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REGULATION OF CANADIAN CAPITAL MARKETS IN THE 1990s: THE UNITED STATES IN THE DRIVER'S SEAT

Cally Jordan†

Abstract: This Article looks at the regulatory techniques that have been adopted in a small but developed market, Canada, in response to the increasing integration of the North American economy and internationalization of capital markets. One of the most comprehensive experiments has been the Multijurisdictional Disclosure System (MJDS) implemented in Canada and the United States in 1991. Based on principles of reciprocal recognition, the MJDS has in fact created greater pressures for harmonization of the two regulatory regimes and, on the Canadian side, prompted regulatory innovations which have attempted to keep Canadian markets in the global game.

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I. INTRODUCTION

The last few years have seen a quiet upheaval on the regulatory scene with respect to issuers and capital markets in Canada. The Canadian regulatory regime, particularly that of Ontario, its principal jurisdiction, has been

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shaken to its roots. Several inexorable forces have been at work, among them the increasing economic integration of North America (most strikingly observed in its capital markets) and the dramatic internationalization of capital markets.

The case of Canada is an interesting one. It is a small but highly developed capital market, with a securities regulatory regime which is innovative in many respects, and which still shows traces of British influences, but is now inextricably caught in the gears of the U.S. Securities and Exchange Commission ("SEC") machinery.

To add to the complexity of the situation, and never far from the surface in Canadian affairs, is the constitutional issue: the regulatory structure is the object of competing jurisdictional claims between the federal and provincial governments. This is the unfortunate legacy of certain Privy Council decisions in the 1930s which fostered a characterization of

1 In 1994, the TSE was the 7th largest trading market in the world, with a domestic share market capitalization of C$315,054.0 million. In 1993, the TSE's market capitalization was C$325,246.8 million, which placed it 8th worldwide. FIBV Pairs Annual Statistical Report.

2 For example, in Lymburn v. Mayland, A.C. 318 (P.C. 1932), the Privy Council upheld an Alberta statute which provided that no person may trade in securities unless registered with the Attorney-General. The Privy Council held that the statute was not invalid in relation to Dominion [federal] companies, as it did not wholly preclude them from selling shares unless they were registered, but merely subjected them to provisions applying to all persons trading in securities. Previous Privy Council cases had held that securities regulation was within the jurisdiction of the provincial legislature, but only where the provincial legislation did not preclude a Dominion company from operating anywhere in the country. See, e.g., A.G. Manitoba v. A.G. Canada, 1 W.W.R. 136, 1 D.L.R. 369 (P.C. 1929).

Parliament has not yet enacted any comprehensive scheme of securities legislation. To date the Canadian experience has been that the provinces have taken control of the marketing of securities, differing in this respect from the United States where the Securities and Exchange Commission has regulated trading and primary distribution of securities. I should not wish by anything said in this case to affect prejudicially the constitutional right of Parliament to enact a general scheme of securities legislation pursuant to its power to make laws in relation to interprovincial and export trade and commerce. This is of particular significance considering the interprovincial and indeed international character of the securities industry. The federal government, it may be noted, has already produced Proposals for a Securities Market Law for Canada (1979). Professor Anisman, writing in 1981 in respect of those proposals expressed the view that:

[T]he factors that indicated a need for federal regulatory involvement in the securities market in 1979 are still present and, if anything, have been reinforced by events during the past two years. The Proposals are premised ultimately on the national and international character of the Canadian securities market and its importance to the
securities regulation as essentially a "local" matter, an anomalous view in an era of rapid internationalization of capital markets.

II. BACKGROUND TO CANADIAN SECURITIES REGULATION

Unlike the United States, there is no federal or national securities commission in Canada. The impediments to a national commission have been political rather than constitutional. Since its emergence, securities regulation has been the preserve of the provincial governments; the federal government has left the field open to them. Although the federal government commissioned a report which appeared in 1978 with respect to federal regulation of securities matters, no action was taken, the federal government seemingly content to exercise its exclusive power over banking.

There are thus twelve separate securities commissions or regulatory authorities, each charged with supervision of their local markets. The province of Ontario, with the lion’s share of market activity and home to the Toronto Stock Exchange, is the acknowledged principal market and the Ontario Securities Commission its regulator.

economic welfare of the country. The fact that the market is national in scope has long been acknowledged and is demonstrated by the cooperative efforts of the provincial commissions with respect to the adoption of national policies and by the statutory authorization for and increasing frequency of joint hearings held by a number of provincial commissions to decide issues that transcend provincial boundaries.


Multiple Access, 2 S.C.R. at 173-74.

4 PROPOSALS FOR A SECURITIES MARKET LAW FOR CANADA (Canada, Minister of Consumer and Corporate Affairs 1979). Part I of the Draft Act states that its purpose is to achieve the goals of the efficient and honest functioning of the Canadian capital market by:

ensuring the availability of information relating to investment decisions, by protecting investors from fraudulent and deceptive conduct and by ensuring fair competition, all of which can best be accomplished by the creation of an independent public body to regulate the Canadian securities market and securities market actors over which the Parliament of Canada has legislative jurisdiction in cooperation with similar provincial and foreign public authorities.

Id.
5 For this reason, this paper will focus on the Ontario regime.
The inefficiencies created by regulatory duplication in a small market have long been recognized and various measures have been taken to address them. With the exception of the province of Québec, securities acts and regulations in the provinces are harmonized to a large degree, the Ontario Securities Act having served as the original model.

Given the rapidity of change and volatility in markets in the last few years, less and less recourse has been had to reliance on the Ontario statute and its regulations to ensure market oversight. Legislative change cannot keep up with the market. For this reason, the role of an ad hoc group of provincial regulators, the Canadian Securities Administrators ("CSA"), has become increasingly important, in effect acting as a substitute for a national securities commission. Although not endowed with any legislative authority, the CSA meets regularly and acts as a coordinating body for regulatory initiatives, most notably in the formulation of "National Policy Statements" adopted (or, more rarely and more recently, not adopted) by each provincial commission.

For many years a precarious balance was maintained, with the industry and legal profession tacitly and conveniently overlooking the lack of legislative authority of the CSA and its National Policy Statements in regulating the market. In the absence of any other mechanism, National Policy Statements filled the bill admirably, providing, for example, the procedures for coordination of prospectus filing across Canada.

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6 The substance of the regulatory regime of Québec is very similar to that of other provinces although the actual statutory format is different. For a brief summary of Québec law, see Luc LaRochelle et al., Bill 85, Québec's New Security Act, 29 McGill L.J. 88, 92-94 (1983).

7 Ontario Securities Act, R.S.O. ch. S.5 (1990), as amended by S.O. ch. 18, § 56 (1992); S.O. ch. 27 (1993); and S.O. ch. 11 (1994) [hereinafter OSA]. With time, regional divergences have crept in.

8 See M. GILLEN, SECURITIES REGULATION IN CANADA 60 (1992).

9 Id. at 61.

10 Id. at 61.

11 For example, National Policy Statement No. 1 establishes the procedures to be followed when documents are to be cleared in more than one jurisdiction. National Policy Statement No. 1, reprinted in Consolidated Ontario Securities Act and Regulations 1995 at 447-78 [hereinafter OSA and Regulations 1995]. These procedures were agreed upon by the various securities regulatory authorities in order to facilitate the acceptance of a prospectus, a short form prospectus or an initial annual information form in more than one Canadian jurisdiction; National Policy Statement No. 27 sets out the accounting principles to be applied to, and the disclosure to be included in, the financial statements of an issuer. Id. at 499-501. National Policy Statement No. 39 regulates various aspects of mutual funds. Id. at 575-624. National Policy Statement No. 40 requires timely disclosure and filing of material information. Id. at 624-31. National Policy Statement No. 41 provides a framework to ensure that materials relating to meetings of security holders, including proxies and audited annual financial statements, will be provided to non-registered holders of securities of reporting issuers. Id. at 631-48. National Policy Statement No. 44 lists
This happy situation, however, could not long resist the dramatic changes provoked by the forces of North American economic integration and the internationalization of capital markets. The first significant event was the introduction of universal banking to Canada, which occurred at the same time that provincial restrictions on foreign ownership of the securities industry were relaxed. This is commonly referred to as the Canadian "little bang" of 1987. The introduction of universal banking in Canada, like the metric system, was very much a response to world trends (still resisted in the United States).

Domestically, however, the effect was to rekindle federal interest in the regulation of securities matters. Canadian banking is dominated by a handful of large, well-capitalized institutions which are subject to federal regulation and operate nationwide with an extensive branch network. Once the regulatory hurdles were removed in 1987, the large Canadian banks quickly snapped up the much smaller investment dealers which continued to operate through separately incorporated subsidiaries but now under bank ownership. Suddenly, the banks were in the securities business and a regulatory tussle ensued, primarily between the Ontario provincial and federal governments, regarding who would regulate which aspects of the overall operations.

The term "universal banking" usually refers to financial institutions combining retail banking and securities dealing activities. See Cally Jordan, Canadian Financial Services—The New Broom, 18:3 FINANCIAL SERVICES REGULATION 177 (Oct. 21, 1987). The allusion, obviously, is to the Big Bang of 1986 in the London markets. There is, in fact, very little similarity to the reforms actually effected in Canada and the United Kingdom at that time. See id. at 177.


The regulatory confusion led to the establishment of the Hockin-Kwinter Accord, an intergovernmental agreement between Tom Hockin, then Federal Minister of State (Finance) and Monte Kwinter, then Minister of Financial Institutions for the Province of Ontario, in respect to the implementation of their respective regimes for the regulation of securities-related activities of federal financial institutions and their subsidiaries or affiliates. The accord enumerated specific securities-related
The effect of a direct federal interest in the bank-owned investment dealers, combined with increasing North American and other international pressures on participation in the Canadian financial services and capital markets, forced the idea of a national securities commission to bob again to the surface. As Canadian and U.S. regulators found themselves increasingly thrown together into negotiations in an attempt to deal with the repercussions of an integrated North American capital market, the disadvantages of the diffuse Canadian regime became glaringly apparent; a motley collection of Canadian regulators found themselves negotiating nose to nose with one of the world's most powerful centralized governmental agencies, the SEC.

In addition, competition between capital markets had intensified with the rise of Tokyo, Hong Kong, and the Euromarkets in the 1980s, and the regulatory duplication in Canada came to be viewed as a competitive disadvantage. In the wave of privatizations and global issuances, the small Canadian market with its multiplicity of regulations and regulators was not worth the effort of compliance. The Canadian markets risked being left out in the cold.

Another factor contributing to the perceived need for nationalizing the securities regulatory system in Canada was the evolving nature of the financial markets themselves. Volatility, a proliferation of new and complex financial products, the sudden interdependence of markets around the world, all these factors called for a regulatory deftness and nimbleness that the cumbersome Canadian system, with its many regulators, large and small, could not provide. The cozy informality of the Canadian regulatory style, issues being resolved through moral suasion in a fairly leisurely fashion as they arose, could also not withstand the intrusion of aggressive new market players and practices.

The need for a national securities commission in Canada to address these issues is widely, if sometimes only covertly, acknowledged. The latest attempt, which only recently derailed, was initiated in December 1993. Interestingly enough, the pressure for a national commission came from several of the smaller provincial governments which, in a remarkable show of pragmatism, were willing to get out of the securities regulation business.19

activities, setting out the respective jurisdictions of the federal Office of the Superintendent of Financial Institutions and the Ontario Securities Commission. The accord was released April 28, 1987.

The opportunity to create a national securities commission was virtually handed on a platter to the federal government. Whether the political winds shifted too quickly for the national commission to be realized or whether the opportunity was simply wasted is unclear. Although the federal government has clear constitutional authority to legislate,\(^{20}\) it chose instead to propose a clumsy provincial to federal delegation of power embodied in an administrative understanding.\(^{21}\)

The ball is now back in the provincial court with some perhaps unintended consequences. In the absence of a national commission, the importance and stature of the CSA is amplified. Ironically, provinces such as Québec and British Columbia, which may have demonstrated resistance to a national commission in an attempt to preserve provincial turf, may find that they have less and less turf to protect. Centripetal market forces will tend inevitably to result in one market and one regulator: Ontario.\(^{22}\)

There is no doubt that the provinces, through the CSA, are valiantly trying to compensate for legislative inaction at the federal level. Recent CSA initiatives have included an “expedited review” procedure designed to simplify and speed up provincial prospectus filings (primarily by applying principles of reciprocal recognition among provinces).\(^ {23}\) In addition, a Task Force on Operational Efficiencies in the Administration of Securities Regulation has been created by the CSA and recently presented its interim report.\(^ {24}\) The task force is looking to “further operational streamlining” so as to ease the “paper burden” and permit quicker access to capital markets.\(^ {25}\) Technological advances such as electronic filing and reciprocal recognition among the provinces will undoubtedly help to promote, in fact, if not in law, one capital market in Canada.

