alternative of rule-making has only been utilized to the extent reflected in the published regulations. Under section 147 the Cabinet has au-

204 Wexler, supra, note 25 at 62.
205 Jowell, supra, note 21.
206 Bellmore, supra, note 48 at 210; Williamson, supra, note 55 at 245.
authority to promulgate regulations that would cover the discretionary situations incorporated in the Act. These may extend to "any matter necessary or advisable to carry out effectively the intent and purpose of this Act.\textsuperscript{207} They are subject to The Regulations Act\textsuperscript{208} with its minimum requirements for clarity and publication; they must be consistent with the statute under which they are enacted, and they must not effect a substantial addition to the enabling legislation.\textsuperscript{209} Yet those that have been promulgated so far have merely been used to flesh out the administrative and procedural structure of the regulatory process without reference to substantive standards that could guide the exercise of discretion.\textsuperscript{210} Although the Cabinet has legal authority to enact these legislative provisions, functionally the O.S.C. must take the initiative, and to this extent, the practice to date indicates an abdication on the part of the Commission of any substantial adherence to this approach.

What the O.S.C. has resorted to, in an attempt to supplement the adjudication process, is the increasing use of policy statements.\textsuperscript{211} To a large extent this practice is based on the residual discretion afforded to the Commission and the Director in the Act.\textsuperscript{212} Their function can be justified on several grounds, many of which have been noted. They represent a compromise between adjudication and rule-making made necessary by the complexities of the securities industry and the notion that reliance on legislative enactment of rules can only lead to obsolescence.\textsuperscript{213}

To a large extent they indicate a preference for a less formal means of policy formulation, as the O.S.C. has no statutory authority to enact its own regulations, although it is suggested above that functionally they have ignored their ability to initiate this type of process. Policy statements are a means to avoid the inflexibility of regulations and the procedures required by The Regulations Act. In addition, they can be utilized to test policy not yet definitely formulated without the need for binding regulations or the \textit{ad hoc} method of adjudication, yet still give the affected parties an idea of what to expect.\textsuperscript{214}

The legal issue of importance here is the extent to which these policy statements can extend beyond the standards contained in the Act and regulations. Several commentators have doubted the legal validity of policy statements that do not merely represent clarification of existing legislative objectives, and have questioned the use of such a jurisdictional base for the creation

\textsuperscript{207} S. 147(u).
\textsuperscript{208} R.S.O. 1970, c. 410.
\textsuperscript{210} Williamson, supra, note 55 at 245.
\textsuperscript{211} Bray, supra, note 2 at 430; Lockwood, supra, note 83 at 123; Kimber Report, supra, note 3 at para. 3:06.
\textsuperscript{212} The Merger Study noted that this situation gave to the administrators "the opportunity of offering guidance through policy statements as to the circumstances under which this discretion may be exercised". Supra, note 2 at para. 2:05.
\textsuperscript{213} Baillie, supra, note 7 at 210.
\textsuperscript{214} H. Molot, The Self-Created Rule of Policy and Other Ways of Exercising Discretion (1972), 18 McGill L. J. 310 at 338.
of policy. The increasing use of policy statements that do not embody legislative or even executive approval, not only means that the O.S.C. is more likely to overlook its jurisdictional boundaries, but also that the policy rulings may become overly concentrated on companies or persons subject to prospectus and registration requirements. This may therefore reinforce the motivation of many to seek exemptions from regulation.

The previous discussion of cases has indicated that as non-legislative guidelines, policy statements have been applied within the adjudicatory framework to the extent they become rules of general application having the force of law. However, due to the complexity of the regulated subject-matter, "the dividing line between legitimate pursuit of a general policy... and the enforcement of an extra-statutory regulation may be narrow and sometimes difficult to draw".217

Judicial authority on the relationship between policy statements and the exercise of discretion is quite clear. It is well established that while an agency may formulate guidelines in advance, it must not fetter its discretion by a rigid policy that prevents the agency from exercising that discretion in individual cases. The policy must be adopted for the attainment of legitimate objectives authorized by the enabling statute, yet must not have the binding effect of legislation. The law has thus attempted to fashion a compromise between the administrative requirements of policy formulation and the interests of the individual party affected.

