



# False hope

When it comes to effective securities regulation in Canada, appearances can be deceiving

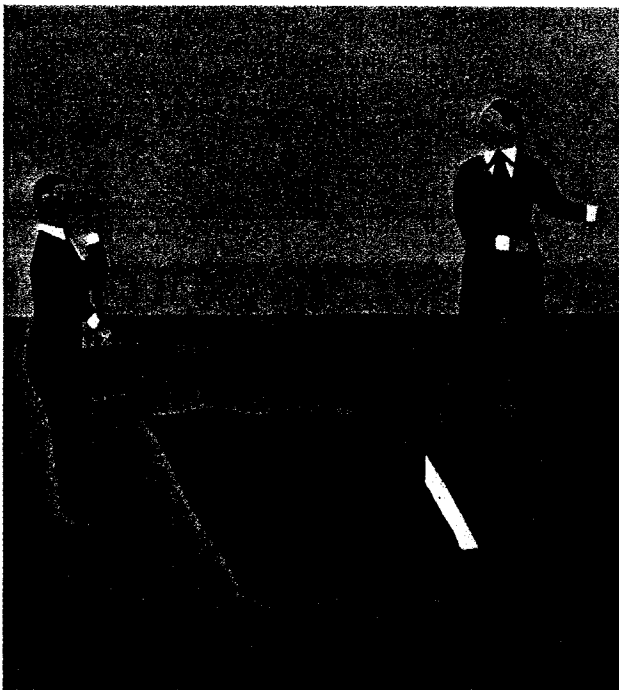
**K**eeping Up Appearances is the title of a popular British TV comedy from a few years ago that still airs regularly in Canada. The star of the show, Hyacinth Bucket (which she pronounces "Bouquet"), goes to great pains to appear sophisticated and wealthy, despite her family's parochial behaviour and her middle-class surroundings. Even if you've never seen the foreign-made sitcom, Hyacinth's pretenses are probably quite familiar because they are rather aptly mirrored in the workings of Canada's securities markets.

The primary goal of the Canadian markets is apparently to give investors the impression of safety and fairness, without necessarily delivering the same. Several regulations are seemingly enacted not to be effective in policing and prosecuting shenanigans, but rather to give the façade of wholesome protection. Pre-emptive and follow-on press campaigns extol the virtues of the so-called enhancements.

The securities regulators are then able to solemnly declare they are striving to attain a "balance" among competing interests. In the words of David Wilson, chair of the Ontario Securities Commission: "We must build trust without adding undue burden. We have a choice: We can craft regulations that bolster investor confidence, or we can smother business through over-regulation." Perhaps as a sign of things not to come, that sounds hauntingly like former OSC chair David Brown, who frequently spoke of "promoting" confidence, instead of prosecuting offenders.

As is usually the case in attempting to balance conflicting interests, the scale gets tilted in favour of those with the most lobbying power. It frequently seems that the primary preoccupation of regulators is to not ruffle the feathers of the corporate establishment. After all, the regulators piously conclude, without a balanced approach, the Canadian standard of living would be at risk. Hyacinth would be so proud of them.

The new parts of Bill 198 that address secondary market civil liability, which are now in force in Ontario, are yet another example of legislation that just doesn't do enough for investors. The new laws were supposed to allow investors to sue companies, officers, directors and certain advisers if an investment in the secondary market (such as the TSX) went sour because of a misrepresentation by



those parties. The secondary market covers roughly 90% of equity trading in Canada.

Instead, we have new legislation that limits recovery options and minimizes any chance that investors will fight to recoup losses. This is perfect from the regulators' view: the appearance of a safety net for investors, without actually curbing abuse by insiders.

Mind you, the soothing platitudes are undoubtedly met with exuberant joy by one group: the con artists. Placated and passive investors make great customers. When the investments fail, blame is placed on anything but lax financial reporting requirements. About 10 years ago, it was supposedly a sudden real estate meltdown that collapsed Confederation Life, and not a weak valuation of the investment portfolio. Just over five years ago it was an alleged unforeseeable collapse in telecom spending that torpedoed Nortel, and not a severe abuse of pro-forma financial reporting. And more recently, some would have us believe that Cro-

## We have new laws that limit investors' options for loss recovery

cus Investment Fund fell victim to a climate of overzealous corporate governance, and not the alleged serious shortfalls in valuation techniques that were identified by Manitoba's auditor general. (Full disclosure: I am working on a class-action lawsuit brought by Crocus investors.)

At all costs, we seem to avoid recognizing a main cause of our continued financial failures: slow and inept responses to previous scams. Instead of honestly comparing ourselves to other countries, we brandish clichés such as "we need a made-in-Canada solution." The drawbacks of our made-in-Canada passivity should be clear. We have to demand better protection in our increasingly specialized world, where it is hard for average people to ferret out sophisticated scams. Investor losses will continue to pile up the longer we keep up the pretense of a safe and secure capital market. ☐

*Al Rosen (al.rosen@rosen-associates.com) is a forensic accountant and principal of Rosen & Associates in Toronto.*