\(^{21}\) Memorandum of Understanding Regarding the Regulation of Securities In Canada, 17 O.S.C.B. 4401 (Sept. 16, 1994).
\(^{22}\) The president of the Montreal Exchange, Gerald Lacoste, is trying to boost the Montreal Exchange market share by fostering trading in specialized products with international appeal. In 1994, Montreal’s share of equities trading in Canada in dollar terms fell by 7% to 14.6%, compared with 16.2% in 1993. By comparison, the TSE share rose from 78% in 1993, to 81.8% in 1994. See K. Dougherty, *Will the ME find PEACE?*, FIN. POST (Toronto), Jan. 11, 1995, at S2-85.
\(^{23}\) Expedited Review of Short Form Prospectuses and Renewal AIFs, 17 O.S.C.B. 5210 (Nov. 4, 1994).
\(^{24}\) Task Force on Operational Efficiencies in the Administration of Securities Regulation Interim Report, 18 O.S.C.B. 235 (Jan. 20, 1995).
\(^{25}\) Id.
III. DISCLOSURE IN CANADA: REGULATORY TECHNIQUES IN A CHANGING WORLD

A. Basic Principles

Anyone familiar with securities regulation in the United States would have little difficulty recognizing the same principles operating in Canada. Prospectus and continuous disclosure requirements, insider trading rules, and takeover bid regimes are all very comparable. The regulations are detailed and technical with great emphasis on compliance with a highly formalistic construct. The Canadian and U.S. regimes are close cousins and speak the same language.

There are differences in approach, however, which is the result of a distinct legislative development and a different regulatory tradition. The Canadian provincial securities statutes were enacted in the wake of the landmark U.S. legislation of the 1930s, the Securities Act of 1933 (the 1933 Act) and the Securities Exchange Act of 1934 (the 1934 Act). The Canadian statutes were able to benefit from the U.S. experience; that, combined with the then still strong British legislative drafting tradition, resulted in simpler, more modern legislation. One only has to read section 5 of the 1933 Act together with the comparable prospectus delivery section in the

27 Section 5 of the 1933 Act, entitled "Prohibitions Relating to Interstate Commerce and the Mails," provides the following:

(a) Unless a registration statement is in effect as to a security, it shall be unlawful for any person, directly or indirectly—
(1) to make use of any means or instruments of transportation or communication in interstate commerce or of the mails to sell such security through the use or medium of any prospectus or otherwise; or
(2) to carry or cause to be carried through the mails or in interstate commerce, by any means or instruments of transportation, any such security for the purpose of sale or for delivery after sale.
(b) It shall be unlawful for any person, directly or indirectly—
(1) to make use of any means or instruments of transportation or communication in interstate commerce or of the mails to carry or transmit any prospectus relating to any security with respect to which a registration statement has been filed under this title, unless such prospectus meets the requirements of section 10; or
(2) to carry or cause to be carried through the mails or in interstate commerce any such security for the purpose of sale or for delivery after sale, unless accompanied or preceded by a prospectus that meets the requirements of subsection (a) of section 10.
Ontario Securities Act\textsuperscript{28} to appreciate the difference in legislative approach. In the Québec Securities Act,\textsuperscript{29} the application of civil law drafting principles to U.S. securities regulation has had even more startling transformative effects.\textsuperscript{30} Although both the Ontario and Québec securities statutes are showing their age (the former dating from 1978 and the latter, 1982), they still represent a fairly modern distillation of North American principles of securities regulation.

The major difference between the U.S. and Canadian regulatory regimes lies in the treatment of transactions exempt from prospectus filing and delivery requirements. The Canadian commissions, unlike the SEC, have a general exemptive power which can dispense with the prospectus requirement where it is not prejudicial to the public interest.\textsuperscript{31} Moreover, a

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\textsuperscript{28} Section 53 of the Ontario Securities Act, R.S.O. ch. S-5 (1990) provides:

(1) No person or company shall trade in a security on his, her or its own account or on behalf of any other person or company, where such trade would be a distribution of such security, unless a preliminary prospectus and a prospectus have been filed and receipts therefore obtained from the Director.

(2) A preliminary prospectus and a prospectus may be filed in accordance with this Part to enable the issuer to become a reporting issuer, despite the fact that no distribution is contemplated.

\textsuperscript{29} Québec Securities Act, R.S.Q. ch. V-1 (1977) (as amended).

\textsuperscript{30} The Québec Securities Act is remarkably simple in its structure and, in the civil law tradition, its provisions state general principles rather than technical detail.

\textsuperscript{31} Section 74 of the Ontario Securities Act provides:

(1) The Commission may, upon the application of an interested person or company, rule that any trade, security, person or company is not subject to section 25 [dealer registration] or 53 [prospectus requirement] where it is satisfied that to do so would not be prejudicial to the public interest, and may impose such terms and conditions as are considered necessary.

(2) Where doubt exists whether a distribution of any security has been concluded or is currently in progress, the Commission may determine the question and rule accordingly.

(3) A decision of the Commission under this section is final and there is no appeal therefrom.


\textsuperscript{29} OSA, R.S.O. § 53 (1990).

\textsuperscript{30} OSA, R.S.O. § 74 (1990).
major rethinking in the 1970s of the basis of the prospectus requirement in Canada resulted in the so-called "closed system" for private placements.\textsuperscript{32}

Until that time, the subjective investment intent of the purchaser of securities served to distinguish a public distribution of securities from a private placement for which no prospectus was required.\textsuperscript{33} This is still the case in the United States.\textsuperscript{34} United States legal practitioners, in the absence of regulatory guidance, developed technical and cumbersome procedures in an attempt to satisfy the investment intent test for private placements. The prospectus filing requirement imposed by section 5 of the 1933 Act (in the ostensible interests of protection of the small retail investor) is such a fundamental tenet of U.S. securities law, that the private placement market, where a prospectus can be dispensed with, was long considered an exceptional regime and not necessarily one to be fostered or encouraged.\textsuperscript{35}

Canadian regulators did away with the subjective investment intent test some fifteen years ago, introducing objective, bright line tests for private placements.\textsuperscript{36} For example, any single purchase of C$150,000 worth of securities is exempt from prospectus delivery requirements.\textsuperscript{37} The necessity for the cumbersome trappings and formalities characteristic of a U.S. private placement simply dropped away, replaced by a post facto notice filing.\textsuperscript{38}

A final major difference between the two regulatory regimes is in their administrative application. Although the SEC has made determined efforts of late to present a friendly and facilitative face,\textsuperscript{39} the perception remains that you approach the SEC at your peril. Canadian issuers and practitioners, in the British tradition, have enjoyed much greater and immediate access to their regulators, resulting in more flexible application of

\textsuperscript{32} See GILLEN, supra note 8, at 177.
\textsuperscript{33} See DAVID W. DRINKWATER ET AL., PRIVATE PLACEMENTS IN CANADA 122-25 (1985).
\textsuperscript{34} A notable exception is Rule 144A under the 1933 Act. 'Private Resales of Securities to Institutions, 17 C.F.R. § 230.144A (1994); Reg. § 230.144 (Rule 144) Persons Deemed Not to be Engaged in a Distribution and Therefore Not Underwriters, 2 Fed. Sec. L. Rep. (CCH) ¶ 5718. See infra parts III.C.2, III.C.3.a.
\textsuperscript{35} The introduction of Rule 144A in 1990 went a long way in adapting the U.S. regulatory regime to the realities of modern markets and the rise of the institutional investor.
\textsuperscript{36} See discussion infra "Exempt Private Placements" in app. A.
\textsuperscript{37} The actual monetary amount may vary from province to province.
\textsuperscript{38} OSA Regulations, R.R.O. Form 20.
\textsuperscript{39} For example, in encouraging issuers, especially foreign issuers, to contact them for guidance in structuring transactions.
the regulatory regime and greater reliance on both formal and informal *ad hoc* solutions.

**B. The Crisis in "Consensual" Regulation: The Breakdown of the Canadian Way**

The Canadian financial community is a small world and, until recently, stresses and strains on the regulatory regime were accommodated for the most part outside the formal legislative process. For a practitioner, an informal meeting with the Chairman of the Ontario Securities Commission could resolve a lot of problems. Equally, the Commission relied on its stature and powers of moral suasion to ensure compliance with the spirit and intent, as well as the letter, of the regulatory regime.

As the pace of change and complexity of financial markets increased, greater and greater reliance was placed on these non-legislative mechanisms. The legislature had neither the time, expertise, nor interest to deal with the revolution occurring worldwide in financial markets. The CSA, in an attempt to coordinate and adapt a rapidly aging regulatory regime to

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40 See Canadian Tire Corp. (Re), 10 O.S.C.B. 857 (1987), where the Ontario Securities Commission, referring to a statement made by it in Federal Commerce and Navigation Ltd., 1 O.S.C.B. 20(c) (1981), said:

> [The] statement is important as outlining the basic approach that the Commission is prepared to take to a transaction in an appropriate case, particularly when a takeover bid is concerned. That is not to say that the terms of the Act or policy statements or the by-laws of the self-regulatory organizations, cannot be relied upon as they are written. It is to say, however, that transactions that are clearly designed to avoid the animating principles behind such legislation and rules will be scrutinized closely by the Commission and intervention will be ordered in appropriate cases. (QL at 45).


> There can be no reasonable quarrel with the general statement that the O.S.C. may appropriately deny trading privileges to persons who have engaged in improper activities. Historically, trading privileges have been denied to persons who are considered to have abused the registration exemptions, or have solicited funds from the public improperly or fraudulently, or have sold securities to the public without a prospectus or with an inadequate prospectus. All of these seem appropriate grounds for exercise of the s. 19(5) power, but the National Sea case [(June 1976) O.S.C.B. 149] significantly extends these traditional grounds. Denial of personal trading privileges previously had not been used as a sanction to hold insiders accountable for any improper trading in securities of their corporation nor to ensure timely disclosure responsibility ....
changing times, formalized the *ad hoc* responses of provincial regulators into "National Policy Statements," which, although devoid of legislative authority, were scrupulously adhered to. For many years, the system worked, essentially because it was to everyone's benefit that it do so.

This "consensual" system of regulation, essentially a response to the increasing change and complexity of financial markets, reached its limits. Formal challenges to the coercive authority of policy statements, a rarity only a few years ago, began to arise. In 1993, one such challenge prevailed in the Ontario courts. The *Ainsley* decision (which correctly put its finger on the lack of legislative authority behind policy statements) put into question the entire elaborate structure erected by the CSA to govern national markets and prompted creation of a task force in Ontario to look for answers to the crisis thus provoked. In the year or so which it took the task force to report, the Ontario Securities Commission hobbled along, acting by other means such as blanket orders, with policy statements continuing to serve as industry guidelines.

Not surprisingly, the solution proposed came from the United States: SEC-like rule-making power for the Ontario Securities Commission. The solution is not, however, without controversy, applying as it does in the context of a very different administrative law regime. But it is significant in several respects. First, it represents the introduction of a fairly alien U.S. solution to the Canadian regulatory environment, yet another indication of the increasing convergence of the markets and their regulatory regimes.

42 In *Ainsley Financial Corp. v. Ontario Securities Commission*, 106 D.L.R. (4th) 507, 14 O.R. (3d) 280 (Gen. Div. 1993), the Court was asked to examine the jurisdiction of the Ontario Securities Commission to issue a policy statement about trading in penny stocks. The policy statement set certain disclosure requirements for traders who were not members of a self-regulatory organization. The Court concluded that the policy statement was not a guideline, but rather was a mandatory or regulatory provision that raised the specter of disciplinary proceedings for non-compliance. The Commission derived its powers exclusively from the Ontario Securities Act, which did not provide the Commission with a jurisdiction of general discretionary nature, nor was there an open-ended general "mandating" section in the Act. Furthermore, the Securities Act did not give the Commission the general authority to regulate the securities industry in the public interest. In addition, the particular policy statement fell within the regulatory power of the Lieutenant-Governor in Council, such power which had not been delegated to the Commission. The Court therefore held that the Commission did not have jurisdiction to issue the policy statement.


44 See, e.g., the blanket ruling discussed *infra* at 23; prior to the *Ainsley* decision, this initiative would have been implemented by policy statement.

45 Securities Amendment Act 1994, R.S.O. ch. 33.
Additionally, the entire crisis itself is eloquent testimony to the limits of "consensual" regulation. The Canadian securities industry is suffering fragmentation and dislocation as a result of increasing outside pressures, pressures from the United States, and the international markets. These pressures are breaking down the cozy communality of the industry by introducing new players and practices which are at odds with the old unwritten (or, in the case of policy statements, unenforceable) rules.

