Contents

[Law 436 – Securities Regulation – Rosalyn Chan 1](#_Toc417838223)

[Foundational Concepts 2](#_Toc417838224)

[What is a Security? I wish I knew 2](#_Toc417838225)

[What is a Trade? 3](#_Toc417838226)

[What is a Distribution? A trigger to file a prospectus: S61(1). 4](#_Toc417838227)

[What is a Reporting Issuer? 4](#_Toc417838228)

[Efficiency, Materiality, and Value 5](#_Toc417838229)

[THe Prospectus Process 5](#_Toc417838230)

[Three ways to Raise Capital – Primary Market Transactions 6](#_Toc417838231)

[Initial Public Offering – Issuing Securities to the Public for the First time 6](#_Toc417838232)

[Subsequent Public Offering – Issuance of Securities by an Already Public Issuer 6](#_Toc417838233)

[Private Placement – A sale of Securities Effected by Means of an Exemption from the Prospectus Requirement as per NI 45-106 6](#_Toc417838234)

[When is a prospectus required? Almost always (S61), unless exempt by NI 45-106(\*pg) or S76 6](#_Toc417838235)

[What must be in a prospectus? Full, true & plain disclosure of all material facts: s63(1) 6](#_Toc417838236)

[What do you have to do to file a prospectus and distribute securities? 8](#_Toc417838237)

[Step 1: Secure an underwriter 8](#_Toc417838238)

[Step 2: File a PP and have the regulator issue a receipt 9](#_Toc417838239)

[Step 3: Make comments and revisions during the waiting period 9](#_Toc417838240)

[Step 4: File the FP and have the regulator issue a receipt 9](#_Toc417838241)

[Step 5: Distribution of securities once receipt for FP is issued 9](#_Toc417838242)

[Alternatives to the Traditional Long Form Prospectus – How to save time and money 10](#_Toc417838243)

[Is the issuer filing in more than one jurisdiction (country/province)? 10](#_Toc417838244)

[Exempt Market Transactions – Discretionary Exemption (S76) or *Prospectus and Registration Exemptions* (NI 45-106) 11](#_Toc417838245)

[*Prospectus and Registration Exemptions* 11](#_Toc417838246)

[Resale Rules – Bridging the gap between the exempt and public market 12](#_Toc417838247)

[The resale rule if the trade is by a control person 13](#_Toc417838248)

[What happens if an issuer or reseller fucks up an exemption (incorrect reliance)? 14](#_Toc417838249)

[Ongoing Disclosure Requirements 14](#_Toc417838250)

[Timely and Periodic Disclosure Requirements 14](#_Toc417838251)

[Consequences 14](#_Toc417838252)

[Reporting Material Change 15](#_Toc417838253)

[Securities Regulators and Corporate Governance 16](#_Toc417838254)

[Corporate Governance – Regulating Corporate Affairs – Four Sources 16](#_Toc417838255)

[Options for a Dissastified Shareholder 16](#_Toc417838256)

[Proxy Solicitation 16](#_Toc417838257)

[Insider Trading 17](#_Toc417838258)

[Legal Insider Trading 17](#_Toc417838259)

[Insider Reporting Requirements 17](#_Toc417838260)

[Exemptions to the Insider Reporting Requirements – An insider is exempt from filing ITRs… 17](#_Toc417838261)

[Go-To-Jail Insider Trading – 2 Elements (Special Relationship and Undisclosed Material Information: S57.2) 18](#_Toc417838262)

[Tipping and Defences for Giving Just the Tip 18](#_Toc417838263)

[Change of Control Transactions 20](#_Toc417838264)

[Types of transactions a client can use to acquire control of another issuer 20](#_Toc417838265)

[Important Disclosure Requirement for offer/bidder who Completes a “Significant Acquisition” – Must File a Busniess Acquisition Report within 75 Days: NI 51-102 S8.2 21](#_Toc417838266)

[Take-Over Bids 21](#_Toc417838267)

[The Bidder’s Obligation during a “Formal” Takeover Bid – Equal treatment, disclosure and Timing 21](#_Toc417838268)

[Exemptions from Formal Takeover Bid Requirements **MI62-104 Part IV** 22](#_Toc417838269)

[Civil Liability for Fucking Up 23](#_Toc417838270)

[Primary Market Liability 23](#_Toc417838271)

[Civil Liability for Misrepresentation in a Prospectus or Offering Memorandum 23](#_Toc417838272)

[Secondary Market Liability 24](#_Toc417838273)

[Civil Liability for Misrepresentations in COntinuous Disclosure Documents and Failure to Make Timely Disclosure 24](#_Toc417838274)

[Enforcement 25](#_Toc417838275)

# Law 436 – Securities Regulation – Rosalyn Chan – Waters/Sollis

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| **Identifier** | **Name** | **Description** |
| NI 31-103 | *Registration Requirements, Exemptions and Ongoing Registrant Obligations* | Sets out the requirement for all persons trading in securities to be registered, unless an exemption applies.  |
| BC Instrument 32-513 | *Registration Exemption for Trades in Connection with Certain Prospectus-Exempt Distributions* | Exemption from registered dealer requirement for distributions that qualify for a prospectus exemption.  |
| NI 41-101 | *General Prospectus Requirements* | Sets out a uniform approach for filing prospectuses in all provinces and territories in Canada.  |
| NP 11-202 | *Process for Prospectus Reviews in Multiple Jurisdictions* | Creates the passport system for prospectus filing in multiple jurisdictions; one regulator acts as the principal regulator. |
| NI 33-105 | *Underwriting Conflicts* | Requires that non-independent underwriters fully disclose the relationship between the underwriter and the issuer, and possibly involve an independent underwriter too.  |
| NI 44-101 | *Short Form Prospectus Distributions* | Sets out a uniform approach for filing short-form prospectuses.  |
| NI 44-102 | *Shelf Prospectus* | Sets out a uniform approach for filing shelf prospectuses. |
| NI 44-103 | *Post-Receipt Pricing* | Sets out a uniform approach for filing post-receipt pricing prospectuses. |
| NI 71-101 | *Multijurisdictional Disclosure System* | Permits issuers in the US and Canada to use the same disclosure forms when selling securities in each other’s markets. |
| NI 45-106 | *Prospectus and Registration Exemptions* | Sets out exempt market transactions from prospectus requirement.  |
| NI 45-102 | *Resale of Securities* | Sets out resale rules for restricted security holders and control persons.  |
| NI 51-102 | *Continuous Disclosure Obligations* | An instrument that sets out the periodic and timely continuous disclosure obligations for reporting issuers. |
| NP 51-102 | *Disclosure Standards* | A policy that discusses best practices for disclosure.  |
| NI 55-102 | *System for Electronic Disclosure by Insiders (SEDI)* | An instrument that establishes SEDI, the disclosure system for insiders.  |
| NI 55-104 | *Insider Reporting Requirements and Exemptions* | An instrument that sets out the disclosure requirements for insiders (what an insider must do to avoid trading illegally as an insider).  |
| NP 51-201 | *Disclosure Standards* | A policy that sets out the two factors to be examined to determine whether material information has been “generally disclosed” in the context of insider trading.  |
| MI 62-104 | *Take-Over Bids and Issuer Bids* | A multilateral instrument governing takeover bids in BC (note: Ontario has a different rules).  |
| NP 62-202 | *Take-Over Bids – Defensive Tactics* | A policy that sets out the various defensive tactics that a target company may employ in response to a hostile takeover bid.  |
| NP 62-203 | *Take-Over Bids and Issuer Bids* | A policy that outlines how provincial and territorial securities regulators interpret and apply the Bid Regime (including MI 62-104), and provides guidance on the conduct of parties involved in a takeover bid.  |
| NI 62-103 | *The Early Warning System and Related Take-Over Bid and Insider Reporting Issues*  | An instrument that sets out the early warning system with takeover bids.  |

