



Get Ready for the New Year
Secondary Market Liability is Almost Here

AN OGILVY RENAULT SEMINAR
DECEMBER 2005



Materials

1. The New Civil Liability Regime – An Overview of the Legislation
2. The New Civil Liability Regime – Questions and Answers
3. Civil Liability for Secondary Market Disclosure – Part XXIII.1 *Securities Act* (Ontario)
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New Amendments to the *Securities Act* (Ontario)

Civil Liability for
Secondary Market Disclosure

OGILVY RENAULT LLP
DECEMBER 2005

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LLP / S.E.N.C.R.L., s.r.l.

Background to the Legislation

- December 1995 – Interim Report of TSE “Allen Committee” on Corporate Disclosure recommends extending statutory civil liability to continuous disclosure
- March 1997 – Final Report of Allen Committee confirms its initial recommendations with some modifications
- May 1998 and November 2000 – CSA Proposals for Statutory Civil Remedy in the Secondary Market
- May 2002 – Draft Report of Five Year Review Committee reviewing the Ontario Securities Act recommends proceeding with CSA proposals for statutory civil remedy
- October 30, 2002 – Ontario Government introduces Bill 198



Background to the Legislation

- March 21, 2003 – Final Report of Five Year Review Committee urges Ontario government to proclaim Bill 198 in force
- December 9, 2002 – Bill 198 passed but not proclaimed in force
- December 16, 2004 – Ontario government passes Bill 149 which amends Bill 198 to address technical deficiencies
- August 2005 – Ontario government sets December 31, 2005 as proclamation date for both Bill 198 and Bill 149




Overview of the Amendments

- The Securities Act amendments will:
 - Create statutory offences for securities fraud, market manipulation and making misleading or untrue statements; and
 - Introduce a private right of action for damages for breaches of Ontario’s continuous disclosure requirements




New Statutory Offences

- **Fraud and Market Manipulation**
 - It is an offence for anyone to "directly or indirectly" engage or participate in any act, practice or course of conduct relating to securities or derivatives of securities that the person or company "knows or reasonably ought to know"
 - results in or contributes to a misleading appearance of trading activity in or an artificial price for a security or derivative; or
 - perpetrates a fraud on any person or company

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New Statutory Offences

- **Misleading or Untrue Statements**
 - It is an offence to "make a statement" that the maker of the statement "knows or ought reasonably to know":
 - in a material respect and at the time and in light of the circumstances under which it was made, is misleading or untrue or does not state a fact required to be stated or necessary to make the statement not misleading; and
 - would reasonably be expected to have a significant effect on the market price or value of a security
 - A breach of this section does not give rise to civil liability otherwise than under the civil remedies provided by the *Securities Act* (Ontario)

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The Current Regime

- **Before the introduction of statutory civil liability for secondary market disclosure:**
 - No specific statutory civil remedies under Canadian securities law for untimely or misleading continuous disclosure.
 - Significant hurdles faced an investor bringing an action at common law based on misrepresentations made by an issuer in its public continuous disclosure, including proving:
 - the issuer owed a duty of care to the investor;

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The Current Regime

- the investor relied to his detriment on the misrepresentation in making an investment decision; and
- the misrepresentation caused the damage suffered
- Difficult to bring class action and prohibitively expensive to bring an individual action

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The Current Regime

- In *Carom v. Bre-X Minerals Ltd.*, an Ontario court rejected the U.S. doctrine of "fraud on the market", which would create a presumption of reliance by the plaintiffs on information publicly disseminated by defendants in order to satisfy the requirement of actual reliance in fraudulent and negligent misrepresentation claims

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The Current Regime

- The "fraud on the market" doctrine is based on the efficient market theory (i.e., that securities markets quickly assimilate and reflect all publicly disclosed information in the trading prices of securities) and that any misleading information released into the market will be implicitly relied upon by investors
- The need to establish individual reliance has been a significant barrier to investors taking collective action (i.e., class certification) under Ontario's *Class Proceedings Act, 1992*

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The Current Regime

- In *Mondor v. Fisherman*, a proposed class proceeding arising out of the failure of YBM Magnex International, Inc., the Ontario Superior Court of Justice refused a motion by the defendant auditors to strike the claim against them as disclosing no cause of action
- The court rejected the defendant's argument that the plaintiffs were effectively relying on the "fraud on the market" doctrine (rejected in *Bre-X*) and held that the plaintiffs were simply arguing that the question of "reliance" was a question of fact which could be *inferred* from the circumstances in which the misrepresentation was made

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The Current Regime

- *Mondor* was subsequently certified on consent pursuant to a larger settlement. Therefore, the concept of "inferred reliance" has never been considered in a contested certification proceeding in Ontario
- In *Kerr v. Danier* class action was successful against directors in respect of a financial forecast contained in a prospectus (appeal judgment pending)

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New Statutory Civil Liability for Continuous Disclosure

- Objective of New Civil Remedy
 - Creating a meaningful civil remedy for investors who trade in the secondary market when there is a failure to make timely disclosure of material changes, or when there are misrepresentations in continuous disclosure documents and oral statements by or on behalf of issuers and other responsible persons
 - Strikes balance between deterrence and compensation
 - New civil remedy is an additional right and does not prevent an investor from bringing an action based on misrepresentation under common law

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Requires Leave of Court to Proceed

- No action can be commenced under the new civil remedy without leave of the Ontario Superior Court of Justice and only where the court is satisfied that:
 - the action is being brought in good faith, and
 - there is a reasonable possibility that the action will be resolved at trial in the plaintiff's favour
- Anyone granted leave to commence an action under the new remedy must promptly issue a news release disclosing that fact
- OSC may intervene in any action under the new remedy and in an application for leave

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Issuers Covered by the New Remedy

- Liability may arise as a result of a continuous disclosure violation of any issuer
 - which is a "reporting issuer" in Ontario, or
 - "with a real and substantial connection to Ontario, any securities of which are publicly traded"
- Unclear how the "real and substantial connection to Ontario" test will be factually established: e.g., does the public trading market need to be in Ontario?

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Disclosures that will Attract Liability


- Written communications (including in electronic form) that contain a "misrepresentation" that are:
 - filed or required to be filed with the OSC; or
 - filed or required to be filed with a government or agency thereof under applicable securities or corporate law or with a stock exchange or quotation and trade reporting system under its rules; or
 - any other communication the content of which would reasonably be expected to affect the market price or value of a security of the issuer

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Disclosures that will Attract Liability

- Public oral statements that relate to the business or affairs of the issuer by persons with actual, implied or apparent authority to speak on behalf of the issuer that contain a "misrepresentation"
- Failure of an issuer to make required timely disclosure of a "material change"


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Disclosures that will Attract Liability

- "Misrepresentation" means
 - an untrue statement of "material fact", or
 - an omission to state a material fact that is required to be stated or that is necessary to make a statement not misleading in light of the circumstances in which it was made
- "Material fact" is a fact that would reasonably be expected to have a significant effect on the market price or value of the issuer's securities


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Disclosures that will Attract Liability

- "Material change" means
 - a change in the business, operations or capital of the issuer that would reasonably be expected to have a significant effect on the market price or value of any of the issuer's securities, or
 - a decision to implement such a change made by the board of directors or by senior management who believe board confirmation is probable

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Potential Defendants

Document released by issuer

- potential liability of:
 - the issuer
 - directors of the issuer at time document released
 - officers of the issuer who authorized, permitted or acquiesced in the document's release
 - influential persons* including control persons, promoters and 10% or greater shareholders, and their directors and officers, who knowingly influenced the release of the document
 - experts who consented in writing to the use of a report, statement or opinion containing a misrepresentation in the document

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Potential Defendants

Public oral statement by issuer

- potential liability of:
 - the issuer
 - the person who made the statement
 - directors and officers of the issuer who authorized, permitted or acquiesced in the making of the statement
 - influential persons and their directors and officers who knowingly influenced the making of the statement
 - experts who consented in writing to the use of a report, statement or opinion containing a misrepresentation in the statement

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Potential Defendants

Document or public oral statement by Influential Persons

- potential liability of:
 - the issuer, if a director or officer of the issuer authorized, permitted or acquiesced in the release of the document or the making of the statement
 - the person who made the statement
 - directors and officers of the issuer who authorized, permitted or acquiesced in the release of the document or the making of the statement
 - the influential person


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Potential Defendants

- directors and officers of the influential person who authorized, permitted or acquiesced in the release of the document or the making of the statement
- experts who consented in writing to the use of a report, statement or opinion containing a misrepresentation in the document or statement


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Potential Defendants

- Failure to make timely disclosure of material change
 - potential liability of:
 - the issuer
 - directors and officers of the issuer who authorized, permitted or acquiesced in the failure to make timely disclosure
 - influential persons and their directors and officers, who knowingly influenced the failure to make timely disclosure