C. The New Regulatory Tactics in Canada

1. Reciprocal Recognition

In one of the most comprehensive experiments in the application of principles of reciprocal recognition, Canada and the United States implemented the Multijurisdictional Disclosure System ("MJDS") in 1991. The system is one of mutual recognition, where both countries' regulatory regimes, each the virtual mirror image of the other, recognize and defer to one another. Certain U.S. issuers are permitted, under the Canadian rules, to issue securities in Canada utilizing a U.S. prospectus which is in con-

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46 The Canadian investment dealer community, for example, was opposed to implementation of the MJDS discussed infra pt. III.C. Their concerns are reflected in the following statement which appeared in the implementing release:

Given the importance to the CSA (Canadian Securities Administrators) of having a strong dealer community knowledgeable of and committed to the Canadian capital markets, the CSA believes the MJDS should include a "safety valve" that is available if the MJDS does prove to harm the Canadian dealer community substantially. The CSA will monitor the effect of the MJDS and obtain input from Canadian dealers and otherwise monitor the dealer community. In addition, the securities regulators in Canada will, if more than two years following the implementation of the MJDS to review the MJDS, including its impact on the bank-owned dealers. If the hearings demonstrate that the MJDS has had and will continue to have a material adverse effect on the Canadian dealer community, the CSA and the Commission will commence rulemaking proceedings to seek comment on such changes to the MJDS as are needed to alleviate such adverse effect on the dealers and to ensure that the MJDS achieves its policy goals.


47 Consensual regulation continues to be useful, for example in the Euromarket, where through the development of widely accepted industry guidelines, the imposition of formal legislative norms has been averted.

48 The European Union, of course, has made widespread use of reciprocal recognition techniques.

formity with U.S. requirements. Similarly, certain Canadian issuers are permitted, under U.S. rules, to issue securities in the United States using a Canadian prospectus which is in accordance with Canadian timing and filing requirements.

Inspired by the Euromarket, the MJDS began as a remarkably simple idea: the standardization of the offering documentation for issuances of debt securities in the interests of speeding up the offering process. The SEC recognized that, for debt securities, an investment decision was much more influenced by an investment grade rating than by prospectus disclosure. Recognition of a foreign prospectus for use in the United States for investment grade debt could thus eliminate the cost and delays associated with regulatory duplication without unduly sacrificing investor protection concerns.

As the idea of reciprocal recognition sprouted, a mighty regulatory oak took shape. Debt and equity offerings, rights and exchange offerings, business combinations, continuous disclosure for both MJDS and other issuers, proxy rules, even recognition of Canada as a sovereign nation, all became part of the system. Needless to say, the increased complexity of the system brought on by these additions has had a significant impact on its utilization by Canadian issuers.

The new system has provided Canadian issuers with a wide range of options and choice in terms of entering the U.S. capital markets and broad exemptive relief for all Canadian issuers, irrespective of MJDS eligibility, from duplicative regulation in other areas such as proxy solicitation and continuous disclosure. Also, the system has delivered more or less what was expected in terms of facilitating U.S. offerings of investment grade debt by Canadian issuers.

Investment grade debt offerings under the MJDS outnumber equity offerings two to one and are relatively true to the principles of reciprocal recognition underlying the system. It remains the case, however, that

50 National Policy Statement No. 45, supra note 49.
51 Id.
52 Id.
53 The MJDS has proved to be a one-way street, a means of enticing more Canadian issuers into the U.S. public markets. In the first two years of operation of the system, no U.S. issuer made use of it although dozens of Canadian issuers did.
54 According to statistics provided to the author by SEC Staff, the debt issues outnumber equity issues two to one under the MJDS with US$3.5 billion in debt securities being registered with the SEC in 1993 compared to US$0.6 billion in equity.
utilization of the regime is more difficult and complex than originally envisaged, even for investment grade debt offerings. Of the many factors contributing to this, one is the "capture" of the regime by U.S. lawyers and investment dealers (not known to miss an opportunity to create a demand for their services). The original principle of reciprocal recognition, i.e., the ability to use a Canadian prospectus to do a public offering in the United States, has been distorted by one of the asymmetrical aspects of the regime, the retention of U.S. civil liability by the SEC for the prospectus document.

The hook of U.S. civil liability has been used to justify a predictable convergence of Canadian and U.S. prospectus disclosure in MJDS offerings. United States investment dealers promote such convergence for marketing reasons; in order to sell the securities in the United States, the prospectus should have a U.S. "look." United States lawyers insist on U.S.-style due diligence and disclosure on the basis of the exposure to U.S. liability.

Although there is no evidence to date that the concerns with U.S. civil liability have materialized, this may be a result of Canadian MJDS prospectuses having become virtually indistinguishable from U.S. domestic registration statements. It is certainly arguable that this was not at all intended by the regulators in implementing the MJDS and was not an inevitable consequence.

The MJDS is significant in several respects. From the point of view of the SEC, the interest in the MJDS was as a model of future (and to date unconsummated) cooperation with bigger fish than Canada. It shows that the Canadian regulatory focus has been fixed squarely on the United States, largely as a result of the acceleration of integration of North American capital markets. As underutilized as it may be, the MJDS does create the infrastructure for an integrated North American capital market. Closely linked as it is to the U.S. domestic regulatory regime, the MJDS is extremely sensitive to changes in it.

Canadian regulators, now tied to the U.S. regime through the MJDS, will be compelled to take into account, in a very timely fashion, developments in the United States. This will give rise to hard regulatory choices and questions as to the extent Canadian regulators set their own agenda in the Canadian market. It heralds the introduction of U.S.-style regulation in Canada and all the complexity that it entails.
2. Harmonization of North American Regulatory Regimes

Canadian securities regulation has been inspired by and profoundly marked by the U.S. regulatory regime. Harmonization of the Canadian regime to the U.S. regime would seem to be a given, as natural as a dog wagging its tail. Until fairly recently, however, this has not been a forgone conclusion, in Ontario at least. Up until negotiations for the MJDS began in 1987, U.S. regulatory developments were regarded with some circumspection by Canadian regulators. For example, in 1986 Ontario regulators considered and rejected introducing a shelf prospectus system. Only a few years later, prompted by imminent implementation of the MJDS, a shelf prospectus system was adopted by National Policy Statement 44; large parts of the Canadian regime follow the U.S. model found in SEC Rule 415 (Delayed or Continuous Offering and Sale of Securities) word for word. Even now, there is still some resistance and bewilderment on the part of the Canadian industry and practitioners with respect to the speed and massive degree of recent harmonization.

The watershed has been the introduction of the MJDS. Over the course of its negotiation, Canadian securities regimes became increasingly aligned with that of the United States. Certain changes to the Canadian regimes had been under consideration for some time and merely reflected the natural process of evolution and adaptation to changing market conditions. The introduction of other U.S.-style disclosure, however, can be directly traced to the MJDS negotiations. In some instances, Canadian regulators, as they became more familiar with the U.S. regime in the course of the negotiations, simply couldn’t resist picking up on a good regulatory idea when they saw one. In other instances, harmonization of the Canadian regime to some aspect of the U.S. one was used explicitly by the SEC as a bargaining chip in the MJDS negotiations. Yet other harmonizing measures, such as a shelf registration system, were introduced in Canada to

55 Québec did not have the same hesitations and opened the door to shelf registrations in 1983. See §§ 21-24 of the Québec Securities Act, R.S.Q. ch. V-1 (as amended) and §§ 74-76 of the Règlement sur les valeurs mobilières, O.C. 660-83 (as amended). None were effected, given that eligible issuers were not interested in setting up a shelf only in Québec.

56 National Policy Statement No. 44: Rules for Shelf Prospectus Offerings and for Pricing Offerings After the Final Prospectus is Received, 14 O.S.C.B. 1844 (May 3, 1991).

ensure that the MJDS operated in a fairly equivalent manner for both U.S. and Canadian issuers.58

Ironically, to date the most palpable influence of the MJDS has been felt by Canadian issuers in their own backyard as a result of the harmonizing impact of the MJDS on the Canadian domestic securities regime. The pressures of convergence have not diminished since the introduction of the MJDS. Recent changes to U.S. short form prospectus eligibility requirements respecting the length of reporting history and market capitalization (reflected in crucial MJDS eligibility requirements) resulted promptly in corresponding changes to both the domestic Canadian Prompt Offering Prospectus system and the parallel MJDS regimes.59

In an interesting twist, the MJDS eliminated certain continuous disclosure filing requirements for Canadian issuers in the United States in an effort to lessen the regulatory burden imposed by duplication. This in turn led to a public outcry for more stringent and broadly-based U.S.-style domestic rules in Ontario. The MJDS permitted many Canadian issuers, otherwise reporting in the United States under domestic U.S. continuous disclosure rules, to switch to use of their Canadian continuous disclosure for reporting purposes. Canadians are a discreet bunch and individualized executive compensation disclosure, as in many European countries, was not required in Canada. For example, Canadian investors searching the public file in Canada would not be able to discover the remuneration of the CEO of Alcan.

The switch to Canadian continuous disclosure for U.S. filing requirements, however, deprived the Canadian financial press of a reliable source of individualized executive compensation disclosure. Prior to the switch, they had been resorting to the U.S. public file for this information. A hue and cry went up (in the financial press, of course) and, not without controversy, U.S.-style executive compensation rules were introduced domestically in Ontario.60 As the rules apply generally to all reporting

58 Because the MJDS is a reciprocal recognition system, unless a shelf registration system was available to Canadian issuers in Canada, they could not have made use of it to issue in the United States under the MJDS; United States issuers, on the other hand, would have had the ability to use the U.S. shelf system under the MJDS to issue in Canada, something Canadian issuers would not have been able to do domestically.
60 The Commission granted a Blanket Order dated December 1, 1993, entitled In the Matter of Part XIX of the Securities Act and In the Matter of Ontario Regulation 638/93 and the Disclosure of Executive
issuers in Ontario (and not only those reporting in the United States), their impact was considerable. For the first time, the major Canadian financial institutions, which had never been subject to U.S. continuous disclosure, found themselves complying with less discreet U.S.-style executive compensation disclosure rules in Canada. Although issuer resistance to the imposition of U.S.-style disclosure in Canada has been very real, as the number of cross-border transactions increases and Canadian issuers flock to the U.S. markets, it is likely the resistance will fade away.

This leaves a question begging to be asked. To what extent has the Canadian securities regime had a harmonizing influence on the U.S. regulatory regime?

The influences, if indeed there are any, are very subtle. The SEC in recent years has not consciously turned to Canadian securities regulation for inspiration. Nevertheless, the MJDS negotiations between Canadian and U.S. regulators did proceed over a period of five years, a period during which each regulator set out to learn a great deal about the other's regulatory regime. There may be trace elements of Canadian securities regulation which, having been negotiated into the MJDS, are now rising to the surface in the domestic U.S. regime.61

For example, it is difficult, at least from a Canadian perspective, to look at SEC Rule 144A without remarking on the similarities to the much more comprehensive Canadian closed system for private placements. Whether or not there was, in fact, any cross-fertilization is not readily apparent. The similarities are more likely the result of market-induced convergence rather than an explicit attempt at harmonization of regimes.

As integration of the North American capital markets proceeds at a fast clip, the pressures tending towards harmonization of the Canadian

Compensation and of Indebtedness of Directors, Executive Officers and Senior Officers made under § 88(2) of the Ontario Securities Act and the Director of Corporate Finance granted a Blanket Permission dated December 1, 1993 made under § 81 of the Regulation to the Securities Act. Blanket Permission—Section 81 of Reg., 16 O.S.C.B. 5914 (Dec. 3, 1993). The Blanket Order and Blanket Permission contained certain transitional provisions with respect to the executive compensation and indebtedness disclosure requirements set out in Ontario Regulation 638/93. The Blanket Permission and Blanket Order were amended in Ontario Regulation 638/93 and the Disclosure of Executive Compensation and of Indebtedness of Directors, Executive Officers and Senior Officers—s. 144, 17 O.S.C.B. 1176 (Mar. 11, 1994), to correct the termination dates for the transitional accommodation set forth therein.

61 The U.S. short form prospectus requirements (found in Forms S-2 and S-3) were recently changed to require a public float of US$75 million or more. This US$75 million figure may very well come from the MJDS eligibility criteria; it was originally inspired, in the MJDS, by a size threshold in the Canadian Prompt Offering Prospectus system.
securities regimes to that in the United States, especially in the area of disclosure, will only increase. An assessment of the long-term implications of this process may be more difficult to formulate. Certainly, there are differences of opinion between issuers and the industry on the one hand (which tend to resist U.S.-style disclosure, arguing that it is unnecessarily burdensome), and the financial press and investor groups on the other (which celebrated mightily when Matthew Barrett, the well-regarded Chairman of the Bank of Montreal, was first required to disclose his compensation in 1994).62

On balance, the importation of more extensive disclosure obligations should provide a tonic to the relatively closed and close world of corporate Canada. This is not to say that U.S.-style disclosure is a panacea for all that might ail Canadian capital markets. More is not necessarily better and there is certainly controversy as to whether U.S.-style disclosure as it has evolved does in fact provide the proper measure of investor protection. There are regulatory alternatives to disclosure as the basic tool of investor protection, most notably, the trend in other jurisdictions towards regulation of financial intermediaries in their dealings with public investors.