# Foundational Concepts

## What is a Security? I wish I knew

A security is an instrument sold to raise funds and used to generate profit. Section 1 of the *Securities Act* sets out the definition of what constitutes a security. It is important to note that *Pacific Coin* emphasizes that the legislated definition is not exhaustive and the categories are not exclusive. Interpretation of the *SA* should reflect a primary purpose of securities regulation, which is to protect investors from parties who seek to take advantage of them.

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| ***Securities Act*** **S1(1) “security”:** | **Interpretation** | **Examples** |
| **(a)** a document known as a security | A document commonly known, by a sophisticated analyst or securities lawyer, not a layperson, as a security qualifies under this provision.The Quebec Securities Commission held that proof of common knowledge “must be based on an overwhelming set of facts and conclusive evidence”: ***Geldermann*** |  |
| **(b)** a document evidencing title to, or an interest in, the capital, assets, property, profits, earnings or royalties of a person | This includes a property interest acquired for the purpose of making an investment, rather than buying a commodity to merely acquire an interest in the property. The investment or speculative purpose of the transaction is key. The contract will typically feature performance of a service by others that is meant to increase the value of the property.Scotch whiskey receipts were held to be a security because the whiskey was being stored and then sold on behalf of investors: ***Brigadoon Scotch***A title document providing the purchaser with a half interest in a pair of breeding chinchillas was held to be a security because the vendor was to keep the animals, breed them, then share profits with the purchaser: ***Swain*** | Rental PoolWhiskey warehouse receiptInterest in breeding chinchillasTitle to a vehicle |
| **(c)** a document evidencing an option, subscription or other interest in or to a security | An option is an instrument that gives the holder the right to buy or sell the underlying interest at an agreed price, on or before an agreed date, but doesn’t obligate the holder to do so. An option can be written against virtually any underlying interest, financial or otherwise, that can have a varying price. | Option contract |
| **(d)** a bond, debenture, note or other evidence of indebtedness, share, stock, unit certificate, participation certificate, certificate of share or interest, preorganization certificate or subscription OTHER THAN **(i)** insurance contract issued by an issuer, and **(ii)** an evidence of deposit issued by a savings institution |  | SharesPromissory notes |
| **(e)** an agreement under which the interest of the purchaser is valued, for the purposes of conversion or surrender, by reference to the value of a proportionate interest in a specified portfolio of assets, but doesn’t include a contract issued by an issuer that provides for payment at maturity of an amount more than ¾ of premiums paid by the purchaser for a benefit payable at maturity**(f)** an agreement providing that money received will be repaid or treated as a subscription to shares, stock, units or interests at the option of the recipient or of any person**(g)** a profit sharing agreement or certificate**(h)** a certificate of interest in an oil, natural gas or mining lease, claim or royalty voting trust certificate**(i)** an oil or natural gas royalty or lease or a fractional or other interest in either**(j)** a collateral trust certificate**(k)** an income or annuity contract, other than one made by an issuer |
| **(l)** an investment contract | **US SUPREME COURT:** “a contract transaction or scheme whereby a person invests his money in a common enterprise and is led to expect profits solely from the efforts of the promoter or a third party”: ***Howey*** (contracts for the sale of units in a citrus grove) “These investors have no desire to occupy the land or to develop it themselves – they are attracted solely by the prospects of a return on their investment… The investors provide the capital and share in the earnings and profits. It follows that their interests involve investment contracts, regardless of the terminology use.”**HAWAII SUPREME COURT:** Expanded *Howey* in this test: ***Hawaii Market Center*** (retail store membership program to earn income if they recruited new members – no expectation of profit)1. An offeree gives an initial value to the offeror.2. A portion of this initial value is subject to the risks of the enterprise.3. The furnishing of the initial value is induced by the offeror’s promises or representations that the offeree will gain some benefit over and above the initial value as a result of the enterprise’s operation.4. The offeree does not receive the right to exercise practical or actual control over the managerial decisions of the enterprise.**SCC:** Canadian test for existence of an investment contract: ***Pacific Coast Coin*** (sale of bags of silver coins on margin – putting down a deposit then either buying remainder or selling at the coin exchange)1. Is there a common enterprise? This is where an investor advances money and the promoter has managerial control over the success of the enterprise.2. Are the profits to come solely from the efforts of others? “Solely” is construed broadly (here if PC didn’t invest purchaser’s deposit properly, there would be no return, regardless of the market price of silver) | Units in a citrus grove development Retail store membership programPurchase of bags of silver coins on marginSome franchises where the franchisor retains a huge degree of control relative to the franchisee Real estate ventures |
| **(m)** a document evidencing an interest in a scholarship or educational plan or trust | RESPs qualify as a security, but 31-103CP, *Registration Requirements and Exemptions* provides an exemption from the dealer registration requirement when the plan is created | Self-directed RESP |
| **(n)** an instrument that is a futures contract or an option but is not an exchange contract | A futures is a contract to sell a specified asset on a stated date in the future at a stated price. **S1.1**: **(a)** its performance is guaranteed by a clearing house, and **(b)** it’s traded on an exchange). Futures can be written against a variety of underlying interests (currencies, commodities, interest rates). Publicly traded commodity futures contracts are **not** subject to securities regulations, even though they fit the definition.  | Futures contracts |
| **(o)** a permit under the *Oil and Gas Activities Act* |

## What is a Trade?

* **S1(1) “trade”: (a)** a disposition of a security for valuable consideration whether the terms of payment be on margin, installment or otherwise, but does not include a purchase of security or a transfer, pledge, mortgage, or other encumbrance of a security for the purpose of giving collateral for a debt
	+ **(a.1)** entering into a futures contract
	+ **(b)** entering into an option that is an exchange contract
	+ **(c)** participation as a trade in a transaction in a security or exchange contract made on or through the facilities of an exchange or reported through the facilities of a quotation and trade reporting system
	+ **(d)** the receipt by a registrant of an order to buy or sell a security or exchange contract
	+ **(e)** a transfer of beneficial ownership of a security to a transferee, pledgee, mortgagee or other encumbrancer under a realization on collateral given for a debt
	+ **(f)** any act, advertisement, solicitation, conduct or negotiation directly or indirectly in furtherance of any of the activities specified above
* **S34:** A person must not **(a)** trade in a security or exchange contract, **(b)** act as an adviser, **(c)** act as an investment fund manager, or **(d)** act as an underwriter, unless the person is registered in accordance with the regulations and in the category prescribed for the purpose of the activity.

