

Cassels

**Day-To-Day
Securities
Compliance**

**WHAT EXECUTIVES
NEED TO KNOW**

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INTRODUCTION

Becoming an executive officer of a publicly traded company brings on responsibilities with respect to compliance in a very complex and ever-changing regulatory environment. A public company executive has to know how to navigate the obligations, restrictions and prohibitions under securities legislation and the regulations, notices, instruments, and policies adopted thereunder, as well as stock exchange rules and governance best practices. It can be a daunting task just getting on top of the basics of securities law compliance. But it is a necessary exercise as any failure to comply with securities law can expose a company and/or its officers and/or directors to enforcement proceedings, prosecution and/or civil liability.

This booklet is meant to provide an overview of the Ontario securities law basics that an officer of a company listed on the Toronto Stock Exchange (“**TSX**”) should know on a day-to-day basis. This document does not cover transactional aspects regulated by securities laws such as equity financings, take-over bids and mergers and acquisitions. Many securities laws, including those described in this document, are subject to nuances and exceptions. This document is intended to provide only a condensed overview and is therefore limited in nature and should not be regarded in any way as containing legal advice.

CONTINUOUS DISCLOSURE AND RELATED LEGAL REQUIREMENTS

A company that is a “reporting issuer” (i.e., a public company) or the equivalent in a province or territory of Canada is subject to ongoing disclosure requirements under securities laws known as “continuous disclosure obligations.”

Continuous disclosure obligations are divided in two main categories: (a) the timely dissemination of material information, and (b) the mandatory periodic disclosure of financial and other information.

It is very important for a public company executive in Canada to get a good grasp of these requirements which are outlined under National Instrument 51-102 — Continuous Disclosure Obligations (“**NI 51-102**”).

MATERIAL INFORMATION DISCLOSURE

News Release

A fundamental principle of securities law is the requirement on reporting issuers to disclose “material changes” in their affairs on a timely basis.

A “material change,” where used in relation to the affairs of a reporting issuer, 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 securities of the issuer and includes a decision to implement such a change made by the board of directors of the issuer or by senior management of the issuer who believe that confirmation of the decision by the board of directors is probable.

When a material change occurs in the affairs of a reporting issuer, the reporting issuer is required to immediately issue and file a press release describing the change and, as soon as practicable (but no later than 10 days after the change), file with the securities commissions a material change report as prescribed by Form 51-102F3. The press release, material change reports and other disclosure documents are filed at www.sedarplus.ca (“**SEDAR+**”).

What can be a delicate exercise for public company executives is to make materiality determinations. In making materiality determinations, it is necessary to take into account a number of factors that cannot be captured in a

simple bright-line standard or test, including the nature of the information itself, the volatility of the company's securities and prevailing market conditions.

Some guidance is provided by National Policy 51-201 — Disclosure Standards (“**NP 51-201**”) in determining whether certain events or information could be considered material and therefore should be disclosed.¹ The policy states that actual or proposed developments that are likely to give rise to material information and thus require prompt disclosure include, but are not limited to, the following types of events or information:

- **Changes in corporate structure** — including changes in share ownership that may affect control of the company, major reorganizations, amalgamations or mergers, and take-over bids, issuer bids or insider bids
- **Changes in capital structure** — including the public or private sale of additional securities, planned repurchases or redemptions of securities, planned splits of common shares or offerings of warrants or rights to buy shares, a share consolidation, share exchange or stock dividend, changes in a company's dividend payment or policies, the possible initiation of a proxy fight, and material modifications to the rights of security holders
- **Changes in financial results** — including a significant increase or decrease in near-term earnings prospects, unexpected changes in the financial results for any period, shifts in financial circumstances such as cash flow reductions, major asset write-offs or write-downs, changes in the value or composition of the company's assets, and any material change in the company's accounting policy
- **Changes in business and operations** — including any development that affects the company's resources, technology, products or markets, a significant change in capital investment plans or corporate objectives, major labour disputes or disputes with major contractors or suppliers, significant new contracts, products, patents or services or significant losses of contracts or business, significant discoveries by resource companies, changes to the board of directors or executive management, the commencement of, or developments in, material legal proceedings or regulatory matters, waivers of corporate ethics and conduct rules for officers, directors and other key employees, any notice that reliance on a prior audit is no longer permissible, and the delisting of the company's securities or their movement from one quotation system or exchange to another
- **Acquisitions and dispositions** — including significant acquisitions or dispositions of assets, property or joint venture interests, and acquisitions of other companies, including take-over bids and mergers
- **Changes in credit arrangements** — including the borrowing or lending of a significant amount of money, any mortgaging or encumbering of the company's assets, defaults under debt obligations, agreements to restructure debt, or planned enforcement procedures by a bank or any other creditors, changes in rating agency decisions, and significant new credit arrangements

Announcements of material changes should be factual and balanced. Unfavourable news must be disclosed just as promptly and completely as favourable news.

The TSX requires that all persons investing on the exchange have equal access to information that may affect investment decisions.² Accordingly, the TSX has timely disclosure requirements that are in addition to applicable statutory requirements under securities laws discussed above. The TSX requires timely disclosure of “material information” of a listed company, which it defines as any information relating to the business and affairs of a company that results in or would reasonably be expected to result in a significant change in the market price or value of the company's listed securities. The term “material information” is considered by the

¹ s. 4.3 of NP 51-201

² s. 406, Part IV of the Toronto Stock Exchange Company Manual

TSX to be broader in scope than the term “material change” used in the *Securities Act* (Ontario) (the “**Act**”). “Material information” also includes the disclosure of material facts that may not entail a material change.

According to securities law, a material fact is a fact that would reasonably be expected to have a significant effect on the market price or value of securities. A “material fact” unlike a “material change” is not confined to a change in business, operations, or capital of the reporting issuer.

A TSX listed company is required to disclose “material information” immediately upon the information becoming known to management or, in the case of information previously known, when it becomes apparent that the information is material. The immediate disclosure of the information is required to ensure that the information is available to all investors promptly and to reduce the possibility of people acting on undisclosed information.

Trading on the TSX is occasionally affected by rumours and speculations surrounding a listed company. When market activity is unduly influenced by the existence of rumours or speculations, the TSX, through Market Surveillance (Canadian Investment Regulatory Organization), may require an announcement by the listed company stating whether the rumours or speculations are factual or not. Disseminations by way of a press release are generally the most effective way to dispel rumours unduly influencing the market.

The overriding rule regarding disclosure is that significant announcements are required to be released immediately. While the TSX may permit certain press releases to be issued after the close of trading, the policy of immediate disclosure frequently requires press releases to be issued during trading hours, especially when an important corporate development has occurred.

The disclosure of “material information” may be delayed temporarily for reasons of corporate confidentiality where the immediate release of the information would be unduly detrimental to the interests of the listed company (e.g., it would prejudice the company’s ability to pursue specific and limited objectives or to complete a transaction or series of transactions that are underway). Disclosure of the information is unduly detrimental to the company if the potential harm to the company or investors, reasonably considered, outweighs the undesirable consequences of delaying disclosure.

Regardless of when an announcement of “material information” is released, Market Surveillance must be advised of its contents and supplied with a copy in advance of its release. Market Surveillance must also be advised of the proposed method of dissemination. If an announcement will be made during trading hours, Market Surveillance must receive advance notice. Where an announcement is to be released after the TSX has closed, Market Surveillance staff should be advised of the announcement before trading opens on the next trading day.