Finally, there are dangers associated with over-enthusiastic harmonization. Homogenization can stifle innovation and the survival of solutions better adapted to local conditions. Is the imported shelf prospectus system a better solution in the Canadian context than the indigenous bought deal?63 Would the Canadian closed system for private placements, developed almost 15 years ago and so different from the U.S. regime, have seen the light of day in the current regulatory environment?

62 It even became the subject of an interview with a popular talk show host.
63 See Brokers Take a Risk With "Bought Deal" Issues, GLOBE & MAIL (Toronto), Apr. 29, 1995, at B4.

Almost every equity issue in [Canada], other than an initial offering, is done through a 'bought deal.' A group of investment dealers puts up its own money to buy an entire issue of shares at a present price and then resells them to its biggest clients.

This is unlike a regular underwriting, where the price is set only after the brokers have assessed how many shares their clients are willing to buy and how much they are willing to pay . . . . Bought deals are popular with companies because they provide a quick and guaranteed way of raising funds.

Brokers like bought deals because they can charge higher fees . . . . as compensation for taking all the risk. If they can't sell the units at the preset price, they take a loss.

Id.
3. **Free-riding as a Regulatory Technique**

Canadian regulators have been in the vanguard with respect to applying principles of harmonization and mutual recognition to their regulatory regimes. Harmonization efforts have met with resistance, as discussed above, but in general have been more productive than in other parts of the world. This is largely a result of the advanced state of economic integration in North American capital markets and the existing structural similarities of the U.S. and Canadian regimes. Formal efforts at harmonization elsewhere have not been as successful; it is hard slogging and, unless implemented unilaterally as in Canada, not particularly well adapted to an area as complex and volatile as capital markets.

The MJDS, on the other hand, is a model of regulatory cooperation based on principles of reciprocal recognition which have shown tangible results elsewhere, as well. It too, however, can be a slow and painful process. The MJDS negotiations stretched over five years and the system itself has required constant monitoring and attention on both sides of the border ever since.

The Ontario Securities Commission has now launched itself on a new regulatory tack, free-riding. What is free-riding? Hitching your cart to someone else's horse, in this case, Uncle Sam's.

The impetus to draft National Policy No. 53 ("draft NP 53"), the "Foreign Issuer Prospectus and Continuous Disclosure System" and the Ontario Securities Commission Blanket Ruling re Certain International Offerings by Private Placement ("the private placement ruling") has been the concern among Canadian regulators that the world may be passing the small Canadian markets by. Both initiatives are based on the principle that compliance with foreign regulatory requirements will constitute compliance with domestic Ontario regulations. Unlike the MJDS, both measures were undertaken unilaterally; there is no reciprocity required with other recognized regulatory regimes.

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a. Draft National Policy No. 53

Draft NP 53 was first put out for comment in August 1993, obviously with an eye to the then imminent French and Latin American privatizations. It has not as of yet been implemented. In its structure and concept it was a direct outgrowth of the MJDS, building on foreign issuer definitions, market capitalization and public float requirements, the use of legend to alert investors to the foreign nature of the issuer and the offering, as well as the retention of domestic civil liability. If it has not yet been implemented, it may well be that it went too far, or at least further than the market justified.

Virtually all large foreign issuers meeting the eligibility criteria and engaging in a global equity offering would be able to come into the Canadian public market using foreign offering documentation. As originally proposed, a broad range of offering documentation would have been acceptable: home country documentation by G-7 issuers or used by any other foreign issuer would have fulfilled Canadian prospectus requirements. Even a Rule 144A offering memorandum used in a U.S. private placement could have served as a prospectus in a Canadian public offering.

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66 See supra note 64.
67 See supra note 64.
68 See criticisms of draft NP 53 by this author in Cally Jordan, The Thrills and Spills of Free-Riding: International Issues Before the Ontario Securities Commission, 23 C.B.L.J. 379 (1994). The major criticism of this author, the breadth of NP 53's scope, apparently has been addressed in a subsequent revision not yet publicly available. "That draft [NP53] has been revised to extend the Multi-Jurisdictional Disclosure System—the system that allows U.S. issuers to access the Canadian markets using U.S. documentation and Canadian issuers to access the U.S. market using Canadian documentation—to large foreign issuers." See Barry Critchley, OSC Smooths Path for Foreign Issuers, FIN. POST (Toronto), Dec. 10, 1994, at 44.
69 To be eligible, the entity must be a foreign issuer in Canada, not incorporated or organized in Canada, and subject to certain other criteria based on greater than 50% share ownership and management control outside Canada. The issuer must have C$3 billion market capitalization (in the case of an initial public offering, based on the expected offering price) with a public float of C$1 billion, both figures being calculated after giving effect to the offering. In addition, the issuer must reasonably believe that no more than 10% of its equity is held in Canada. See infra app. B.
70 The term G-7 refers to the group of seven nations representing the largest economies in the world. The G-7 nations are: Canada, France, Germany, Italy, Japan, the United Kingdom, and the United States.
71 Subject to meeting the Canadian standard of "full, true and plain disclosure" of all material facts.
72 See supra note 64.
To judge by recent comments in the financial press, the regulatory approach now being considered would be to narrow the acceptable offering documentation to that used in a U.S. public offering, i.e., unilaterally to extend use of the MJDS in Canada to foreign issuers entering the U.S. market.

This makes sense. Any major global equity offering is going to go through the United States, although, it is true, that not all such issues will be made by public offering there. Rule 144A does provide an attractive alternative to the public markets for foreign equity. Still, as extensive as Rule 144A disclosure documents may be in the United States, they are not subject to regulatory scrutiny there and strong policy reasons would militate against their use in Canada in a public offering.

As an example of the flexibility of the Canadian regulatory approach, and in recognition of the importance of the role played by Rule 144A in international equity markets, ad hoc exemptive relief from Canadian prospectus requirements would be available. In cases where the foreign issuer is not making a public offering in the United States, the regulators will conduct a case-by-case review. In addition, pending final implementation of NP 53, case-by-case waivers and exemptions will be considered in two key areas: eliminating the need for reconciliation to Canadian generally accepted accounting principles and permitting international dealers to sell such securities in a Canadian public offering.

By hitching their cart to the U.S. regulatory horse, Canadian regulators are trying to ensure that Canadian capital markets get to go along for the ride by reducing regulatory barriers and the compliance costs associated with duplicative regulation. Canadian regulatory requirements are suppressed in reliance on compliance with those of the United States. The proponents of regulatory free-riding have usually recommended it as a cheap and easy fix to fill the regulatory void in emerging markets.

73 Barry Critchley, supra note 68.
74 However, they are subject to the sobering effects of statutory liability for misrepresentations under § 12(2) of the 1933 Act.
75 See Cally Jordan, The Thrills and Spills of Free-Riding, supra note 67, for a discussion of the concerns raised by the proposal originally contained in NP 53. It appears that these concerns have been addressed in the subsequent revisions to the policy.
76 See supra note 64.
77 See In the Matter of Allied-Domecq PLC, 18 O.S.C.B. 353 (Jan. 27, 1995), where such relief was granted.
Does the United States have anything to say about this? From its point of view, the more free-riders there are, the greater the assurance of U.S. dominance of global markets. Rather like the story of Beta and VHS or Apple and IBM, there may have been a better product out there, but the propagation of systems technology created the sheer mass of market share that resulted in one product prevailing over another. Thus the U.S. interest in promoting the adoption of U.S.-style regulatory regimes and free-riding in the emerging markets. The United States wants to ensure that its product set the industry standard.

b. The private placement ruling

The private placement ruling, unlike draft NP 53, is restricted to private placements in Ontario, and also institutionalizes relief which was granted on an ad hoc basis in the past. The private placement ruling is highly focused and quite narrow in the relief which it grants.

The private placement ruling permits the use of U.S. or U.K. offering documentation in a limited number of private placements. The significance of this ruling goes far beyond mere issues of disclosure. Due to the curious nature of the remedy for misrepresentation in private placements in Ontario (it is a contractual right which must be disclosed), acceptance of foreign offering documentation results in the Ontario investor having no domestic remedy. In fact, the Ontario investor may have no foreign remedy either.

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79 Supra note 65.

80 Offerings eligible to benefit from the relief granted by the private placement ruling are the following:

1. "International offerings," i.e., made in one or more jurisdictions outside Canada;
2. Ontario private placements exempt under § 72(1)(c) or (d) of the Securities Act, i.e., exempt investors as recognized by the Commission, or investors purchasing $150,000 in the aggregate; and
3. concurrent offerings in the United States (by prospectus or private placement memorandum) or in the United Kingdom.

Such offerings are allowed to rely on a U.S. private placement memorandum or a U.K. prospectus (constituting or including "listing particulars"), which may be supplemented by Canada-specific information.

81 For a discussion of the difficulties raised by the private placement ruling in this regard, see Jordan, The Thrills and Spills of Free-Riding, supra note 67. In response to the recent decision of the United States Supreme Court in Gustafson v. Alloyd Co., Inc., 131 L. Ed. 2d. 1 (1995) which raised some issues relating
In this respect the Ontario Securities Commission may have overstepped the bounds of acceptable free-riding. However, the real problem resides in the use of contractual rights of rescission and damages to impose liability for misrepresentation in the context of a private placement in Ontario. This is a false "regulatory hurdle." It was intended as a stop gap measure pending the introduction of statutory liability along U.S. lines. As often happens, a makeshift solution proved adequate enough to preclude adoption of a preferable one. The legislation proposing statutory liability was never implemented.\(^8\)\(^2\)

Statutory liability is industry standard; Ontario’s contractual rights of rescission are an anomaly exposed by the glare of the international market. A better response would be to correct the anomaly, not deprive Ontario investors of a remedy on the basis that it is necessary to ensure the international competitiveness of Ontario capital markets.

IV. CONCLUSION

The Canadian securities regulatory regime has in recent years been shaken by profound changes in capital markets, both in North America and to the availability to Canadian purchasers of the remedy under § 12(2) of the U.S. Securities Act of 1933, the Staff of the Ontario Securities Commission issued a notice, 18 O.S.C.B. 1350 (1995), stating that it has undertaken a review of the impact of the Gustafson decision on the blanket ruling, which is now a rule, and that pending completion of such review, issuers and their advisers are recommended to exercise caution before relying on the blanket ruling. In the event that issuers or other parties intend to rely upon the rule, in the view of the Staff of the Ontario Securities Commission, it may be appropriate to incorporate into the offering documents additional disclosure concerning the possible unavailability of certain U.S. remedies that were previously thought to be available.

82 Like NP 53, the Ontario Securities Commission’s private placement blanket ruling was designed to overcome certain of the Canadian regulatory hurdles identified by foreign issuers as hindering the inclusion of Canadian markets in securities issues around the world and barriers to attracting transactions domestically. The private placement ruling grants relief by accepting foreign offering documentation where a private placement is made in the course of a concurrent offering in the United Kingdom or the United States.

Canadian commentators noted that though Ontario common law standards would continue to apply, the ruling served to eliminate contractual rights of rescission for foreign offerings, a remedy that had been adopted in 1979. See § 20(2)(a) of Ontario Reg. 478/79. The Ontario Securities Commission had pushed for the inclusion of this right when it became aware that many trades were being made under prospectus exemptions without adequate disclosure of material information to purchasers. The Commission consequently required investors receiving an offering memorandum to be granted a contractual right of action for rescission or damages exercisable within 90 days of initial or full payment for the securities.

This contractual right of action was to be temporary only, and was intended to be replaced by an imminent amendment to the Ontario Securities Act, introducing statutory liability much along the lines of § 12(2) of the 1993 Act in the United States.
around the world. The old certainties and understandings no longer hold true as world markets impinge upon the Canadian markets. In the face of a highly competitive environment among capital markets, Canadian regulators are struggling to keep the Canadian markets from following the road to insignificance in the global scheme of things.

At the domestic level, the impact of changing times has been felt in renewed calls for a national securities regulator in Canada. "Almost everyone involved in the process concedes that the current regime is no longer effective. Canada is the only major industrialized country that does not have a national securities regulator, yet the industry has grown far beyond its provincial borders." Unfortunately, the federal government has abdicated its legislative jurisdiction in this area and the process of implementation has become highly politicized, resulting, predictably, in an impasse.

The most significant factor currently affecting the regulation of Canadian capital markets is without a doubt the increasing pace of North American economic integration. Not only is the Canadian securities regulatory regime being brought more and more into line with the substantive provisions of U.S. regulation (or, in the case of draft NP 53 and the private placement ruling, reliance on compliance with U.S. rules), the entire regulatory culture is being transformed. There is still a rocky road ahead for Canadian securities regulators, and, no doubt about it, the United States is in the driver's seat.