**S34** and **NI 31-103** state that a trade triggers the requirement that a registered dealer be involved in the transaction and thus, it is important to determine whether a transaction qualifies as a trade or not. This will determine whether a transaction is subject to securities regulations.

**BC Instrument 32-513** provides that the dealer registration requirement “does not apply to a trade in a security by a person or company in connection with a prospectus-exempt distribution,” provided that the following conditions are met: the person was or is not registered under Canadian or foreign securities legislation; prior to the trade, the purchaser did not advise or recommend to the purchaser that the security being traded is suitable for the purchaser; the person obtained a sign risk acknowledgement form from the purchaser before the purchaser entered into the K to purchase the security; the person does not hold or have access to the purchaser’s assets; the person has not provided financial services to the purchaser other than in connection w/ prospectus-exempt distribution; and, the person has filed a current info report with the regulator.

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| **Trade** | **Not a Trade** |
| * The granting of stock options to employees or directors (valuable consideration being the employee/director’s future or current services)
* Transferring shares from one company that you own to another company that you own, provided there is valuable consideration
* Converting a share from one form to another
* Advertising or solicitation directed at investors (even though no securities have actually been sold yet) – this qualifies as an “act in furtherance”
 | * A gift of securities as there is no consideration
* The inheritance of securities – no consideration
* Moving assets in divorce – no consideration
* A trust company managing the portfolios of mutual fund dealers (doesn’t qualify under (f) because the trade already is already completed by the time the trust company becomes involved)
* MAYBE: drafting an advertisement directed at investors or sending it to the printers, but before it’s actually published (could be argued that it’s not enough under (f))
 |

## What is a Distribution? A trigger to file a prospectus: S61(1).

* **S1(1) “distribution”: (a)** a trade in a security of an issuer that has not been previously issued
	+ **(b)** a trade by or on behalf of an issuer in a previously issued security of that issuer that has been redeemed or purchased by or donated to that issuer
	+ **(c)** a trade in a previously issued security of an issuer from the holdings of a control person
	+ **(d)** a trade by or on behalf of an underwriter in a security that was acquired by the underwriter, acting as underwriter, before Feb 1 1987, if the security continues, on Feb 1 1987, to be owned by or on behalf of that underwriter so acting
	+ **(e)** **DEEMED DISTRIBUTION:** **(i)** in an order made under S76 by the commission or the executive director or **(ii)** in the regulations
	+ **(f)** a transaction or series of transactions involving further purchases and sales in the course of or incidental to a distribution (ie: if X sells shares to Y, then Y immediately sells those shares to A, B, C, then the sale from X to Y is a distribution)
	+ **(g)** a prescribed class of trade of transaction
* **S1(1) “control person”: (a)** a person who has a sufficient number of voting rights attached to all outstanding voting securities of an issuer to **affect** **materially** the control of the issuer OR **(b)** each person in a group of people acting together according to an agreement that has a sufficient number of voting rights
	+ **DEEMED CONTROL PERSON**: if one person or a group of persons holds 20% of the voting rights, unless there is evidence to the contrary

Distributions are a type of trade that triggers the prospectus process, which is why this characterization is important. The definition set out in S1(1) of the *SA* is exhaustive. It is important to note that while all distributions involve trades, not all trades qualify as distributions.

## What is a Reporting Issuer?

* **S1(1) “reporting issuer”:** an issuer that **(a)** has issued securities in respect of which **(i)** a prospectus was filed and a receipt was issued, **(ii)** a statement of material facts was filed and accepted, OR **(iii)** a securities exchange take over bid circular was filed under a former enactment,
	+ **(b)** has filed a prospectus or statement of material facts and the executive director has issued a receipt for it under this Act (even if no distribution is contemplated at that time by the issuer)
	+ **(c)** has securities that have been at any time listed and posted for trading on any exchange in BC, regardless of when the listing and posting for trading began
	+ **(d)** is an issuer that has exchanged its securities with another issuer or with the holder of the securities of that other issuer in connection with an amalgamation, merger, reorganization, arrangement or similar transaction if one of the parties to one of those things was a reporting issuer at the time of one of those things
	+ **(e)** is designated as a reporting issuer in an order made under S3.2
	+ **(f)** has filed a securities exchange takeover bid circular under this Act for the acquisition of securities of a reporting issuer and has taken up and paid for securities subject to the bid in accordance with the circular
	+ UNLESS the commission orders under S88 that the issuer has ceased to be a reporting issuer
* **S3.2: (1)** If the commission considers it to be in the public interest, the commission may, for the purposes of this Act, order that **(a)** a person is an insider, or **(b)** a person or a person within a class of persons is a mutual fund, a non-redeemable investment fund or a reporting issuer.
	+ **(2)** An order under (1) may be made on application by an interested person or on the commission’s own motion.

S1(1) of the *SA* defines an “issuer” as a individual who has a security outstanding, is issuing a security, or proposes to issue a security, and a “reporting issuer” as an issuer who has filed a prospectus or whose securities have, at any time, been listed on a recognized exchange in BC. The characterization of whether an issuer is a reporting issuer determines whether or not they are required to continually disclose information to the markets and investors. Another way from an issuer to crossover to become a reporting issuer is through a merger, acquisition, amalgamation, or arrangement of securities, as per (d). The regulator may also deem an issuer to be a reporting issuer. An issuer that has filed and obtained a receipt for final prospectus is a reporting issuer even if the closing/distribution of securities didn’t take place.

## Efficiency, Materiality, and Value

Issuers cannot be expected to disclose absolutely everything. What is disclosable rests on materiality, determined through the **market impact test**: Information is material if it is reasonable to expect that the release of that information would impact the market price of the security (being investigated for money laundering in the US is a material fact: ***YBM***).

In ***Danier Leather***, the SCC said that material changes are inward looking and material facts are outward looking (ie: a change in weather forecast was held to be a material fact, but not a material change, so there would not be a requirement to disclose this material fact to meet disclosure obligations). In ***YBM Magnex***, the Ontario Securities Commission said that if the decision whether a piece of information or event qualifies as material is borderline, then the information should be considered material and disclosed accordingly. When advising clients about the materiality of historic/existing information (past financials, etc), it is important to look at both the market impact test and the reasonable investor test. The RIT is used in the US, but is now migrating north. Information is material if the reasonable investor would consider the information important to an investment decision. The SCC applied this test in ***Sharbern*** and said “an omitted fact is material if there is a substantial likelihood that its disclosure would have been viewed by the reasonable investor as having significantly altered the total mix of information made available.”

When advising clients about the materiality of potential/future information (a pending merger, lawsuit, etc), the test to determine disclosure is the **probability/magnitude test** (***YBM Magnex****)*: the materiality of a potential future event depends on (a) an assessment of the probability that the event will occur having regard to all known or ascertainable facts, and (b) an assessment of the magnitude or significance of the change, in terms of whether the information would be viewed by reasonable investors as important information for making a decision to buy, sell, or continue to hold their securities.

