

LEGISLATIVE ASSEMBLY OF ONTARIO

Tuesday 2 May 2006 Mardi 2 mai 2006

[SECURITIES TRANSFER ACT, 2006 /](#)

The House met at 1845.

SECURITIES TRANSFER ACT, 2006 /

Mr. Michael Prue (Beaches-East York): I understand I may be the only speaker tonight, and I promise to be as brief as possible, given the severity and the difficulty of the situation.

We are here tonight to discuss Bill 41, which in its full title says it all: An Act to create a comprehensive system of rules for the transfer of securities that is consistent with such rules across North America and to make consequential amendments to various Acts.

It is, of course, modelled on the Uniform Securities Act, 2004, which was a joint project of all the provinces of Canada, and we are, not unlike the other provinces in Canada, coming up with a new bill to try to revitalize and reform a system very much in need of revitalization and reform.

The comprehensive rules we have or that are contained within the body of this act are for the transfer of investment securities, whether directly or indirectly held. That may not mean much to most of the population or probably to most of the people in this Legislature, but just to be sure, what it means is: The indirect holding system is the system for transfer of securities where an investor's interest in a security is recorded on the books of an intermediary, i.e., a securities dealer or bank, and that intermediary in turn has his interests recorded on the books of another intermediary through a complex chain of intermediaries that may span multiple jurisdictions. At the top of this chain is the central clearing agency, the only intermediary in the chain with a direct relationship with the issuer. The clearing agency is either recorded as the owner directly or in the issuer's register or has physical possession of the securities certificates.

It's a very complex rule of law. It's a very complex financial distribution and financial holding system that not too many people are aware of. Of course those who trade in commodities, those who trade in stocks, those who frequent Bay Street, Wall Street or any of the legion other trading agencies around the world -- the Japanese Nippon -- will be very familiar with this.

We are attempting, as a government, to try to remedy the problems under the Securities Transfer Act, 2005. As per the briefing notes that the minister so kindly gave to my assistants because I was not able to attend -- and I want to personally thank the minister for making these available -- the Securities Transfer Act, 2005 is, in fact, not a securities law. As his own notes have indicated, and as the minister has stated, the Securities Transfer Act "deals with a very narrow element of the settlement of a typical trade in securities -- the transfer of property and the payment of money that takes place in a transaction involving investment securities. Therefore, the Securities Transfer Act may be properly called commercial law."

New Democrats have no real problem with Bill 41 as far as it goes. The problem we have with the entire initiative of this government is that it does not indeed go far enough.

The standing committee looking into the Ontario Securities Commission met over a number of months and culminated in a report of October 2004. That is some 18 months ago. Members of all parties got together and listened to the various recommendations of lawyers, accountants, forensic accountants, people involved in the Ontario Securities Commission, people who were involved in their structure, and ordinary investors, and we made a number of very real and very strong recommendations to the minister which we fail to see in the body of this report. That is the problem: not so much what is contained in the 72 pages of Bill 41, but what has not been done by this government in the time frame that the government and the government members promised.

We heard, at the time when the all-party members got together in the Legislature, that we had many options available to us. The option we have chosen and the option the government has brought forward is indeed a very timid one.

We heard that the United States, our neighbour to the south, has two committees that oversee the trade in stocks and in the stock market. They have one that is based in the Senate and one that is based in the House of Representatives. Those committees are very strong indeed. I do not have the most up-to-date figures, but going back as far as 2001, they prepared nine complete reports on fraudulent transactions, on what needed to be done to strengthen Wall Street, what needed to be strengthened to help the ordinary investor. We in Ontario are very timid. We don't do any of those things. What we do is Bill 41.

I want to tell you as well that we heard the Senate and House of Representatives committees have complete oversight. They have a formula whereby those committees are given a great deal of money by the General Accounting Office -- called the GAO -- of the United States government, and that money is used to do prosecutions, investigations, oversight and generally make sure that when you do business on Wall Street, you are very carefully monitored, and if you transgress, you are fined and/or you go to jail. In Ontario, we don't do anything of the sort. We have Bill 41.