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APPENDIX A
THE REGULATION OF CANADIAN CAPITAL MARKETS

Contents

I. Introduction
II. The Prospectus System
III. World-Class Foreign Issuers
IV. Exempt Private Placements
V. Stock Exchange Requirements
VI. Disclosure and Reporting Obligations of a Public Company in Canada
VII. Sanctions

I. Introduction

The securities laws of Canada consist of a mosaic of federal and provincial laws, with the provincial laws playing the predominant role. The primary reference sources to the Canadian regulatory scheme for securities matters are:

(1) the securities law statutes of the ten provinces and two territories;
(2) the regulations passed under such statutes;
(3) the provincial policy statements and practice notes; and
(4) the National Policy Statements.

It should be recognized by non-residents, that when dealing with the markets of Canada, the basic pragmatic rule is to meet the strictest requirement imposed by any Canadian jurisdiction which thereby automatically meets less strict requirements imposed by other Canadian jurisdictions. As the requirements under the Ontario Securities Act84 (the "OSA") are, generally speaking, the strictest imposed by any Canadian jurisdiction, textual references are made only to the corresponding provisions of the OSA.

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84 OSA, R.S.O. ch. S.5 (1990), as amended.
Given the rate at which capital markets are evolving, the "policy statement" has become one of the most important regulatory mechanisms in Canada. Legislation simply cannot keep up with the market. Although certain recent judicial decisions have cast doubt on the authority of the provincial securities regulators to enforce compliance with their numerous policy instruments, participants in Canadian capital markets generally treat such policy statements as if they had the force of law. In response to these decisions and in recognition of the fact that policy statements are the only vehicle by which dynamic domestic and international capital markets may be effectively regulated, the government of Ontario recently passed the Securities Amendment Act, 199486 to give the Ontario Securities Commission ("OSC") the jurisdiction to create rules that have the force of law and the power to enforce compliance with them. The Securities Amendment Act, 1994 also elevated many of the OSC's policy statements to the status of "rules." While the OSC remains able to issue policy statements that do not have the force of law, such power has been specifically limited—policies may only set forth guidelines for the exercise of discretion, interpretive issues, and other practices—they may not be "prohibitive or mandatory" in nature.

In the absence of a national securities commission, the National Policy Statements serve an extremely important coordinating function in the regulation of Canadian capital markets. The National Policy Statements are the product of meetings of an ad hoc group of provincial securities administrators, the Canadian Securities Administrators, and provide those seeking to raise capital in Canada with an efficient and coordinated approach to interacting with and between the various provincial securities administrators. National Policy No. 1, for example, is a policy designed to facilitate the clearance of a prospectus filed in more than one province.

II. THE PROSPECTUS SYSTEM

For those familiar with the system in the United States, the Canadian prospectus qualification requirements are similar to the registration of

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86 Securities Amendment Act, R.S.O. ch. 33 (1994).
securities requirements imposed by the Securities and Exchange Commission pursuant to its legislative mandate.

Public offerings of securities in Canada are effected by the filing of a preliminary prospectus and a prospectus the forms of which are provided for in the Regulations to the various Securities Acts. Basically, the prospectus form is a disclosure document in narrative form containing current financial information as well as all "material facts" related to the public company. The directors and officers of the issuing corporation, any "promoter" of the securities offered by a prospectus, and the "underwriter" of the issue are each required to certify the prospectus in substantially the following language: "The foregoing constitutes full, true and plain disclosure of all material facts relating to the securities offered by this prospectus as required by . . . the Securities Act and the regulations thereunder." The wording of the underwriter's certificate is slightly less onerous and is qualified by "the best of [the underwriter's] knowledge, information and belief," thus giving rise to a due diligence defense.

Civil liability for "misrepresentations" in a prospectus attaches to each person who certifies a prospectus. In addition, any person or company that makes a statement in any preliminary prospectus or prospectus that, at the time and in the light of the circumstances under which it is made, is a "misrepresentation," is guilty of an offense and, on conviction, is liable to fine or imprisonment or both. Certain defenses to civil liability, most notably the defense of reasonable investigation or "due diligence," are available to persons other than the issuer.

Subject to certain exceptions and possible exemptions, every prospectus must contain a balance sheet as of a date not more than 120 days prior to the date of the issuance of a receipt for the preliminary prospectus, and as of the corresponding date of the previous financial year as well as an income statement, a statement of surplus and statement of changes in financial

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87 OSA, R.S.O. § 1(1) (1990) defines a "material fact" as a fact that significantly affects, or would reasonably be expected to have a significant effect on, the market price or value of securities issued or proposed to be issued.
88 OSA, R.S.O. § 58 (1990).
89 Id. § 59.
90 OSA, R.S.O. § 1(1) (1990) defines a "misrepresentation" as 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 the light of the circumstances in which it was made.
91 OSA, R.S.O. § 130 (1990).
92 Id.
93 Id.
position for each of the last five financial years, and any part of a subsequent financial year to the date at which the balance sheet is made up.\footnote{OSA Regulation, R.R.O. § 53 (1990).}

The securities law statutes of the provinces and territories provide, generally speaking, that all financial matters must be presented on the basis of Canadian generally accepted accounting principles. Aside from limited, specialized situations, such as for banks incorporated under the \textit{Bank Act} (Canada),\footnote{Bank Act, S.C. ch. 46 (1991).} Canadian GAAP refers to the rules and procedures of the Canadian Institute of Chartered Accountants in the manner specified in their Handbook. Unlike under United States securities law, where an issuer is incorporated or organized in a non-Canadian jurisdiction, financial statements may be presented in accordance with the "generally accepted accounting principles" of the incorporating jurisdiction, provided that a statement to this effect is included in the notes to the financial statements.

National Policy No. 3 provides that only persons independent of the company and its affiliates and of the directors and officers of the company and its affiliates qualify to be auditors. While independence is ultimately a question of fact, National Policy No. 3 deems certain persons that have economic or other direct or indirect interests in an issuer not to be independent. An exemption order may be granted, however, upon application to a court, if this would not unfairly prejudice shareholders.

A company that intends to effect a public offering of securities within a particular province or territory of Canada must first file a preliminary prospectus with the securities commission of that particular jurisdiction.\footnote{OSA, R.S.O. § 53(1) (1990).} The company will then be issued a "preliminary receipt" for its preliminary prospectus from the securities commission with which it was filed.\footnote{\textit{Id.} § 55.} During the ten days following the issuance of the preliminary receipt while the issuer awaits written comments on its preliminary prospectus from the securities commission with which it was filed, an issuer's marketing efforts are significantly restricted.\footnote{\textit{Id.} § 65. The OSC takes the position that except for the limited distribution of materials permitted under § 65(2), only the preliminary prospectus may be distributed during the "waiting period." In the view of the OSC, marketing brochures and other forms of marketing information and material distributed to prospective investors during the "waiting period" are being distributed in contravention of § 53(1) of the OSA. \textit{See} Advertising and Use of Marketing Material During the Waiting Period, 10 O.S.C.B. 2831 (May 15, 1987). The OSC also takes the position that no interviews should be given to the financial media by...} While an issuer may advertise the security
proposed to be issued, it must ensure that all such communications identify from whom a preliminary prospectus may be obtained and that the preliminary prospectus is forwarded to each prospective purchaser from whom the issuer solicits expressions of interest.99

The company will usually receive written comments on its preliminary prospectus from the securities commission within 10 days following the issuance of the preliminary receipt. Once the securities commission is satisfied that all of its comments have been resolved and the issuer files its final prospectus with that securities commission, a “final receipt” will be issued and the issuer may begin sales of its qualified securities in that particular province.100 A final receipt must be issued for a prospectus unless it appears that it is not in the public interest to do so.101 Generally speaking, a prospectus for which a final receipt has been issued has a life span of one year but may be renewed.102

An issuer contemplating qualifying an offering in more than one province must follow the procedures set out in National Policy No. 1. The policy provides that a preliminary prospectus, together with the supporting material listed in the policy, shall be filed, as nearly as may be practicable, contemporaneously with the securities administrator in each province in which it is proposed to qualify the offering. The issuer selects one of the provinces as the principal jurisdiction and advises each of the other jurisdictions of the name of the principal jurisdiction. The principal jurisdiction will review the material and will use its best efforts to issue the first written comments within ten working days from the date the receipt for the preliminary prospectus was received. The first comment letter will be transmitted by the principal jurisdiction immediately to each of the other filing jurisdictions and to the issuer or the issuer’s solicitor. The other jurisdictions will use their best efforts to advise the principal jurisdiction of any additional comments within five working days of receipt of the first comment letter. The issuer or the issuer’s solicitors will provide written responses to the comment letters, and when the principal jurisdiction is satisfied that all comments have been resolved and a final prospectus, together with support-
ing documents, has been filed, the principal jurisdiction will issue a final receipt. The other jurisdictions will issue final receipts after receipt by them of acceptable final material and after receipt of advice as to the issuance of the final receipt by the principal jurisdiction.

In an attempt to avoid duplicative filings and delays, a system of “expedited review” has recently been introduced. Issuers that have been “reporting issuers”\(^{103}\) in one or more of the provinces or territories of Canada for at least twelve months and that have equity securities\(^ {104} \) that trade on a Canadian stock exchange with an aggregate market value in excess of C$75 million are eligible to participate in an expedited review process.\(^ {105} \) Qualified issuers are assigned a designated jurisdiction that acts as that issuer’s “principal jurisdiction” for purposes of the review. As under National Policy No. 1, qualified issuers file their preliminary prospectus, together with the supporting material listed in National Policy No. 1, contemporaneously with the designated jurisdiction and the securities commission of each province in which it is proposing to qualify the offering. Immediately upon receipt of such materials, the designated jurisdiction will issue a preliminary expedited review receipt evidencing that a preliminary receipt has been issued by each jurisdiction in which the preliminary prospectus was filed. Thereafter, the designated jurisdiction will review the materials and will use its best efforts to issue its written comments within only three working days. Once the designated jurisdiction is satisfied that all comments have been resolved and a final prospectus, together with supporting documents, has been filed the designated jurisdi-

\(^{103}\) The term “reporting issuer” is defined in § 1(1) of the OSA and generally refers to a company that has filed a prospectus and obtained a receipt therefore, filed a securities exchange take-over bid circular, has securities listed and posted for trading on a Canadian stock exchange, or is, pursuant to the provisions of the company’s particular incorporating statute, a company that is offering its securities to the public.

\(^{104}\) Securities that carry a residual right to participate in earnings of the issuer and, upon liquidation or winding up of the issuer, in its assets.

\(^{105}\) The expedited review procedure is set out in the Memorandum of Understanding for Expedited Review of Short Form Prospectuses and Renewal AIFs, 17 O.S.C.B. 5212 (Nov. 4, 1994), among the various provinces and territories of Canada except Québec. While Québec is the only jurisdiction that is not a party to the Memorandum of Understanding, the Commission des valeurs mobilières du Québec, Québec’s securities commission, has agreed to attempt to review materials filed under the procedure for expedited review within the time periods prescribed by the Memorandum of Understanding. An issuer intending to qualify an offering in more than one Canadian jurisdiction and Québec may nonetheless participate in the expedited review process and file under National Policy Statement No. 1 provided it selects its designated jurisdiction under expedited review as its principal jurisdiction for the purposes of National Policy Statement No. 1.
tion will issue a final expedited review receipt evidencing that a final receipt has been issued by each jurisdiction in which the preliminary prospectus was filed.

III. WORLD-CLASS FOREIGN ISSUERS

In August of 1993, the Canadian Security Administrators circulated for comment Draft National Policy Statement No. 53—Foreign Issuer Prospectus and Continuous Disclosure System. The intended purpose of Draft National Policy Statement No. 53 is to reduce barriers to entry to the Canadian capital markets for "world-class" foreign issuers who are accessing the U.S. public markets, provide increased opportunity for Canadian dealers to participate in offerings by foreign issuers and provide increased opportunity for investment by Canadian investors in the securities of these issuers while maintaining an appropriate level of investor protection.

In order to be considered a "world-class" issuer, the Draft Policy requires that the issuer have both a market capitalization of C$3 billion and a public float of C$1 billion after giving effect to the offering. Moreover, the Draft Policy provides that the Canadian tranche must be limited to ten percent of the offering and the issuer must have less than ten percent of its equity securities held by Canadian residents. Although originally broader in scope, recent pronouncements from the OSC indicate that qualified world-class foreign issuers who access the U.S. public markets will be enabled to take advantage of the Multi-Jurisdictional Disclosure System (the "MJDS") and use their U.S. registration statement to sell their securities into Canada.

The prospectus used by the world-class foreign issuer in Canada is receipted as a prospectus and therefore must comply with the requirement of "full, true and plain disclosure of all material facts." Accordingly, the civil liability provisions of applicable Canadian legislation will continue to apply to the issuer in connection with its disclosure document.