# THe Prospectus Process

* **S1(1) “control person”: (a)** a person who has a sufficient number of voting rights attached to all outstanding voting securities of an issuer to **affect** **materially** the control of the issuer OR **(b)** each person in a group of people acting together according to an agreement that has a sufficient number of voting rights
	+ **DEEMED CONTROL PERSON**: if one person or a group of persons holds 20% of the voting rights, unless there is evidence to the contrary
	+ **“material change”: (a)** if used in relation to an issuer other than an investment fund **(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 a security of the issuer, or **(ii)** a decision to implement a change referred to above made by **(A)** the directors of the issuer, or **(B)** senior management of the issuer who believe that confirmation of the decision by the directors is probable and
		- **(b)** if used in relation to an investment fund, **(i)** change in the business, operations or affairs of the investment fund that would be considered important by a reasonable investor in determining whether to purchase or continue to hold a security of the investment fund, or, **(ii)** a decisions to implement a change referred to above made **(A)** by the directors of the investment fund or the directors of the investment fund manager, or **(B)** by senior management of the investment fund who believe that confirmation of the decision by the directors or **(C)** by directors of the manager is probable
	+ **“material fact”:** when used in relation to securities issued or proposed to be issued, a fact that would reasonably be expected to have significant effect on the market price or value of the securities
* **S65: (1)** The executive director must issue a receipt for a preliminary prospectus as soon as practicable after it has been filed under this Part.
	+ **(2)** Subject to the regulations, the executive director must issue a receipt for a prospectus filed under this Part unless the executive director considers it to be prejudicial to the public interest to do so.
	+ **(3)** The executive director must not refuse to issue a receipt for a prospectus without giving the person who filed the prospectus an opportunity to be heard.
* **S132.1(1):** If a prescribed disclosure document contains a misrepresentation, a purchaser who purchases a security offered by the disclosure document **(a)** is deemed to have relied on the misrepresentation if it was a misrepresentation at the time of the purchase, and **(b)** has a right of action for damages against **(i)** the issuer, **(ii)** every director of the issuer at the date of the disclosure document, and **(iii)** every person who signed the disclosure document.

## Three ways to Raise Capital – Primary Market Transactions

### Initial Public Offering – Issuing Securities to the Public for the First time

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| **Pros** | The issuer can access the broadest possible market for its securities, increasing its ability to raise capital and investors enjoy enhanced liquidity for the issuer’s securities because of the ability to trade on public markets. The value of the securities can be formally established and other financings facilitated more efficiently. |
| **Cons** | **An IPO is a distribution: S1(1) “distribution” (a)** – this triggers the prospectus requirement and this process, including continuing disclosure responsibilities, as they are now a reporting issuer (**S1(1) “reporting issuer” (a)**), can eat up resources, especially for small issuers. It creates a high opportunity cost to comply with the regulations and there can be increased delays for issuers seeking regulatory approval in multiple jurisdictions. IPOs tend to be very time sensitive, so a failure to offer within the opportune market window can impact the price of securities. IPOs also lead to an increased vulnerability to takeovers. Finally due to disclosure requirements, IPOs can lead to increased public scrutiny of the issuer’s financial results, management and director performance.  |

### Subsequent Public Offering – Issuance of Securities by an Already Public Issuer

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| **Pros** | The issuer has another opportunity to raise more capital in the broad public market. |
| **Cons** | Issuance of another set of securities is still another distribution (**S1(1) “distribution” (a)**) and so the prospectus requirement is triggered again, but it is possible that the reporting issuer can file a short form prospectus, since so much information is already publically available. **NI 44-101** sets out the test to determine whether an issuer can file a SFP – SEE PAGE 7 |

### Private Placement – A sale of Securities Effected by Means of an Exemption from the Prospectus Requirement as per NI 45-106

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| **Pros** | Issuing securities without filing a prospectus greatly reduces the cost, both time and money, needed to obtain capital. |
| **Cons** | You have to qualify for the exemption. – SEE PAGE 11-12 |

## When is a prospectus required? Almost always (S61), unless exempt by NI 45-106(\*pg) or S76

A prospectus provides investors with detailed information about the issuer so they can make informed valuation and investment decisions. This requirement goes back to the overarching goal of securities regulation – to protect the capital market from those seeking to take advantage of investors. Prospectuses are designed as an instrument to increase public confidence in public offerings and the capital market in general, and to enhance transparency of market transactions. The general requirements for the prospectus process are outlined in **NI 41-101.**

* **S61:** **(1)** Unless exempted under this Act, a person must not **distribute** a security unless **(a)** a preliminary prospectus and a prospectus respecting the security have been filed with the executive director and **(b)** the executive director has issued receipts for the preliminary prospectus and prospectus.
	+ **(2)** These must both be in the required form (hence why it is *required*…)
* **S76: (1)(a)** You can apply for discretionary exemption by the commission/executive director from the requirements as long as it isn’t prejudicial to the public interest.
* REQUIRED FOR: IPOs, subsequent public offerings, some secondary offerings (ie: resale by a control person **N1 45-102, S1(1) “distribution” (c)**)

## What must be in a prospectus? Full, true & plain disclosure of all material facts: s63(1)

* **S63: (1)** A prospectus must prove full, true and plain disclosure of all material facts relating to the securities issued or proposed to be distributed.
	+ **(2)** A preliminary prospectus must substantially comply with the requirements of this Act and the regulations respecting the contents of a prospectus.
* **S1(1) “material fact”:** a fact that would reasonably be expected to have significant effect on the market price or value of the securities
* The issuer’s CFO, CEO, two directors, and the issuer’s underwriters must certify that the prospectus includes full, true and plain disclosure, giving rise to their liability: ***YBM***

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| **Preliminary Prospectus (PP)** |
| This is the first version of the final document that will accompany a public offering of securities. It must include a resolution of the board authorising the filing, an underwriter agreement, FSs, and certified notes by senior officers. It must note that the document is not final. The preliminary prospectus does not have to contain a price for the securities as this will be set based on market conditions at the time of filing the final prospectus. Regulators only selectively review PPs, unless it is for an IPO, which gets a full review. Triggers for a full review, which includes a review of issuer’s continuous disclosure:* Investors of a reporting issuer bear the risk that the issuer’s filings don’t comply with requirements
* Clients of an advisor or fund manager face a risk that the firm isn’t adequately managing the risks
* Interests are at risk when market participants materially breach securities laws

Advertising is, for the most part, restricted during the waiting period as there are public policy concerns that the public must take information in the PP as a final representation regarding accuracy.  |
| **Final Prospectus (FP)** |
| This is the final and amended version of the PP, which must meet all requirements, containing final pricing and audit reports. FSs include assets and liabilities, cash flow statements re: issuer’s cash from operations, investments, and financing activities, and an income statement containing revenues, expenses, gains, losses and earnings over a specified period of time.A long-form prospectus must generally include:* The issuer’s business plan and its current and expected activities
* FSs
* The issuer’s capital structure
* Estimated proceeds of the offering
* Planned purpose for the utilization of the capital
* The underwriting agreement
* A description of the risk factors of the security
* Disclosure of estimated net proceeds to be received