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Standards of Liability, Burdens of Proof and Defences


- Core Documents vs. Non-core Documents
 - standard for establishing liability differs depending upon whether the misrepresentation is contained in a core or non-core document

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Standards of Liability, Burdens of Proof and Defences


- Core Documents
 - "Core documents" for an outside director of an issuer, an influential person and its directors and officers consist of:
 - prospectuses
 - take-over bid circulars
 - issuer bid circulars
 - directors' circulars
 - rights offering circulars
 - MD&A

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Standards of Liability, Burdens of Proof and Defences


- AIFs
- information circulars
- annual and interim financial statements
- other documents that may be prescribed by regulation

- "Core documents" for an officer of an issuer include all of the above, as well as material change reports

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Standards of Liability, Burdens of Proof and Defences

- Non-core Documents
 - Non-core documents are documents other than core documents, that are:
 - filed or required to be filed with the OSC, a government or government agency under applicable securities or corporate law or with a stock exchange or quotation and trade reporting system under its rules, or
 - other communications the content of which would reasonably be expected to affect the market price or value of a security of the issuer

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Standards of Liability, Burdens of Proof and Defences

- Non-core documents would include for outside directors material change reports
- Non-core documents would also include press releases (if filed or required to be filed), annual and quarterly reports to shareholders (excluding MD&A and financial statements), business acquisition reports, material contracts and U.S. securities law filings (other than those filed to satisfy "core document" filings with the OSC)

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Standards of Liability, Burdens of Proof and Defences

- Higher standard of proof for non-core documents, public oral statements and failure to timely disclose a material change
 - To be liable for a misrepresentation in a non-core document or public oral statement or for a failure to make timely disclosure of a material change (excluding the issuer and its officers), the plaintiff must prove that the party either:
 - knew of the misrepresentation or failure to disclose at the time;
 - deliberately avoided acquiring knowledge of the disclosure violation; or

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Standards of Liability, Burdens of Proof and Defences

- was guilty of "gross misconduct" in connection with the disclosure violation
- Legislation provides a list of factors for court to consider in determining whether a party is guilty of gross misconduct

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Standards of Liability, Burdens of Proof and Defences

- Lower standard of proof for core documents and experts and for failure to timely disclose a material change in certain instances:
 - A plaintiff will not need to prove the defendant knew of misrepresentation or failure to disclose, deliberately avoided acquiring knowledge or was guilty of "gross misconduct" in connection with the disclosure violation, in order to establish liability:
 - for a misrepresentation contained in a core document;

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Standards of Liability, Burdens of Proof and Defences

- in a claim against an expert for misrepresentation in a document or public oral statement derived from the expert's report, opinion or statement; or
- in a claim against an issuer or an officer of the issuer for failure to make timely disclosure of a material change

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Standards of Liability, Burdens of Proof and Defences

- Due Diligence Defence
 - No person is liable if the person can prove he conducted or caused to be conducted a reasonable investigation and had reasonable grounds to believe that there was no misrepresentation or failure to make timely disclosure of a material change

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
Standards of Liability, Burdens of Proof and Defences

- Due Diligence/Gross Misconduct – factors to be considered
 - The court will consider all relevant circumstances, including:
 - the nature of the issuer
 - the knowledge, experience and function of the person or company
 - the office held if the person was an officer
 - the presence or absence of another relationship with the issuer if the person was a director

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Standards of Liability, Burdens of Proof and Defences

- the existence and nature of any system designed to ensure that the issuer meets its continuous disclosure obligations
- the reasonableness of reliance on the issuer's disclosure compliance system and on the issuer's officers, employees and others whose duties would, in the ordinary course, give knowledge of the relevant facts
- the period within which disclosure was required to be made
- the role and responsibility of the person in the preparation and release of the document or in ascertaining the facts contained in the document or public oral statement

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Standards of Liability, Burdens of Proof and Defences

- the role and responsibility of the person involved in a decision not to disclose a material change
- the extent to which the person knew or should reasonably have known the content and medium of dissemination of the document or public oral statement
- in respect of a report, opinion or statement of an expert, the professional standards applicable to the expert

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Standards of Liability, Burdens of Proof and Defences

- Due diligence requires effective disclosure compliance systems
 - A due diligence standard will compel an issuer to implement effective disclosure compliance systems.
 - The Allen Committee distinguished between the conduct required of an officer and an outside director to establish the defence:
 - a *director* exercises due diligence, either through the board or a committee, by taking reasonable care to ensure that the issuer has implemented and maintains on an ongoing basis appropriate procedures designed to ensure that all disclosure is prepared accurately, on a timely basis and without any misrepresentations

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Standards of Liability, Burdens of Proof and Defences

- an *officer* exercises due diligence, either directly or through the implementation of information generation and review procedures (and, where relevant, by taking reasonable steps to ensure such procedures are adhered to) by taking reasonable care to ensure that all documents and public and oral statements are prepared accurately, on a timely basis and without any misrepresentations

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Standards of Liability, Burdens of Proof and Defences

- Corrective Action Defence available for certain defendants
 - No person, other than the issuer, is liable if:
 - the misrepresentation or failure to make timely disclosure was made without their knowledge or consent; and
 - after becoming aware of the misrepresentation or failure to make timely disclosure, and before it was corrected, the person
 - promptly notified the issuer's board of directors of the disclosure violation, and
 - if no correction of the disclosure violation was made by the issuer within 2 business days of the notice (unless prohibited by law or by professional confidentiality rules), promptly notified the OSC in writing of the disclosure violation.

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Standards of Liability, Burdens of Proof and Defences

- No liability for timely disclosure violation if confidential filing made
 - No person is liable for a failure to make timely disclosure if:
 - confidential material change report was filed with the OSC;
 - the issuer had a reasonable basis for filing on a confidential basis;
 - once unconfidential, disclosure of the material change was made promptly;
 - no document or public statement was issued that, due to the confidential filing, contained a misrepresentation; and
 - if the material change became public other than as provided by law, the issuer promptly disclosed the material change as required



Standards of Liability, Burdens of Proof and Defences

- Safe Harbour for Forward-Looking Information in Documents
 - No person is liable for forward-looking information in a document if the person proves that:
 - the document contained *proximate* to the forward-looking information:
 - reasonable cautionary language identifying the forward looking information and identifying material factors that could cause actual results to differ materially from a conclusion, forecast or projection, and
 - a statement of the underlying material factors or assumptions
 - the person had a reasonable basis for drawing the conclusion or making the forecast or projection



Standards of Liability, Burdens of Proof and Defences

- The safe harbour is not available where the forward-looking information is contained in a prospectus of the issuer filed in connection with an initial public offering of securities of the issuer or contained in financial statements prepared by the issuer



Standards of Liability, Burdens of Proof and Defences

▪ Safe Harbour for Forward-Looking Information in Public Oral Statements

- No person is liable for forward-looking information in a public oral statement if the person had a reasonable basis for drawing the conclusion or making the forecast or projection and the person making the statement:
 - made a cautionary statement that the oral statement contains forward-looking information
 - stated that actual results could differ materially from a conclusion, forecast or projection and that material factors or assumptions were applied, and that additional information about these matters is contained in a "readily available document" (including a document filed with the OSC or otherwise generally disclosed)

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Standards of Liability, Burdens of Proof and Defences

▪ Non-experts not liable for misrepresentation based on expert's report

- No person is liable, other than the expert, in respect of any part of a document or public oral statement that includes, summarizes or quotes from an expert's opinion or report and the expert consented in writing to the use of the report, if:
 - the person had no knowledge or reasonable belief that there was a misrepresentation in the part of the document or statement made on the authority of the expert; and
 - the part of the document or statement fairly represented the expert's opinion or report

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Calculation of Damages and Liability Caps

▪ Calculation of Damages

- Damages will be calculated to be the actual loss suffered or by reference to an objective formula depending upon the circumstances of a particular trade
- Damages in respect of securities acquired during a period when a disclosure violation was outstanding:
 - in respect of any securities disposed of on or before the 10th trading day after the public correction of the disclosure violation, damages shall equal the plaintiff's actual loss (including commissions paid), taking into account any hedging or risk limitation transactions undertaken by the plaintiff

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Calculation of Damages and Liability Caps

- Losses not caused by disclosure violation
 - No amount is recoverable for any loss or damages which the defendant proves was unrelated to the misrepresentation or failure to make timely disclosure

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Calculation of Damages and Liability Caps

- Proportionate Liability
 - Liability of defendants will be proportionate to their respective fault
 - Exception where defendant (other than the issuer) is found to have authorized, permitted or acquiesced in the making of the misrepresentation or failure to make timely disclosure while *knowing* it was a disclosure violation, in which case such defendant will be jointly and severally liable with each similarly culpable defendant for the aggregate amount of damages awarded