This judicially created limit is explicitly recognized by the Commission. In its recent comments on draft additions and amendments to a particular policy, the OSC has noted that policies "are guidelines only... the Director will exercise (his) discretion to meet special or unusual circumstances".220

The courts have often emphasized the need for making policy guidelines explicit. This can be coupled with the judicial requirement that in certain cases the material on which an agency will base its decision must be disclosed to the affected party. In recent years, the courts have indicated a willingness...

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215 Id. at 314; Lockwood, supra, note 83 at 123; Baillie, supra, note 7 at 214.
216 Baillie, Securities Regulation in the Seventies, supra, note 7 at 354.
217 Molot, supra, note 214.
221 Re Hopedale Developments Ltd., supra, note 219.
to widen their scrutiny of the agency’s perception of its guiding policy and that expressed in the tribunal’s governing legislation. This trend may be significant in restricting the use of policy statements by the O.S.C. as grounds for decision-making.

Advocates of change in this area are divided between clarification of existing policy and its increased publication and dissemination, and the legislative enactment of all policy in the form of regulations. One might easily conclude that having regard to the limits, costs and benefits of both, a superior system would incorporate a synthesis of their respective advantages. Thus it might be suggested that the O.S.C. be given statutory power to enact its own regulations, subject to approval by a responsible public authority, i.e., the Cabinet. With specific requirements for consultation and participation in the rule-making function and widespread dissemination of promulgated policy, it can be argued that this would best serve the legislative objectives of The Securities Act.

The obvious and fatal weakness of this remedy is that it effectively ignores the public interest. Provision for rule-making could only lead to a greater tendency by the regulated interests to fashion the content of the rules applicable to themselves. Indications of this can be seen in both the statute (section 6(7) of the Regulations), and in practice. Policy statements are often presented in draft form and comments from the “interested” parties are welcomed. Relevant to this is the not surprising practice that in the current debate over Bill 98 representatives of the financial community are making submissions to the O.S.C. and not to the legislative committee responsible for the Bill. The Commission is implicitly viewed as the protector or spokesman for the regulated interests. Rule-making would only aggravate this. It is suggested therefore that the Commission is not the proper forum for this task, that legislative objectives be made more clear, and that emphasis be placed on making explicit the Director’s guiding standards in order that their merits may be subject to public scrutiny.


224 Baillie, supra, note 7 at 237; Merger Study, supra, note 2 at para. 2:05; Williamson, supra, note 55 at 245.

225 Kimber Report, supra, note 3 at para. 8:06; Bellmore, supra, note 48 at 224. The McRuer Report suggested that there ‘be inserted in the governing act in as precise a form as possible what considerations the authority may or may not take into account in reaching its decision’. Report of the Royal Commission Inquiry into Civil Rights (1968), Vol. III, at 1104.

226 This model is similar to that contemplated by the American Administrative Procedure Act which divides the functions of agencies between rule-making and adjudication. A good summary of the issue is found in D. Shapiro, The Choice of Rule Making or Adjudication in the Development of Administrative Policy (1965), 78 Har. L. R. 921. For a discussion in the context of American securities regulations, see Comment, SEC Rule 144: The Development of Objective Standards in the Administrative Process (1972), 45 Temple L. Q. 403.
G. INFORMAL RESTRAINTS ON DISCRETION

The great amount of emphasis placed on formal procedural and substantive means of structuring the Director's discretion fails to account for a host of informal factors which impose natural or human restraints on administrative discretion, and which may also serve to increase the scope of available power. Only recently have studies been made of the highly discretionary and informal practices which exist in any sophisticated administrative system.227