Speaking with Analysts

Issuers should not selectively disclose significant data, particularly financial information such as, in the case of mining companies for example, earnings forecasts and sales, cash costs, all-in sustaining costs and profit figures, or material operational information such as new reserves, resources and production numbers to analysts, investors and other market professionals rather than to the market as a whole. The issuer should not attempt to transform material information into non-material information by simply breaking the information into seemingly non-material pieces.³

³ s. 5.1(4) of NP 51-201

An issuer should not selectively confirm that a financial estimate in an analyst's report is "on target" or "too high" or "too low," whether directly or indirectly through implied "guidance."⁴

An issuer must also consider, when confirming information that was previously made public, whether the selective confirmation itself communicates information above and beyond the initial forecast and whether the additional information is material. A materiality determination will depend in large measure on how much time has passed between the original statement and the subsequent confirmation, as well as the timing of the two statements relative to the end of the company's fiscal reporting period and any intervening events.

One recommendation for avoiding selective disclosure issues is to provide details concerning areas of interest to analysts within the issuer's regular periodic disclosure documents. Regular and timely public dissemination of qualitative and quantitative information can assist in ensuring that analyst expectations are in line with the issuer's own expectations.

Issuers should also avoid redistributing analyst reports and third-party newsletters and tip sheets to their employees or persons outside the company. If a company posts on its website or otherwise publishes the names of the analysts who cover the company and/or their recommendations, the issuer should similarly post or publish the names and/or recommendations of all analysts who cover the company.

Analysts, investors, investment dealers and other market professionals who receive material undisclosed information from a company are "tippees" (discussed below).⁵ There is no exception to the tipping provisions under securities legislation for selective disclosures made to analysts under the cover of a confidentiality agreement.

An issuer should have a reasonable basis for presenting "financial outlooks" and other voluntary disclosure presenting certain forecast information such as expected revenues, net income, earnings per share and cash costs that are disseminated through news releases or posted on an issuer's website and forward-looking statements should include appropriate statements of risks and other cautionary language.⁶

Insider Trading and Tipping

Insider Trading Prohibition: Securities law prohibits a person or company in a special relationship with a reporting issuer from purchasing or selling securities of the reporting issuer with knowledge of a material fact or material change with respect to the reporting issuer that has not been generally disclosed.⁷

Tipping Prohibition: In addition, securities law prohibits a reporting issuer and a person or company in a special relationship with a reporting issuer from informing, other than in the necessary course of business, another person or company of a material fact or material change with respect to the reporting issuer before the material fact or material change has been generally disclosed.

"Generally disclosed" is not defined but court decisions indicate that information has been generally disclosed if: (i) the information has been disseminated in a manner calculated to effectively reach the marketplace (e.g., news release distributed through a widely circulated news service, or press conferences/conference calls with analysts that interested members of the public can listen to and prior notice of the call has been given by news release

⁴ s. 5.2 of NP 51-201

⁵ s. 5.4 of NP 51-201

⁶ See the section of this brochure entitled *Civil Liabilities for Misrepresentation Defenses — Forward Looking Information Defense*

⁷ See s. 76 of the Act for the insider trading and tipping prohibitions

containing certain information. See 3.5 (4) of NP 51-201), and (ii) public investors have been given a reasonable amount of time to analyze the information.

The filing of insider trading reports does not give licence to insiders to “trade” or “tip” with knowledge of undisclosed information.

Persons or companies in a “special relationship” with a reporting issuer include, but are not limited to, directors, officers or employees of the issuer and other insiders, affiliates, or associates of the issuer.

Persons or companies in a “special relationship” with a reporting issuer consist of:

- i) Insiders, affiliates, or associates of (a) the reporting issuer, (b) a person or company that is proposing to make a take-over bid for the securities of the reporting issuer, or (c) a person or company proposing to become a party to a reorganization, amalgamation, merger or arrangement or similar business combination with the reporting issuer or to acquire a substantial portion of its property;
- ii) Persons or companies engaged in or proposing to engage in any business or professional activity with or on behalf of the reporting issuer or with or on behalf of a person or company described in (i)(b) or (c);
- iii) Directors, officers, or employees of the reporting issuer or any person or company described in (i)(b) or (c) or (ii);
- iv) Persons or companies that learn of a material fact or material change with respect to the reporting issuer while the person or company was a person or company described in (i), (ii) or (iii); or
- v) Persons or companies that learn of a material fact or material change with respect to the reporting issuer from any other person or company described in (i), (ii), (iii), or (iv), including a person or company described in this clause, and knows or ought reasonably to have known that the other person or company is a person or company in such a relationship.

The Act also provides that every person or company in a special relationship with a reporting issuer who purchases or sells the securities of the reporting issuer with the knowledge of a material fact or material change with respect to the reporting issuer that has not been generally disclosed is liable (in addition to other criminal and regulatory penalties) to compensate the seller or purchaser of the securities, as the case may be, for damages as a result of the trade.⁸

In addition, the Act provides that every reporting issuer, person or company in a special relationship with a reporting issuer and a person or company that proposes to make a take-over bid for the securities of a reporting issuer, to become a party to a reorganization, amalgamation, etc. or to acquire a substantial portion of the property of a reporting issuer who informs another person or company of a material fact or material change with respect to the reporting issuer that has not been generally disclosed is liable (in addition to other criminal and regulatory penalties) to compensate for damages any person or company that thereafter sells securities of the reporting issuer to or purchases securities of the reporting issuer from the person or company that received the information.

The statutory defence available under the Act for these contraventions is that the person or company in the special relationship with the reporting issuer had reasonable grounds to believe that the material fact or material change had been generally disclosed or the material fact or change was known or ought reasonably to have been known to the seller or purchaser, as the case may be.

It is imperative that all officers, directors, employees and professional advisors of reporting issuers understand the necessity to: (i) keep undisclosed material information concerning the issuer confidential, (ii) release any such

⁸ s. 134 of the Act

information only to authorized individuals on a “need-to-know” basis and only in the necessary course of business (and emphasize the confidential nature of such information to the recipients thereof), and (iii) refrain from buying or selling securities of the issuer during periods where material facts or material changes remain undisclosed.

Insider Reporting

Insider reporting is a reporting requirement of “insiders” being the persons or entities subject to such a requirement (directors, officers, and 10% security holders). The main purpose of this requirement is to track trading patterns to enforce breaches of the insider trading prohibitions.

The main insider reporting requirements and exemptions as well as those requirements for certain insiders of reporting issuers are set out in National Instrument 55-104 — Insider Reporting Requirements and Exemptions (“NI 54-101”).

The term “insider” is broadly defined in the applicable legislation and includes:

- A director or officer of a reporting issuer
- A director or officer of a person or company that is itself an insider or subsidiary of a reporting issuer
- A person or company that has:
 - Beneficial ownership of, or control or direction over, directly or indirectly, securities of a reporting issuer carrying more than 10 per cent of the voting rights attached to all the reporting issuer’s outstanding voting securities, excluding, for the purpose of the calculation of the percentage held, any securities held by the person or company as underwriter in the course of a distribution, or
 - A combination of beneficial ownership of, and control or direction over, directly or indirectly, securities of a reporting issuer carrying more than 10 per cent of the voting rights attached to all the reporting issuer’s outstanding voting securities, excluding, for the purpose of the calculation of the percentage held, any securities held by the person or company as underwriter in the course of a distribution
- A reporting issuer that has purchased, redeemed, or otherwise acquired a security of its own issue, for so long as it continues to hold that security
- A person or company designated as an insider in an order made by the Commission in the public interest
- A person or company that is in a class of persons or companies designated under section 143(1) 40(v) of the Act as persons or companies who would reasonably be expected to have, in the ordinary course, access to material information about the business, operations, assets or revenue of the issuer

One of the most critical definitions for the purposes of the insider reporting requirements is “reporting insider.” It must be noted that to be a “reporting insider”, you must first be an “insider.” But only certain “insiders” fall within the definition of a “reporting insider.”