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Calculation of Damages and Liability Caps

- Where No Limit on Liability
 - No limit on the total liability of a defendant (other than the issuer) if the plaintiff proves that the defendant
 - authorized, permitted or acquiesced in the making of the misrepresentation or failure to make timely disclosure while *knowing* it was a disclosure violation, or
 - influenced the making of the misrepresentation or failure to make timely disclosure while *knowing* it was a disclosure violation

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Liability Caps

- Issuer and Influential Persons
 - Damages limited to greater of:
 - 5% of its "market capitalization", and
 - \$1 million

less any damages assessed (after appeals) against that defendant in all other actions brought under the new remedy and under comparable legislation elsewhere in Canada in respect of the same disclosure violation

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Liability Caps

- "Market capitalization" is defined in concurrent amendments to Regulation 1015 of the *Securities Act* (Ontario) and is based upon the trading price of the issuer's equity securities over a 10-day period before the continuous disclosure violation occurred
- No netting of damages assessed in actions brought under foreign legislation (e.g., Rule 10b-5 under the U.S. *Securities Exchange Act of 1934*)

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Liability Caps

- Directors and Officers
 - Damages limited to greater of:
 - \$25,000, and
 - 50% of the aggregate of the director's or officer's compensation from the issuer and its affiliates or, in the case of a director or officer of an influential person, from the influential person and its affiliates, during the 12 months preceding the continuous disclosure violation,

less any damages assessed (after appeals) against that defendant in all other actions brought under the new remedy and under comparable legislation elsewhere in Canada in respect of the same disclosure violation

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Liability Caps

- Compensation includes the fair market value of any deferred compensation (for e.g. options, SARs, benefits) granted during the 12 months preceding the continuous disclosure violation
- Deferred compensation will be valued as of the date such compensation is awarded (for e.g., date option is granted)

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Liability Caps

- Experts
 - Damages limited to greater of:
 - \$1 million, and
 - the revenue earned by the expert and its affiliates from the issuer and its affiliates during the 12 months preceding the continuous disclosure violation;
 - less any damages assessed (after appeals) against the expert in all other actions brought under the new remedy and under comparable legislation elsewhere in Canada in respect of the same misrepresentation

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Liability Caps

- Costs
 - Costs must be awarded to the prevailing party (plaintiff or defendant) notwithstanding anything to the contrary in the Ontario *Courts of Justice Act* or *Class Proceedings Act, 1992*
 - Codification of a "loser pays" costs rule for all actions brought under the new civil remedy

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Limitation Period

- No action shall be commenced to enforce the new civil remedy later than the earlier of:
 - 3 years after, in the case of a misrepresentation, the date on which the document or public oral statement containing the misrepresentation was released or made, or in the case of a failure to make timely disclosure, the date on which the requisite disclosure was required to be made, and
 - 6 months after the issuance of a news release disclosing that a court has granted leave to commence the action under the new civil remedy or under comparable legislation elsewhere in Canada in respect of the same disclosure violation

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Comparison to US Regime

- U.S. Regime
 - Secondary market liability regime
 - Section 10(b)5 and Rule 10(b)-5 under *Securities Exchange Act of 1934* created broad anti-fraud rule through which U.S. courts have inferred private action
 - "fraud on the market" creates presumption of reliance on the misrepresentation based on "efficient market" theory
 - jurisprudence has significantly developed the remedy

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Comparison to US Regime

- New Ontario civil remedy clearly defines violations, responsibilities, defences and liability caps versus U.S. 10b-5 remedy which has evolved through judicial precedent and imposes no liability caps
- New Ontario civil remedy requires leave of an Ontario court, which is not required in the U.S. under 10b-5

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Comparison to US Regime



- In U.S. 10b-5 actions, plaintiffs must prove "scienter" (reckless or intentional conduct as opposed to negligence) on the part of the defendant. Under the new Ontario civil remedy, no scienter-like element need be proven for misrepresentations in core documents or, in the case of officers, for failure to make timely disclosure of material changes
- The safe harbour for forward-looking information is potentially more onerous to invoke in Canada than U.S.

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The Ontario New Civil Liability Regime for Secondary Market Disclosure

Questions and Answers
December 2005



The Ontario New Civil Liability Regime for Continuous Disclosure QUESTIONS AND ANSWERS

Amendments to the *Securities Act* (Ontario) (the "Act") will come into force on December 31, 2005 and will provide investors in the secondary market with a statutory right of action for damages against an issuer, its directors and officers and certain other persons connected with the issuer where a continuous disclosure violation exists with respect to that issuer.

Ogilvy Renault LLP has prepared these questions and answers on the new civil liability regime. We hope they will assist issuers, their directors and officers and other persons connected with the issuer in understanding and limiting their exposure to liability under the new regime.



Potential Liability

Q Which employees of our company will be exposed to liability under the new civil remedy? For example, will liability extend to the controller, treasurer and finance and legal staff who participate in the preparation of our continuous disclosure documents?

A The amendments provide that "officers" of the issuer will have potential liability under the new regime. The extent of such liability will depend upon both the nature and context of the misrepresentation and the involvement of the particular officer in the preparation of the continuous disclosure document, the making of a public oral statement or the failure to make timely disclosure of a material change.

An "officer" is defined to mean, in addition to the chair and vice-chair of the board of directors and the president of the issuer, any vice-president, the secretary, assistant secretary, treasurer, assistant treasurer and general manager of an issuer, and any other person designated by by-law or similar authority as an officer, or *any individual acting in a similar capacity on behalf of the issuer*. Therefore, non-titled employees who function as any of the aforementioned specified officers of the issuer will also have potential liability under the amendments.

An officer will have potential liability for a misrepresentation contained in a document or public oral statement or in respect of a failure to make timely disclosure of a material change but only if they authorized, permitted or acquiesced in the document's release, the making of the statement or the failure to make timely disclosure. Whether or not an officer authorized, permitted or acquiesced in the conduct would depend upon an assessment of the relevant facts. Where an officer participates in the preparation of a continuous disclosure document and has not objected to its release, it is likely the officer would be seen to have, at a minimum, acquiesced in the release of the document. In addition, in order to establish liability of an officer for misrepresentations contained in certain "non-core" documents (e.g., a press release), or in public oral statements, it would be necessary to establish that the officer had actual knowledge of the misrepresentation,



deliberately avoided acquiring such knowledge or was guilty of gross misconduct. It is not necessary to prove actual or implied knowledge or gross misconduct of an officer in the case of misrepresentations contained in "core" documents (e.g., AIFs, MD&A and financial statements, material change reports) or in respect of the failure to make timely disclosure of a material change. A plaintiff will merely need to establish that there was a continuous disclosure violation and that the officer authorized, permitted or acquiesced in the violation.

Further, any person, whether or not an "officer", with actual, implied or apparent authority to speak on behalf of an issuer who makes a public oral statement that relates to the business or affairs of the issuer, will be liable for any misrepresentations in such statement. Thus, a designated spokesperson will have potential liability under the amendments irrespective of whether they are an officer of the issuer.

In all circumstances, an officer or spokesperson will not be liable if he or she can establish that he or she was duly diligent: i.e., conducted a reasonable investigation and had no reasonable grounds to believe that there was a misrepresentation or that a failure to make timely disclosure would occur.

Q If I sit on our company's disclosure committee, can I be held liable for disclosure errors I was not actually aware of?

A An officer of an issuer who sits on the disclosure committee of the issuer has potential liability for any misrepresentations contained in a written document or public oral statement or in respect of a failure to make timely disclosure of a material change but only if that officer authorized, permitted or acquiesced in the release of the document, the making of the public oral statement or the failure to make timely disclosure or was in fact the spokesperson who made the public oral statement.



The applicable standards of proof in establishing liability of an officer and potential due diligence defence are described above. However, it is important to note that in order to establish liability of an officer for a misrepresentation in a core document (such as annual or interim financial statements, MD&A or an AIF) it is not necessary for a plaintiff to prove that the officer knew or had implied knowledge of the misrepresentation. The involvement of an officer as a member of an issuer's disclosure committee would be a relevant fact for the court to assess in determining whether such officer authorized, permitted or acquiesced, whether he or she deliberately avoided acquiring knowledge of the misrepresentation or was guilty of gross misconduct in respect of the misrepresentation, or whether a due diligence defence was established.

Q If I sit on the audit committee will I have greater exposure to liability than other directors as a result of misrepresentations contained in our company's financial reporting?

A All directors of an issuer have potential liability under the new regime regardless of whether they sit on a committee of the board or not. They may be liable for misrepresentations contained in documents released by the issuer and in addition, they have potential liability for public oral statements and any failure to make timely disclosure of material changes if they permitted, authorized or acquiesced in the making of the statement or the failure to make timely disclosure. A director who is a member of the audit committee may have greater exposure to liability as a result of that role and its responsibilities.