One of the people who appeared before our committee was Glorianne Stromberg. She made some very strong and very good recommendations about where we should be heading as a government with the bills related to the Ontario Securities Commission, and none of those have been followed.

I listened while I was in the chair the other day -- you hear much more in the chair than if you are otherwise occupied in this chamber, because you have to make sure you're fully aware of what each speaker is saying lest they step beyond the bounds, so that you know exactly when to call the appropriate motions or the appropriate procedure or rules. I listened very carefully to what the minister had to say on that date, and he said that the other bills are coming. The other bills will be companion pieces in the future. But with the greatest of respect to the minister, I believe he has missed the mark, because the recommendations made to the minister by the all-party committee, which form the basis of Bill 41, contained much stronger resolutions than have been brought forward.

We recommended, in light of what Glorianne Stromberg had to tell us, that there be a five-year rotating committee, and although the five years have not elapsed, that's the only thing for which this government cannot be faulted. She recommended as well that there be effectiveness to the security laws. Those have not yet been enacted, and people in the Ontario Securities Commission and those who trade on Bay Street do not have the same security. They do not have the same laws. They do not have the same force of prosecution should someone transgress the laws.

Mr. Joseph N. Tascona (Barrie-Simcoe-Bradford): Break them.

Mr. Prue: Break them. Make them easy, eh? Break those laws.

She recommended an effectiveness security, and we do not have that in this bill. She recommended that there be an operations commission; no such operations commission has been set up. She recommended that financial services be brought under the control of the committee; that has not been done. She recommended that a government office

be set up similar to the American GAO, and in fact that has not been set up. What has been put together in this bill is very timid indeed.

Other people came before our committee, and they talked about the role of the prosecutor-adjudicator. Ontario is the only jurisdiction of which I am aware -- and there may be others, but the only one certainly which has any major trading capacity in this country or in the world -- where the prosecutor and adjudicator roles are combined in one individual. It is impossible, I would suggest, for that institution to survive. It is impossible for them to be fair, because it cannot legally or morally be said that justice is done -- not only done but seen to be done -- when you have one person who acts as both the prosecutor and the adjudicator. The change to the rules in the Ontario Securities Commission that allows the new power of this person or this body to impose administrative penalties of up to \$1 million on those who are in violation of the acts simply makes it impossible to have a prosecutor and an adjudicator role.

I go back to my time before I was a politician. I go back to the 20 years I spent in the immigration department. I remember a time in that department when we had people who were called special inquiry officers, and I was one. I was both the prosecutor and the adjudicator at the same time. It was called two-cornered justice. I was in front of whoever was seeking to come into Canada, who may or may not have had someone defending them who was legally trained, or indeed someone at all, and the decision to both prosecute and to adjudicate rested upon me. I will tell you that the people who reframed the Immigration Act in the late 1970s, in 1978, saw that this was not a good system. It was not fair because it was indeed very near impossible for one to be both a prosecutor and an adjudicator.

In fact, the immigration department changed it to have two separate roles, one called the case presenting officer and the other the adjudicator, so that the justice was much more clearly articulated. A person coming before the adjudicator knew that that person was independent, and the person also knew that the civil servant who was acting in the role of case presenting officer was there to represent the crown, and that person had the right to represent themselves or be represented by a lawyer. It was called three-cornered justice. There was a remarkable difference that took place within that department with that one mere change to the law, going from two-cornered justice to three cornered justice.

I don't understand the great difficulty here. I do not understand at all why there is a reluctance on the part of this government or why there was reluctance on the part Mr. Brown, who was then the OSC chair -- to sit on Coulter Osborne's report for over a year without doing anything about it. That is the reality. People are very reluctant to move from a system which they understand, and in fact which they control, to a system which is fair to all parties.

I would like to quote Coulter Osborne. We all know him. We all know him as our Integrity Commissioner. But he is also a person who made, I think, probably the single greatest recommendation to the all-party committee looking at the Ontario Securities Commission.

Mr. Tascona: Read it.