Section 1.1(1) of NI 55-104 provides that “reporting insider” means an insider of a reporting issuer if the insider is:

- a) The CEO, CFO, or COO of the reporting issuer, of a significant shareholder of the reporting issuer, or of a major subsidiary of the reporting issuer
- b) A director of the reporting issuer, of a significant shareholder of the reporting issuer or of a major subsidiary of the reporting issuer
- c) A person or company responsible for a principal business unit, division, or function of the reporting issuer
- d) A significant shareholder (i.e., a 10% holder) of the reporting issuer
- e) A significant shareholder based on post-conversion beneficial ownership (“post-conversion beneficial ownership” means assuming conversion of convertible securities, such as options, warrants or convertible

- debt instruments, that are convertible within 60 days) of the reporting issuer's securities and the CEO, CFO, COO, and every director of the significant shareholder based on post-conversion beneficial ownership
- f) A management company that provides significant management or administrative services to the reporting issuer or a major subsidiary of the reporting issuer, every director of the management company, every CEO, CFO and COO of the management company, and every significant shareholder of the management company
 - g) An individual performing functions similar to the functions performed by any of the insiders described in paragraphs (a) to (f)
 - h) The reporting issuer itself, if it has purchased, redeemed, or otherwise acquired a security of its own issue, for so long as it continues to hold that security, or
 - i) Any other insider that:
 - i) In the ordinary course receives or has access to information as to material facts or material changes concerning the reporting issuer before the material facts or material changes are generally disclosed, and
 - ii) Directly or indirectly exercises, or has the ability to exercise, significant power or influence over the business, operations, capital, or development of the reporting issuer.

Basically, a "reporting insider" includes all of the directors and the CEO, CFO, COO of the reporting issuer, of its significant shareholders, of its major subsidiaries and of its management company. It also includes any person responsible for a principal business unit, division, or function of the reporting issuer as well as a management company. The definition also captures the significant shareholders of the reporting issuer and its management company, and those significant shareholders based on post-conversion beneficial ownership. Any other "insider" who falls within the "basket clause" as described in (i) above as having received or access to material undisclosed information **and** significant power or influence over the reporting issuer is also included in the definition of "reporting insider."

All insiders who also fall within the definition of "reporting insider" must file insider reports.

Section 107(1) of the Act and NI 55-104 provide that an insider of a reporting issuer must file an initial insider report within 10 days of becoming an insider. This initial insider report must disclose all securities of the issuer which the insider "beneficially owned" or exercised control or direction over on the day he became an insider. All "securities" of the reporting issuer and "related financial instruments" held by the insider must be reported.

Section 107(2) of the Act, as modified by NI 55-104 provides that where an insider's direct or indirect beneficial ownership of, or control or direction over, securities of the reporting issuer changes from the latest insider report filed, he must file an updated insider report within 5 days after the date the change takes place.

There is no fee for filing an insider report, unless it is filed late. In such case, there is a fee of \$50 per calendar day per issuer up to a maximum of \$1,000 per issuer within any one year beginning on April 1st and ending on March 31st payable to the Ontario Securities Commission ("**OSC**").

An issuer is permitted to file on SEDI an "issuer grant report" in order to assist its insiders in reporting option and other incentive securities grants. If the issuer files an issuer grant report, then the reporting insider subject to such report will be exempt from filing an insider report about the grant within the required time frame and instead may file an alternative report on an annual basis. This exemption is available for the acquisition or specified disposition of a security of the reporting issuer under a compensation arrangement if (a) the reporting issuer has previously disclosed the existence and material terms of the compensation arrangement in an information circular or other public document filed on SEDAR+, (b) in the case of an acquisition of securities, the reporting issuer has previously filed in respect of the acquisition an issuer grant report on SEDI in

accordance with section 6.3, and (c) the director or officer complies with the alternative reporting requirement in section 6.4 of NI 55-104.

The System for Electronic Disclosure by Insiders (“**SEDI**”) is an internet based system for insider reporting. The SEDI website is located at www.sedi.ca. The aim of SEDI is to facilitate the filing of insider information by insiders and to provide easy access of this information to the public. The SEDI system is available at all times. To file information through the SEDI system, a person must first register as a SEDI user.

It should be noted that it is ultimately the insider’s obligation to file and that prior to filing an insider report, the insider or the insider’s agent must certify the information is true and complete in every respect. In the case of an agent, the certification is based on the agent’s best knowledge, information, and belief, but the insider is still responsible for ensuring that the information filed by the agent is true and complete.

Should you require any assistance in connection with the SEDI system, the help desk phone number is 1 800 219 5381.

PERIODIC DISCLOSURE

The other main component of the continuous disclosure obligations is periodic reporting via the filing of financial statements, annual information forms (“**AIF’s**”) in the case of non-venture issuers, management’s discussion & analysis (“**MD&A’s**”) and other documents by reporting issuers.

Unaudited Interim Financial Reports

A reporting issuer must file an interim financial report for each interim period (quarter) ended after it became a reporting issuer.⁹

Interim financial reports must be compiled and certified as required by the regulations and in accordance with accounting principles.¹⁰ Generally, a reporting issuer that is listed on the TSX must file its interim financial report on SEDAR+, on or before the earlier of the 45th day after the end of the interim period (for venture issuers it is 60 days) and the date of filing an interim financial report in a foreign jurisdiction for a period ending on the last day of the interim period.

An interim financial report must include the following:

- A statement of financial position as at the end of the interim period and a statement of financial position as at the end of the immediately preceding financial year, if any
- A statement of comprehensive income, a statement of changes in equity and a statement of cash flows, all for the year-to-date interim period, and comparative financial information for the corresponding interim period in the immediately preceding financial year, if any
- For interim periods other than the first interim period in a reporting issuer’s financial year, a statement of comprehensive income for the three month period ending on the last day of the interim period and comparative financial information for the corresponding period in the immediately preceding financial year, if any
- In the following circumstances, a statement of financial position as at the beginning of the immediately preceding financial year:

⁹ s. 4.3(1) of NI 51-102

¹⁰ s. 1.1 of NI 52-107 defines “accounting principles” as a body of principles relating to accounting that are generally accepted in a jurisdiction of Canada or a foreign jurisdiction and includes, without limitation, IFRS, Canadian GAAP and U.S. GAAP

- The reporting issuer discloses in its interim financial report an unreserved statement of compliance with International Accounting Standard 34 Interim Financial Reporting, and
- The reporting issuer
 - Applies an accounting policy retrospectively in its interim financial report
 - Makes a retrospective restatement of items in its interim financial report, or
 - Reclassifies items in its interim financial report
- Notes to the interim financial report¹¹

Generally, interim financial reports are not audited and, therefore, must be accompanied by a notice indicating that they have not been reviewed by an auditor if that is the case.

The board of directors must review and approve the interim financial reports prior to the filing and delivery of the reports to securityholders. However, the rule permits the board of directors to delegate the foregoing function to the audit committee of the board.