The Director has various informal methods of exercising his power, which are not to be confused with his statutory authority. Thinly veiled threats of potential investigations, sanctions, and the resulting adverse publicity, informal advisory rulings, and even press releases and speeches are all means by which parties subject to the jurisdiction of the O.S.C. are affected. The deterrent influence of discretion should not be overlooked, for the potential power that may be exercised by an administration, even if it be unreasonable, may have salutary effects on the regulated interests.228

However, decisions may be constrained by factors that have hitherto escaped the attention of lawyers, academics, or the administrators themselves. One authority has undertaken a sophisticated analysis of the "decisional referents" that affect the exercise of discretion.229 Commencing from the insights offered by Professors Hart and Dworkin into the relevance of the rule-internalization by an administrator of the obligations which the legal and administrative system imposes on him to decide in accordance with its mandates, Gifford proceeds to an examination of how the administrator is led to conform to his own self-created rules. Attached to this is the important concept that one must realize that an administrator's perception of the constraints which bind him are frequently different from external expectations of others.

The bulk of the analysis is devoted to an examination of possible factors that can influence the decision-maker, apart from the applicable statute or policy. Even when external standards are imposed, informal or internal considerations will often dictate the weight that will be attached to them. Examples of such "non-rule referents" are numerous and varied. These include the factual context of the decision, the need to be sheltered from public or

227 Initial efforts have been directed at the informal discretion exercised by law enforcement agencies: See e.g. Goldstein, Police Discretion Not to Involve the Criminal Process: Low Visibility Decisions in the Administration of Justice (1960) 69 Yale L.J. 543; N. Abrams, Internal Policy: Guiding the Exercise of Prosecutorial Discretion (1971), 19 U.C.L.A. Rev. 1. For a more recent examination of the United States Immigration and Naturalization Service, see A. D. Sofaer, Judicial Control of Informal Discretionary Adjudication and Enforcement (1972) 72 Col. L. R. 1293. This latter article draws upon the empirical data given by Sofaer in The Change of Status Adjudication: A Case Study in the Informal Agency Process (1972) 1 J. Legal Studies 349.

228 Sofaer, Judicial Control of Discretionary Adjudication and Enforcement, id., at 1297.

229 Gifford, supra, note 25. For other remarks on informal factors see Willis, supra, note 16, and Bellmore, supra, note 48 at 211.
collegial criticism, analytical technique and professional discipline, prior experience, approaches and values shared with others, and the dynamic aspects of human interaction with the participants in the decision. These referents are not restricted to past events, but are often future oriented because the legislative mandates require formulation of decisional criteria to govern future conduct.

Other types of decisional referents include the use of studies and analyses, and consultation with specialized disciplines. These latter two factors are quite evident in the development of the O.S.C. as a regulatory agency, and are dictated by its regulated subject matter. It utilizes or employs a large proportion of professionals, and has been responsible for several major studies which provide it with the information necessary for qualitative decisions.

Organizational factors may influence the Director in the exercise of his discretion. Cost-benefit analysis is often unconsciously applied in determining the allocation of scarce administrative resources to a backlog of cases. It is not surprising then to see a close relation between delay, delegation of decision-making (i.e. to Deputy-Directors), and the exercise of discretion.230 The increasing scope of the Commission’s activities, and the lack of adequate resources231 may mean that the Director is not often able to exercise his discretion in a totally rational and consistent manner, perhaps to the detriment of the public interest.

The crucial point of this analysis is the recognition that disclosure of rules or policy is insufficient for a proper understanding of the exercise of discretion. The conclusion that the major decisional referents of the administrator, however underdeveloped they might be, must be made explicit232 is consistent with the thesis of this article.