As to ongoing reporting issuer obligations, generally speaking, world-class foreign issuers which have offered securities under Draft National Policy Statement No. 53 may comply with the continuous financial and other reporting requirements of the U.S. Securities and Exchange Commission in lieu of those of the Canadian securities regulators.
IV. Exempt Private Placements

There are, essentially, four categories of prospectus exempt securities transactions or "private placements." The first involves the distribution of certain securities that are considered inherently "safe," such as government or bank guaranteed bonds and guaranteed investment certificates issued by licensed loan and trust corporations. In addition, no prospectus is required for securities that are traded upon a "recognized stock exchange," i.e., The Toronto Stock Exchange and The Montreal Exchange, where the securities are distributed through the facilities and pursuant to the rules of that stock exchange and the applicable provincial or territorial securities commission.

The second category of exempt private placements focuses upon the purchaser of the securities rather than upon the securities distributed. There are, broadly speaking, two types of exempt purchasers; the first are considered "sophisticated" purchasers, who (it is assumed) will take appropriate precautions in respect of their investment decision, such as government purchasers or purchasers who purchase as principal a security the acquisition cost of which is not less than C$150,000. The other class of exempt purchasers are persons who have a sufficient nexus to the issuer such that they possess or have ready access to the information they require to assess the proposed investment, such as employees of the issuer (provided that such employees are not induced to purchase by way of expectation of employment or continued employment) and existing security holders, when the securities are distributed by way of dividends in specie.

The third category of private placement involve trades in securities in which purchasers are given an acceptable alternate source of information from the prospectus. Such transactions include securities exchanged pursu-

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106 Reference should be made to §§ 72, 73, and 74 of the OSA, §§ 14 and 17 of the OSA Regulation, and the corresponding sections of the various other provincial and territorial securities acts and the regulations thereto for a comprehensive description of available exemptions from the prospectus requirements of each.

107 OSA, R.S.O. § 73 (1990).

108 Id.

109 Id. § 72(1)(a).

110 Id. § 72(1)(d); OSA Regulation, R.R.O. § 27(1) (1990).


112 Id. § 72(1)(g).
Ant to a take-over bid in respect of which shareholders are given a take-over
bid circular\textsuperscript{113} or pursuant to a statutory amalgamation or arrangement in
respect of which shareholders are given an information circular.\textsuperscript{114}

An issuer desiring to take advantage of the C$150,000 private place-
m ent prospectus exemption in circumstances where solicitations are made
through an advertisement in printed media of general and regular paid circu-
l ation, radio or television, must provide prospective purchasers with an
"offering memorandum."\textsuperscript{115} There are no rules specifying the content of an
offering memorandum. Essentially, a document is an "offering memoran-
dum" if it purports to describe the business and affairs of an issuer and has
been prepared primarily for delivery to and review by prospective investors
so as to assist them in their investment decision in respect of the securities
being sold.\textsuperscript{116} An offering memorandum must, however, contain a
"contractual right of action" stating that investors have a right of action
against the issuer for rescission or damages that is exercisable within 90
days after payment in the event that the offering memorandum contains a
"misrepresentation."\textsuperscript{117} The contractual right of action must reasonably
 correspond to the rights provided by statute applicable to a purchaser under
 a prospectus and may be subject to the defense that the issuer is not liable if
 it proves that the purchaser acquired the securities with knowledge of the
 misrepresentation.\textsuperscript{118} If an issuer voluntarily provides prospective purchas-
ers with an offering memorandum certain prospectus exemptions will not be
 available to the issuer unless the prospective investor is also given a
contractual right of action described in the offering memorandum.\textsuperscript{119}

The final category of exemption from the prospectus requirements, is
a discretionary one. Unlike in the United States, securities regulators in
Canada have the power to exempt issuers from the prospectus requirements
where they are "satisfied to do so would not be prejudicial to the public
interest, upon such terms and conditions as they may consider to be neces-

\textsuperscript{113} Id. § 72(1)(k).
\textsuperscript{114} Id. § 72(1)(i).
\textsuperscript{115} OSA Regulation, R.R.O. § 32(2) (1990).
\textsuperscript{116} Id. § 32.
\textsuperscript{117} Id.
\textsuperscript{118} Id.
\textsuperscript{119} Issuers who intend to rely on the prospectus exemptions found at OSA, R.S.O. §§ 72(1)(c), (d)
or (p) or at OSA Regulation, R.R.O. § 14(f) and who voluntarily provide prospective purchasers with an
offering memorandum must provide purchasers with the contractual right of action. OSA Regulation,
R.R.O. § 32(3)
The OSC Blanket Ruling concerning Certain International Offerings By Private Placement In Ontario is an example of such discretionary power. The OSC Blanket Ruling allows foreign issuers which are not incorporated or organized under the laws of Canada or a province or territory thereof, not controlled by Canadians and whose assets and operations are not principally located or administered in Canada to make a private placement in Ontario to (i) persons, other than individuals, who are recognized by the OSC as an exempt purchaser, and (ii) persons purchasing securities the aggregate acquisition cost of which are at least C$150,000; provided that the foreign issuer file with the OSC either a U.S. prospectus or offering memorandum if the offering is being made concurrently in the United States or a U.K. prospectus if the offering is being made concurrently in the United Kingdom. In either event, the foreign disclosure document need not contain the “contractual rights of action” for rescission or damages against the foreign issuer which would otherwise be required.

In summary, a company may distribute securities in Canada by a public offering, by filing a prospectus with the applicable securities administrators in the jurisdictions in which it proposes to distribute the securities, or by a “private placement” pursuant to one or more of the exemptions from prospectus qualification requirements.

V. STOCK EXCHANGE REQUIREMENTS

Stock exchanges in Canada are self-regulating organizations with their own rules, regulations, and by-laws, but are ultimately subject to the oversight of the securities commission of the jurisdiction in which they are located. The principal exchange through the facilities of which securities of mature issuers are traded is The Toronto Stock Exchange, with The Montreal Exchange providing strong competition. Speculative and junior corporations are more often traded through the facilities of the Vancouver Stock Exchange and to a lesser extent through the facilities of the Alberta

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120 OSA, R.S.O. § 74 (1990).
121 Supra note 65.
123 Id. § 23.
Stock Exchange. Each exchange has its own listing requirements, rules, by-laws and policies.

Section 324 of The Toronto Stock Exchange Company Manual provides the minimum listing requirements for a foreign company, and requires that the foreign company have net tangible assets of at least C$10 million and a minimum of 1 million issued shares held by at least 3,000 public shareholders having a minimum market value of C$10 million. Additionally, if the foreign company is not listed on a recognized “major stock exchange,” The Toronto Stock Exchange requires that there be at least 300 public shareholders each holding a board lot or more who are residents of Canada. To list on the International Division of The Montreal Exchange, a foreign company must have net tangible assets of at least C$15 million, pre-tax income of at least C$2.5 million and a minimum of 100 issued shares held by at least 1,000 public shareholders having a minimum market value of C$25 million. French companies that are reporting issuers in Quebec only because certain of their securities are listed on the International Division of The Montreal Exchange and that are not reporting issuers in any other province of Canada or subject to United States securities regulations are eligible to participate in a simplified continuous disclosure regime.

The Toronto Stock Exchange may at any time temporarily halt trading in any securities or suspend from trading or delist a company’s securities if it is satisfied that the company has failed to comply with any of the provisions of its Listing Agreement or such action is necessary in the public interest.

VI. DISCLOSURE AND REPORTING OBLIGATIONS OF A PUBLIC COMPANY IN CANADA

Public companies in Canada are subject to a myriad of continuous disclosure and reporting obligations outlined in Appendix B, including

124 The Charter of the Montreal Stock Exchange, Rule 9, art. 9904, ¶ 4200-16.
125 Commission des valeurs mobilières du Québec, Policy Statement No. Q-16, exempts eligible foreign companies from the requirement to communicate directly with shareholder resident in Québec provided that it designate a person who also has a place of business in Québec and from whom shareholders may review and obtain such shareholder communications. The simplified continuous disclosure regime provided by Policy Statement No. Q-16 does not, however, exempt the reporting issuer from its filing requirements with the Commission des valeurs mobilières du Québec.
annual and interim financial reporting, proxy solicitation, and insider reporting obligations. Such continuous disclosure and reporting obligations apply to all public companies, unless specifically exempted, regardless of whether their securities are listed for trading on a Canadian stock exchange.

VII. SANCTIONS

As in many countries, fraud, manipulation, and insider trading are sanctioned under Canadian law, by

(1) the criminal law enacted by the federal government and applicable in all jurisdictions in Canada;
(2) the securities and company law quasi-criminal prohibitions; and
(3) the existence of civil remedies under securities, company and common law.

The provisions of the federal criminal law pertaining to fraud are found in Part VIII of the Criminal Code. Section 338 of the Criminal Code is the "general" fraud section. Fraudulent use of the mails as penalized by section 339 includes schemes "devised or intended" to achieve any one of the three stated purposes: to deceive the public, to defraud the public, or to obtain

127 OSA, R.S.O. §§ 75-76 (1990) require reporting issuers to issue a press release and file it, together with a report on a prescribed form, of all "material changes" that occur in their affairs. The term "material change," where used in relation to the affairs of an issuer, is defined at OSA, R.S.O. § 1(1) (1990) to mean 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 the 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.
129 Id. part XXI. Insiders of public companies are required to file and update a report with the applicable securities commission reflecting their beneficial ownership and trading activity of the securities of the companies in respect of which they are "insiders." An "insider" is defined as every director or senior officer of a reporting issuer or of a company that is itself an insider or subsidiary of a reporting issuer, any person or company who beneficially owns voting securities of a reporting issuer, or who exercises control or direction over such securities carrying more than ten percent of the voting rights attached to all voting securities of the reporting issuer then outstanding and a reporting issuer where it has purchased, redeemed or otherwise acquired any of its securities, for so long as it holds any of its securities.
money under false pretenses. These two sections may be used to attempt to control fraudulent behavior relating to securities or other matters. It should be observed that it is not necessary that there be an ascertained victim. In addition, section 340 subjects to criminal sanctions the activity or conduct commonly called "wash trading" which is a technique designed to manipulate a market by giving the appearance of investor activity and interest.

Securities law offenses are specified in the various securities statutes, which provide that "persons" or "companies" that

(1) make false statements in materials required to be filed or disseminated pursuant to the securities law; or
(2) contravene any provisions of the securities law, including those contained in the regulations under the statutes; or
(3) fail to comply with directions, decisions and rulings of the securities administrators are guilty of offenses with fines ranging up to $1,000,000 or to imprisonment for a term of not more than two years, or to both.\textsuperscript{131}

In addition to the quasi-criminal connotation of a conviction for a securities offense, most Canadian statutes grant to the securities administrators the power to remove the exemptions from trading, whether by way of registration of "securities" or registration of traders, from persons whose conduct is "unbecoming," i.e., the administrators are given discretion to remove the ability to use the exemptions where in their opinion it is "in the public interest so to do."\textsuperscript{132} Further, the relevant commission retains the power to order that all "trading" in particular "securities" cease "where in its opinion such action is in the public interest."\textsuperscript{133}

Civil liability is specified in the various securities statutes in terms not dissimilar to those specified in Part XXII of the OSA. Damages are

\textsuperscript{131} OSA, R.S.O. § 122 (1990). Since December of 1990, 14 individuals have received jail sentences for violations of the OSA. Prior to 1990, it appears that only 12 prosecutions under the OSA resulted in jail sentences in more than 40 years. It would also appear that there are only two decisions, R. v. Kushnyrick (unreported) (Alberta P.C. May 14, 1991) and R. v. Bachewick (unreported) (Manitoba P.C. June 15, 1994), involving the imposition of a jail sentence for a provincial securities violation outside of Ontario, despite the fact that it is a penalty which is available in every province except Québec. David E. Lang, Emerging Trend Toward Jail Sentences for Securities Act Violations in Ontario, 18 O.S.C.B. 346 (Jan. 27, 1995).

\textsuperscript{132} OSA, R.S.O. § 128 (1990).

\textsuperscript{133} Id. § 127.
specified for a "misrepresentation" in a prospectus, take-over bid circular, and directors' circular issued pursuant to the take-over bid requirements. It is a specified defense that no "person" or "company" is liable for a misrepresentation in a prospectus, if the accused or respondent proves that the purchaser purchased the security with knowledge of the "misrepresentation." Also, due diligence defenses are specified by most statutory provisions, where the defendant can establish that he conducted "reasonable investigation" to provide "reasonable grounds" for believing that there had been no "misrepresentation." Damages are limited to those that relate directly to the depreciation in the value of the "security" concerned only to the extent such depreciation is attributable to the "misrepresentation" concerned.

Additional civil remedies are those available under the common law, including actions for damages, fraud, or deceit. Recourse to such remedies is rarely made as affected security holders would, in certain circumstances, have to prove reliance on an alleged "misrepresentation" in a prospectus or take-over bid circular whereas they are statutorily "deemed to have relied on the misrepresentation" under Canadian securities law. As well, the securities laws provide that no agreement of purchase and sale is binding if a prospectus has not been delivered.