Audited Annual Financial Statements

Every reporting issuer that is listed on the TSX must file comparative financial statements annually on or before the earlier of 90 days from the end of its last financial year (it is 120 days for venture issuers) and the date of filing of annual financial statements in a foreign jurisdiction for its most recently completed financial year. These annual statements must include:

- A statement of comprehensive income, a statement of changes in equity, and a statement of cash flows for
 - The most recently completed financial year, and
 - The financial year immediately preceding the most recently completed financial year, if any
- A statement of financial position as at the end of each of the periods referred to in the first bullet
- In the following circumstances, a statement of financial position as at the beginning of the financial year immediately preceding the most recently completed financial year:
 - The reporting issuer discloses in its annual financial statements an unreserved statement of compliance with IFRS, and
 - The reporting issuer:
 - Applies an accounting policy retrospectively in its annual financial statements,
 - Makes a retrospective restatement of items in its annual financial statements, or
 - Reclassifies items in its annual financial statements
- Notes to the annual financial statements

All financial statements filed, or included in a document that is filed, by an issuer under National Instrument 51-102 Continuous Disclosure Obligations or National Instrument 71-102 Continuous Disclosure and Other Exemptions Relating to Foreign Issuers, other than acquisition statements, must be prepared in accordance with Canadian GAAP¹² applicable to publicly accountable enterprises.¹³ The *CICA Handbook* (the “**Handbook**”) indicates that save for certain exceptions, publicly accountable enterprises must apply the International Financial Reporting Standards.

¹¹ s. 4.3(2) of NI 51-102

¹² “Canadian GAAP” is defined to mean, “generally accepted accounting principles determined with reference to the Canadian Institute of Chartered Accountants (“**CICA**”) Handbook

¹³ s.3.2(1)(a) of NI 52-107

A reporting issuer must annually send a request form to the registered holders and beneficial owners of its securities, other than debt instruments, that the registered holders and beneficial owners may use to request a copy of the reporting issuer's annual financial statements and MD&A for the annual financial statements, the interim financial reports and MD&A for the interim financial statements, or both.¹⁴

If a registered holder or beneficial owner requests the reporting issuer's annual or interim financial statements, the reporting issuer must send a copy of the requested financial statements to the person or company that made the request, without charge, by the later of 10 calendar days after:

- The filing deadline for the financial statements requested, or
- After the date the issuer receives the request¹⁵

A reporting issuer is not required to send copies of annual financial statements or interim financial reports that were filed more than one year before the issuer receives the request. See also National Instrument 54-101, which prescribes a procedure for the distribution of shareholders' meeting-related materials, including annual financial statements, to beneficial owners of securities registered in the names of financial intermediaries or clearing agencies.

The audit committee must review the issuer's annual financial statements and interim financial reports before the issuer publicly discloses the information.¹⁶ The annual financial statements must be audited and approved by the board of directors of the reporting issuer.¹⁷ The approval should be evidenced by the signatures of one or more directors.¹⁸ In addition, the annual financial statements must be accompanied by a report of the auditor of the reporting issuer in accordance with the regulations.¹⁹

CEO and CFO Certification

A Chief Executive Officer and Chief Financial Officer have to certify annual financial statements, interim financial reports, and MD&A's as well as the AIF's. They have to certify, among other things, that:

- They have reviewed the documents to be certified
- The documents do not contain any misrepresentations or omit material facts, and
- The financial statements and other financial information fairly present the issuer's financial condition, results of operation and cash flow²⁰

Management's Discussion and Analysis and Annual Information Form Requirements

An MD&A is a narrative explanation, through the eyes of management, of how the company performed during the period covered by the financial statements, and of the company's financial condition and future prospects. The MD&A complements and supplements the financial statements and financial reports, but does not form part of the financial statements and financial reports. All reporting issuers must file an MD&A with respect to their annual financial statements and interim financial reports. The same filing deadlines applicable to interim

¹⁴ s. 4.6(1) of NI 51-102

¹⁵ s. 4.6(3) of NI 51-102

¹⁶ s. 2.3(5) of NI 52-110

¹⁷ s.4.5(1) of NI- 51-102

¹⁸ s. 158 of the CBCA

¹⁹ s. 158(2)(b) of the CBCA

²⁰ National Instrument 52-109 Certification of Disclosure in Issuers' Annual and Interim Filings

financial reports apply to the interim MD&A's and the same filing deadlines applicable to annual financial statements apply to the annual MD&A.

The content requirements for annual and interim MD&A's are set forth in Form 51-102F1.

Reporting issuers that publicly disclose forward-looking information in their public disclosure documents are required to discuss events and circumstances that occurred during the period to which the MD&A relates that are reasonably likely to cause actual results to differ materially from material forward-looking information for a period that is not yet complete that the reporting issuer previously disclosed to the public and the expected differences. If an issuer decides to withdraw previously disclosed material forward-looking information, it will be required to disclose this in its MD&A as well as the events and circumstances leading to its decision.²¹

If the MD&A or any disclosure document contains non-GAAP financial measures (e.g., cash costs per ounce, all-in sustaining costs) the issuer must include prescribed cautionary language and a reconciliation to the most directly comparable GAAP measure.²²

Note that where a reporting issuer sends an annual report containing the annual financial statements it is acceptable to include the annual MD&A in the annual report sent to securityholders.

Reporting issuers that are listed on the TSX are required to file an AIF prepared in accordance with Form 51-102F2 with the regulatory authorities for each financial year within 90 days after the end of the financial year.²³ An AIF must contain, among other information, detailed information with respect to the business of the reporting issuer. For additional requirements regarding AIF's refer to NI 51-102, Companion Policy 51-102CP and Form 51-102F2.

Business Acquisition Reports

If a reporting issuer completes a significant acquisition (see s. 8.3 of NI 51-102 for details on the determination of "significance"), it is required to file a Business Acquisition Report on Form 51-102F4 within 75 days after the date of the acquisition. The Business Acquisition Report describes the significant businesses acquired and their effect on the reporting issuer. Unless an exemption from inclusion is available, the Business Acquisition Report must also include annual and interim financial statements of the acquired business, together with pro forma financial statements. See Part 8 of the NI 51-102 for more details on the requirements relating to Business Acquisition Reports.

Shareholder Meetings

Companies governed by the *Canada Business Corporations Act* ("**CBCA**") must call an annual meeting of shareholders to elect directors, appoint an auditor and present audited financial statements of the Company no later than 15 months after its last annual meeting but no later than six months after the end of its preceding financial year.²⁴ The TSX requires each company listed on the TSX to hold an annual meeting of shareholders

²¹ s.5.8(5) of NI 51-102

²² National Instrument 52-112 Non-GAAP and Other Financial Measures Disclosure

²³ s. 6.2 of NI 51-102

²⁴ s. 133(1)(b) of the CBCA

within six months of the end of the company's fiscal year.²⁵ In addition, a company may call a special meeting at any time to consider matters beyond the annual business of the company.

National Instrument 51-102 contains the requirements for information circulars that must be sent (or made available) to securityholders of reporting issuers in connection with meetings of securityholders. Information circulars must be prepared in accordance with Form 51-102F5 and filed with the securities commissions. Included in the required disclosure is a detailed "statement of executive compensation," containing the information specified by Form 51-102F6 (Form 51-102F6V for venture issuers).

The timing for notice of meetings and other meeting materials to be sent and/or made available to shareholders pursuant to the "notice and access process" is governed by the issuer's governing corporate statute, its by-laws and by National Instrument 54-101 — Communication with Beneficial Owners of Securities of a Reporting Issuer.

Other Requirements

Part 12 of NI 51-102 also requires the filing of certain other documents, including documents affecting the rights of securityholders (articles, by-laws, shareholder rights plans, indentures...), material contracts, other than contracts entered in the ordinary course of business (although this exception does not apply to certain specified contracts, e.g., a material contract with an officer or director).