In order to establish liability for misrepresentations contained in core documents (which include financial statements and MD&A) and, in the case of directors who are also officers, for failure to make timely disclosure of a material change, it is not necessary for a plaintiff to establish that a director actually knew or had implied knowledge of the misrepresentation or failure.



To establish liability for a misrepresentation contained in certain “non-core” documents, in public statements or in respect of a timely disclosure violation, it would need to be shown that the audit committee member had knowledge of the misrepresentation, avoided acquiring knowledge of the misrepresentation or was guilty of gross misconduct in connection with the violation. An audit committee member who establishes that he or she was duly diligent, i.e., that he or she conducted a reasonable investigation and had no reasonable grounds to believe there was a continuous disclosure violation, will have no liability.

In determining gross misconduct or whether a due diligence defence has been established, the court is directed by the legislation to consider, among other factors, the knowledge, experience and function of the particular defendant. In addition, the court must consider the role and responsibility of the individual in question, the nature of the issuer’s disclosure compliance system and the reasonableness of reliance on such system. The actual liability of a member of the audit committee will depend upon the court’s assessment of all these relevant facts.

The fact that an audit committee member has been delegated greater responsibility for the oversight of the external auditor and financial disclosure than other directors, is required to be “financially literate” within the meaning of *Multilateral Instrument – 52-110 Audit Committees* and has acquired significant knowledge that other directors may not possess will likely be considered by the courts in assessing whether a director had the requisite knowledge or was guilty of gross misconduct or whether the director has established that he or she exercised due diligence. As a result of the increased knowledge and responsibility, it may be difficult to argue that the director did not meet the knowledge standard and a due diligence defence may be harder to establish in the case of an audit committee member than other directors as it relates to the issuer’s financial disclosure.



It should be noted however that outside directors are not officers of the issuer and their function is one of oversight and not execution. The Allen Committee Report, which was the foundation of the new regime, clearly distinguished between the exercise of due diligence by a director as opposed to an officer of an issuer. It noted that a director exercises due diligence by taking reasonable care to ensure the issuer has implemented and maintains appropriate procedures designed to ensure that all disclosure is prepared accurately, on a timely basis and without any misrepresentations. However, compliance with these procedures is the responsibility of management.

An audit committee member will not be liable for any part of a document or public oral statement that includes, summarizes or quotes from an expert's opinion, provided the expert consented in writing to the use of the report and provided that the audit committee member had no knowledge or reasonable belief that there was a misrepresentation. As a final point, when assessing damages, the legislation recognizes the concept of proportionality of damages based on responsibility.

Q What liability will documents that an issuer is required to file with the U.S. Securities and Exchange Commission attract under the legislation?

A An issuer's SEC filings that are filed in Ontario will either be core documents or non-core documents depending upon their nature. If a document filed with the SEC is also filed with the Ontario Securities Commission to satisfy the filing requirement in respect of a core document, it will attract liability as a core document. For example, if an issuer satisfies the requirement to file an Annual Information Form by the filing of a Form 10-K or 20-F, any misrepresentation contained in such document will be considered a misrepresentation in a core document and it will not be necessary for the plaintiff to establish knowledge, implied knowledge or gross misconduct of the defendants as to the misrepresentation. Other filings which are made in Canada but not to satisfy a core document filing requirement will be non-core documents and therefore knowledge or implied knowledge of or gross misconduct with respect to the violation must be established.



Preventing Liability

Q What steps do we need to take to protect ourselves against potential liability?

A Issuers should educate the appropriate personnel in their organizations as to the new liability regime and the steps that should be taken to mitigate risk exposure, not only to the issuer but also to its directors, officers and spokespersons. Appropriate corporate disclosure policies should be in place and officers, directors and others who act on behalf of the issuer should be aware of such policies and strictly adhere to them.

Particular care should be taken when speaking publicly on behalf of an issuer and issuers should consider the formal scripting of any public comments, especially where forward-looking information is being discussed. When releasing any forward-looking information, in documents or public oral statements, particular attention should be taken to ensure that the safe harbour for such forward-looking information is properly invoked.

Directors, officers and other potential defendants will need to take the necessary steps to establish a potential due diligence defence. Such steps will include documenting adherence to disclosure policies and procedures, confirming and verifying information and relying on expert advice where appropriate.

Q Will our company need to adopt a formal written policy on how our disclosure documents are to be prepared and approved? Would such policy help us avoid liability under the new regime?

A Yes. We would strongly recommend implementing a written disclosure policy or ensuring your existing disclosure policy is sufficient to ensure an issuer meets its continuous disclosure obligations. The disclosure policy adopted will provide support to establishing a due diligence defence to liability under the new regime, provided the policy is complied with. The disclosure policy should be practical to implement and reflective of the particular situation of the issuer and the informational risks it faces.



Q What defences are available?

A The amendments provide for several defences. An overriding defence is the "due diligence" defence discussed above where a person or company can prove that it conducted or caused to be conducted a reasonable investigation and at the time of the release of the document or the making of the public statement had no reasonable grounds to believe that the document or public statement contained a misrepresentation or that, in the case of a failure to make timely disclosure of a material change, that the person or company was duly diligent and had no reasonable grounds to believe that the failure to make timely disclosure would occur. Further, the amendments outline certain relevant circumstances to be taken into account by the court in determining whether an investigation was reasonable. These factors include the existence, if any, and the nature of any system designed to ensure that the issuer meets its continuous disclosure obligations and the reasonableness of reliance by a person or company on the issuer's disclosure compliance system and on the issuer's officers and employees and others whose duties would, in the ordinary course, have given them knowledge of the relevant facts. As stated above, an issuer should put in place an effective disclosure compliance system to ensure that it meets its continuous disclosure obligations and to permit potential defendants to establish this defence.

For this purpose it is reasonable to assume that compliance with the best disclosure practices in Part VI of *National Policy 51-201 – Disclosure Standards* will assist in permitting potential defendants to establish this defence.

In addition to the due diligence defence, defendants, other than the issuer, will have a defence if they take corrective action once they become aware of the misrepresentation or failure to make timely disclosure. Such a defence will be available if the defendant in question was not aware of the misrepresentation or failure to make timely disclosure and, after becoming aware of such violation, notified the issuer's board of directors and, if no correction of the violation was made within two business days, promptly and in writing notified the Ontario Securities Commission of the violation (unless such notification was prohibited by law or professional confidentiality rules).



Q Assuming there is a misrepresentation in a document, what steps can be taken to limit liability?

A The right of action arises in respect of the period between the time a document is released and the time when the misrepresentation contained in the document is publicly corrected. Therefore, if a misrepresentation is found in an issuer's documentation, immediate steps should be taken to correct such information. While the method of public correction is not outlined in the legislation, immediately press releasing such information would be the prudent way to proceed.

Material Change Reporting

Q Should we be reviewing our policy with respect to the timing of material change announcements?

A Under the legislation, the issuer and others are responsible for failure to make timely disclosure of a material change to a person who acquires or disposes of the issuer's security between the time when the material change was required to be disclosed in the manner required under the Act and the subsequent disclosure of the material change in the manner required by the Act. Liability arises at the moment the material change is required to be disclosed. Under section 75 of the Act, where a material change occurs in the affairs of a reporting issuer, the issuer must forthwith issue and file a news release authorized by a senior officer disclosing the nature and substance of the change. The amendments do not change this obligation. However, issuers should now be aware that their potential liability for secondary market trading arises at the earliest point in time at which a material change should have been disclosed, subject only to an issuer's entitlement to make confidential disclosure under subsection 138.4(8) of the Act.



Q If we file a material change report on a confidential basis, will we be protected from liability?

A If there is a reasonable basis for making the material change disclosure on a confidential basis, it will provide protection from liability provided certain other conditions are met. The amendments do not, however, change the basis for when confidential filings should be made. It is necessary to set out in writing at the time of filing the report that the public release of the information would be unduly detrimental to the interests of the issuer or a decision to implement a change has been made by senior management who believe it will be confirmed by the directors of the issuer and no trading has been made by people with knowledge of the change using that knowledge. The use of a confidential filing solely as a preventative measure to avoid liability under the secondary market regime would not, in our view, be a reasonable basis for filing the material change on a confidential basis. It would be necessary to establish that the confidential filing meets the criteria set out in subsection 75(3) of the Act. In addition, certain other conditions must be met. First, prompt disclosure must have been made of any information (to the extent it remained material) when the basis for confidentiality ceased to exist. Secondly, no document or public oral statement was released or made that, due to the undisclosed material change, contained a misrepresentation and finally, if the material change became publicly known other than as required by the Act, the issuer must have promptly disclosed the material change as required under the Act.

