

## Notice of Proposed Amendments to the Securities Act and Commodity Futures Act

On October 30, 2002, proposed amendments to the *Securities Act* and the *Commodity Futures Act* were introduced by the Minister of Finance as part of the Government's Fall 2002 Budget Bill. The proposed amendments are included in Bill 198, *Keeping the Promise for a Strong Economy Act (Budget Measures), 2002*.

The proposed amendments are not yet in effect. When, and if, the Budget Bill receives Royal Assent, the proposed *Securities Act* and *Commodity Futures Act* amendments are proposed to come into force on a day to be named by proclamation of the Lieutenant Governor.

The proposed amendments to the *Securities Act* and *Commodity Futures Act* are intended to bolster the protection of Ontario investors and improve investor confidence in the integrity of Ontario's capital markets. Generally, the proposed amendments are aimed at improving transparency and disclosure, strengthening corporate governance, and broadening the sanctions and remedies available to the Commission and investors for violations of securities law. Many of the amendments are based on the recommendations contained in the May 2002 Draft Report of the Minister of Finance's Five Year Review Committee, chaired by Purdy Crawford.<sup>1</sup> Part of the Five Year Review Committee's mandate was to ensure that securities legislation in Ontario is up to date and enables the Commission to proactively enforce clear standards to protect investors and foster a fair and efficient marketplace.

Among the most significant changes being proposed to the *Securities Act* are amendments to:

- Enshrine in the legislation the concept of reviews of the continuous disclosure record of a reporting issuer.
- Increase the maximum penalties that can be imposed by the court for offences under section 122 of the *Securities Act* from a fine of \$1 million and imprisonment for two years to a fine of \$5 million and imprisonment for five years less a day.
- Create express prohibitions against securities fraud, market manipulation and making misleading or untrue statements.
- Give the Commission the power to impose an administrative fine of up to \$1 million where there has been non-compliance with Ontario securities law.
- Give the Commission the power to order a person or company to disgorge amounts obtained as a result of non-compliance with Ontario securities law.
- Create a statutory right of action for investors in the secondary market to sue companies and other responsible persons for misrepresentations (written or oral) or a failure to make timely disclosure.<sup>2</sup>
- Give the Commission rule making authority to require reporting issuers to appoint audit committees and to prescribe requirements relating to the functions and responsibilities of audit committees, including independence requirements.
- Give the Commission rule making authority to require reporting issuers to establish and maintain internal controls and disclosure controls and procedures and requiring chief executive officers and chief financial officers to provide certifications related to internal controls and to disclosure controls and

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<sup>1</sup> See (2002) 25 OSCB (Supp).

<sup>2</sup> The proposed civil liability regime is based on the draft legislation previously published by the Canadian Securities Administrators (the "CSA") in November 2000. The CSA's draft legislation arose out of the CSA's review and support of The Toronto Stock Exchange Committee on Corporate Disclosure's (the "Allen Committee") final report issued in March 1997. The Allen Committee made a number of recommendations in this report including that a statutory civil liability regime be created whereby issuers and others responsible for misleading disclosure could be held liable in civil actions brought by injured investors to recover their damages. For more information also see CSA Notice 53-302 *Proposal for a Statutory Civil Remedy for Investors in the Secondary Market and Response to the Proposed Change to the Definitions of "Material Fact" and "Material Change"* ((2000) 23 OSCB 7383).

procedures. The Commission's current rule making authority would permit it to address other aspects of the certification regime as appropriate.

Parallel amendments are also being proposed, where appropriate, to the *Commodity Futures Act*.

The relevant portions of Bill 198 are reprinted below and may also be viewed on the Ontario Legislative Assembly's web site at [www.ontla.on.ca](http://www.ontla.on.ca) and the Commission's web site at [www.osc.gov.on.ca](http://www.osc.gov.on.ca).

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**Keeping the Promise for a Strong Economy Act  
(Budget Measures), 2002**

EXPLANATORY NOTE

The Bill implements measures contained in the 2002 Budget and other initiatives of the Government. The major elements of the Bill are described below.

**PART III  
COMMODITY FUTURES ACT**

The maximum penalties for offences under the *Commodity Futures Act* are increased from a fine of \$1 million and imprisonment for two years to a fine of \$5 million and imprisonment for five years less a day. (See the amendments to section 55 of the Act.)

If a person or company fails to comply with Ontario commodity futures law, the Ontario Securities Commission is given power to order the payment of an administrative penalty of up to \$1 million and to order the disgorgement of amounts obtained as a result of the non-compliance. (See the amendments to section 60 and subsection 65 (2) of the Act and the new section 60.5 of the Act.)

The amendments prohibit engaging in acts that a person or company knows or reasonably ought to know perpetrate a fraud or result in a misleading appearance of trading activity in, or an artificial price for, a commodity, commodity futures contract or commodity futures option. The amendments also contain a general prohibition on making statements that a person or company knows or reasonably ought to know are misleading or untrue and significantly affect, or would reasonably be expected to have a significant effect on, the market price or value of a commodity, commodity futures contract or commodity futures option. (See the new sections 59.1 and 59.2 of the Act.)