Provisions of material contracts may be redacted if disclosure would be seriously prejudicial to the issuer or would violate confidentiality provisions. Timing for filing material contracts is the same as for material change report if the making of the document is a material change or no later than time of the next AIF (or within 120 days of year end).

MINING COMPANIES — BASICS OF NI 43-101

Canada is a world leader in the mining sector, and has therefore developed an extensive compliance regime specific to this industry. In Canada, disclosure of scientific and technical information related to mineral projects is governed by National Instrument 43-101 — Standards of Disclosure for Mineral Projects ("**NI 43-101**"), including the Technical Report Form ("**43-101F1**") and Companion Policy ("**43-101CP**"). Disclosure obligations in Canada are also guided by the standards set out by the Canadian Institute of Mining, Metallurgy and Petroleum ("**CIM**").

The three pillars of the NI 43-101 are: (i) making disclosure of technical/scientific information on mineral projects the responsibility of an expert, the "qualified person"; (ii) making such disclosure subject to a comprehensive technical report prepared and signed by qualified persons; and (iii) the standardization of definitions with respect to mineral resources and mineral reserves.

QUALIFIED PERSONS

All disclosure of scientific or technical information made by a company on a material property must either be based upon information prepared by, or under the supervision of, a qualified person, or be approved by a qualified person. For this reason, qualified persons need to be involved in some capacity in the preparation of such disclosure and/or in technical reports, which are discussed below in more detail.

According to NI 43-101, a "qualified person" is an individual who:

²⁵ s. 464 of the TSX Company Manual

- Is an engineer or geoscientist with a university degree, or equivalent accreditation, in an area of geoscience, or engineering, relating to mineral exploration or mining
- Has at least five years of experience in mineral exploration, mine development or operation, or mineral project assessment, or any combination of these, that is relevant to his or her professional degree or area of practice
- Has experience relevant to the subject matter of the mineral project and the technical report
- Is in good standing with a professional association, and, in the case of a professional association in a foreign jurisdiction, has a membership designation that requires attainment of a position of responsibility in their profession that requires the exercise of independent judgment; and either a favourable confidential peer evaluation of the individual's character, professional judgement, experience, and ethical fitness, or a recommendation for membership by at least two peers, and demonstrated prominence or expertise in the field of mineral exploration or mining (a chart of acceptable foreign associations and membership designations is provided in Appendix A to 43-101CP).

In most cases, in Canada the qualified person needs to be independent of the company with respect to the preparation of technical reports.

A qualified person is considered independent if there is no circumstance that, in the opinion of a reasonable person aware of all relevant facts, could interfere with the qualified person's judgment regarding the preparation of the technical report. "Producing issuers" (i.e., issuers with gross revenues from mining operations of at least \$30 million for the most recently completed financial year, and \$90 million in the aggregate for the three most recently completed financial years) are exempt from the independence requirement with respect to the qualified person(s) signing its technical reports. Taken together, the provisions regarding qualified persons ensure that the technical reports supporting the information that companies disclose about mining operations is coming from individuals with enough background and independence to accurately assess and endorse such information.

All written disclosure of scientific or technical information about a mineral project on a property material to the issuer must include the name of the qualified person and the relationship to the issuer of the qualified person who prepared or supervised the preparation of the information that forms the basis for the written disclosure or approved the written disclosure.

TECHNICAL REPORTS

Upon becoming a public company in Canada, the company must file a technical report for each mineral property that is material to the company. NI 43-101 lays out the requirements necessary for such reports. It defines the report as one that is prepared and filed in accordance with NI 43-101 and 43-101F1, and includes, in summary form, all material scientific and technical information in respect of the subject property as of the effective date of the report.

The company must also file a technical report to support scientific information that is contained in certain documents filed or available to the public, including but not limited to: a prospectus; an information circular; an offering memorandum; an annual information form; or any other written disclosure made to the public that discloses mineral resources or reserves for the first time, or that discloses a related material change. Technical reports are not necessary when the mineral property is not material to the company or there has been no material change to a previously filed report.

STANDARDS AND DEFINITIONS

To ensure uniformity across the industry, the NI 43-101 has adopted the resources and reserves definitions that have been established by CIM. Pursuant to NI 43-101, except in certain circumstances, disclosure of a quantity and grade of mineralized material must be made using CIM standard definitions of “mineral resources” and “mineral reserves.” Mineral resources are defined by categories based upon the level of confidence associated therewith, ranging from “inferred resources,” being the least certain, to “indicated resources” and “measured resources” which are gradually more certain. Mineral reserves are mineral resources which have been supported by at least a preliminary feasibility study and have therefore economic feasibility. Again, mineral reserves are categorized on the basis of the associated level of certainty, with “probable reserves” being less certain than “proven reserves.” NI 43-101 provides certain exceptions in specified and restricted circumstances for “exploration targets,” “historical estimates” and the use of certain foreign codes, such as the JORC Code.

BASICS OF GOVERNANCE

Maintaining the highest standards of corporate governance has become a business imperative in Canada. Corporate governance regulation in Canada has largely been administered through a ‘best practices’ approach that relies on extensive guidance to maintain high standards of corporate behaviour.

SEPARATE ROLES OF DIRECTORS AND MANAGERS

One of the pillars of corporate governance in Canada is the separation of the roles and responsibilities of members of the board of directors from those of the officers (i.e., the senior executives and managers, of the corporation). The CBCA as well as the various provincial statutes require a clear division between the powers of the board of directors and those of the managers of the corporation.

In addition, the shareholders of a corporation have the ability to vote on matters that are presented to them at annual and special meetings and to elect the directors who are responsible for supervising the management, business activities, policies, and practices of the corporation.

While the directors may delegate some of their powers to officers in order to conduct the business of the corporation, ultimately the board members are accountable to the shareholders who elected them and can be subject to legal and regulatory liability for the corporation’s activities.

The separation of roles between the board and the management of the corporation is a crucial aspect of corporate governance in Canada because the board is elected by, and represents, the shareholders who are the owners of the corporation. Therefore, the board creates the vision and direction for the corporation and evaluates the performance of management in achieving this vision.

The board’s responsibility for monitoring the performance of management encourages transparency and accountability, helping to ensure that the corporation’s leaders perform their duties in the best interests of the corporation.

COMPOSITION OF THE BOARD OF DIRECTORS

Under the CBCA, a minimum of 25-percent of the directors of a corporation must be resident Canadians. “Resident Canadian” is defined in the CBCA to include Canadian citizens and persons holding permanent resident status who are “ordinarily resident in Canada.” Corporations incorporated in certain provinces, such as British Columbia and Ontario, are not subject to residency requirements for directors.

NATIONAL POLICY 58-201 — CORPORATE GOVERNANCE GUIDELINES

In addition to the legislated requirements, National Policy 58-201 — Corporate Governance Guidelines (“**NP 58-201**”), was enacted to provide public companies with guidance on corporate governance with a view to achieving the right balance between providing protection to investors and maintaining fair and efficient capital markets. Set out below are some of the guidelines of NP 58-201 related to the composition and operation of the board.

Director Independence

NP 58-201 provides that boards should have a majority of independent directors and that the chair of the board should be independent. If a corporation does not have an independent chair, an independent director should be appointed to act as “lead director.”

NP 58-201 recommends that the independent directors hold regularly scheduled meetings without the attendance of the non-independent directors.

A director is considered independent if he or she has no direct or indirect “material relationship” with the corporation. A “material relationship” is one which could, in the view of the board, be reasonably expected to interfere with the exercise of the director’s independent judgement.