Press Releases

Q Should we be reconsidering our company's policy of filing all press releases on SEDAR in light of the new legislation?

A Yes. The definition of "document" in section 138.1 of the Act includes any written communication which is required to be filed with the Commission or, if not required to be filed with the Commission, is in fact so filed or is filed or required to be filed with a

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government or an agency of the government under applicable securities or corporate law or with any stock exchange or quotation and trade reporting system under its by-laws, rules or regulations. In addition, "document" includes any written communication, including documents in electronic form, the content of which would reasonably be expected to affect the market price or value of a security of the issuer. To the extent that a press release is not required to be filed and would not reasonably be expected to affect the market price or value of a security of an issuer, it should not be filed with the Commission or other government agency or stock exchange, etc. voluntarily for to do so may attract liability for the issuer and others.

Earnings Guidance and Other Forward Looking Information

Q Our company provides earnings guidance and other forward-looking information to the market in press releases and other continuous disclosure documents. What will we need to do to avoid liability for these statements?

A The amendments contain a so-called 'safe harbour' for "forward-looking information". Forward-looking information ("FLI") encompasses all disclosure regarding possible events, conditions or results of operations that is based on assumptions about future economic conditions and courses of action. This would include, for example, disclosure of "financial outlooks" or guidance such as expected revenues, net income, gross margins, earnings per share and R&D spending.

To avoid liability for a misrepresentation in FLI contained in a company document, such as a press release, the document must contain "proximate" to that information:

- » reasonable cautionary language identifying the information as forward-looking and the material factors that could cause actual results to differ materially from the conclusion, forecast or projection set out in the information ("material risk factors"); and



- » a statement of the material factors or assumptions that were applied in drawing such conclusion or making such forecast or projection (“material applied factors/assumptions”).

Moreover, there must be a “reasonable basis” for drawing the conclusion or making the forecast or projection set out in the FLI.

When invoking the protection of this safe harbour, companies should consider the following:

- » The required disclosure of material risk factors and material applied factors/assumptions must be specific. General boilerplate disclosure will not satisfy the requirement.
- » Disclosure of material risk factors and material applied factors/assumptions must be contained in the disclosure document containing the FLI. This requirement will not be satisfied merely by referring the reader of the document to another more detailed public disclosure document on file with the Canadian securities regulators that contains the required disclosure.
- » The Ontario safe harbour differs in two respects from its U.S. counterpart. First, there is no prescribed requirement under the U.S. safe harbour to disclose material applied factors/assumptions, only material risk factors. Second, the “proximate” disclosure requirement in the Ontario rule may possibly indicate that the placement of the disclosure relative to the FLI in the document is critical to invoking the safe harbour and could potentially be interpreted to require that the disclosure appear immediately before or after the FLI. The use of the term “proximate” differs from the wording of the U.S. safe harbour which provides that the FLI be “accompanied by” the required cautionary statement and material risk factor disclosure.

Companies will need to review and, if necessary, change their existing practices in order to properly invoke the protection of the Ontario safe harbour for their FLI.



Limitations on Liability

Q As a director or officer my liability is capped at the greater of \$25,000 and 50% of the aggregate of my compensation received from the issuer and its affiliates during the 12 month period preceding the continuous disclosure violation. How will any options I have be valued for the purposes of determining the amount of this limitation?

A Compensation will include the fair market value of any deferred compensation you have received from the issuer or its affiliates during the twelve months preceding the continuous disclosure violation. Deferred compensation will include the value of any options granted during that 12 month period. Any options will be valued as of the date of the grant of the option. The value of the option will most likely be determined by reference to recognized formulas commonly used to price options and will be based upon several factors, including their term, exercise price and the trading price of the securities.

Investment Bank Liability

Q Are there any issues surrounding the liability of investment bankers for their expert reports?

A A person or company has a defence where the document or public oral statement includes, summarizes or quotes from a report, statement or opinion made by an expert in respect of which the issuer obtained the written consent of the expert to the use of the report, statement or opinion. On the other hand, the expert is so liable. An expert is defined as "a person or company whose profession gives authority to a statement made in a professional capacity by the person or company...". This may have a practical effect on reports prepared by investment bankers and other experts in connection with M&A transactions: e.g., fairness opinions and valuations included in proxy material or take-over bid or issuer bid circulars. For this reason, investment bankers should put in place



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PART XXIII.1 - *Securities Act* (Ontario)

CIVIL LIABILITY FOR SECONDARY
MARKET DISCLOSURE

Interpretation and Application

138.1 Definitions - In this Part,

"compensation" means compensation received during the 12-month period immediately preceding the day on which the misrepresentation was made or on which the failure to make timely disclosure first occurred, together with the fair market value of all deferred compensation including, without limitation, options, pension benefits and stock appreciation rights, granted during the same period, valued as of the date that such compensation is awarded; ("*rémunération*")

"control person" means,

- (a) a person or company who holds a sufficient number of the voting rights attached to all outstanding voting securities of an issuer, or
- (b) each person or company or combination of persons or companies acting in concert by virtue of an agreement, arrangement, commitment or understanding, which holds in total a sufficient number of the voting rights attached to all outstanding voting securities of an issuer,

to affect materially the control of the issuer, and, where a person or company, or combination of persons or companies, holds more than 20 per cent of the voting rights attached to all outstanding voting securities of an issuer, the person or company, or combination of persons or companies, shall, in the absence of evidence to the contrary, be deemed to hold a sufficient number of the voting rights to affect materially the control of the issuer; ("*personne qui a le contrôle*")

"core document" means,

- (a) where used in relation to,
 - (i) a director of a responsible issuer who is not also an officer of the responsible issuer,
 - (ii) an influential person, other than an officer of the responsible issuer or an investment fund manager where the responsible issuer is also an investment fund, or
 - (iii) a director or officer of an influential person who is not also an officer of the responsible issuer, other than an officer of an investment fund manager,

a prospectus, a take-over bid circular, an issuer bid circular, a directors' circular, a rights offering circular, management's discussion and analysis, an annual information form, an information circular, annual financial statements and interim financial statements of the responsible issuer,

(b) where used in relation to,

(i) a responsible issuer or an officer of the responsible issuer,

(ii) an investment fund manager, where the responsible issuer is an investment fund, or

(iii) an officer of an investment fund manager, where the responsible issuer is an investment fund,

a prospectus, a take-over bid circular, an issuer bid circular, a directors' circular, a rights offering circular, management's discussion and analysis, an annual information form, an information circular, annual financial statements, interim financial statements and a report required by subsection 75 (2) of the responsible issuer, and

(c) such other documents as may be prescribed by regulation for the purposes of this definition; ("*document essentiel*")

"document" means any written communication, including a communication prepared and transmitted only in electronic form,

(a) that is required to be filed with the Commission, or

(b) that is not required to be filed with the Commission and,

(i) that is filed with the Commission,

(ii) that is filed or required to be filed with a government or an agency of a government under applicable securities or corporate law or with any stock exchange or quotation and trade reporting system under its by-laws, rules or regulations, or

(iii) that is any other communication the content of which would reasonably be expected to affect the market price or value of a security of the responsible issuer; ("*document*")

"expert" means a person or company whose profession gives authority to a statement made in a professional capacity by the person or company including, without limitation, an accountant, actuary, appraiser, auditor, engineer, financial analyst,

geologist or lawyer, but not including an entity that is an approved rating organization for the purposes of National Instrument 44-101 of the Canadian Securities Administrators; (*“expert”*)

“failure to make timely disclosure” means a failure to disclose a material change in the manner and at the time required under this Act; (*“non-respect des obligations d’information occasionnelle”*)

“influential person” means, in respect of a responsible issuer,

- (a) a control person,
 - (b) a promoter,
 - (c) an insider who is not a director or senior officer of the responsible issuer, or
 - (d) an investment fund manager, if the responsible issuer is an investment fund;
- (*“personne influente”*)

“issuer’s security” means a security of a responsible issuer and includes a security,

- (a) the market price or value of which, or payment obligations under which, are derived from or based on a security of the responsible issuer, and
- (b) which is created by a person or company on behalf of the responsible issuer or is guaranteed by the responsible issuer; (*“valeur mobilière d’un émetteur”*)

“liability limit” means,

- (a) in the case of a responsible issuer, the greater of,
 - (i) 5 per cent of its market capitalization (as such term is defined in the regulations), and
 - (ii) \$1 million,
- (b) in the case of a director or officer of a responsible issuer, the greater of,
 - (i) \$25,000, and
 - (ii) 50 per cent of the aggregate of the director’s or officer’s compensation from the responsible issuer and its affiliates,
- (c) in the case of an influential person who is not an individual, the greater of,
 - (i) 5 per cent of its market capitalization (as defined in the regulations), and
 - (ii) \$1 million,
- (d) in the case of an influential person who is an individual, the greater of,
 - (i) \$25,000, and