**PART XXVII  
SECURITIES ACT**

The maximum penalties for offences under the *Securities Act* are increased from a fine of \$1 million and imprisonment for two years to a fine of \$5 million and imprisonment for five years less a day. (See the amendments to section 122 of the Act.)

If a person or company fails to comply with Ontario securities law, the Ontario Securities Commission ("OSC") is given power to order the payment of an administrative penalty of up to \$1 million and to order the disgorgement of amounts obtained as a result of the non-compliance. (See the amendments to section 127 and subsections 3.4 (2) and 143 (2) of the Act and the new section 129.2 of the Act.)

The amendments prohibit engaging in acts that a person or company knows or reasonably ought to know perpetrate a fraud or result in a misleading appearance of trading activity in, or an artificial price for, a security. The amendments also contain a general prohibition on making statements that a person or company knows or reasonably ought to know are misleading or untrue and significantly affect, or would reasonably be expected to have a significant effect on, the market price or value of a security. (See the new sections 126.1 and 126.2 of the Act.)

The OSC is authorized to conduct reviews of disclosures that have been made or that ought to have been made by a reporting issuer or mutual fund. (See the new section 20.1 of the Act.)

The OSC is given power to make rules requiring the appointment of and prescribing requirements for audit committees, requiring systems of internal controls, requiring disclosure controls and procedures, requiring chief executive officers and chief financial officers to provide certifications related to internal controls and to disclosure controls and procedures, and defining auditing standards for reporting on internal controls. (See the amendments to subsection 1 (1.1) and 143 (1) of the Act.)

The Act is amended to add new Part XXIII.1 which provides for civil liability for secondary market disclosure. Specified transactions are exempted from the new Part. Related amendments are made to section 1 (definitions), section 75 (duty to disclose material changes), section 142 (Crown liability) and section 143 of the Act (the OSC's authority to make rules).

In the new Part, rights of action are created in section 138.3. These rights of action are in addition to any rights that may otherwise exist. (See the new section 138.13 of the Act.)

The rights of action created by section 138.3 include a right of action for damages by persons or companies who acquire or dispose of the securities of a responsible issuer during a period of time in which there is an uncorrected misrepresentation in a document released by the responsible issuer or by a person with actual, implied or apparent authority, or in a public oral statement by such a person or by an influential person (a defined expression) relating to the affairs of the responsible issuer. The right of action is given to persons or companies acquiring or disposing of the securities of the responsible issuer between the time the misrepresentation was made and the time it was publicly corrected.

Section 138.3 also creates a right of action for damages by persons or companies who acquire or dispose of an issuer's security during a period in which a responsible issuer fails to make a timely disclosure of a material change. The period ends when the responsible issuer makes the required disclosure.

These rights of action lie against specified persons and companies in the circumstances described in the section: (1) the responsible issuer; (2) the person making the public oral statement; (3) each director or officer of the responsible issuer; (4) an influential person; (5) each director or officer of the influential person; and (6) each expert (a defined word). Section 138.3 relieves directors and officers of influential persons from liability under this section if they are also liable as directors or officers of a responsible issuer.

The liability of each of these persons or companies is limited under the new Part. The liability limit for each of them is specified in the definition of "liability limit" in section 138.1.

The court is permitted to treat multiple misrepresentations or multiple instances of failure to make timely disclosure as a single misrepresentation or single failure to make timely disclosure, respectively, if the multiple misrepresentations or multiple failures have a common subject matter or if the multiple misrepresentations have a common content. Section 138.3 also limits liability in situations where the public oral statement was made by a person who has apparent authority but who does not have actual or implied authority.

In the new Part, section 138.4 sets out a plaintiff's burden of proof in a proceeding under section 138.3. It also sets out defences that are available in such a proceeding.

Sections 138.5 to 138.7 in the new Part govern awards of damages in proceedings under section 138.3. Section 138.5 describes the manner in which damages are to be assessed. Section 138.6 describes how the damages are to be allocated among defendants. Section 138.7 limits the damages payable by a person or company.

Procedural matters are addressed in the new sections 138.8 to 138.14. Section 138.14 sets out the limitation periods that apply to proceedings under section 138.3. A proceeding cannot be commenced without leave of the court. Section 138.9 requires the plaintiff to issue a news release upon being given leave to commence the proceeding, and to give the news release and other documents to the OSC. Section 138.10 specifies that a proceeding cannot be discontinued, stayed, settled or dismissed for delay without leave of the court. It also specifies the matters that the court is required to consider when approving a settlement.

**PART III  
COMMODITY FUTURES ACT**

**10. (1) Subsection 55 (1) of the *Commodity Futures Act*, as re-enacted by the Statutes of Ontario, 1999, chapter 9, section 39, is amended by striking out the portion after clause (c) and substituting the following:**

is guilty of an offence and on conviction is liable to a fine of not more than \$5 million or to imprisonment for a term of not more than five years less a day, or to both.