NP 58-201 also sets out some specific instances in which directors would be deemed not to be independent.

The Board Mandate

NP 58-201 recommends that the directors develop a clear board mandate that acknowledges responsibility for the stewardship of the corporation, including:

- The corporation’s corporate governance approach and principles
- The integrity of the Chief Executive Officer (“**CEO**”) and that the CEO and other executive officers create a culture of integrity throughout the organization
- Adopting a strategic planning process
- Identifying risks to the corporation’s business and ensuring the implementation of appropriate systems to manage these risks
- Providing for succession planning
- Adopting a communication policy
- The corporation’s internal control and management information systems

The mandate should also set out the expectations and responsibilities of directors regarding their fundamental duties and responsibilities, including the board’s expectations regarding directors’ attendance at meetings.

Position Descriptions

NP 58-201 also recommends that the board develop position descriptions for the chair of the board and the chair of each board committee. As well, the board should work with the CEO to develop a CEO position description.

Education and Ethics

NP 58-201 recommends that the board ensure that new directors receive comprehensive orientation and that all directors are provided continuing education to improve their skills and abilities as directors.

As well, the board should adopt a written code of business conduct that serves to promote personal integrity and deter potential wrongdoing by directors, officers, and employees of the corporation.

COMMITTEES OF THE BOARD

It is recommended, and in some cases mandatory, that the board appoint committees to be responsible for various activities. For example, the appointment of an audit committee is mandated by National Instrument 52-110 — Audit Committees (“**NI 52-110**”), while NP 58-201 recommends the appointment of a nominating committee and compensation committee.

Audit Committee

NI 52-110 mandates that public corporations must have an audit committee and sets out the requirements for such an audit committee.

The audit committee must be composed of at least three directors and all members must be independent and financially literate. The independence requirements for members of the audit committee are more restrictive than the independence requirements for a member of the board.

The audit committee must have a written charter that sets out its mandate and responsibilities, including:

- Recommending the external auditors and their compensation to the board
- Directly overseeing the work of the external auditor
- Reviewing the corporation’s financial statements and other related information before they are publicly disclosed
- Establishing procedures for the treatment of complaints received by the corporation regarding accounting matters
- Pre-approval of all non-audit services provided by the external auditor

Compensation Committee

NP 58-201 recommends that a compensation committee be appointed to review and recommend the compensation policies and compensation levels to the board.

It is recommended that the compensation committee should be composed entirely of independent directors and be given the authority to engage and compensate any outside advisor necessary to permit it to carry out its duties.

The compensation committee should have a written charter that sets out its purpose and responsibilities, including:

- Reviewing and approving goals and objectives relevant to the CEO’s compensation, evaluating the CEO’s performance in light of those goals and objectives and determining his or her compensation level
- Making recommendations to the board regarding the compensation of non-CEO officers and directors
- Reviewing the disclosure of executive compensation before it is publicly released

Nominating Committee

NP 58-201 recommends that a nominating committee be appointed to be responsible for identifying individuals qualified to become new directors and recommending new directors to the board.

It is recommended that the nominating committee should be composed entirely of independent directors and be given the authority to engage and compensate any outside advisor necessary to permit it to carry out its duties.

The nominating committee should have a written charter that sets out its purpose and responsibilities. In carrying out its responsibilities in recommending new directors, the nominating committee should consider:

- The competencies and skills the board should possess, as a whole

- The competencies and skills of each existing director
- The competencies and skills each new nominee will bring to the board

DISCLOSURE OF CORPORATE GOVERNANCE PRACTICES

National Instrument 58-101 — Disclosure of Corporate Governance Practices (“**NI 58-101**”) sets out the disclosure and filing requirements related to corporate governance practices.

The form requirement for NI 58-101 requires that public corporations disclose information about their board, including the identity of independent and non-independent directors, whether or not a majority of directors are independent, whether or not the independent directors hold regularly scheduled meetings and whether the chair of the board is independent. Where there is not a majority of independent directors, the independent directors do not hold meetings or the chair is not independent, corporations must disclose what the board does to facilitate independent judgement.

Further, corporations must disclose the board mandate, positions descriptions, the orientation and continuing education measures, the code of ethical business conduct, the process for identifying and nominating the board, and how compensation is determined.

This disclosure allows investors to make informed decisions about the nominees who are being presented for election to the board of directors.

MAJORITY VOTING POLICY

In recent years there has been a push in Canadian governance circles to give more power to shareholders with respect to the election of directors of public companies. In this connection, many public companies have adopted “Majority Voting Policies” and other best practices to address this trend.

The CBCA mandates majority voting for federally incorporated reporting issuers. They must allow shareholders to vote “for” or “against” individual director nominees in an uncontested election, rather than “for” or “withhold.” Subject to the issuer’s articles, where only one nominee is up for election for each board seat and less than 50% of the votes cast by shareholders are “for” a particular director nominee, such nominee will not be elected as a director. However, if an incumbent director is not elected by a majority of “for” votes at the meeting, s/he will still be permitted to continue in office until the earlier of (a) the 90th day after the day of the election; and (b) the day on which their successor is appointed or elected.

A Majority Voting Policy is a policy adopted by a public company that requires a director who receives a majority of votes cast “withheld” from him or her to immediately tender his or her resignation to the board to be effective upon acceptance by the board. Under the TSX Company Manual each TSX listed issuer is required to:

- Elect directors on an individual basis (i.e., no slate voting is permitted)
- Hold elections for all directors (i.e., staggered board are, as a matter of principle, no longer permissible for TSX listed issuers)
- Adopt a Majority Voting Policy for directors for uncontested meetings (not required for CBCA companies), and
- Promptly issue a news release providing detailed disclosure of the voting results for the election of directors

BOARD RENEWAL AND DIVERSITY

NI 58-101 includes corporate governance disclosure requirements concerning board renewal and the representation of women on boards and in executive officer positions.

Under the instrument, issuers are required to disclose if they have adopted term limits for directors or other mechanisms of board renewal (for example, the regular assessment of the effectiveness and contribution of directors or mandatory retirement ages), and a description of such term limits or other mechanisms. If term limits or other mechanisms have not been adopted, the issuer must explain why.

Issuers are also required to disclose whether they have adopted policies relating to the identification and nomination of women on boards, including a short summary of the policy's objectives and key provisions, implementation measures, annual and cumulative progress in achieving the policy's objectives and effectiveness measures. If written policies have not been adopted, the issuer must explain why.

Issuers are required to disclose if and how they consider the number of women on their board when identifying and nominating candidates for election or re-election. If an issuer does not give this consideration, the issuer must explain why.

Issuers are also required to disclose if and how they consider the number of women executive officers that they have when making executive officer appointments. If an issuer does not give this consideration, the issuer must explain why.

Issuers are required to disclose whether they have adopted targets regarding women representation on their board and in executive officer positions, a description of the adopted targets, and annual and cumulative progress in achieving such targets. If targets have not been adopted, the issuer must explain why.

Finally, issuers are required to disclose the number and proportion of (a) women directors on the issuer's board, and (b) women in executive officer positions at the issuer (including at its *major subsidiaries*).

Pursuant to the CBCA, all federally incorporated reporting issuers must provide a report to shareholders and Corporations Canada on the representation of women, Indigenous peoples (First Nations, Inuit, and Métis), members of visible minorities and persons with disabilities (together, the Designated Groups) among the directors and members of senior management.