- (ii) 50 per cent of the aggregate of the influential person's compensation from the responsible issuer and its affiliates,
- (e) in the case of a director or officer of an influential person, the greater of,
 - (i) \$25,000, and
 - (ii) 50 per cent of the aggregate of the director's or officer's compensation from the influential person and its affiliates,
- (f) in the case of an expert, the greater of,
 - (i) \$1 million, and
 - (ii) the revenue that the expert and the affiliates of the expert have earned from the responsible issuer and its affiliates during the 12 months preceding the misrepresentation, and
- (g) in the case of each person who made a public oral statement, other than an individual referred to in clause (d), (e) or (f), the greater of,
 - (i) \$25,000, and
 - (ii) 50 per cent of the aggregate of the person's compensation from the responsible issuer and its affiliates; (*"limite de responsabilité"*)

"management's discussion and analysis" means the section of an annual information form, annual report or other document that contains management's discussion and analysis of the financial condition and results of operations of a responsible issuer as required under Ontario securities law; (*"rapport de gestion"*)

"public oral statement" means an oral statement made in circumstances in which a reasonable person would believe that information contained in the statement will become generally disclosed; (*"déclaration orale publique"*)

"release" means, with respect to information or a document, to file with the Commission or any other securities regulatory authority in Canada or a stock exchange or to otherwise make available to the public; (*"publication"*)

"responsible issuer" means,

- (a) a reporting issuer, or
- (b) any other issuer with a real and substantial connection to Ontario, any securities of which are publicly traded; (*"émetteur responsable"*)

"trading day" means a day during which the principal market (as defined in the regulations) for the security is open for trading. (*"jour de Bourse"*).

138.2 Application - This Part does not apply to,

- (a) the purchase of a security offered by a prospectus during the period of distribution;
- (b) the acquisition of an issuer's security pursuant to a distribution that is exempt from section 53 or 62, except as may be prescribed by regulation;
- (c) the acquisition or disposition of an issuer's security in connection with or pursuant to a take-over bid or issuer bid, except as may be prescribed by regulation; or
- (d) such other transactions or class of transactions as may be prescribed by regulation.

Liability

138.3 Liability for secondary market disclosure - **(1) Documents released by responsible issuer** - Where a responsible issuer or a person or company with actual, implied or apparent authority to act on behalf of a responsible issuer releases a document that contains a misrepresentation, a person or company who acquires or disposes of the issuer's security during the period between the time when the document was released and the time when the misrepresentation contained in the document was publicly corrected has, without regard to whether the person or company relied on the misrepresentation, a right of action for damages against,

- (a) the responsible issuer;
- (b) each director of the responsible issuer at the time the document was released;
- (c) each officer of the responsible issuer who authorized, permitted or acquiesced in the release of the document;
- (d) each influential person, and each director and officer of an influential person, who knowingly influenced,
 - (i) the responsible issuer or any person or company acting on behalf of the responsible issuer to release the document, or
 - (ii) a director or officer of the responsible issuer to authorize, permit or

- acquiesce in the release of the document; and
- (e) each expert where,
 - (i) the misrepresentation is also contained in a report, statement or opinion made by the expert,
 - (ii) the document includes, summarizes or quotes from the report, statement or opinion of the expert, and
 - (iii) if the document was released by a person or company other than the expert, the expert consented in writing to the use of the report, statement or opinion in the document.

- (2) Public oral statements by responsible issuer** - Where a person with actual, implied or apparent authority to speak on behalf of a responsible issuer makes a public oral statement that relates to the business or affairs of the responsible issuer and that contains a misrepresentation, a person or company who acquires or disposes of the issuer's security during the period between the time when the public oral statement was made and the time when the misrepresentation contained in the public oral statement was publicly corrected has, without regard to whether the person or company relied on the misrepresentation, a right of action for damages against,
- (a) the responsible issuer;
 - (b) the person who made the public oral statement;
 - (c) each director and officer of the responsible issuer who authorized, permitted or acquiesced in the making of the public oral statement;
 - (d) each influential person, and each director and officer of the influential person, who knowingly influenced,
 - (i) the person who made the public oral statement to make the public oral statement, or
 - (ii) a director or officer of the responsible issuer to authorize, permit or acquiesce in the making of the public oral statement; and
 - (e) each expert where,
 - (i) the misrepresentation is also contained in a report, statement or opinion made by the expert,

- (ii) the person making the public oral statement includes, summarizes or quotes from the report, statement or opinion of the expert, and
- (iii) if the public oral statement was made by a person other than the expert, the expert consented in writing to the use of the report, statement or opinion in the public oral statement.

(3) Influential persons - Where an influential person or a person or company with actual, implied or apparent authority to act or speak on behalf of the influential person releases a document or makes a public oral statement that relates to a responsible issuer and that contains a misrepresentation, a person or company who acquires or disposes of the issuer's security during the period between the time when the document was released or the public oral statement was made and the time when the misrepresentation contained in the document or public oral statement was publicly corrected has, without regard to whether the person or company relied on the misrepresentation, a right of action for damages against,

- (a) the responsible issuer, if a director or officer of the responsible issuer, or where the responsible issuer is an investment fund, the investment fund manager, authorized, permitted or acquiesced in the release of the document or the making of the public oral statement;
- (b) the person who made the public oral statement;
- (c) each director and officer of the responsible issuer who authorized, permitted or acquiesced in the release of the document or the making of the public oral statement;
- (d) the influential person;
- (e) each director and officer of the influential person who authorized, permitted or acquiesced in the release of the document or the making of the public oral statement; and
- (f) each expert where,
 - (i) the misrepresentation is also contained in a report, statement or opinion made by the expert,
 - (ii) the document or public oral statement includes, summarizes or quotes from the report, statement or opinion of the expert, and
 - (iii) if the document was released or the public oral statement was made by a

person other than the expert, the expert consented in writing to the use of the report, statement or opinion in the document or public oral statement.

(4) Failure to make timely disclosure - Where a responsible issuer fails to make a timely disclosure, a person or company who acquires or disposes of the issuer's security between the time when the material change was required to be disclosed in the manner required under this Act and the subsequent disclosure of the material change has, without regard to whether the person or company relied on the responsible issuer having complied with its disclosure requirements, a right of action for damages against,

- (a) the responsible issuer;
- (b) each director and officer of the responsible issuer who authorized, permitted or acquiesced in the failure to make timely disclosure; and
- (c) each influential person, and each director and officer of an influential person, who knowingly influenced,
 - (i) the responsible issuer or any person or company acting on behalf of the responsible issuer in the failure to make timely disclosure, or
 - (ii) a director or officer of the responsible issuer to authorize, permit or acquiesce in the failure to make timely disclosure.

(5) Multiple roles - In an action under this section, a person who is a director or officer of an influential person is not liable in that capacity if the person is liable as a director or officer of the responsible issuer.

(6) Multiple misrepresentations - In an action under this section,

- (a) multiple misrepresentations having common subject matter or content may, in the discretion of the court, be treated as a single misrepresentation; and
- (b) multiple instances of failure to make timely disclosure of a material change or material changes concerning common subject matter may, in the discretion of the court, be treated as a single failure to make timely disclosure.

(7) No implied or actual authority - In an action under subsection (2) or (3), if the

person who made the public oral statement had apparent authority, but not implied or actual authority, to speak on behalf of the issuer, no other person is liable with respect to any of the responsible issuer's securities that were acquired or disposed of before that other person became, or should reasonably have become, aware of the misrepresentation.

138.4 Burden of proof and defences - (1) Non-core documents and public oral statements - In an action under section 138.3 in relation to a misrepresentation in a document that is not a core document, or a misrepresentation in a public oral statement, a person or company is not liable, subject to subsection (2), unless the plaintiff proves that the person or company,

- (a) knew, at the time that the document was released or public oral statement was made, that the document or public oral statement contained the misrepresentation;
- (b) at or before the time that the document was released or public oral statement was made, deliberately avoided acquiring knowledge that the document or public oral statement contained the misrepresentation; or
- (c) was, through action or failure to act, guilty of gross misconduct in connection with the release of the document or the making of the public oral statement that contained the misrepresentation.

(2) Same - A plaintiff is not required to prove any of the matters set out in subsection (1) in an action under section 138.3 in relation to an expert.

(3) Failure to make timely disclosure - In an action under section 138.3 in relation to a failure to make timely disclosure, a person or company is not liable, subject to subsection (4), unless the plaintiff proves that the person or company,

- (a) knew, at the time that the failure to make timely disclosure first occurred, of the change and that the change was a material change;
- (b) at the time or before the failure to make timely disclosure first occurred, deliberately avoided acquiring knowledge of the change or that the change was a material change; or

(c) was, through action or failure to act, guilty of gross misconduct in connection with the failure to make timely disclosure.