H. THE FUTURE: BILL 98

The foregoing analysis has shown that the discretion allocated to the Director of the O.S.C., however necessary it is in the public interest, is quite broad, both in its legislative expression and the interpretation given to it by the Director. One commentator has noted, “it is difficult to see how the Ontario Securities Commission could have more discretionary power than it now exercises with respect to the registration of securities”.233

Bill 98, which is a substantial revision of The Securities Act and is currently before the Ontario legislature, negates this contention completely. It also fails to recognize the need, elaborated in this article for all relevant standards applicable to the exercise of the Director’s discretion to be made explicit in the interest of both the public and the financial community. The legislature has obviously placed no urgent priority on passage of this legislation,

231 Baillie, supra, note 7 at 210.
232 Gifford, supra, note 25 at 21.
233 Smith, supra, note 7 at 474-75.
for it has been over three years since it was first introduced. Since then the Bill has undergone considerable alterations and revisions, which is not surprising, given the nature and influence of those whom it seeks to regulate.

Under section 25(1) of the Bill the Director retains the same authority as he now does under section 7 of the existing Act, yet added to this is the power to grant reinstatement or amendments to registration. No change has been made in the vague standards of suitability that are applicable. Section 23(2) of the Bill's predecessor (Bill 75) was a new addition that required the Director to approve any director of a registrant. Not only would this have added to the workload of the registration staff, but it would also have enabled the Director to continue to apply, on a broader basis, the ill-defined policy as to character and ethical conduct of registrants which was found to be suspect. This provision has been dropped from the current proposals.

Section 62, which governs the issuance of a final receipt for a prospectus is different in several aspects from the current provision. It incorporates a substantial increase in the scope of the Director's discretion. Section 62(1) provides that the Director “shall issue a receipt . . . unless it appears to him that it is not in the public interest to do so”. While the use of the word “shall” is undoubtedly intended to clear up the doubt expressed earlier whether the Director can exercise a discretion if the statutory grounds for refusal do not exist, the standard of the public interest is so vague that it destroys any utility of the imperative duty assigned to the Director. What the Legislature gave with one hand, it more than took away with the other. It is obvious from past decisions made under section 61(1), and the attitude of the Ontario Courts, that this amorphous standard can be used to justify almost any interference, except perhaps the most blatant example of refusal made with no reference to the legislative purpose or the public interest.

Section 62(2) makes explicit the requirement that the Director refuse a prospectus if the situations in paragraphs (a) to (h) are present. While this attempt at statutory elaboration of standards is commendable, it falls short for two reasons. The first is that the very wide discretion allowed in section 62(1) renders many of these grounds irrelevant. The second is that the two new grounds that have been added will only invite more arbitrary decisions. Paragraphs (d) and (e) allow the Director to refuse to issue a receipt on the grounds of financial irresponsibility, and past conduct that indicates “the business of the issuer will not be conducted in accordance with law and with integrity”. They allow the Director to examine the applicant and any officer, director, promoter or control person of it for evidence that any of these grounds might exist.

The implications of these paragraphs are particularly odious. They purport to give statutory approval to those decisions of the Director in which the

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234 Bill 154 was first introduced in the Ontario Legislature on June 1, 1972. It underwent considerable revision and was reintroduced as Bill 75 on June 7, 1974. Subsequent amendments are found in the current Bill 98, which was introduced on May 30, 1975.
235 The workload is already increased by the addition of new classes of registration in s. 23(1)(d) (e) (f).
236 These grounds are similar to the standards imposed in other provincial occupational licencing statutes, see supra, note 102.
conditions of financial responsibility and business integrity were breached by applicants for registration. Thus, standards applicable to the control of access to the occupational field of securities have been transposed to the control of access to the capital markets.

A more important consideration is less obvious. While these conditions may appear to be in the public interest, past experience has shown that they can be applied in a manner that protects the interest of those whom the Act is intended to regulate. No apparent consideration is given to the economic ramifications of this discretion, and the power of the Cabinet to make regulations under section 136, is more limited than now permitted. The possibility of the elaboration of substantive standards has thus been diminished, and the effect of this lack of legislative power of the Cabinet on the validity of future policy statements is open to question. Thus, the approach taken by the Bill could result in litigation that might negate the intended purpose of the reform.