You only have 90 days to file a FP or amendment to the PP after the date of receipt for the PP (**NI 41-101 S2.3(1)&(1.1)**) or 180 days from the date of receipt of the PP to file a FP if you have filed an amendment to the PP (**NI 41-101 S2.3(1.2)**. and distribution must cease within 90 days of the receipt for the FP (**NI 41-101**). Failure to comply with prospectus requirements can include cease-trading orders or cancellation/restriction of the issuer’s registration. Junior issuers (defined in **NI 41-101** as an issuer who is not yet a reporting issuer and whose consolidated assets and revenue are both less than $10,000,000) must disclose additional information, including the total funds available and a breakdown of those funds, estimated consolidated working capital up to the most recent month before filing, and total other funds available to be used to achieve the principal purpose identified by the issuer. In preparing a prospectus, the issuer must apply **plain language principles**, including using short sentences, everyday language, the active voice, avoidance of superfluous words, avoiding boilerplate wording, avoiding multiple negatives, etc. |
| **Short Form Prospectus (SFP)** |
| SFPs are extremely desirable for repeat issuers to making public offerings in a more timely fashion. These issuers will already have a lot of publically available information from previous offerings so these SPFs just build on these previously filed documents through referencing. The SPF will include information on the distribution, the intended market, what the proceeds will be used for, the rights attaching to the securities, and any other relevant information to the distribution. **NI 44-101** sets out the test that determines whether an issuer can file a SPF. The issuer must file electronically, be a reporting issuer in at least one jurisdiction of Canada, have filed all required disclosure documents, have a current AFS and AIF. The securities that are to be distributed are approved and aren’t the subject of an announcement by an approved rating organization. Credit supporters can also pledge full and unconditional credit support to allow you to file an SPF. |

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| **Future Oriented Financial Information (FOFI)** | With the regulator’s approval, a prospectus may include financial forecasts. However, if there are any changes to the forecast’s underlying assumptions or if external events cause the issuer to revise the forecast, the issuer must update the FOFI. An issuer must also address the FOFI in its quarterly filings of financial statements. The issuer should include a cautionary note of the risk that actual performance may vary considerably from the forecast to help mitigate liability (**S131(8.1)(a)(i)**). SEE PAGE 24 for liability on FOFI.  |

## What do you have to do to file a prospectus and distribute securities?

### Step 1: Secure an underwriter

Underwriters are the critical link between issuers and investors, often referred to as the gatekeepers of securities law. The OSC state in ***YBM Magnex*** that “the underwriter stands between the issuer and the public as an independent, expert party in bringing new securities to the market. In a sense the underwriter and the issuer are joint venturers, but in another more important sense they must be adversaries. That is the underwriter must seek out and question all relevant and material facts concerning the issuer and reasonably ensure himself that these facts are fully and truly set before the investing public.” Most public offerings are underwritten by investment banking firms.

* UWs must perform **due diligence**  on the issuer – a requirement highlighted in ***YBM***. UWs must lookout for red flags and must avoid automatic reliance on statements by the issuer’s directors, officers, and counsel.
* UWs must sign an underwriter’s certificate, certifying that the prospectus contains full, true and plain disclosure of all material facts related to the securities offered by the prospectus to the best of the UW’s knowledge, information, and belief.
* The UW may be liable for any misrepresentations in the prospectus.

#### Types of Underwriting Agreements

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| **Agency Agreement** |
| The UW promises to use its “best efforts” to sell the securities as an agent for the issuer. The UW takes a commission on the securities that it is actually able to sell. The securities are sold directly by the issuer to the investors. The agency agreement is signed right before the FP is filed. **This type of agreement is beneficial to the UW** as they are not stuck with any unsold securities at the end of the process. |
| **A Firm Commitment Agreement** |
| The UW agrees to purchase a certain amount of the issuer’s securities for a certain price and resell them. This agreement is not signed by the UW until they receive a fee based on a percentage of the issue price. An UW may agree to a firm commitment where they are confident they can make a profit between the issue price and the sale price (a wide spread). Securities are sold by the issuer to the UW, then from the UW to investors. The firm commitment agreement is signed right before the FP is filed. **This type of agreement is beneficial to the UW** as they can begin to canvass potential purchasers before the PP is filed, but the UW risks having unsold securities in the end. |
| **A Bought Deal Agreement** |
| The UW agrees to purchase a large block of the securities to be issued before the issuer files the PP. Securities are sold by the issuer to the UW and from the UW to the investors. This agreement is signed before the PP has been filed. **This agreement is beneficial to the issuer** as cash accrues faster, but in order to effect this agreement, the issuer must qualify for a SFP, must immediately issue and file a news release, and the SFP must be filed within 4 days of entering into this contract. **A bought deal is beneficial to the UW** as it reduces the risk of the offering as the UW can canvas potential purchasers before the PP is filed, but risks having unsold securities to deal with. **A bought deal agreement can be detrimental to investors** because a purchaser has no remedy of contract rescission against the issuer for misrepresentation in the prospectus (***Kerr v Danier Leather***), as it is the UW who sells the securities.  |

#### How an UW can limit their risk

* **Termination clauses:** The UW can include a market-out clause and a disaster-out clause in the underwriting agreement. With a market-out clause, the UW can terminate the agreement if it determines, acting reasonably, that the securities cannot be marketed profitably (***Retrieve Resources***:“state of financial markets” held to mean the financial market into which specific shares were placed, not the financial markets as a whole). With a disaster-out clause, the UW can terminate the agreement if a significant event affects the issuer’s business or capital markets. The underwriter may also include other termination clauses, including regulatory-out, due diligence-out, and tax-out clauses.
* **Invite other UWs:** The UW can limit their risk by inviting other dealers into the offering – the purchasers are jointly and severally liable.
* **Due diligence:** Check everything! UWs are not liable if they conducted a reasonable investigation to provide grounds for belief that there was no misrepresentation: **S131(5)(d)(iii)**
	+ **S133:** Standard of reasonableness what is required for a prudent person in the circumstances of a particular case
* **Indemnity from the issuer:** The UW can include an indemnity clause in the underwriting agreement (ex: the issuer indemnifies the UW from and against all losses, claims, damages, liability, reasonable costs and expenses)
* **Accumulate sufficient expressions of interest before signing the underwriting agreement:** Before signing a firm commitment or bought deal agreement, the UW should solicit expressions of interest and not enter into the agreement unless there is sufficient interest – at least equal to the amount of securities the UW is taking on.
* **Lockups and blackout periods:** The UW can require that the issuer, major shareholders, principal officers, and directors not sell securities for a specified number of days after the IPO without the UW’s consent (prevents market disruptions)
* **Disclosure of conflicts of interest:** A potentially non-independent UW (ie: where the UW is a subsidiary of a bank to which the issuer owes money) should make disclosers pursuant to **NI 33-105**, *Underwriting Conflicts*, and if necessary, involve an independent UW.