Corporation Canada has published guidelines (<https://ised-isde.canada.ca/site/corporations-canada/en/business-corporations/diversity-boards-directors-and-senior-management>) to assist in standardizing the format for disclosure and clarifying required disclosure with respect to term limits or other mechanisms of board renewal, written policies relating to the identification and nomination of directors from Designated Groups, consideration of levels of representation from Designated Groups for the board and senior management, and targets and recommended formats for representation of Designated Groups.

GUIDANCE FOR SHAREHOLDERS

In addition to the legislation and formal guidelines published by regulators, corporate governance in Canada is also influenced by certain shareholder advisory service organizations. These organizations monitor and analyze public corporations' corporate governance practices and often provide voting recommendations to shareholders.

Institutional Shareholder Services Inc. ("**ISS**") is one of the influential shareholder service organizations. ISS sets out its own corporate governance guidelines which are often more extensive than mandatory requirements or regulator guideline recommendations. ISS reviews a corporation's governance and will advise institutional shareholders how to vote their shares. These types of shareholder services have a strong influence on shareholder decision-making. Glass Lewis is another very influential shareholder advisory service.

For example, ISS recommends that shareholders withhold their votes from candidates who served on the board and have a record of less than 75% attendance at board meetings without acceptable reasons. Shareholders are also advised to decline to vote in favour of situations where a former CEO or CFO of the corporation is on the audit committee.

When assessing nominees to serve as directors, ISS recommends that shareholders consider the fundamental principles of accountability, responsiveness, independence, and board capability.

ISS also places a strong emphasis on board independence from management. Practices that facilitate independence include:

- Selecting an independent chair of the board
- Structuring executive compensation policies and practices to eliminate the potential for self-dealing
- Taking steps to reduce practices that lead to risky decision-making, and
- Dealing quickly and aggressively with any potential conflicts of interests that may arise

Finally, the skills, experience, and competencies of board members, as well as their ability to devote time to the board in addition to meeting their other existing professional and personal responsibilities, are all items which ISS will review and which should be carefully considered in the selection of the board.

CIVIL LIABILITIES FOR MISREPRESENTATION

Part XXIII.1 of the Act provides securityholders who buy or sell securities on a stock exchange or other secondary markets, a limited statutory right to sue the company and its directors, management, controlling shareholders and others if the company's continuous disclosure is improper. Aggrieved investors have the following main possible civil causes of action for continuous disclosure violations involving: (a) misrepresentations in documents released by a responsible issuer; (b) misrepresentations in public oral statements by a responsible issuer; (c) misrepresentation by influential persons with actual, implied or apparent authority and (d) the failure to make timely disclosure by a responsible issuer.²⁶ For purposes of this chapter, the term "disclosure violation" means one or more of the above causes of action.

Each of these causes of action is briefly described below, as well as the available defences, burdens of proof and damages under Part XXIII.1 of the Act.

APPLICATION

Part XXIII.1 of the Act applies to secondary market disclosure and does not apply to prospectus offerings, private placements, take-over bids, or issuer bids, except as prescribed by the Regulations.

MISREPRESENTATIONS IN DOCUMENTS RELEASED BY RESPONSIBLE ISSUERS

Where a "responsible issuer"²⁷ ("RI") or a person with actual, implied or apparent authority to act on behalf of a RI releases a document that contains a "misrepresentation,"²⁸ 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

²⁶ s. 138.3(1-4) of the Act

²⁷ s. 138.1 of the Act defines a "responsible issuer" as: (a) a reporting issuer; or (b) any other issuer with a real and substantial connection to Ontario, any securities of which are publicly traded

²⁸ s. 1(1) of the Act defines a "misrepresentation" as: (a) an untrue statement of material fact; or (b) an omission to state a material fact that is required to be stated or that is necessary to make a statement not misleading in the light of the circumstances in which it was made

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.²⁹

MISREPRESENTATIONS IN PUBLIC ORAL STATEMENTS BY RESPONSIBLE ISSUERS

A suit can also be commenced for misrepresentations in “public oral statements”³⁰ (“POS”) made by a RI. The Act states that where a person with actual, implied or apparent authority to speak on behalf of a RI makes a POS that relates to the business or affairs of the RI and that contains a misrepresentation, a person or company who acquires or disposes of an issuer’s security during the period between the time when the POS was made and the time when the misrepresentation contained in the POS was publicly corrected has, without regard to whether the person or company relied on the misrepresentation, a right of action for damages.³¹

MISREPRESENTATION BY AN INFLUENTIAL PERSON

Where an “influential person”³² (an “IP”) 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 POS that relates to a RI 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.³³

FAILURE TO MAKE TIMELY DISCLOSURE

The Act also provides a plaintiff with a right of action where the RI fails to make timely disclosure of a material change. Section 138.3(4) of the Act states that where a RI fails to make timely disclosure, a person or company who acquires or disposes of an 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 has, without regard to whether the person or company relied on the RI having complied with its disclosure requirements, a right of action for damages.

BURDEN OF PROOF

The burden of proof varies depending on the type of document and defendant.

Where a misrepresentation involves a non-core document or POS, a plaintiff must prove that the person or company: (a) *knew*, at the time that the document was released or POS was made, that the document or POS contained a misrepresentation; (b) at or before the time that the document was released or the POS was made, *deliberately avoided acquiring knowledge* that the document or POS contained the misrepresentation;

²⁹ s. 138.3(1) of the Act

³⁰ Section 138.1 of the Act defines a “public oral statement” as an oral statement made in circumstances in which a reasonable person would believe that information contained in the statement would become generally disclosed. Such circumstances might include, among others, statements made by investor relations persons, a chairman of the board at a RI’s annual general meeting, or the president of a RI on a conference call with investment analysts

³¹ s. 138.3(2) of the Act

³² s. 138.1 of the Act defines an “influential person” in respect of a RI to mean a control person, a promoter, an insider who is not a director or officer of the RI, or an investment fund manager, if the RI is an investment fund

³³ s. 138.3(3) of the Act

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 POS that contained the misrepresentation (collectively, “Knowledge/Gross Misconduct Requirement”).³⁴

A plaintiff does not have to establish the Knowledge/Gross Misconduct Requirement involving misrepresentation in a non-core document or POS in an action against an expert; the plaintiff merely has to establish a misrepresentation and the onus shifts to the defendant.³⁵

In an action for a failure to make timely disclosure, the plaintiff must also establish a Knowledge/Gross Misconduct Requirement by proving 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. However, the plaintiff does not have to establish the Knowledge/Gross Misconduct Requirement in any proceeding against a RI, an officer of the RI, an investment fund manager, or an officer of the investment fund manager.³⁶

The Act does not provide a definition for the term “non-core document,” however, it defines the term “document” and more importantly the term “core document.”³⁷ What constitutes a core document varies slightly depending on the defendant. Where used in relation to:

- A director of the RI who is not also an officer of the RI
- An IP, other than an officer of the RI or an investment fund manager where the RI is an investment fund, or
- A director or officer of an IP who is not also an officer of the RI, other than an officer of an investment fund manager

a core document consists of a prospectus, take-over bid circular, an issuer bid circular, a directors’ circular, a notice of change or variation in respect of a take-over bid circular issuer bid circular or 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 RI (collectively, the “Director/IP Core Documents”).

Where used in relation to:

- A RI or an officer of the RI
- An investment fund manager, where the RI is an investment fund, or
- An officer of an investment fund manager, where the RI is an investment fund

a core document consists of the Director/IP Core Documents plus a material change report required by the Act. Other core documents may be added pursuant to the Proposed Regulations under the Act.