(4) Same - A plaintiff is not required to prove any of the matters set out in subsection (3) in an action under section 138.3 in relation to,

- (a) a responsible issuer;
- (b) an officer of a responsible issuer;
- (c) an investment fund manager; or
- (d) an officer of an investment fund manager.

(5) Knowledge of the misrepresentation or material change - A person or company is not liable in an action under section 138.3 in relation to a misrepresentation or a failure to make timely disclosure if that person or company proves that the plaintiff acquired or disposed of the issuer's security,

- (a) with knowledge that the document or public oral statement contained a misrepresentation; or
- (b) with knowledge of the material change.

(6) Reasonable investigation - A person or company is not liable in an action under section 138.3 in relation to,

- (a) a misrepresentation if that person or company proves that,
 - (i) before the release of the document or the making of the public oral statement containing the misrepresentation, the person or company conducted or caused to be conducted a reasonable investigation, and
 - (ii) at the time of the release of the document or the making of the public oral statement, the person or company had no reasonable grounds to believe that the document or public oral statement contained the misrepresentation; or
- (b) a failure to make timely disclosure if that person or company proves that,
 - (i) before the failure to make timely disclosure first occurred, the person or company conducted or caused to be conducted a reasonable investigation, and
 - (ii) the person or company had no reasonable grounds to believe that the failure to make timely disclosure would occur.

(7) Factors to be considered by court - In determining whether an investigation was reasonable under subsection (6), or whether any person or company is guilty of gross

misconduct under subsection (1) or (3), the court shall consider all relevant circumstances, including,

- (a) the nature of the responsible issuer;
- (b) the knowledge, experience and function of the person or company;
- (c) the office held, if the person was an officer;
- (d) the presence or absence of another relationship with the responsible issuer, if the person was a director;
- (e) the existence, if any, and the nature of any system designed to ensure that the responsible issuer meets its continuous disclosure obligations;
- (f) the reasonableness of reliance by the person or company on the responsible issuer's disclosure compliance system and on the responsible issuer's officers, employees and others whose duties would in the ordinary course have given them knowledge of the relevant facts;
- (g) the period within which disclosure was required to be made under the applicable law;
- (h) in respect of a report, statement or opinion of an expert, any professional standards applicable to the expert;
- (i) the extent to which the person or company knew, or should reasonably have known, the content and medium of dissemination of the document or public oral statement;
- (j) in the case of a misrepresentation, the role and responsibility of the person or company in the preparation and release of the document or the making of the public oral statement containing the misrepresentation or the ascertaining of the facts contained in that document or public oral statement; and
- (k) in the case of a failure to make timely disclosure, the role and responsibility of the person or company involved in a decision not to disclose the material change.

(8) Confidential disclosure - A person or company is not liable in an action under section 138.3 in respect of a failure to make timely disclosure if,

- (a) the person or company proves that the material change was disclosed by the responsible issuer in a report filed on a confidential basis with the Commission under subsection 75 (3);
- (b) the responsible issuer had a reasonable basis for making the disclosure on a confidential basis;

- (c) where the information contained in the report filed on a confidential basis remains material, disclosure of the material change was made public promptly when the basis for confidentiality ceased to exist;
- (d) the person or company or responsible issuer did not release a document or make a public oral statement that, due to the undisclosed material change, contained a misrepresentation; and
- (e) where the material change became publicly known in a manner other than the manner required under this Act, the responsible issuer promptly disclosed the material change in the manner required under this Act.

(9) Forward-looking information -A person or company is not liable in an action under section 138.3 for a misrepresentation in forward-looking information if the person or company proves all of the following things:

1. The document or public oral statement containing the forward-looking information contained, proximate to that information,
 - i. reasonable cautionary language identifying the forward-looking information as such, and identifying material factors that could cause actual results to differ materially from a conclusion, forecast or projection in the forward-looking information, and
 - ii. a statement of the material factors or assumptions that were applied in drawing a conclusion or making a forecast or projection set out in the forward-looking information.
2. The person or company had a reasonable basis for drawing the conclusions or making the forecasts and projections set out in the forward-looking information.

(9.1) Same - The person or company shall be deemed to have satisfied the requirements of paragraph 1 of subsection (9) with respect to a public oral statement containing forward looking information if the person who made the public oral statement,
(a) made a cautionary statement that the oral statement contains forward looking information;
(b) stated that,

- (i) the actual results could differ materially from a conclusion, forecast or projection in the forward-looking information, and

(ii) certain material factors or assumptions were applied in drawing a conclusion or making a forecast or projection as reflected in the forward-looking information; and

(c) stated that additional information about,

(i) the material factors that could cause actual results to differ materially from the conclusion, forecast or projection in the forward-looking information, and

(ii) the material factors or assumptions that were applied in drawing a conclusion or making a forecast or projection as reflected in the forward-looking information,

is contained in a readily-available document or in a portion of such a document and has identified that document or that portion of the document. 2004, c. 31, Sched. 34, s. 13 (10).

(9.2) Same - For the purposes of clause (9.1) (c), a document filed with the Commission or otherwise generally disclosed shall be deemed to be readily available.

(10) Exception - Subsection (9) does not relieve a person or company of liability respecting forward-looking information in a financial statement required to be filed under this Act or forward-looking information in a document released in connection with an initial public offering.

(11) Expert report, statement or opinion - A person or company, other than an expert, is not liable in an action under section 138.3 with respect to any part of a document or public oral statement that includes, summarizes or quotes from a report, statement or opinion made by the expert in respect of which the responsible issuer obtained the written consent of the expert to the use of the report, statement or opinion, if the consent had not been withdrawn in writing before the document was released or the public oral statement was made, if the person or company proves that,

(a) the person or company did not know and had no reasonable grounds to believe that there had been a misrepresentation in the part of the document or public oral statement made on the authority of the expert; and

(b) the part of the document or oral public statement fairly represented the report, statement or opinion made by the expert.

(12) Same - An expert is not liable in an action under section 138.3 with respect to any part of a document or public oral statement that includes, summarizes or quotes from a report, statement or opinion made by the expert, if the expert proves that the written consent previously provided was withdrawn in writing before the document was released or the public oral statement was made

(13) Release of documents - A person or company is not liable in an action under section 138.3 in respect of a misrepresentation in a document, other than a document required to be filed with the Commission, if the person or company proves that, at the time of release of the document, the person or company did not know and had no reasonable grounds to believe that the document would be released.

(14) Derivative information - A person or company is not liable in an action under section 138.3 for a misrepresentation in a document or a public oral statement, if the person or company proves that,

(a) the misrepresentation was also contained in a document filed by or on behalf of another person or company, other than the responsible issuer, with the Commission or any other securities regulatory authority in Canada or a stock exchange and was not corrected in another document filed by or on behalf of that other person or company with the Commission or that other securities regulatory authority in Canada or stock exchange before the release of the document or the public oral statement made by or on behalf of the responsible issuer;

(b) the document or public oral statement contained a reference identifying the document that was the source of the misrepresentation; and

(c) when the document was released or the public oral statement was made, the person or company did not know and had no reasonable grounds to believe that the document or public oral statement contained a misrepresentation.

(15) Where corrective action taken - A person or company, other than the responsible issuer, is not liable in an action under section 138.3 if the misrepresentation or failure to make timely disclosure was made without the knowledge or consent of the person or company and, if, after the person or company became aware of the misrepresentation before it was corrected, or the failure to make timely disclosure before it was disclosed in the manner required under this Act,

(a) the person or company promptly notified the board of directors of the responsible issuer or other persons acting in a similar capacity of the misrepresentation or the failure to make timely disclosure; and

(b) if no correction of the misrepresentation or no subsequent disclosure of the material change in the manner required under this Act was made by the responsible issuer within two business days after the notification under clause (a), the person or company, unless prohibited by law or by professional confidentiality rules, promptly and in writing notified the Commission of the misrepresentation or failure to make timely disclosure.

Damages

138.5 (1) Assessment of damages - Damages shall be assessed in favour of a person or company that acquired an issuer's securities after the release of a document or the making of a public oral statement containing a misrepresentation or after a failure to make timely disclosure as follows:

1. In respect of any of the securities of the responsible issuer that the person or company subsequently disposed of on or before the 10th trading day after the public correction of the misrepresentation or the disclosure of the material change in the manner required under this Act, assessed damages shall equal the difference between the average price paid for those securities (including any commissions paid in respect thereof) and the price received upon the disposition of those securities (without deducting any commissions paid in respect of the disposition), calculated taking into account the result of hedging or other risk limitation transactions.