### Step 2: File a PP and have the regulator issue a receipt

**NI 41-101** sets out the required form and content of the long-form PP (see above). As per **S63(2)**, the PP must substantially comply with the rules governing the FP, but need not disclose certain information, including the offering price of the securities. The PP must provide full, true and plain disclosure of all material facts relating to the securities: **S63(1)**. Upon receiving a PP, so long as there is no need for additional filing requirements and conditions, which the executive director may deem necessary for the public interest (**S64(1)**), the executive director must issue a receipt for the PP as soon as practicable after it has been filed.

### Step 3: Make comments and revisions during the waiting period

Once the issuer has filed the PP and the regulator has issued a receipt, a mandatory waiting period begins. **NI 41-101, S78(1)** defines this as the time between the issuance of a receipt by the regulator for the PP and the issuance of the receipt for the FP. This waiting period can be <10 days for SFP or as long as several months for smaller issuers, or issuers who have no history with the market.

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| **Activities During the Waiting Period** |
| **UW** | Underwriters can do limited marketing to gauge market interest and potential pricing so long as a copy of the PP is sent to the prospective purchaser as soon as practicable after indication of interest. (**S78(2)(c)**) |
| **Regulator** | During the waiting period, the regulator engages in selective review of the PP that are filed to determine whether they comply with all statutory/regulatory requirements. If an issuer has filed in multiple jurisdictions, the primary regulatory will provide the majority of the comments. Once the review process is complete, the regulator sends a comment letter to the issuer advising if there are any required revisions or additional information. |
| **Issuer** | The issuer’s communication with potential investors is extremely limited during the waiting period, as per **S78**. The PP may only be distributed to prospective purchasers who make unsolicited expressions of interest in purchasing the security. Advertising is limited to alerting the public of the existence of the PP and where it can be found. Any advertising that can reasonably be considered to be in furtherance of an issue of securities is prohibited (***Cambior***). All advertisements must include the disclaimer set out in **NI 41-101 S13.1(1)** to help ensure that the public does not take the information in a PP as a final representation of the accuracy of information, before regulators have reviewed it. |
| **Ongoing obligation to amend the PP**: If there is a material *adverse* change between filing the PP and the issuance of the receipt for the PP, the issuer must file an amendment to the prospectus as soon as practicable and within 10 days after the change occurs, as per **NI 41-101 S6.5.** SEE PAGE 15 for more on materiality. |
| **NI 41-101 S13.1(1) DISCLAIMER:** | “A preliminary prospectus containing important information relating to these securities has been filed with securities commissions or similar authorities in certain jurisdictions of Canada. The preliminary prospectus is still subject to completion or amendment. Copies of the preliminary prospectus may be obtained from [insert name and contact information for dealer or other relevant person or entity.] There will not be any sale or any acceptance of an offer to buy the securities until a receipt for the final prospectus has been issued.” |

### Step 4: File the FP and have the regulator issue a receipt

The FP is an amended version of the PP and must contain final pricing information and audit reports. The executive director must issue a receipt for a FP filed, unless they consider it to be prejudicial to the public interest to do so (**S65(2)**) and must not refuse without giving the person who filed the FP an opportunity to be heard (**S65(3)**).

### Step 5: Distribution of securities once receipt for FP is issued

* Once the FP has been filed and a receipt has been issued, the securities may be lawfully sold
* **S83(1):** The FP must be delivered before any purchase contract is entered into and no later than midnight on the second day after entering into an agreement
* **S83(3):** If an investor sends the issuer a written notice of their intention to exercise their right of rescission within two days of receiving the FP, and any other document they are entitled to, then the purchase contract is not binding. The issuer will want these two days to elapse before closing.
* As per **NI 44-101 S8.2**, if securities are being distributed on a “best efforts”, agency agreement basis, the distribution must cease within 90 days after the date of receipt of the FP, unless an amendment to the FP and a receipt for the amendment has been received, in which case, distribution must cease within 90 days of that receipt. The total period of distribution cannot exceed 180 days after the receipt for the FP.
* **Ongoing obligation to amend the FP:** If there is ANY material change, beneficial or adverse, between the issuance of the receipt for the FP and the completion of the distribution, the issuer must file an amendment to the prospectus as soon as practicable and within 10 days after the change occurs (**NI 41-101 S6.6)**. If an amended FP is filed, the two day right of rescission restarts for investors.
	+ **S83(2):** There is no requirement to send an amendment to a purchaser if the purchase contract and sale of the security has been entered into before the obligation to send the amendment arises.
	+ SEE PAGE 15 for more on materiality

## Alternatives to the Traditional Long Form Prospectus – How to save time and money

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| **SFP****\*only available for RIs with good disclosure records** | **NI 41-101:** If a reporting issuer qualifies, they may file a SFP in Form 44-101F1. A SFP incorporates the reporting issuer’s disclosure record “by reference”. The filing process is similar to a long-form prospectus, but the waiting period is far shorter (**NP 11-202**). This is beneficial in expediting the process of raising capital and can lower the cost of making an offering.  |
| **Shelf Prospectus (SP)** **\*only available for RIs with good disclosure records** | **NI 41-102:** Reporting issuers that are eligible for the SFP are also eligible for the SP. This allows an issuer to file a SFP-style prospectus and leave it “on the shelf” for up to 25 months. At any point during that time, the issuer can take the securities “off the shelf” and distribute them. This is beneficial in expedite the process of raising capital, lowers the cost of making an offer. To distribute securities, the issuer only needs to prepare an information supplement, which does not require review by regulators. There is a risk of “market overhang” in that share prices can drop in anticipation of forthcoming issuance. Still, this makes sense to allow for reporting issuers who have a ton of publically available information available to the market with a good disclosure record. |
| **Post-Receipt Pricing Prospectus (PRPP)****\*available to all issuers** | **NI 41-103:** All issuers are eligible for PRPP, but it may only be used for a specific transaction and a single type of security, in contrast with SPs, which can be used for multiple types of securities. The PRPP allows issuers to file a base prospectus and can be kept “on the shelf” for 90 days. This shelf life can be extended if the issuer files a supplemental PRPP prospectus. To distribute securities, the issuer must prepare an information supplement to distribute to prospective purchaser, which does not need to be reviewed by regulators. |

### Is the issuer filing in more than one jurisdiction (country/province)?

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| **Multijurisdictional Disclosure System (MJDS)** | **NI 71-101**: Under the MJDS, issuers from the US and Canada can use the same disclosure forms when selling securities in the other market. This is based on the same policy considerations that allow SFPs.* US issuers can use US continuous disclosure documents that are compliant with US securities laws in Canada
* Issuers must file a PP in all jurisdictions of Canada
* Issuers can choose the principal jurisdiction in Canada to review the material filed and a receipt will be issued as long as disclosure requirements have been met
* Certification requirements for the issuer and UWs are the same as usual – full, true and plain disclosure of all material facts
 |
| **Passport System \*available in all jurisdictions except Ontario** | **NI 11-202:** All Canadian regulators, aside from Ontario, who thinks they are better than everyone else, have agreed that one security regulation authority can act as the principal regulator for all materials relating to an issuer. This is recognized under **NI 41-101**. Issuers can enjoy the benefits of coordinated review by the principal regulator (and Ontario if relevant) in filing prospectuses and getting receipts and the issuance of a receipt for a PP by the primary regulator is deemed to be the receipt for the PP in all passport jurisdictions (these must be listed by the primary regulator on the receipt). The primary regulator will provide the bulk of the comments during the waiting/review period. * If the principal regulator is a passport regulator and the issuer hasn’t filed in Ontario, then only the principal regulator will review the prospectus.
* If the principal regulator is a passport regulator and the issuer has filed in Ontario, the **dual prospectus system** will apply and both will review the prospectus.
* If the principal regulator is Ontario and the issuer has also filed in a passport jurisdiction, only Ontario will review the prospectus.
 |