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134 Id. §§ 130(1), 131(1).
APPENDIX B
DISCLOSURE AND REPORTING OBLIGATIONS OF A FOREIGN PUBLIC COMPANY IN CANADA

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I. INTRODUCTION

Appendix B outlines the disclosure and reporting obligations of a foreign public company in Canada as they arise under the Securities Act (Ontario) (the “OSA”), the policies of the Ontario Securities Commission (the “OSC”), National Policy Statements, and the rules and by-laws of The Toronto Stock Exchange (the “TSE”) as to December 31, 1994. For the purposes of this memorandum, the corporate and other foreign securities regime applicable to any particular foreign issuer has not been considered except with respect to the applicability of OSC Policy 7.1 and National Policy 14 as discussed below.
Broadly speaking, OSC Policy 7.1 allows public companies, other than those incorporated, organized, or continued under the laws of Canada, or a province or territory thereof, registered with the Securities and Exchange Commission (the "SEC") in the United States under the Securities Exchange Act of 1934 to comply with the annual and interim financial reporting, timely disclosure, management information circular, and insider reporting obligations of the SEC provided that copies of all such reports are filed within prescribed time periods with the OSC. OSC Policy 7.1 is augmented by National Policy 14 which allows a public company to disclose financial information in a currency other than Canadian dollars provided that the currency of display is reasonable in the circumstances (e.g., the currency of the jurisdiction in which the public company is organized or incorporated, or the currency of the public company’s primary economic environment).

II. DISCLOSURE

The disclosure requirements applicable to public companies in Ontario are discussed below. It should be noted that some provinces have securities legislation with different requirements from those of Ontario.

A. Financial Statements

Generally, financial statements must be prepared in accordance with the Canadian Institute of Chartered Accountants Handbook and generally accepted accounting principles. Where the CICA Handbook is silent, the required accounting practice would be found in general industry practice or from pronouncements of other major accounting bodies, principally in the United States and England. However, where the public company is incorporated or organized in a jurisdiction other than Canada or a province or territory thereof, "generally accepted accounting principles" may, at the option of the public company, mean such principles as prescribed in the incorporating jurisdiction by an association in that jurisdiction equivalent to the Canadian Institute of Chartered Accountants; provided that disclosure to such effect is made in the notes to the financial statements.

135 Id. § 78; OSA Regulation, R.R.O. § 1(3) (1990); TSE Company Manual § 439.
1. Annual

The TSE requires the public companies to send the annual financial statements and an annual report containing a record of the public company’s activities, if any, during the period covered to each shareholder within 140 days after the end of the financial year, and to file four copies of these materials with the TSE concurrently with the sending of these materials to the shareholders. The financial statements which must be accompanied by an auditor’s report, include a balance sheet, statement of retained earnings, income statement, and a statement of changes in financial position. The annual financial statements must also be filed with the OSC and sent to shareholders resident in Ontario within 140 days of the public company’s financial year-end.

2. Interim

Unless an exempting order has been obtained, public companies are required to file with the OSC and send to shareholders resident in Ontario unaudited interim financial statements, comprised of a statement of changes in financial position and an income statement, for each of three quarterly periods of each fiscal year, within sixty days of the end of that period. Comparative financial statements for the corresponding period in the previous year must also be filed. These statements need not be accompanied by an auditor’s report. Four copies must be forwarded to the TSE. The interim financial statements must be sent to the shareholders within sixty days of the date to which they are made up.

3. AIF and MD&A

OSC Policy Statement 5.10 requires public companies to prepare an annual information form (“AIF”) on the business and operations of the

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137 TSE Company Manual § 437.
140 Id. §§ 77, 79; OSA Regulation, R.R.O. § 7 (1990).
141 OSA, R.S.O. § 77 (1990).
142 OSA Regulation, R.S.O. § 9 (1990).
143 TSE Company Manual § 436.
144 OSA, R.S.O. § 79 (1990).
public company and to prepare a management discussion and analysis ("MD&A") of the current financial situation and future prospects of the public company. The primary objective of Policy 5.10 is to enhance investor understanding of the public company's business by providing supplemental analysis and background material to allow fuller understanding of the nature of the public company, its operations, and known prospects for the future.

The AIF must be filed with the OSC (with four copies to the TSE) within 140 days of the fiscal year end. The AIF must also be made available to any security holder on request and any other person on request upon payment of a reasonable fee set by the public company. The MD&A must accompany the annual financial statements. There is no requirement for interim financial statements to include MD&A, but the OSC encourages such inclusion of MD&A.

4. Exemptions

The OSC may permit the omission of the comparative financial statements for particular periods of time, the sales or gross revenue figures (if disclosure would be detrimental to the public company), or basic earnings per share or fully diluted earnings per share,\(^ {145} \) where to do so would not be prejudicial to the public interest. Given the importance of the annual financial statements to investor protection, the OSC will not normally grant full relief from these requirements.\(^ {146} \) The OSC may also allow exemptions where the public company uses another form of reporting or if there is adequate justification for exempting the public company.\(^ {147} \) If the interim financial statements are not of significant benefit to the investors and are a material financial burden to the public company, the OSC may fully or partly exempt the public company from preparing them.\(^ {148} \) Since the statements are for shareholder benefit, the OSC generally requires shareholder approval. Alternative methods of distribution of the interim financial statements may be used if the quality and effectiveness of distribution meets with the OSC's approval.

\(^ {145} \) Id. § 80(a).
\(^ {146} \) OSC Policy 7.1, reprinted in OSA and Regulations 1995 at 981-93.
\(^ {148} \) OSC Policy 2.6, reprinted in OSA and Regulations 1995 at 836-39.
B. **Timely Disclosure**

To place all investors on an equal footing with respect to access to material information about a public company, timely disclosure obligations are imposed on every public company.\(^{149}\) To become a public company under the OSA, a company must place all material facts on public record through the issuance of a prospectus and the TSE listing statement. New and material information concerning the public company may thereafter arise as a result of a material change in the affairs of the public company.\(^{150}\) Such material change must be disclosed on a timely basis.

For the purposes of securities legislation, a “material change” is a change in the business, operations, or capital of the public company that would reasonably be expected to have a significant effect on the market price or value of any of its securities. A “material change” includes a decision to implement such change that is made by the board of directors or senior management of the public company if they believe the confirmation of the decision by the board of directors is probable.

“Forthwith” after a material change, a public company must issue a press release authorized by a senior officer disclosing the nature and substance of the change and must file a copy with the OSC. The public company must also file with the OSC, and with such other securities regula-

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\(^{150}\) A “material change” is a change in the business, operations, or capital of the company that would reasonably be expected to have a significant effect on the market price or value of any of the company’s securities and includes a decision to implement such change made by the board of directors of the company or by senior management of the company who believe that confirmation of the decision by the board of directors is probable. The national security administrators have indicated that actual or proposed developments that are likely to give rise to material information, and thus to require prompt disclosure, include, but are not limited to, the following:

- changes in share ownership that may effect control
- changes in corporate structure such as reorganizations, amalgamations
- take-over bids or issuer bids
- major corporate acquisitions or dispositions
- changes in capital structure
- significant borrowings
- issuances of securities publicly or privately
- development of new products or resources
- significant contracts
- changes in strategy
- significant changes in management
- major labor disputes
- events of default under financing or other agreements.
tory authorities of provinces in which the public company is a reporting issuer, a material change report (Form 27) disclosing the change as soon as practicable and, in any event, within ten days of the change. The OSC (and other relevant authorities) may relieve the public company from the requirement to issue a press release if the disclosure would be unduly detrimental to the public company or the material change consists of a decision to implement the change by senior management who have no reason to believe that persons with knowledge of the change have made use of it in purchasing or selling securities of the public company. The public company must still file a Form 27, but it can be marked "confidential" and must be filed together with written reasons for the non-disclosure. The OSC and the TSE will monitor trading in the issuer's securities in the market, and the public company must report to the OSC (and other relevant authorities) every ten days, outlining the reasons why confidentiality is still required. This mechanism will continue until the public company is ready to make disclosure or the OSC or another securities authority compels disclosure.151 The OSC may exempt from the timely disclosure requirements public companies with less than fifteen Ontario resident security holders, if this would not be prejudicial to the public interest.152

National Policy No. 40 supplements the requirements of the Securities Act (Ontario) by requiring disclosure of material information, which includes material facts. Actual or proposed developments that are likely to give rise to material information and thus to require prompt disclosure include, but are not limited to, the following:

1. changes in share ownership that may affect control of the issuer;
2. changes in corporate structure, such as reorganizations, amalgamations etc.;
3. take-over bids or issuer bids;
4. major corporate acquisitions or dispositions;
5. changes in capital structure;
6. ordering of a significant amount of funds;
7. public or private sale of additional securities;
8. development of new products and developments affecting the issuer's resources, technology, products or market;

151 OSA, R.S.O. §§ 75(3)-75(4) (1990).
152 Id. § 83.
(9) significant discoveries by resource companies;
(10) entering into or loss of significant contracts;
(11) firm evidence of significant increases or decreases in near-term earnings prospects;
(12) changes in capital investment plans or corporate objectives;
(13) significant changes in management;
(14) significant litigation;
(15) major labor disputes or disputes with major contractors or suppliers;
(16) events of default under financing or other agreements; or
(17) any other developments relating to the business and affairs of the issuer that would reasonably be expected to significantly affect the market price or value of any of the issuer’s securities or that would reasonably be expected to have a significant influence on a reasonable investor’s investment decision.

The TSE\textsuperscript{153} requires listed companies to make timely disclosure of all material information concerning the business and affairs of the public company including changes in control, the acquisition or dispositions of significant assets, reorganizations, amalgamations and take-overs, development of new products, material contracts, changes in the capital structure, firm evidence of significant changes in near-term earning prospects, and any other change that is expected to significantly affect the market price of the securities.\textsuperscript{154} Such changes should be disclosed promptly to the TSE and the general public using a media service (such as Canada News-Wire) and rumors known to the public company should also be promptly clarified. For ease and speed of processing, separate notices for each event should be sent to the TSE.\textsuperscript{155}

The timing of public disclosure of material information is a very difficult issue. Premature public disclosure may cause a public company as much difficulty as delayed disclosure or failure to disclose at all. A public announcement by an issuer that it intends to proceed with a particular transaction implies a present willingness and ability to carry out that intent; if the

\begin{footnotes}
\footnotetext[153]{TSE Company Manual § 406. The TSE’s timely disclosure requirements are extended to all public companies or the equivalent in any Canadian jurisdiction by draft National Policy No. 40 of the Canadian Securities Administrators.}
\footnotetext[154]{\textit{Id.} §§ 409-410.}
\footnotetext[155]{\textit{Id.} § 433.}
\end{footnotes}
party making the announcement is not in a position to proceed with the change within a short period of time, the OSC will consider the making of the announcement to be premature and misleading. 156

How can a public company best organize itself to deal with the timely disclosure obligations? Forward planning would not be of assistance for example, if a major plant of a public company burns down. However, a public company can structure its strategic decision-making process to prevent triggering a public disclosure requirement prematurely, when for example, a significant acquisition is made. To do this management should identify proposed transactions which would appear to constitute material changes. If management is in any doubt as to whether the transaction would have a significant effect on the market price of the issuer’s securities, one or more investment dealers should be consulted together with legal counsel. Management should also avoid making decisions to implement significant changes without prior consultation with the board of directors. After hearing management’s specific recommendations regarding a particular course of action, the board should make the final decision.

Finally, management must attempt to prevent knowledge of the proposed change from spreading within the public company. Those who need to know must understand their duty to keep this information confidential and not to buy or sell in the public company’s securities on the basis of it. The implications of breaching this duty are discussed under “Insider Trading” below. It is a good idea for management to notify each director in writing when the occurrence of a material change is possible, warning the director to avoid buying or selling in the market.

In order for the TSE to have up-to-date information on certain basic aspects of all listed companies, annual questionnaires must be filed. 157 These questionnaires cover basic corporate information such as head office location, the names of officers, directors and transfer agent(s), capital structure, fiscal year-end date, and publication of financial statements.

The TSE also requires notification of the declaration by the board of any dividends forthwith upon declaration and, in any event, at least seven trading days in advance of the dividend record date. 158 Notification may be made by phone and confirmed by letter, or by press release with copies sent

156 Premature Announcements of Takeover Bids, Mergers, Amalgamations or Other Corporate Restructuring, OSC BULLETIN, Oct. 1980, at 450.
158 Id. §§ 428-435.
to the TSE. Failure to notify the TSE at least four business days before the record date will result in the TSE holding the public company liable to all parties with bona fide disputes over entitlement to the dividend. The notice must be published, and must contain the public company’s name, stock issue, rate of dividend, date payable, record date, and the dividend period.