**(2) Subsection 55 (3) of the Act, as re-enacted by the Statutes of Ontario, 1999, chapter 9, section 39, is amended by striking out “to a fine of not more than \$1,000,000 or to imprisonment for a term of not more than two years, or to both” at the end and substituting “to a fine of not more than \$5 million or to imprisonment for a term of not more than five years less a day, or to both”.**

**11. The Act is amended by adding the following sections:**

Fraud and market manipulation

**59.1** A person or company shall not, directly or indirectly, engage or participate in any act, practice or course of conduct relating to commodities or contracts that the person or company knows or reasonably ought to know,

- (a) results in or contributes to a misleading appearance of trading activity in, or an artificial price for, a commodity or contract; or
- (b) perpetrates a fraud on any person or company.

Misleading or untrue statements

**59.2** A person or company shall not make a statement that the person or company knows or reasonably ought to know,

- (a) in a material respect and at the time and in the light of the circumstances under which it is made, is misleading or untrue or does not state a fact that is required to be stated or that is necessary to make the statement not misleading; and
- (b) significantly affects, or would reasonably be expected to have a significant effect on, the market price or value of a commodity or contract.

**12. (1) Subsection 60 (1) of the Act, as re-enacted by the Statutes of Ontario, 1999, chapter 9, section 41, is amended by adding the following paragraphs:**

- 9. If a person or company has not complied with Ontario commodity futures law, an order requiring the person or company to pay an administrative penalty of not more than \$1 million for each failure to comply.
- 10. If a person or company has not complied with Ontario commodity futures law, an order requiring the person or company to disgorge to the Commission any amounts obtained as a result of the non-compliance.

**(2) Section 60 of the Act, as re-enacted by the Statutes of Ontario, 1999, chapter 9, section 41, is amended by adding the following subsection:**

Disgorgement order

(2.1) A person or company is not entitled to participate in a proceeding in which an order may be made under paragraph 10 of subsection (1) solely on the basis that the person or company has a right of action against the respondent to the proceeding or the person or company may be entitled to receive any amount disgorged under the order.

**13. Part XIII of the Act is amended by adding the following section:**

Directors and officers

**60.5** For the purposes of this Act, if a company or a person other than an individual has not complied with Ontario commodity futures law, a director or officer of the company or person who authorized, permitted or

acquiesced in the non-compliance shall be deemed to also have not complied with Ontario commodity futures law, whether or not any proceeding has been commenced against the company or person under Ontario commodity futures law or any order has been made against the company or person under section 60.

**14. Subsection 65 (2) of the Act, as enacted by the Statutes of Ontario, 1999, chapter 9, section 47, is amended by adding the following clause:**

- (a.1) the administration and distribution of amounts disgorged under paragraph 10 of subsection 60 (1);

**Commencement**

**15. (1) Subject to subsection (2), this Part comes into force on the day this Act receives Royal Assent.**

**Same**

**(2) Sections 10 to 14 come into force on a day to be named by proclamation of the Lieutenant Governor.**

**PART XXVII  
SECURITIES ACT**

**190. (1) Subsection 1 (1) of the *Securities Act*, as amended by the Statutes of Ontario, 1994, chapter 11, section 349, 1994, chapter 33, section 1, 1997, chapter 19, section 23, 1999, chapter 6, section 60, 1999, chapter 9, section 193 and 2001, chapter 23, section 209, is amended by adding the following definitions:**

“investment fund” means a mutual fund or a non-redeemable investment fund; (“fonds d’investissement”)

“investment fund manager” means a person or company who has the power and exercises the responsibility to direct the affairs of an investment fund; (“gestionnaire de fonds d’investissement”)

**(2) The definitions of “material change”, “material fact” and “mutual fund” in subsection 1 (1) of the Act are repealed and the following substituted:**

“material change”,

- (a) when used in relation to an issuer other than an investment fund, means,
- (i) 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, or
  - (ii) a decision to implement a change referred to in subclause (i) made by the board of directors or other persons acting in a similar capacity or by senior management of the issuer who believe that confirmation of the decision by the board of directors or such other persons acting in a similar capacity is probable, and
- (b) when used in relation to an issuer that is an investment fund, means,
- (i) a change in the business, operations or affairs of the issuer that would be considered important by a reasonable investor in determining whether to purchase or continue to hold securities of the issuer, or
  - (ii) a decision to implement a change referred to in subclause (i) made,
    - (A) by the board of directors of the issuer or the board of directors of the investment fund manager of the issuer or other persons acting in a similar capacity,
    - (B) by senior management of the issuer who believe that confirmation of the decision by the board of directors or such other persons acting in a similar capacity is probable, or
    - (C) by senior management of the investment fund manager of the issuer who believe that confirmation of the decision by the board of directors of the investment fund manager of the issuer or such other persons acting in a similar capacity is probable; (“changement important”)

“material fact”, when used in relation to securities issued or proposed to be issued, means a fact that would reasonably be expected to have a significant effect on the market price or value of the securities; (“fait important”)