Mr. Prue: Yes, I am. I'm going to read just a little tiny part of what he had to say. The Osborne committee summed up the arguments in favour of the separation of these two bodies as follows, and I quote it in its full context: "The nature of the apprehension of bias has become sufficiently acute as to not only undermine the commission's adjudicative process, but also the integrity of the commission as a whole among the many constituencies that we interviewed. Matters of institutional loyalty, the involvement of the chair in the major cases, the increased penalties, the sense that 'the cards are stacked against them,' the home court advantage, the lengthy criminal law-like trials, and the commission's aggressive enforcement stance, which will likely only increase over time, all combine to make a compelling case for a separate adjudicative body."

I remember quite clearly the member from Perth-Middlesex moving a motion in committee that was adopted by all the parties and which I believe is binding upon this government, that within one year, if the government of Ontario

was not successful in combining or having one legislative body for all of Canada, this government would move on this process. More than a year -- 18 months -- has now gone by. I don't see us any closer to having one legislative body for all of Canada, and yet nothing has been done to separate the adjudicative function from the enforcement function. That's a major failing, and I would suggest the member from Perth-Middlesex is hearing me. He knows he made the motion. He absolutely knows he made it.

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Interjection: He was there.

Mr. Prue: He was there, and we voted for it. That was probably the deal-breaker that got all of the parties together, and it has not happened. That's a major failure. Whether it should be in this legislation or in a companion piece, I leave to government, but without the companion piece, all I can say is that this bill is extremely timid in its approach.

We also talked during the committee --

Mr. Tascona: It's tepid.

Mr. Prue: Tepid? No, I don't think so. That's lukewarm. I don't like that. I think it's timid.

We also talked during all of those days with the committee about the self-regulating organizations, or SROs. The committee believed that this was an absolutely pressing issue that needed to be dealt with. All three parties voted that something had to be done with the SROs. We talked, and they talked and all of the deputants talked that they had a huge conflict of interest. They were both a trade advocacy group and a self-regulation group; they combined the two. The committee and every single deputant recommended that they be split. There was a lawyer, and unfortunately I cannot find his or her name but I remember the quote. The body, which they call the IDA, "gives the appearance of being expert and impartial when, in fact, it is neither." That was the quote before the committee. It's true. The IDA is not expert, it is not impartial and it exists because the member agencies pay them. They have evolved along a line where they are nothing more than a trade advocate. Every single major decision, they merely -- up until that time and, I'm sure, until today -- parrot what their member agencies have to say. They merely repeat it. They repeat the line from the brokerage firm. That's what they do. That's what they're paid for. That's where they get their mandate. That's where they get their money. They parrot the brokerage firms. They also give legal advice to the alleged transgressors.

Has this government moved at all on this major recommendation? No, they have not. What we have is 72 pages of timidity.

Mr. Tascona: Tepid.

Mr. Prue: And my friend here thinks it's tepid.

Other governments have acted much more strongly. We certainly know the United States has a very strong system. But we also know that in 2001, the United Kingdom didn't come forward with the equivalent of Bill 41. They came forward with a complete revamping of the system as it related to SROs. They changed all of the existing SROs, which were merely mouthpieces for their organizations, which were simply trade advocacy groups, the same as in Ontario, into a single regulator. That single regulator looks after financial services, banking, insurance and the very supervision of the firms for which they were once the advocacy group. I will tell you, the problems in England are minuscule in comparison to the problems we are facing here in Ontario, trying to regulate and to police and to enforce the many infractions that take place under Ontario's current laws, the people who are trying to rip off, very simply and very expertly, the system of bonds and trading that takes place on Bay Street.

The committee asked that a task force be set up to review everything about the SROs. If there was not a single regulator in Canada within one year, one of the recommendations was that a task force be set up to review the continued existence of the SROs with the role of changing them, of modifying them, of moving them, of developing a system either like the United States or the United Kingdom. A year has come and gone, 18 months have come and gone, and the government has chosen to do nothing. We have instead Bill 41.

Mr. Tascona: Tepid.

Mr. Prue: Tepid. My friend likes this.