It is noted that Part XXIII.1 of the Act does not apply to, for example, prospectuses, take-over bids and issuer bids, yet they are included in the list of core documents. On its face, this seems contradictory, but it is not. The prospectus liability regime under the Act still provides a right of action for a person who bought securities

³⁴ s. 138.4 of the Act

³⁵ s. 138.4(2) of the Act

³⁶ s. 138.4(3) and (4) of the Act

³⁷ s. 138.1 of the Act

pursuant to the prospectus and not any other person. However, Part XXIII.1 of the Act now gives a right of action to a person who bought or sold a security of the RI during the disclosure violation period in the secondary market for a misrepresentation in the same prospectus while such prospectus contained in a misrepresentation that was not corrected.

DEFENCES

Part XXIII.1 of the Act provides a number of defences, each of which are briefly described below.

A Plaintiff Had Knowledge of Misrepresentation or Material Change

A defendant has a defence where he, she or it proves that the plaintiff acquired or disposed of the RI's securities while the plaintiff had knowledge that the document or POS contained a misrepresentation or had knowledge of the material change.³⁸

Reasonable Investigation Defense

The Act provides a person or company with a reasonable investigation or due diligence defense³⁹ in relation to:

- A misrepresentation if that person or company proves that: (i) before the release of a document or the making of a POS 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 POS, the person or company had no reasonable grounds to believe that the document or POS contained the misrepresentation, or
- 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 the timely disclosure would occur

The reasonable investigation defence is essentially a question of fact and depends on the circumstances and person involved. The Act sets forth various factors that a court would consider in determining whether an investigation was reasonable or whether a person or company is guilty of gross misconduct.⁴⁰

Confidential Disclosure Defense

The Act provides for a confidential disclosure defense.⁴¹ The RI's obligations under Ontario securities law to make a material change report allows, in certain instances, a reporting issuer to file a confidential material change report. The five part test that a defendant must establish in order to successfully assert the defence involves the following:

- The person or company proves the material change was disclosed by the RI in a report filed on a confidential basis with the OSC in accordance with the Act
- The RI had a reasonable basis for making the disclosure on a confidential basis
- 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

³⁸ s. 138.4(5) of the Act

³⁹ s. 138.4(6) of the Act

⁴⁰ s. 138.4(7) of the Act

⁴¹ s. 138.4(8) of the Act

- The person or company or RI did not release a document or make a POS that, due to the undisclosed material change, contained a misrepresentation, and
- Where the material change became publicly known in a manner other than the manner required under the Act or the regulations, the RI promptly disclosed the material change in the manner required under the Act or the regulations⁴²

Forward-Looking Information Defense

The Act provides a defendant with a forward-looking information defense if the company or person proves that:

- The document or POS containing the forward-looking information contained, proximate to the forward-looking 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 in the forward-looking information, and
- The person or company had a reasonable basis for drawing the conclusions or making the forecasts or projections set out in the forward-looking information⁴³

The forward-looking information defense does not apply to a person or company in respect of forward-looking information contained in the prospectus of the RI filed in connection with the initial public distribution of securities of the RI or contained in financial statements prepared by the financial issuer.⁴⁴

Reliance on Expert's Report, Statement or Opinion Defense

The Act provides that a person or company (other than the expert) is not liable with respect to any part of the document or POS that includes, summarizes or quotes from a report, a statement or opinion made by the expert in respect of which the RI obtained the written consent of the expert to use the report, statement or opinion, if the consent had not been withdrawn in writing before the document was released or the POS 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 POS made on the authority of the expert; and (b) the part of the document or POS fairly represented the report, statement or opinion made by the expert.⁴⁵

Expert's Withdrawal of Consent Defense

This defense is only available to experts. The Act states that an expert is not liable with respect to any part of a document or POS 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 POS was made.⁴⁶

⁴² s. 138.4(8) of the Act

⁴³ s. 138.4(9) of the Act. See also s. 138.4(9) of the Act with respect to POS containing forward looking information

⁴⁴ s. 138.4(10) of the Act

⁴⁵ s. 138.4(11) of the Act

⁴⁶ s. 138.4(12) of the Act

Leaked Document Defense

The Act states that a person or company is not liable in a proceeding involving a misrepresentation in a document, other than a document required to be filed with the OSC, 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.⁴⁷

Derivative Information Defense

Certain documents may incorporate by reference information that was derived from other sources. The Act states that a person or company is not liable for a misrepresentation in a document or a POS, if the person or company proves that:

- A misrepresentation was also contained in a document filed by or on behalf of another person or company, other than the RI, with the OSC 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 OSC or that other securities' regulatory authority in Canada or a stock exchange before the release of a document or the POS made by or on behalf of the RI
- The document or POS contained a reference identifying the document that was a source of the misrepresentation, and
- When the document was released or the POS was made, the person or company did not know and had no reasonable grounds to believe that the document or POS contained a misrepresentation⁴⁸

Whistle-Blower Defense

The Act states that a person or company, other than the RI, is not liable 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 disclosure violation before it was corrected: (a) the person or company promptly notified the board of directors of the RI or other persons acting in a similar capacity of the disclosure violation; and (b) if no correction of the disclosure violation was made by the RI within two business days after notice of the disclosure violation, the person or company, unless prohibited by law or by professional confidentiality rules, promptly and in writing notified the OSC of the disclosure violation.⁴⁹

Loss Causation Defence

Lastly, another defence available to defendants is the loss causation defence where assessed damages shall not include any amount a defendant proves is attributable to a change in the market price of securities that is unrelated to the disclosure violation.⁵⁰

DAMAGES

Damages are available for plaintiffs who *acquire* an issuer's securities after the release of a document or making a POS containing a misrepresentation or after a failure to make timely disclosure as follows:

- In respect of any of the securities of the RI 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

⁴⁷ s. 138.4(13) of the Act

⁴⁸ s. 138.4(14) of the Act

⁴⁹ s. 138.4(15) of the Act

⁵⁰ s. 138.5(3) of the Act

material change in the manner required under the Act or the regulations, 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

- In respect of any of the securities of the RI 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 the Act or the regulations, assessed damages shall equal the lesser of:
 - 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
 - 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,
 - 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 the Act or the regulations, or
 - If there is no published market, the amount that the court considers just
- In respect of any of the securities of the RI 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
 - 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 the Act or the regulations, or
 - If there is no published market, the amount that the court considers just⁵¹

Damages are also available for plaintiffs who *dispose* of an issuer's securities after the release of a document or making a POS containing a misrepresentation or after a failure to make timely disclosure as follows:

- In respect of any of the securities of the RI 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 the Act or the regulations, 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
- In respect of any of the securities of the RI 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 the Act or the regulations, assessed damages shall equal the lesser of:

⁵¹ s. 138.5(1) of the Act

- 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
- 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
 - 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 the Act or the regulations, or
 - If there is no published market, the amount that the court considers just
- In respect of any of the securities of the RI 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
 - 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 the Act or the regulations, or
 - If there is no published market, then the amount that the court considers just⁵²

These damage amounts shall not include any amount that the issuer proves is attributable to a change in the market price of the securities that is unrelated to the misrepresentation or the failure to make timely disclosure.⁵³

CONCLUSION

Securities law compliance is becoming more and more of a complex exercise for public company executives on a daily basis. However, the core principle remains the same; the protection of the integrity of capital markets by ensuring that an informational playing field is present for all participants through disclosure and other requirements. If you have any questions or wish to discuss further, please do not hesitate to contact **André Boivin** at **416 860 6580** or e-mail at aboivin@cassels.com or contact any other member of our [securities group](#).

⁵² s. 138.5(2) of the Act

⁵³ s. 138.5(3) of the Act

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