“mutual fund” includes,

- (a) an issuer,
  - (i) whose primary purpose is to invest money provided by its security holders, and
  - (ii) whose securities entitle the holder to receive on demand, or within a specified period after demand, an amount computed by reference to the value of a proportionate interest in the whole or in part of the net assets, including a separate fund or trust account, of the issuer, or
- (b) an issuer or a class of issuers that is designated as a mutual fund by an order of the Commission in the case of a single issuer or otherwise in a regulation which is made for the purposes of this definition,

but does not include an issuer or a class of issuer that is designated not to be a mutual fund by an order of the Commission in the case of a single issuer or otherwise in a regulation which is made for the purposes of this definition; (“fonds mutuel”)

**(3) Subsection 1 (1.1) of the Act, as enacted by the Statutes of Ontario, 1994, chapter 33, section 1, is repealed and the following substituted:**

Same

(1.1) For the purposes of this Act, the regulations and the rules, any of “derivatives”, “disclosure controls and procedures”, “future-oriented financial information”, “going private transaction”, “insider bid”, “internal controls”, “non-redeemable investment fund”, “penny stocks”, “related party transactions” and “reverse take-overs” may be defined in the regulations or the rules and if so defined shall have the defined meaning.

**191. Subsection 3.4 (2) of the Act, as enacted by the Statutes of Ontario, 1997, chapter 10, section 37, is repealed and the following substituted:**

Exceptions

(2) The Commission shall pay into the Consolidated Revenue Fund money received by the Commission pursuant to an order under paragraph 9 or 10 of subsection 127 (1) of this Act or paragraph 9 or 10 of subsection 60 (1) of the *Commodity Futures Act* or as a payment to settle enforcement proceedings commenced by the Commission, other than money,

- (a) to reimburse the Commission for costs incurred or to be incurred by it; or
- (b) that is designated under the terms of the order or settlement for an allocation to or for the benefit of third parties that is approved by the Minister or that belongs to a class of allocations approved by the Minister.

**192. Part VII of the Act is amended by adding the following section:**

Continuous disclosure reviews

**20.1** (1) The Commission or any member, employee or agent of the Commission may conduct a review of the disclosures that have been made or that ought to have been made by a reporting issuer or mutual fund in Ontario, on a basis to be determined at the discretion of the Commission or the Director.

Information and documents

(2) A reporting issuer or mutual fund in Ontario that is subject to a review under this section shall, at such time or times as the Commission or Director may require, deliver to the Commission or Director any information and documents relevant to the disclosures that have been made or that ought to have been made by the reporting issuer or mutual fund.

*Freedom of Information and Protection of Privacy Act*

(3) Despite the *Freedom of Information and Protection of Privacy Act*, information and documents obtained pursuant to a review under this section are exempt from disclosure under that Act if the Commission determines that the information and documents should be maintained in confidence.

Prohibition on certain representations

(4) A reporting issuer or mutual fund in Ontario, or any person or company acting on behalf of a reporting issuer or mutual fund in Ontario, shall not make any representation, written or oral, that the Commission has in any way passed upon the merits of the disclosure record of the reporting issuer or mutual fund.

**193. (1) Clauses 75 (3) (a) and (b) of the Act are repealed and the following substituted:**

- (a) in the opinion of the reporting issuer, and if that opinion is arrived at in a reasonable manner, the disclosure required by subsection (2) would be unduly detrimental to the interests of the reporting issuer; or
- (b) the material change consists of a decision to implement a change made by senior management of the issuer who believe that confirmation of the decision by the board of directors is probable and senior management of the issuer has no reason to believe that persons with knowledge of the material change have made use of that knowledge in purchasing or selling securities of the issuer,

**(2) Section 75 of the Act, as amended by the Statutes of Ontario, 1994, chapter 11, section 349, is amended by adding the following subsection:**

Same

(5) Although a report has been filed with the Commission under subsection (3), the reporting issuer shall promptly generally disclose the material change in the manner referred to in subsection (1) upon the reporting issuer becoming aware, or having reasonable grounds to believe, that persons or companies are purchasing or selling securities of the reporting issuer with knowledge of the material change that has not been generally disclosed.

**194. (1) Subsection 122 (1) of the Act, as re-enacted by the Statutes of Ontario, 1994, chapter 11, section 373, is amended by striking out the portion after clause (c) and substituting the following:**

is guilty of an offence and on conviction is liable to a fine of not more than \$5 million or to imprisonment for a term of not more than five years less a day, or to both.

**(2) Subsection 122 (3) of the Act, as re-enacted by the Statutes of Ontario, 1994, chapter 11, section 373, is amended by striking out “to a fine of not more than \$1,000,000 or to imprisonment for a term of not more than two years, or to both” at the end and substituting “to a fine of not more than \$5 million or to imprisonment for a term of not more than five years less a day, or to both”.**

**(3) Clause 122 (4) (a) of the Act, as re-enacted by the Statutes of Ontario, 1994, chapter 11, section 373, is repealed and the following substituted:**

- (a) \$5 million; and

**195. The Act is amended by adding the following sections:**

Fraud and market manipulation

**126.1** A person or company shall not, directly or indirectly, engage or participate in any act, practice or course of conduct relating to securities or derivatives of securities that the person or company knows or reasonably ought to know,

- (a) results in or contributes to a misleading appearance of trading activity in, or an artificial price for, a security or derivative of a security; or
- (b) perpetrates a fraud on any person or company.