Bill 98 attempts to meet some of these problems by increasing the opportunity for review of decisions of the Director. Section 8 provides that he must forthwith notify the Commission of every decision under sections 25 or 62 in which he refuses registration or the issue of a receipt for a prospectus and the Commission may notify both the Director and directly affected parties of its intention to review the decision. This appears to be an attempt to ensure that policy decided on an adjudicative basis will not be dependent on the initiative and financial wherewithal of the affected party or parties.

Section 62(4) provides for a referral by the Director to the O.S.C. of a material question involving the public interest under section 62(2) that may result in the Director refusing to issue a receipt for a prospectus. The Commission is required to consider and determine the question and refer the matter back to the Director for final consideration, and, although subject to an order of the Supreme Court under section 9, the decision of the former is binding on the latter (sections 62(7), (8)).

These provisions, it seems, add little more than another level to the adjudicative side of O.S.C. policy formulation, and are complemented by the failure of the Bill to flesh out the jurisdictional basis for the issue of policy statements. Instead of providing a more clear indication of legislative intent regarding the purpose and direction of securities regulation, the legislature has decided to allow the O.S.C. to substitute its discretion for that of the Director.

The increased scope of discretion vested in the Director and the Commission may lead paradoxically to its ineffectiveness in another way. The undefined substantive control allocated to them may be so great that it will encourage more issuers and registrants to seek exemptions from the requirements of the Act. It is not surprising then to see that the submissions made so far to the O.S.C. concerning Bill 75 make little explicit reference to these sections,\(^{238}\)

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\(^{237}\) No provision similar to section 147(u) of the present Act is to be found in s. 136 of the Bill.

\(^{238}\) See e.g. Blake, Cassels & Graydon, Submission to the O.S.C. Regarding Bill 75, October 22, 1974.
and emphasis can be expected to be placed on the need for broader exemp-
tions. Apparently, the regulated interests have no quarrel with this extended
discretion. The result is contrary to the public interest, in that a substantial
amount of new securities, probably of better quality, can be expected to be
offered to institutional investors or private placees, to the exclusion of the
general investing public.

The provisions of Bill 98 relating to the Director's control over registra-
tion and acceptance of prospectuses fail to meet the need, elaborated in this
article, for effective regulation in the public interest. Regardless of whether he
acts by means of adjudication or rule-making in the exercise of his discretion,
the Director is still engaged in the formulation of securities policy. The major
decisional referents affecting this exercise must be made explicit to establish
a predictive basis for rational policy and its application.

A policy of disclosure similar to that which is being advocated can benefit
both the public and the regulated interests. The regulated parties will be able
to negotiate more effectively on the basis of knowledge of the relevant con-
siderations, to appeal more expeditiously any application of improper factors
or the improper use of relevant considerations, and to assess the hierarchical
level at which they may best attempt to have policy changed.\textsuperscript{239}

The public interest is served in that the applicable premises upon which
the Director acts can be compared with the purposes of the overall regulatory
and legislative framework within which he is situated. This, of course, is pre-
dicated on effective review of both aspects by both elected representatives and
public interest groups or institutions. How this can be achieved is open to
further study. But to give power to the Director and/or the Commission to
regulate according only to the vague standards of the public interest and suit-
ability, merely reinforces the fundamental sterility of the O.S.C. Statutory
language and sporadic action by the Commission against individuals or com-
panies for occasional breaches of the statute are functional only to provide
symbolic reassurance to achieve public acquiescence.\textsuperscript{240} No opportunity is given
by which one can critically analyse the assumptions and objectives on which
policy is based. In the meantime, the economic and political influence of the
securities industry and the growing interdependence between the regulated and
the regulators can only result in the gradual loss of autonomy by both the
Director and the Commission. They have become concerned, on a daily basis,
with the industry that they seek to regulate; they are dependent on it for a
good deal of its knowledge; and many of its members and staff come from or
go into the securities business. The practice of inviting comments from the
financial community in the elaboration of O.S.C. policy and the constant ex-
posure to the regulated interest can only lead to an absorption of its values
and biases by the administrators. The emphasis of this article has been not so
much on the regulation of the Director as it is on the regulation of the securi-
ties community and the capital markets through his discretion. One must not