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2. In respect of any of the securities of the responsible issuer that the person or company subsequently disposed of after the 10th trading day after the public correction of the misrepresentation or the disclosure of the material change in the manner required under this Act, assessed damages shall equal the lesser of,
- i. an amount equal to the difference between the average price paid for those securities (including any commissions paid in respect thereof) and the price received upon the disposition of those securities (without deducting any commissions paid in respect of the disposition), calculated taking into account the result of hedging or other risk limitation transactions, and
 - ii. an amount equal to the number of securities that the person disposed of, multiplied by the difference between the average price per security paid for those securities (including any commissions paid in respect thereof determined on a per security basis) and,
 - (A) if the issuer's securities trade on a published market, the trading price of the issuer's securities on the principal market (as those terms are defined in the regulations) for the 10 trading days following the public correction of the misrepresentation or the disclosure of the material change in the manner required under this Act, or
 - (B) if there is no published market, the amount that the court considers just.
3. In respect of any of the securities of the responsible issuer that the person or company has not disposed of, assessed damages shall equal the number of securities acquired, multiplied by the difference between the average price per security paid for those securities (including any commissions paid in respect thereof determined on a per security basis) and,
- i. if the issuer's securities trade on a published market, the trading price of the issuer's securities on the principal market (as those terms are defined in the regulations) for the 10 trading days following the public correction of the misrepresentation or the disclosure of the material change in the manner required under this Act, or
 - ii. if there is no published market, the amount that the court considers just.

(2) Same - Damages shall be assessed in favour of a person or company that disposed of securities after a document was released or a public oral statement made containing a misrepresentation or after a failure to make timely disclosure as follows:

1. In respect of any of the securities of the responsible issuer that the person or company subsequently acquired on or before the 10th trading day after the public correction of the misrepresentation or the disclosure of the material change in the manner required under this Act, assessed damages shall equal the difference between the average price received upon the disposition of those securities (deducting any commissions paid in respect of the disposition) and the price paid for those securities (without including any commissions paid in respect thereof), calculated taking into account the result of hedging or other risk limitation transactions.

2. In respect of any of the securities of the responsible issuer that the person or company subsequently acquired after the 10th trading day after the public correction of the misrepresentation or the disclosure of the material change in the manner required under this Act, assessed damages shall equal the lesser of,

i. an amount equal to the difference between the average price received upon the disposition of those securities (deducting any commissions paid in respect of the disposition) and the price paid for those securities (without including any commissions paid in respect thereof), calculated taking into account the result of hedging or other risk limitation transactions, and

ii. an amount equal to the number of securities that the person disposed of, multiplied by the difference between the average price per security received upon the disposition of those securities (deducting any commissions paid in respect of the disposition determined on a per security basis) and,

(A) if the issuer's securities trade on a published market, the trading price of the issuer's securities on the principal market (as those terms are defined in the regulations) for the 10 trading days following the public correction of the misrepresentation or the disclosure of the material change in the manner required under this Act, or

(B) if there is no published market, the amount that the court considers just.

3. In respect of any of the securities of the responsible issuer that the person or company has not acquired, assessed damages shall equal the number of securities that

the person or company disposed of, multiplied by the difference between the average price per security received upon the disposition of those securities (deducting any commissions paid in respect of the disposition determined on a per security basis) and,

- i. if the issuer's securities trade on a published market, the trading price of the issuer's securities on the principal market (as such terms are defined in the regulations) for the 10 trading days following the public correction of the misrepresentation or the disclosure of the material change in the manner required under this Act, or
- ii. if there is no published market, then the amount that the court considers just.

(3) Same - Despite subsections (1) and (2), assessed damages shall not include any amount that the defendant proves is attributable to a change in the market price of securities that is unrelated to the misrepresentation or the failure to make timely disclosure.

138.6 (1) Proportionate liability - In an action under section 138.3, the court shall determine, in respect of each defendant found liable in the action, the defendant's responsibility for the damages assessed in favour of all plaintiffs in the action, and each such defendant shall be liable, subject to the limits set out in subsection 138.7 (1), to the plaintiffs for only that portion of the aggregate amount of damages assessed in favour of the plaintiffs that corresponds to that defendant's responsibility for the damages.

(2) Same - Despite subsection (1), where, in an action under section 138.3 in respect of a misrepresentation or a failure to make timely disclosure, a court determines that a particular defendant, other than the responsible issuer, authorized, permitted or acquiesced in the making of the misrepresentation or the failure to make timely disclosure while knowing it to be a misrepresentation or a failure to make timely disclosure, the whole amount of the damages assessed in the action may be recovered from that defendant.

(3) Same - Each defendant in respect of whom the court has made a determination under subsection (2) is jointly and severally liable with each other defendant in respect of whom the court has made a determination under subsection (2).

(4) Same - Any defendant against whom recovery is obtained under subsection (2) is entitled to claim contribution from any other defendant who is found liable in the action

138.7 (1) Limits on damages - Despite section 138.5, the damages payable by a person or company in an action under section 138.3 is the lesser of,
(a) the aggregate damages assessed against the person or company in the action; and
(b) the liability limit for the person or company less the aggregate of all damages assessed after appeals, if any, against the person or company in all other actions brought under section 138.3, and under comparable legislation in other provinces or territories in Canada in respect of that misrepresentation or failure to make timely disclosure, and less any amount paid in settlement of any such actions.

(2) Same - Subsection (1) does not apply to a person or company, other than the responsible issuer, if the plaintiff proves that the person or company authorized, permitted or acquiesced in the making of the misrepresentation or the failure to make timely disclosure while knowing that it was a misrepresentation or a failure to make timely disclosure, or influenced the making of the misrepresentation or the failure to make timely disclosure while knowing that it was a misrepresentation or a failure to make timely disclosure.

Procedural Matters

138.8 (1) Leave to proceed - No action may be commenced under section 138.3 without leave of the court granted upon motion with notice to each defendant. The court shall grant leave only where it is satisfied that,

- (a) the action is being brought in good faith; and
- (b) there is a reasonable possibility that the action will be resolved at trial in favour of the plaintiff.

(2) Same - Upon an application under this section, the plaintiff and each defendant shall serve and file one or more affidavits setting forth the material facts upon which each intends to rely.

(3) Same - The maker of such an affidavit may be examined on it in accordance with the rules of court.

(4) Same - A copy of the application for leave to proceed and any affidavits filed with the court shall be sent to the Commission when filed.

138.9 Notice - A person or company that has been granted leave to commence an action under section 138.3 shall,

- (a) promptly issue a news release disclosing that leave has been granted to commence an action under section 138.3;
- (b) send a written notice to the Commission within seven days, together with a copy of the news release; and
- (c) send a copy of the statement of claim or other originating document to the Commission when filed.

138.10 Restriction on discontinuation, etc., of action - An action under section 138.3 shall not be discontinued, abandoned or settled without the approval of the court given on such terms as the court thinks fit including, without limitation, terms as to costs, and in determining whether to approve the settlement of the action, the court shall consider, among other things, whether there are any other actions outstanding under section 138.3 or under comparable legislation in other provinces or territories in Canada in respect of the same misrepresentation or failure to make timely disclosure.

138.11 Costs - Despite the Courts of Justice Act and the Class Proceedings Act, 1992, the prevailing party in an action under section 138.3 is entitled to costs determined by a court in accordance with applicable rules of civil procedure.

138.12 Power of the Commission - The Commission may intervene in an action under section 138.3 and in an application for leave under section 138.8.

138.13 No derogation from other rights - The right of action for damages and the defences to an action under section 138.3 are in addition to, and without derogation from, any other rights or defences the plaintiff or defendant may have in an action brought otherwise than under this Part.

138.14 Limitation period - No action shall be commenced under section 138.3,

- (a) in the case of misrepresentation in a document, later than the earlier of,
 - (i) three years after the date on which the document containing the misrepresentation was first released, and
 - (ii) six months after the issuance of a news release disclosing that leave has been granted to commence an action under section 138.3 or under comparable legislation in the other provinces or territories in Canada in respect of the same misrepresentation;
- (b) in the case of a misrepresentation in a public oral statement, later than the earlier of,
 - (i) three years after the date on which the public oral statement containing the misrepresentation was made, and
 - (ii) six months after the issuance of a news release disclosing that leave has been granted to commence an action under section 138.3 or under comparable legislation in another province or territory of Canada in respect of the same misrepresentation; and
- (c) in the case of a failure to make timely disclosure, later than the earlier of,
 - (i) three years after the date on which the requisite disclosure was required to be made, and
 - (ii) six months after the issuance of a news release disclosing that leave has been granted to commence an action under section 138.3 or under comparable legislation in another province or territory of Canada in respect of the same failure to make timely disclosure.