There's the whole issue of restitution. I want to read a direct quote from the standing committee about restitution. The standing committee recommended "that the government work with the Ontario Securities Commission to establish a workable mechanism that would allow investors to pursue restitution in a timely and affordable manner, and that government report on its progress in this regard within 12 months." We're 18 months into it and nothing has been done in this regard. It does not contain anything within a single sentence of Bill 41, which has to be a major failing.

You might ask why I'm talking about all of this stuff -- what's not in the bill. It's only because I am so severely disappointed. Back in October 2004, there was an all-party agreement and, I believed, a real opportunity to move this province forward, a real opportunity to make sure that people who go down to Bay Street and try to fiddle, people who steal money, people who rob pensioners, pension funds and other people of their hard-earned money in order to line their pockets would face the same consequences that they would in the United Kingdom, Switzerland, Germany, on Wall Street and in literally every other country on the face of this planet. It has not happened.

We can see what happens in the United States. We can see what happens to a company like Enron when it goes afoul. The prosecution has come down hard. We can see the court cases. We can see the people literally -- I'll use the vernacular of the streets -- spilling their guts to make sure they don't go away for a long time, turning each other in, with the multiple scams that took place around the Enron fiasco. We can see what happened, some would say, to poor Martha Stewart, who tried to fiddle the market, got caught and went to jail, in a time when we would still be investigating. We would still be wondering what she did. We would still be trying to piece things together and seeing whether a deal could be made. The United States, with all due respect to them -- and I'm not the greatest apologist for that country, but with respect --

Mr. Tascona: He's running for governor now.

Mr. Prue: Who? Martha Stewart?

Mr. Tascona: Spitzer.

Mr. Prue: Okay, Spitzer is running for governor. Maybe Martha Stewart should run for governor too; I don't know. But Martha Stewart has already been prosecuted, has done her time, is already out and the appeals have been dealt with.

That event happened after we had our committee hearings. Nothing like that ever happens in Ontario. You can look at the whole range of the United States, from Arthur Andersen to Conrad Black. Conrad Black, who did a lot of his alleged transgressions in this country and in this province, has never been prosecuted once. He's never even been touched. He's never even been named. In the United States, in Chicago, you can watch him daily or weekly on the news, going down to the courts, because they are taking action, because they have a prosecution body that actually works. You can look at WorldCom, you can look at Adelphia, you can look at a thousand things that happen in that country and then you can contrast them with Ontario.

Just today, in section C3 of the Toronto Star, there was a whole article about the Royal Group. I think some people here are familiar with that. There it is on page C3 that they are still being investigated by the Ontario Securities Commission a year and a half after the fact. They are still being investigated by the RCMP. They are still being defended by the various SROs. No actions have been taken whatsoever. According to the article, they are not required to file any documents of their financial holdings or their financial transactions between 2001 and 2003, but if and when they are required to, the article went on to say, there may be some financial implications for their bottom line next year. That's the same as what happened with Philip Services, with Livent, with Nortel, with the 100 other groups that have, maybe or maybe not, been investigated.

People in this province are looking to this government to be less than timid. We're looking for something better than Bill 41.

I think David Brown said it best --

Mr. Tascona: You're wearing yourself out.

Mr. Prue: No, no.

I think the government has followed what the former chair of the OSC had to say before the committee back in October 2004. This government seems to be playing exactly the same card. David Brown, the recently departed chairman of the Ontario Securities Commission, believed that his organization's mandate, "was not to bring lawbreakers to justice," but rather "to promote the integrity of the capital markets and foster confidence in them." That's what this bill does.

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We know that literally tens of thousands of people have lost fortunes on the stock market in Ontario. If it were purely a speculative practice where you put the money down and you think that a company -- Barrick, as an example -- is going to find gold somewhere and they don't find gold and you lose your money, I guess that's like a horse race: You take your chances and there it is. But if you lose your money when someone has fiddled the books, if you lose your money when someone has cheated the system, if you lose your money when the Ontario Securities Commission and the regulating body hasn't caught the transgressor, then you would indeed be very angry. There are tens of thousands of people in this province and many, many funds that they are very angry at because they believe they have been cheated, and our system certainly does not work for them.