Misleading or untrue statements

**126.2** A person or company shall not make a statement that the person or company knows or reasonably ought to know,



- (a) in a material respect and at the time and in the light of the circumstances under which it is made, is misleading or untrue or does not state a fact that is required to be stated or that is necessary to make the statement not misleading; and
- (b) significantly affects, or would reasonably be expected to have a significant effect on, the market price or value of a security.

**196. (1) Subsection 127 (1) of the Act, as re-enacted by the Statutes of Ontario, 1994, chapter 11, section 375 and amended by 1999, chapter 9, section 215, is amended by adding the following paragraphs:**

- 9. If a person or company has not complied with Ontario securities law, an order requiring the person or company to pay an administrative penalty of not more than \$1 million for each failure to comply.
- 10. If a person or company has not complied with Ontario securities law, an order requiring the person or company to disgorge to the Commission any amounts obtained as a result of the non-compliance.

**(2) Section 127 of the Act, as re-enacted by the Statutes of Ontario, 1994, chapter 11, section 375 and amended by 1999, chapter 9, section 215, is amended by adding the following subsection:**

Disgorgement order

(3.1) A person or company is not entitled to participate in a proceeding in which an order may be made under paragraph 10 of subsection (1) solely on the basis that the person or company has a right of action against the respondent to the proceeding or the person or company may be entitled to receive any amount disgorged under the order.

**197. Part XXII of the Act is amended by adding the following section:**

Directors and officers

**129.2** For the purposes of this Act, if a company or a person other than an individual has not complied with Ontario securities law, a director or officer of the company or person who authorized, permitted or acquiesced in the non-compliance shall be deemed to also have not complied with Ontario securities law, whether or not any proceeding has been commenced against the company or person under Ontario securities law or any order has been made against the company or person under section 127.

**198. The Act is amended by adding the following Part:**

**PART XXIII.1  
CIVIL LIABILITY FOR SECONDARY MARKET DISCLOSURE**

INTERPRETATION AND APPLICATION

Definitions

**138.1** In this Part,

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

“control person” means,

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

to affect materially the control of the issuer, and, where a person or company, or combination of persons or companies, holds more than 20 per cent of the voting rights attached to all outstanding voting securities of an issuer, the person or company, or combination of persons or companies, shall, in the absence of evidence to the

contrary, be deemed to hold a sufficient number of the voting rights to affect materially the control of the issuer; (“personne qui a le contrôle”)

“core document” means,

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

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

- (b) where used in relation to,
  - (i) an officer of the responsible issuer,
  - (ii) an investment fund manager where the responsible issuer is an investment fund, or
  - (iii) an officer of an investment fund manager where the responsible issuer is an investment fund,

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

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

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

- (a) that is required to be filed with the Commission, or
- (b) that is not required to be filed with the Commission and,
  - (i) that is filed with the Commission,
  - (ii) that is filed or required to be filed with a government or an agency of a government under applicable securities or corporate law or with any stock exchange or quotation and trade reporting system under its by-laws, rules or regulations, or
  - (iii) that is any other communication the content of which would reasonably be expected to affect the market price or value of a security of the responsible issuer; (“document”)

“expert” means a person or company whose profession gives authority to a statement made in a professional capacity by the person or company including, without limitation, an accountant, actuary, appraiser, auditor, engineer, financial analyst, geologist or lawyer; (“expert”)

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

“forward-looking information” means all disclosure regarding possible events, conditions or results (including future-oriented financial information with respect to prospective results of operations, a prospective financial position or

prospective changes in financial position that is based on assumptions about future economic conditions and courses of action) that is presented as either a forecast or a projection; (“information prospective”)

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

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

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

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

“liability limit” means,

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

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

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

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

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

"responsible issuer" means,

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

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

Application.

**138.2** This Part does not apply to,

- (a) the acquisition of an issuer's security under a prospectus;
- (b) the acquisition of an issuer's security pursuant to an exemption from section 53 or 62, except as may be prescribed by regulation;
- (c) the acquisition or disposition of an issuer's security in connection with or pursuant to a take-overbid or issuer bid, except as may be prescribed by regulation; or
- (d) such other transactions or class of transactions as may be prescribed by regulation.

#### LIABILITY

Liability for secondary market disclosure

Documents released by responsible issuer

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

- (a) the responsible issuer;
- (b) each director of the responsible issuer at the time the document was released;
- (c) each officer of the responsible issuer who authorized, permitted or acquiesced in the release of the document;

- (d) each influential person, and each director and officer of an influential person, who knowingly influenced,
  - (i) the responsible issuer or any person or company on behalf of the responsible issuer to release the document, or
  - (ii) a director or officer of the responsible issuer to authorize, permit or acquiesce in the release of the document; and
- (e) each expert where,
  - (i) the misrepresentation is also contained in a report, statement or opinion made by the expert,
  - (ii) the document includes, summarizes or quotes from the report, statement or opinion of the expert, and
  - (iii) if the document was released by a person or company other than the expert, the expert consented in writing to the use of the report, statement or opinion in the document.