All listed companies must give immediate notice to the TSE of any proposed issuance of equity securities or options, and must not proceed with the transaction without the TSE’s prior consent.\(^{159}\) As a condition of such consent, the TSE may require shareholder approval if the proposed transaction may materially affect control of the public company or has not been negotiated at arm’s length, or if such approval is desirable, having regard to the interests of shareholders and the investing public.\(^ {160}\)

Options granted pursuant to the public company’s stock option plan (the “Plan”) must be reported to the TSE at the time of the grant, but do not require prior acceptance by the TSE. Any material amendment to the Plan, or to the terms of an option granted thereunder, must be approved by the TSE and shareholder approval will be required.\(^ {161}\)

Additionally, by January 30 of each year, the public company must file a notice with the Ontario Securities Commission (the “OSC”) stating the aggregate proceeds realized in Ontario from the public company’s Director, Officer and Employee Stock Option Plan in the previous year. The public company must notify the OSC by January 30 of the aggregate proceeds from the issuance of securities under the plan since the last notice filed. Together with the notice, the public company must pay a fee equal to 0.02% of the aggregate gross proceeds stated in the notice. This requirement will be applicable only for a year in which shares are issued under the plan.\(^ {162}\)

### III. INSIDER TRADING AND REPORTING

#### A. Insiders

Corporate legislation is designed to prevent insiders of public companies and their associates from using confidential information—not generally known to the public—to make a profit, and hence to protect investors and

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\(^{159}\) TSE By-law 19.06(1); TSE Company Manual §§ 601-605.

\(^{160}\) TSE By-law 19.06(2); TSE Company Manual §§ 606-608.

\(^{161}\) TSE Company Manual §§ 626-632.

maintain public confidence in the market place. To accomplish this, the legislation uses two mechanisms. First, anyone who becomes an insider of a public company must file an initial report disclosing the insider’s interest in the public company’s securities, and must file insider change reports when this interest changes. Second, an insider and his associates are prohibited from trading in the public company’s securities with information that has not been generally disclosed to the public or disclosing such information outside the necessary course of business. Insiders include the directors and senior officers of the public company and its subsidiaries and insiders. Companies or persons who exercise control of more than ten percent of the votes attached to all voting securities are also insiders.163

B. Insider Reporting

The OSA requires that a person or company who becomes an insider of a public company must file a report (Form 36) disclosing any direct or indirect beneficial ownership, control, or direction over securities of that public company.164 This report must be filed within ten days after the end of the month in which that person or company becomes an insider with the OSC and, if applicable, to its equivalent in the provinces of Manitoba, Newfoundland and Nova Scotia, and within ten days from the date upon which that person or company becomes an insider with the securities commission of each of Alberta, British Columbia, Québec, and Saskatchewan, if applicable.

Insiders must also file Insider Reports disclosing any changes in their direct or indirect beneficial ownership or control or direction over the securities of the public company within ten days after the end of the month of such change with the securities commission of Ontario and, if applicable, of each of British Columbia, Québec, Manitoba, Newfoundland, and Nova Scotia and within ten days of such change with the securities commission of each of Alberta and Saskatchewan, if applicable.165 Provinces that require filing of insider trading reports permit filing of a uniform report.

An insider without any direct or indirect beneficial ownership, control or direction over securities of the public company is not required to file

164 Id. § 107(1).
165 Id. § 102.
these reports with the OSC and its equivalent in Alberta, Manitoba, and Saskatchewan, but must file a "Nil" report with the securities commission of British Columbia, Québec, Newfoundland, and Nova Scotia, if subject to the authority of the securities regulatory authorities of such jurisdictions.166 The acquisition or disposition of a put, call, or other transferable option is deemed to be a change in the beneficial ownership of the security and must be included in the insider report.167

Where a public company itself becomes an insider, every director and senior officer of that public company (but not the public company itself) is deemed to have been an insider for the previous six months.168 "Senior officer" is defined as the chairman and/or vice-chairman of the board of directors, the president, vice-president, secretary, treasurer, and general manager of the public company and any other individual that performs similar functions, as well as the five highest paid employees of the public company including any of the officers specifically mentioned.169 During the period of time that a public company contemplates becoming an insider of another public company, the directors and officers of the former company may obtain access to information about the public company in the course of discussions prior to the actual sale. Thus if a person has become an insider in this manner, he must include in his insider report all direct or indirect beneficial ownership, control or direction over securities of the public company for the previous six months.170

An insider may not transfer any securities into the name of an agent, nominee or custodian without informing the OSC and other securities regulatory authorities to which the public company is subject within ten days.171 This reporting requirement also extends to securities that are registered in the name of a person or company but are beneficially owned by an insider and the registered holder is aware that beneficial owner is an insider.172 In both instances, however, a transfer for the purpose of giving collateral for a bona fide debt is exempt from the reporting requirements.

168 Id. § 1(8).
169 Id. § 1(1)(41).
170 Id. § 107(3).
On application by any interested person or company, the OSC may grant an exemption from the insider reporting requirements. An exemption is normally granted for directors and senior officers of insider companies where these companies do not control the public company of which they are insiders, individually or in concert with others, and do not provide that public company or its major subsidiaries with materials or services, the supply of which could have a significant effect on the market price or value of its securities. The exempted directors and senior officers must not normally get information relating to material facts or material changes prior to general disclosure.

C. Insider Trading

The insider reporting requirement provides the investing public with information about who the insiders are and when their trades are being made. There is a wider group, however, who may have access to inside information.

This group comprises persons or companies in a "special relationship" with a public company, and is defined to include:

- insiders, affiliates and associates of the public company, any offerors proposing to make a take-over bid for the public company, and anyone proposing to become a party to a business combination with the public company or to acquire a substantial portion of its property;
- anyone engaging in or proposing to engage in any business or professional activity with the public company (or a take-over bid offeror or a party to a business combination);
- directors, officers and employees of the public company (or an offeror or a party to business combination);
- anyone that obtained the insider information while being in any of the above three categories;
- anyone that obtained the insider information from anyone whom the recipient knew or ought reasonably to have known was in a

173 OSA, R.S.O. § 121(2) (1990).
special relationship with the issuer in any of the above four categories.175

Persons in such a special relationship are prohibited from purchasing or selling securities with the knowledge of an undisclosed material fact or change ("insider information") with respect to the public company.176

Under the OSA, any person in a special relationship who tips inside information to a third party, may also be liable to the seller or to the purchaser of such securities from a third party.177 The "insider information" must be such that, if generally known, would reasonably be expected to affect materially the value of the security.

Liability will not arise if the relevant information was disclosed in the necessary course of business, or if the informer proves that he reasonably believed the "insider information" had been generally disclosed.178

D. Sanctions

There are substantial statutory penalties for persons or companies where there has been a breach of the legislation or where required documents or notices contain misrepresentations.

These penalties include fines up to C$1,000,000 (or triple any profit made by such contravention, whichever the greater), and prison terms of up to two years.179 An order may also be made to force compliance with the legislation.180 Where a public company is found to be in breach of the relevant statutory provisions, the directors and officers who authorized, permitted, or acquiesced in the offense are also held to be guilty and may be liable to the same penalties as the public company.181

The OSC has the power, where it believes this to be in the public interest, to order trading to cease with respect to any securities of a public company and to impose terms and conditions on such a cease trading

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176 Id. § 76(1).
177 Id. § 134.
178 Id. § 76(4).
179 Id. §§ 122(1), 122(4).
180 Id. § 126; O.B.C.A. § 253.
181 OSA, R.S.O. § 122(3) (1990).
order. A hearing is mandatory before suspension, unless the delay would be prejudicial to the public interest.

The TSE has no rules or policies with respect to insider trading, but advises that all listed companies should have an internal rule prohibiting such trading. The TSE, however, may temporarily halt trading in any listed securities or suspend from trading or delist a public company's securities if it is satisfied that the public company has failed to comply with its Listing Agreement or if such action is in the public interest. A halt in trading should not always be seen as a penalty; this is a temporary measure which usually does not last more than a few hours (or one or two days at most), and may be used to give a public company the opportunity to comply with the TSE's disclosure policies. If suspension or delisting has been imposed, the public company may ask for a hearing within ten days of notice of the penalty.

In addition to specific statutory sanctions, any applicable common law right of action for breach of a statutory duty is available. This tort requires that the duty be owed to the plaintiff, that the injury is of a nature that the statute is intended to prevent, and that the breach of the duty must have caused the damage. For example, the statutory requirement to provide a proxy information circular is for the benefit of shareholders to protect them from the harm suffered by not having access to certain information. Although statutory penalties are provided for breach of this requirement, the shareholders also have rights enforceable by a common law action.

The OSA provides that the liability for misrepresentation in a prospectus or information circular is in addition to and without derogation from any other right the investor may have at law. Whether breaches of other OSA requirements give rise to a civil cause of action depends on the circumstances. The courts will consider the intent of the legislation and, in particular, whether or not the statute was passed for the benefit of an ascertainable class of persons, whether the penalty imposed by statute is sufficient given the nature of the breach, and whether the existing common law remedies are adequate.

182 Id. § 127.
183 TSE Company Manual § 423.4.
184 Id. § 701.
What is the proper time for insiders to trade once there has been public disclosure of the material fact or change? Since the markets may be slow to absorb the information, the law requires that insiders wait an appropriate period, which will vary according to the nature and complexity of the information and the market for the securities. One case has held that a safe working rule is a minimum of one full trading day after the release of the information.\textsuperscript{187}

IV. SHAREHOLDER MEETINGS

A. Shareholder Meetings

There are two types of shareholder meetings: the regular annual meeting and the special meeting. The TSE requires that the annual shareholders meeting be held within six months from the end of the financial year.\textsuperscript{188}

The determination as to those shareholders entitled to vote at a shareholders meeting, as to those shareholders entitled to receive a notice of the shareholders meeting and the time within which such notice must be delivered is, generally speaking, prescribed not by the OSA but rather by the legislation under which the public company has been incorporated or organized.\textsuperscript{189} However, even if the public company complies with applicable legislation, the TSE may require a postponement of the shareholders meeting if it believes investors have not had enough time to reach considered and informed decisions.\textsuperscript{190} Trading of the public company's securities may also be suspended if the shareholders, in the opinion of the TSE, have not been given adequate notice of corporate activities in which those shareholders have a right of participation.

B. Mandatory Solicitation of Proxies

A public company is required to send concurrently with or prior to sending the notice of a shareholders meeting to the shareholders, a form of

\begin{footnotes}
\item[187] In re Harold P. Connor, O.S.C.B. 149 (June 1976).
\item[188] TSE Company Manual § 464.
\item[190] TSE Company Manual § 459.
\end{footnotes}
proxy to each voting shareholder entitled to a notice of the meeting.\textsuperscript{191} The contents of the form of proxy are prescribed by the legislation.\textsuperscript{192}

\section*{C. Management Information Circular}

Management of a public company must also send an information circular to each shareholder whose proxy is solicited and to the auditor of the public company.\textsuperscript{193} The management information circular is intended to provide shareholders with sufficient information to enable them to evaluate the public company's proposed actions and to provide shareholders with important information.

A management information circular requires considerable time and effort to prepare. The legislation requires that the circular include, among other matters, information about:\textsuperscript{194}

\begin{enumerate}
\item the persons making the solicitation;
\item the material interests of persons soliciting proxies in any special business to be acted on at the meeting;
\item the number of shares entitled to be voted and the number of votes required to approve any matter;
\item the nominees for election as directors, if directors are to be elected;
\item directors and officers remuneration;
\item any indebtedness of directors and officers to the public company in certain circumstances;
\item the material interests of insiders in material transactions of the public company;
\item the appointment of the auditor, if an auditor is to be appointed;
\item the details of any management agreements; and
\item the matters to be acted upon at the meeting.
\end{enumerate}

\begin{flushleft}
\textsuperscript{191} OSA, R.S.O. § 85 (1990), O.B.C.A. § 111 (1994).
\textsuperscript{192} OSA Regulation, R.R.O. §§ 177-179 (1990).
\textsuperscript{193} OSA, R.S.O. § 86 (1990). The OSA does not require a public corporation with 15 or fewer shareholders to send a management information circular to shareholders. \textit{Id.} § 86(2).
\textsuperscript{194} OSA Regulation R.R.O. § 176, Form 30 (1990).
\end{flushleft}
The management information circular must be manually signed by or contain a facsimile signature of an officer duly authorized to sign the circular.195

D. Exemption Applications

Any interested party may apply to the Ontario Securities Commission for an exemption from all or part of the proxy and information circular requirements.196 Contemporaneous applications should be made to the securities regulatory authorities of other provinces where the public company is a reporting issuer. The applicant must show that there is adequate justification for making the exemption order. Since the distribution of information circulars and proxy solicitation material is crucial to investor protection, full exemptions will be seldom granted by the Ontario Securities Commission.197

E. Filing Documents

The public company must send to the Ontario Securities Commission, and to the securities regulatory authorities to whose legislation the public company is subject, copies of the management information circular, annual financial statements, form of proxy, notice of meeting and any other documents for use in connection with the meeting of shareholders at the same time such materials are sent to shareholders.198 Every company listed on the TSE must also file with the TSE four copies of all materials sent to its shareholders concurrently with the sending of the materials to the shareholder.199

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195 Id. § 181.
196 OSA, R.S.O. § 88(2) (1990).