Mr. Speaker, I want to talk finally -- and I'm going to finish, as I promised you, in about half an hour -- about what Al Rosen had to say about this.

Mr. Tascona: He's a suit manufacturer.

Mr. Prue: No, no. Al Rosen is considered Canada's leading forensic accountant when it comes to all of this.

He said that, as politicians, we need to do three things to take the appropriate action, three important steps. First, we need to change the traditional power structures. We have to eliminate them, and Canada's accounting and auditing practitioners have to be "separated from the rule-setters, to keep them from setting deliberately weak investor protection hurdles."

We have the same weak protection hurdles today that we had back in October 2004, when the all-party committee met and agreed that something major had to be done. When the minister came before the committee and congratulated us for having made very strong, very pertinent recommendations to literally change the system to protect investors, to protect the public and to make sure that Ontario did not lag behind every other trading company and every other trading floor in the world, he said, "Congratulations. We will implement it."

But Bill 41 doesn't do any of those. There is no companion piece. There is no time frame set out for the companion piece. The government is at least six months late on the recommendations made by the committee. That's the first thing. Mr. Rosen said it, and we as a Legislature have not done it.

The second thing he said is that "an independent Canada-wide enforcement (not regulatory) agency has to be set up to initiate proceedings against corporate scam artists. Simply put, the crooks are light years ahead of the provincial commissions in carrying out financial fleecings." We know that that is correct. We heard evidence, back in 2004, about the year before, when there were about 300 transgressions investigated under the Ontario Securities Commission in Ontario at Bay Street. That's about one per day. Once a day somebody is coming in there with a wonderful little scam to siphon money out of the market.

I would suggest that anybody who has any money in the market, either directly invested by them or if they have the money invested through a pension fund, should be extremely worried about the level of scams taking place in Ontario. Certainly, if they are caught in Ontario, virtually nothing happens to them. If they are caught in the United States, though, you can rest assured that they will be going to jail for a long time. And you can rest assured that if it happens in another country, be it Britain, the United States, Switzerland, France, Germany or anywhere else, there is an enforcement agency with teeth out there looking for them. In Ontario, we continue to follow Mr. Brown's advice that we are not out there to do enforcement action but simply to give a good image about investing in Ontario.

Lastly, Mr. Rosen talked about how the penalties for abusers have to be stiff enough to change behaviour. Many of the current penalties handed out are routinely treated as a mere cost of doing business.

If you look back at what happened before the Ontario Securities Commission when investigations have taken place, usually only two things happen. There is a requirement that there be some form of restitution, be it minor. They have to give back some of the money they pilfered. Oftentimes, those who have pilfered it are forbidden to trade in stocks on the floor of the Toronto Stock Exchange for anywhere from a month to a year or two years, and occasionally even life -- but rarely life. It's usually a month or a year or two years that they're not allowed to trade in stocks because, you see, they have been caught and they've been tainted and, supposedly, after a month or a year or two years, they can come back and be forgiven and go on with their nefarious activities, knowing full well that even though they were caught, they're not likely to be caught again.

We have before us tonight a very timid bill. What is it going to accomplish, these 72 pages? It says it right in the bill on the first page: "The rules contained in the bill address both securities that are directly held ... and those that are indirectly held," and that it was put together, and the recommendations were made, by the very groups that are contained within the Bay Street establishment. They all sat down and thought, "What's going to make this work better for us?" not "What is going to make it better for the consumer?" not "What is going to make it better for the investor?" not "What is going to make it better for the province of Ontario?" not "What is going to make it better for law enforcement?" but "What is going to make it better for us?" I'm sure this bill will accomplish everything that the drafters expected it to do. Unfortunately, it's going to do nothing for those people who have come to the province of Ontario seeking protection, for those people who have their life savings invested in the stock market, for those people who believe in the honesty of the free market system -- and there are still many people who do.

We have an obligation to do so much more. If the minister is going to introduce a companion piece, let him do it immediately. Let him take the appropriate action, which is not the timidity of this bill. Let him take the action that is actually going to help people in Ontario.

Those would be my comments. Thank you very much for your attention