\textsuperscript{239} Gifford, \textit{supra}, note 25 at 21.
\textsuperscript{240} For an extended treatment of this concept of symbolic reassurance and the in-
terests of the regulated, see Edelman, \textit{supra}, note 160.
confuse procedural justice to self-interested parties with substantive merits of policy, for the real issue is not the fact of discretion, but the manner in which it is exercised. Strict reliance on rule-making procedures may restrict the opportunities of effective challenge to policies by reducing legal issues to mere questions of fidelity to the rules. While some may argue that the answer to these problems lies in the potential of judicial review to limit and control discretion, a careful examination of our courts’ approach to discretionary decision-making and illustrates their dysfunctionalities in dealing with complex policy issues.

Discretion is a necessary adjunct of securities administration and regulation. In many instances it is unavoidable, and in others, it is the only feasible way in which an administration may demonstrate flexibility, creativity, expertise and sensitivity. However, discretion need not be overly broad, open-ended or untrammelled to achieve these objectives. The substantially undefined power of the Director to refuse registration under section 7, and the failure to restrict him to the statutory grounds for refusing to issue a receipt for a prospectus have important consequences. The most obvious and explainable are the inconsistencies that result from the application of conflicting or confusing policies. A second group of consequences, which demand more empirical research are the economic implications that are to be derived from the exercise of discretion, be it by adjudication or rule-making.

A third, and equally important consequence of excessive discretion is the opportunity that it allows for extensive and successful intervention and influence by the regulated interests. One must be careful not to place too much stress on a simplified “capture theory” of administrative agencies, for as Professor Jaffe has pointed out, this often-times exaggerates the significance of the regulated in the “peculiar political process which provides the milieu and defines the activities of each agency”. It is essential to recognize that the vulnerability of the agency is often determined by the extent to which the legislation has adequately defined and rationalized the purpose and objectives of the agency.

It is suggested that the answer to these problems lies in the encouragement and development of more elaborate and better defined standards by which the discretion of the Director may be guided. This can not be achieved quickly and comprehensively by relying upon a transformation of current judicial attitudes towards court review of discretionary powers. Nor is a workable solution likely to be found in a complex myriad of stringent rules and regulations, for some room must be left for the rational resolution of the marginal equities which are bound to appear.

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241 Wexler, supra, note 25 at 162.
242 Sofaer, supra, note 227 at 1294-95.
244 Sofaer, supra, note 227 at 1298. In this regard, see M. Kadich & S. Kadich, On Justified Rule Departures by Officials (1971), 59 Cal. L. R. 905.
What is feasible is to require greater legislative activity in devising a statutory scheme governed by readily-identifiable rules and standards which set out, as much as possible without impeding administrative and organizational imperatives of flexibility and efficiency, the consequences which will follow certain actions. Where the complexity, or indeed the triviality of the subject matter cannot reasonably be entertained by the elected component of government, then the O.S.C. should be able to develop its own fully disclosed standards through the use of policy statements, provided of course that there is an ample jurisdictional base for such procedures. Administrative necessity dictates that discretion be allocated to the Director, yet the public interest requires that it be structured and made explicit in such a manner that the interests of the wider community are not only represented but also served.

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245 This approach is evident in the legislative scheme that is the basis of the new Canada Business Corporations Act, R.S.C. 1974-75, c. 33. In the draft regulations published in May, 1975, it was stated in the foreword that the purpose of the expanded regulation-making powers of the Act were, inter alia: "To confine administrative discretion within reasonable boundaries so that persons affected by the regulations are aware of the substantive standards applied . . . to structure as clearly as possible the administrative procedures so that persons affected can comply more easily with the law . . .".