#### Public oral statements by responsible issuer

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

- (a) the responsible issuer;
- (b) the person who made the public oral statement;
- (c) each director and officer of the responsible issuer who authorized, permitted or acquiesced in the making of the public oral statement;
- (d) each influential person, and each director and officer of the influential person, who knowingly influenced,
  - (i) the person who made the public oral statement to make the public oral statement, or
  - (ii) a director or officer of the responsible issuer to authorize, permit or acquiesce in the making of the public oral statement; and
- (e) each expert where,
  - (i) the misrepresentation is also contained in a report, statement or opinion made by the expert,
  - (ii) the person making the public oral statement includes, summarizes or quotes from the report, statement or opinion of the expert, and
  - (iii) if the public oral statement was made by a person other than the expert, the expert consented in writing to the use of the report, statement or opinion in the public oral statement.

#### Influential persons

(3) Where an influential person or a person or company with actual, implied or apparent authority to act on behalf of the influential person releases a document or makes a public oral statement that relates to a responsible issuer and that contains a misrepresentation, a person or company who acquires or disposes of an issuer's security during the period between the time when the document was released or the public oral statement was made and the time when the misrepresentation contained in the document or public oral statement was publicly corrected has,

without regard to whether the person or company relied on the misrepresentation, a right of action for damages against,

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

#### Failure to make timely disclosure

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

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

#### Multiple roles

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

#### Multiple misrepresentations

(6) In a proceeding under this section,

- (a) multiple misrepresentations having common subject matter or content may, in the discretion of the court, be treated as a single misrepresentation; and

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

#### No implied or actual authority

(7) In a proceeding under subsection (2) or subsection (3), if the person who made the public oral statement had apparent authority, but not implied or actual authority, to speak on behalf of the issuer, no other person is liable with respect to any of the responsible issuer's securities that were acquired or disposed of before that person became, or should reasonably have become, aware of the misrepresentation.

#### Burden of proof and defences

##### Non-core documents and public oral statements

**138.4** (1) In a proceeding under section 138.3 in relation to a misrepresentation in a document that is not a core document, or a misrepresentation in a public oral statement, a person or company is not liable, subject to subsection (2), unless the plaintiff proves that the person or company,

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

#### Same

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

#### Failure to make timely disclosure

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

- (a) knew, at the time that the failure to make timely disclosure first occurred, of the change and that the change was a material change;
- (b) at the time or before the failure to make timely disclosure first occurred, deliberately avoided acquiring knowledge of the change or that the change was a material change; or
- (c) was, through action or failure to act, guilty of gross misconduct in connection with the failure to make timely disclosure.

#### Same

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

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

#### Knowledge of the misrepresentation or material change

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

- (a) with knowledge that the document or public oral statement contained a misrepresentation; or

- (b) with knowledge of the material change.

#### Reasonable investigation

(6) A person or company is not liable in a proceeding under section 138.3 in relation to,

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

#### Factors to be considered by court

(7) In determining whether an investigation was reasonable under subsection (6), or whether any person or company is guilty of gross misconduct under subsection (1) or (3), the courts shall consider all relevant circumstances, including,

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



#### Confidential disclosure

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

- (a) the person or company proves that the material change was disclosed by the responsible issuer in a report filed on a confidential basis with the Commission under subsection 75 (3);
- (b) the responsible issuer had a reasonable basis for making the disclosure on a confidential basis;
- (c) where the information contained in the report filed on a confidential basis remains material, disclosure of the material change was made public promptly when the basis for confidentiality ceased to exist;
- (d) the person or company or responsible issuer did not release a document or make a public oral statement that, due to the undisclosed material change, contained a misrepresentation, and
- (e) where the material change became publicly known in a manner other than the manner required under this Act, the responsible issuer promptly disclosed the material change in the manner required under this Act.

#### Forward-looking information

(9) A person or company is not liable in a proceeding under section 138.3 for a misrepresentation in forward-looking information if the person or company proves that,

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

#### Same

(10) Subsection (9) does not apply to a person or company in respect of forward-looking information contained in the prospectus of the responsible issuer filed in connection with the initial public distribution of securities of the responsible issuer or contained in financial statements prepared by the responsible issuer.

#### Expert report, statement or opinion

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

- (a) the person or company did not know and had no reasonable grounds to believe that there had been a misrepresentation in the part of the document or public oral statement made on the authority of the expert; and
- (b) the part of the document or oral public statement fairly represented the report, statement or opinion made by the expert.

#### Same

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

#### Release of documents

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

#### Derivative information

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

- (a) the misrepresentation was also contained in a document filed by or on behalf of another person or company, other than the responsible issuer, with the Commission or any other securities regulatory authority in Canada or a stock exchange and was not corrected in another document filed by or on behalf of that other person or company with the Commission or that other securities regulatory authority in Canada or stock exchange before the release of the document or the public oral statement made by or on behalf of the responsible issuer;
- (b) the document or public oral statement contained a reference identifying the document that was the source of the misrepresentation; and
- (c) when the document was released or the public oral statement was made, the person or company did not know and had no reasonable grounds to believe that the document or public oral statement contained a misrepresentation.