# Exempt Market Transactions – Discretionary Exemption (S76) or *Prospectus and Registration Exemptions* (NI 45-106)

* **S76: (1)(a)** You can apply for discretionary exemption by the commission/executive director from the requirements as long as it isn’t prejudicial to the public interest.
* No dealer registration (**BCI 32-513**) or prospectus requirements

## *Prospectus and Registration Exemptions*

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| **Small and Medium-Sized Enterprises or Start-up Issuer Exemptions** |
| **Private Issuer Exemption****NI 45-106 S2.4** | **(1)(a):** The issuer **cannot be a reporting issuer or an investment fund.** The issuer must be a private issuer.**(1)(b)(ii) :**The issuer cannot have > 50 securities holders, excluding former and current employees.**(2)(a)-(k):** The offering cannot be “to the public”, meaning that all security holders must have a blood relation or a close personal friendship or close business association with or be married to the issuer, its directors, officers, or control persons, or must be an accredited investor (someone sophisticated, well-off enough to bear investment risk). **Note**: this is a qualitative/subjective test, not an objective test.* **Common Bonds Test:** In ***Piepgrass****,* the Alberta CA held that investor farmers “were not in any sense friends or associates of the accused, or persons having common bonds of interest or association”, therefore, the offering was “to the public” and there was no exemption.
* Employees should be regarded as members of the public for the purposes of obtaining a prospectus: ***Ralston Purina***

**(1)(b)(i):** The issuer’s securities must be subject to restrictions on transfer that are contained in the issuer’s constating documents or security holdiers’ agreements (ie: securities can’t be bought/sold without director approval)  |
| **Family, Friends, and Business Associates Exemption****NI 45-106 S2.5****\*doesn’t apply in Ontario** | The issuer can be private (non-reporting) or public (reporting) and there is no limit on number of securities holders. **(1)(a)-(i):** Investors must be a spouse, a family member, a “close personal friend”, or “a close business associate” of the founder, the directors, executive officers, or control persons. **Note**: this is a qualitative/subjective test, not an objective test.**NI 45-106CP S2.7 “close personal friend”:** an individual who knows the director, executive officer, founder or control person well enough and has known them for a sufficient period of time to be in a position to assess their capabilities and trustworthiness. **S1.10** recommends (Sask requires) that issuers obtain signed statements from purchasers describing the purchaser’s relationship, and should not rely on representations(ex: “I am a close personal friend of the director”)**S6.1:** Issuers are required to file a report in the jurisdiction where distribution takes place no later than **10 days** after distribution The issuer **cannot rely on advertising or an agent to facilitate the transactions** (goes against the “spirit” of this exemption).  |
| **Founder, Control Person, and Family Exemption****NI 45-106 S2.7****\*only available in Ontario** | This is a variation of the Family, Friends, and Business Associates Exemption. Where a trade in a security is to a person who is the founder of the issuer, an affiliate of the founder, a spouse or blood relative of an executive officer, director or founder, or a control person of the issuer, the distribution is exempt from the dealer registration and prospectus requirements. The key difference is that this exemption does not allow sales to close personal friends or close business associates. |

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| **Wealthy & Sophisticated Investor Exemptions** |
| **Accredited Investor Exemption****NI 45-106 S2.3** | The issuer can be private (non-reporting) or public (reporting) and there is no limit on number of securities holders. **(1):** Investors must be accredited investors. An investor qualifies as “accredited” if they meet one of the following objective tests: **NI 45-106 S1.1**:* **Asset Test #1:** If the person’s household has financial assets, excluding their principal residence(cash, securities, contracts of insurance, deposit or evidence of a deposit that is not a security for the purposes of securities legislation) that exceed **$1,000,000**
* **Asset Test #2:** If the person’s household has net assetsin excess of **$5,000,000** (includes all debt, all assets, including the principal place of residence)
* **Income Test:** If the person has a net income that exceeds before tax $200,000 or a combined spousal net income of $300,000.
* **Otherwise Sophisticated Investors:** financial institutions such as banks, loan or trust companies, insurance companies, credit unions, pension funds and mutual funds, and various levels of government.
 |
| **Minimum Amount Investment Exemption****NI 45-106 S2.10** | The issuer can be private (non-reporting) or public (reporting) and there is no limit on number of securities holders. Investors must pay a minimum of $150,000 in cash and must purchase as a principal (not as an agent for a group pooling their money). The trade must be in a security of a single issuer. |

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| **Pre-Existing Relationship Exemptions** |
| **Dividends Exemption****NI 45-106 S2.31** | This exemption applies to the issuance, by a private or reporting issuer of, securities to investors as payment of dividends in lieu of cash (this qualifies as a distribution)  |
| **Trades to Employees Exemption****NI 45-106 S2.24** | Applies to the trade of securities to employees, directors, officers, consultants (as a form of compensation or as an incentive for future performance) from the issuer or a control person as long as the trade is voluntary. |
| **Issuer and Affiliates Exemption****NI 45-106 S2.8, 2.15** | Applies to the issuance of securities by the issuer to itself or to an affiliate of the issuer.  |
| **Business Combinations and Reorganizations Exemption****NI 45-106 S2.11** | Applies to the issuance of securities to creditors in exchange for the issuer’s debt obligations as part of an amalgamation, merger, reorganization, dissolution or wind-up of the issuer. Regulators do not want to add difficulties to an issuer in financial distress and creditors may have enhanced access to information about the issuer in their debt agreements.  |
| **Takeover Bids Exemption****NI 45-106 S2.16** | Applies to the issuance of securities in connection with a takeover bid or issuer bid |
| **Conversions or Exchanges Exemption****NI 45-10 S2.42** | Applies to the conversion or exchange of existing securities to new securities. There is a 10 day period where regulators may object. |
| **Rights Offering Exemption****NI 45-106 S2.1** | Applies to a rights offering that gives investors the right to buy additional securitiesbased on the number of securities the investor currently holds.The rationale is that investors have already made a decision to hold securities, so no additional disclosure are needed for a rights offering. This exemption does not apply if the rights offering is to effect a “major financing” (exercise of rights would result in 25%+ of the outstanding securities in the class).**(1)(b):** There is a 10 day period where regulators may object. |

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| **Offering Memorandum Exemption** |
| **Offering Memorandum Exemption****NI 45-106 S2.9****\*not available in Ontario (they have a separate exemption)** | The issuer can be private (non-reporting) or public (reporting) and there is no limit on number of securities holders. The issuer must file an offering memorandum in the prescribed form, 45-106F2 and **(1)(b)(i)** deliver it to the purchaser prior to or at the same time the purchaser signs the purchasing agreement. **(1)(b)(ii)** The issuer must obtain from the investor a signed risk acknowledgement statement **(14)** in the required form and must retain the acknowledgement for 8 years after the distribution. **For qualified reporting issuers:** a shorter form memorandum is allowed, similar to the SFP, incorporating information by reference.**For non-qualified issuers:** a full-length memorandum is required (looks a lot like a long-form prospectus). The information disclosed in an offering memorandum will generally attract liability. **(8)** An offering memorandum must contain a certificate that states the following: “This offering memorandum does not contain a misrepresentation.”  |

## Resale Rules – Bridging the gap between the exempt and public market

If an investor purchase securities under an exemption and now wants to sell those securities, the investor must either 1) find a purchaser who qualifies for an exemption, keeping the securities in the exempt market, or 2) satisfy the resale rules set out in **NI 45-102** in order to sell the securities in the public market.