#### Where corrective action taken

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

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

#### DAMAGES

#### Assessment of damages

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

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

disposition of those securities (without deducting any commissions paid in respect of the disposition), calculated taking into account the result of hedging or other risk limitation transactions, and

- ii. an amount equal to the number of securities that the person disposed of, multiplied by the difference between the average price per security paid for those securities (including any commissions paid in respect thereof determined on a per security basis) and,
  - A. if the issuer's securities trade on a published market, the trading price of the issuer's securities on the principal market (as those terms are defined in the regulations) for the 10 trading days following the public correction of the misrepresentation or the disclosure of the material change in the manner required under this Act, or
  - B. if there is no published market, the amount that the court considers just.
- 3. In respect of any of the securities of the responsible issuer that the person or company has not disposed of, assessed damages shall equal the number of securities acquired, multiplied by the difference between the average price per security paid for those securities (including any commissions paid in respect thereof determined on a per security basis) and,
  - i. if the issuer's securities trade on a published market, the trading price of the issuer's securities on the principal market (as those terms are defined in the regulations) for the 10 trading days following the public correction of the misrepresentation or the disclosure of the material change in the manner required under this Act, or
  - ii. if there is no published market, the amount that the court considers just.

#### Same

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

- 1. In respect of any of the securities of the responsible issuer that the person or company subsequently acquired on or before the 10th trading day after the public correction of the misrepresentation or the disclosure of the material change in the manner required under this Act, assessed damages shall equal the difference between the average price received upon the disposition of those securities (deducting any commissions paid in respect of the disposition) and the price paid for those securities (without including any commissions paid in respect thereof), calculated taking into account the result of hedging or other risk limitation transactions.
- 2. In respect of any of the securities of the responsible issuer that the person or company subsequently acquired after the 10th trading day after the public correction of the misrepresentation or the disclosure of the material change in the manner required under this Act, assessed damages shall equal the lesser of,
  - i. an amount equal to the difference between the average price received upon the disposition of those securities (deducting any commissions paid in respect of the disposition) and the price paid for those securities (without including any commissions paid in respect thereof), calculated taking into account the result of hedging or other risk limitation transactions, and
  - ii. an amount equal to the number of securities that the person disposed of, multiplied by the difference between the average price per security received upon the disposition of those securities (deducting any commissions paid in respect of the disposition determined on a per security basis), and,
    - A. if the issuer's securities trade on a published market, the trading price of the issuer's securities on the principal market (as those terms are defined in the regulations) for the 10 trading days following the public correction of the misrepresentation or the disclosure of the material change in the manner required under this Act, or

- B. if there is no published market, the amount that the court considers just.
3. In respect of any of the securities of the responsible issuer that the person or company has not acquired, assessed damages shall equal the number of securities that the person or company disposed of, multiplied by the difference between the average price per security received upon the disposition of those securities (deducting any commissions paid in respect of the disposition determined on a per security basis) and,
- i. if the issuer's securities trade on a published market, the trading price of the issuer's securities on the principal market (as such terms are defined in the regulations) for the 10 trading days following the disclosure of the material change in the manner required under this Act, or
  - ii. if there is no published market, then the amount that the court considers just.

Same

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

Proportionate liability

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

Same

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

Same

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

Same

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

Limits on damages

**138.7** (1) Despite section 138.5, the damages payable by a person or company in a proceeding under section 138.3 is the lesser of,

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

Same

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

## PROCEDURAL MATTERS

## Leave to proceed

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

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

## Same

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

## Same

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

## Same

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

## Notice

**138.9** A person or company that has been granted leave to commence a proceeding under section 138.3 shall,

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

## Restriction on discontinuation, etc., of proceeding

**138.10** A proceeding under section 138.3 shall not be stayed, discontinued, settled or dismissed for delay without the approval of the court given on such terms as the court thinks fit including, without limitation, terms as to costs, and in determining whether to approve the settlement of the proceeding, the court shall consider, among other things, whether there are any other proceedings outstanding under section 138.3 or under comparable legislation in the other provinces or territories in Canada in respect of the same misrepresentation or failure to make timely disclosure.

## Costs

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

## Power of the Commission

**138.12** The Commission may intervene in a proceeding under section 138.3 and in an application for leave under section 138.8.

## No derogation from other rights

**138.13** The right of action for damages and the defences to a proceeding under section 138.3 are in addition to and without derogation from any other rights or defences the plaintiff or defendant may have in a proceeding brought otherwise than under this Part.

## Limitation period

**138.14** No proceeding shall be commenced under section 138.3,

- (a) in the case of misrepresentation in a document, later than the earlier of,
  - (i) three years after the date on which the document containing the misrepresentation was first released, and

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

**199. Subsection 142 (2) of the Act, as amended by the Statutes of Ontario, 1994, chapter 11, section 378, is amended by striking out the portion before clause (a) and substituting the following:**

Exceptions

(2) Subsections 13 (1), (3) and (4), sections 60, 122, 126, 129, 130, 131, 134 and 135, Part XXIII.1 and section 139 do not apply to,

. . . . .

**200. (1) Paragraph 25 of subsection 143 (1) of the Act, as re-enacted by the Statutes of Ontario, 1994, chapter 33, section 8, is amended by striking out “and” at the end of subparagraph iv, by adding “and” at the end of subparagraph v and by adding the following subparagraph:**

- vi. defining auditing standards for attesting to and reporting on a reporting issuer’s internal controls.

**(2) Subsection 143 (1) of the Act, as re-enacted by the Statutes of Ontario, 1994, chapter 33, section 8 and amended by 1997, chapter 19, section 23, 1997, chapter 43, Schedule F, section 13, 1999, chapter 9, section 220 and 2001, chapter 23, section 217, is amended by adding the following paragraphs:**

- 55.1 Prescribing documents for the purposes of the definition of “core document” in subsection 138.1 (1).
- 55.2 Prescribing exemptions from the prospectus requirement under this Act for the purposes of clause 138.2 (b), take-over bids and issuer bids for the purposes of clause 138.2 (c) and transactions or classes of transactions for the purposes of clause 138.2 (d).
- 55.3 Prescribing the meaning of “market capitalization”, “trading price” and “principal market” and such other terms as are used in Part XXIII.1 and are not otherwise defined in this Act.

**(3) Subsection 143 (1) of the Act, as re-enacted by the Statutes of Ontario, 1994, chapter 33, section 8 and amended by 1997, chapter 19, section 23, 1997, chapter 43, Schedule F, section 13, 1999, chapter 9, section 220 and 2001, chapter 23, section 217, is amended by adding the following paragraphs:**

- 57. Requiring reporting issuers to appoint audit committees and prescribing requirements relating to the functioning and responsibilities of audit committees, including requirements in respect of,
  - i. the standard of review to be applied by audit committees in their review of documents filed under Ontario securities law,
  - ii. the certification or other evidence of review by audit committees,

- iii. the scope and content of an audit committee's review, and
  - iv. the composition of audit committees and the qualifications of audit committee members, including independence requirements.
58. Requiring reporting issuers to devise and maintain a system of internal controls related to the effectiveness and efficiency of their operations, including financial reporting and asset control, sufficient to provide reasonable assurances that,
- i. transactions are executed in accordance with management's general or specific authorization,
  - ii. transactions are recorded as necessary to permit preparation of financial statements in accordance with generally accepted accounting principles or any other criteria applicable to those statements,
  - iii. transactions are recorded as necessary to maintain accountability for assets,
  - iv. access to assets is permitted only in accordance with management's general or specific authorization, and
  - v. the recorded accountability for assets is compared with the existing assets at reasonable intervals and appropriate action is taken with respect to any differences.
59. Requiring reporting issuers to devise and maintain disclosure controls and procedures sufficient to provide reasonable assurances that,
- i. information required to be disclosed under Ontario securities law is recorded, processed, summarized and reported, within the time periods specified under Ontario securities law, and
  - ii. information required to be disclosed under Ontario securities law is accumulated and communicated to the reporting issuer's management, including its chief executive and financial officers, as appropriate, to allow timely decisions regarding required disclosure.
60. Requiring chief executive officers and chief financial officers of reporting issuers, or persons performing similar functions, to provide a certification that addresses the reporting issuer's internal controls, including a certification that addresses,
- i. the establishment and maintenance of the internal controls,
  - ii. the design of the internal controls, and
  - iii. the evaluation of the effectiveness of the internal controls.
61. Requiring chief executive officers and chief financial officers of reporting issuers, or persons performing similar functions, to provide a certification that addresses the reporting issuer's disclosure controls and procedures, including a certification that addresses,
- i. the establishment and maintenance of the disclosure controls and procedures,
  - ii. the design of the disclosure controls and procedures, and
  - iii. the evaluation of the effectiveness of the disclosure controls and procedures.

**(4) Subsection 143 (2) of the Act, as enacted by the Statutes of Ontario, 1994, chapter 33, section 8, is amended by striking out "and" at the end of clause (a) and by adding the following clause:**

- (a.1) the administration and distribution of amounts disgorged under paragraph 10 of subsection 127 (1);

**Bill 179 – Government Efficiency Act, 2002**

201. (1) This section applies only if Bill 179 (*Government Efficiency Act, 2002*, introduced on September 25, 2002) receives Royal Assent.

(2) References in this section to provisions of Bill 179 are references to those provisions as they were numbered in the first reading version of the Bill.

(3) On the later of the day subsection 194 (3) of this Act comes into force and the day section 11 of Schedule H to Bill 179 comes into force, clause 122 (4) (a) of the *Securities Act* is repealed and the following substituted:

- (a) \$5 million; and

**Commencement**

202. (1) Subject to subsection (2), this Part comes into force on the day this Act receives Royal Assent.

**Same**

(2) Sections 190 to 201 come into force on a day to be named by proclamation of the Lieutenant Governor.