### The resale rule if the trade is by a control person

**S1(1) “control person”: (a)** a person who has a sufficient number of voting rights attached to all outstanding voting securities of an issuer to **affect** **materially** the control of the issuer OR **(b)** each person in a group of people acting together according to an agreement that has a sufficient number of voting rights

* **DEEMED CONTROL PERSON**: if one person or a group of persons holds 20% of the voting rights, unless there is evidence to the contrary

#### **NI 45-102 S2.8**

If a **control person** purchased securities in the exempt market and now wants to sell those securities, they must either:

* **S1(1) “distribution” (c), 61(1):** file a prospectus (include the securities as part of a secondary offering by the issuer)
* Apply for a discretionary exemption under **S76** (unlikely to be granted)
* Find a purchaser who qualifies for an exemption, keeping the securities in the exempt market, OR
* Satisfy the five resale conditions set out in **S2.8** to sell in the public market:
	1. The issuer, who originally issued to restricted securities, must be a reporting issuer for at least four months
	2. The control person has held the restricted securities for at least four months
	3. There must be no extraordinary effort to prepare the market in advance of the trade (ie: no advertising)
	4. There must be no extraordinary commission paid to a person or company in respect of the trade
	5. The control person must have no reasonable grounds to believe the issuer is in default of securities legislation
* In addition to meeting the five requirements for a control distribution set out in **S2.8**, the control person must also:
	1. Sign Form 45-102F1, *Notice of Intention to Distribute Securities*, and then file it within one business day of signing
	2. File the form on SEDAR at least seven days before the control person intends to sell the securities, AND
	3. File an insider report (Form 55-102F2 or 55-102F6) within three days of completing the trade.

Control persons are subject to more onerous resale rules when selling securities in the public market because regulators are concerned with information asymmetry and the possibility that control persons may be selling into the market place on the basis of information not generally available to investors.

#### Resale rules if the trade is by someone who isn’t a control person

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| **1.** Identify the exemption under which the restricted securities were issued. |
| **2.** **Appendix D Exemptions:** If the exemption is one of the following, **S2.5** applies: * Accredited Investor Exemption
* Family, Friends, Business Associates Exemption
* Founder, Control Person, Family Exemption (ON)
* Affiliates Exemption
* Offering Memorandum Exemption
* Minimum Amount Investment Exemption
* Asset Acquisition Investment
* Petroleum, Natural Gas, Mining Exemption
 | **S2.5** provides for a “restricted period”. **Seven** conditions must be met to satisfy this resale rule to sell restricted securities in the public market:**1.** Seasoning period: the original issuer must be a reporting issuer for at least four months immediately before the trade.**2.** At least four months have elapsed since the date of distribution: security holder must wait four months + 1 day to resell**3.** The certificate must include a legend stating that the holder cannot trade the security before [insert date that is four months + 1 day after distribution] – if issuer wasn’t reporting at the time, then it must also include the date they became a reporting issuer in any province.**4.** This can’t be a control distribution: not a resale by a control person**5.** There must be no unusual effort to prepare the market in advance of the trade (ie: no advertising): **S4 *ASC Rules p343*****6.** No extraordinary commission or consideration is paid to a person or company in respect of the trade.**7.** If the security holder is an insider or officer of the issuer, they must have no reasonable grounds to believe the issuer is in default of securities laws |
| **2.** **Appendix E Exemptions:** If the exemption is one of the following, **S2.6** applies:* Private Issuer Exemption
* Dividends Exemption
* Rights Offering Exemption
* Business Combination & Reorg Exemption
* Takeover Bid Exemption
* Trades to Employees Exemption
 | **S2.6** provides for a “seasoning period”. **Five** conditions must be met to satisfy this resale rule to sell restricted securities in the public market:**1.** Seasoning period: the original issuer must be a reporting issuer for at least four months immediately before the trade.**2.** This can’t be a control distribution: not a resale by a control person**3.** There must be no unusual effort to prepare the market in advance of the trade (ie: no advertising): **S4 *ASC Rules p343*****4.** No extraordinary commission or consideration is paid to a person or company in respect of the trade.**5.** If the security holder is an insider or officer of the issuer, they must have no reasonable grounds to believe the issuer is in default of securities laws |
| **4.** If the applicable resale rule cannot be satisfied, see if the exemption under **S2.7** applies. Under this exemption, the resale rules in S2.5 and S2.6 do not apply if the issuer became a reporting issuer after the distribution date by filing a prospectus in BC, AB, MN, NB, NS, ON, QB, or Sask and is a reporting issuer at the time of the resale trade. Note: If the issuer is not a reporting issuer and does not become one, the restricted security holder is confined to selling his or her securities in the exempt market to an exempt buyer, or selling in the public market via a prospectus. |
| **5.** If all else fails, sell the restricted securities to another investor who qualifies for an exemption.  |

## What happens if an issuer or reseller fucks up an exemption (incorrect reliance)?

If an issuer or restricted security holder improperly relies on an exemption from the prospectus requirement, the consequences can be quite significant. In ***Deacon Hodgson***, the Court held that a failure to file a prospectus renders the contract of purchase and sale null and void, and that no limitation period applies. The fact that the remedy for failure to file a prospectus is never barred by statute indicates the fundamental importance of the provision of a prospectus for securities regulations.

# Ongoing Disclosure Requirements

* **NI 51-102 S1.1 “material change”: (a)** 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 a security of the issuer, or **(b)** a decision to implement a change referred to above made by the directors of the issuer, or senior management of the issuer who believe that confirmation of the decision by the directors is probable
	+ **“venture issuer”:** reporting issuer that, as at the applicable time, did not have any of its securities listed or quoted on any of the TSE, a US marketplace, or a marketplace outside of Canada and the USA other than the Alternative Investment Market of the London Stock Exchange or the PLUS markets operated by PLUS Markets Group, where the “applicable time” in respect of… some bullshit.

## Timely and Periodic Disclosure Requirements

All reporting issuers must comply with the continuous disclosure requirements set out in **NI 51-102, *Continuous Disclosure Obligations.*** There are two aspects of a reporting issuer’s ongoing disclosure obligations:

1. Periodic disclosure of IFSs and AFSs and accompanying reports, and
2. Timely and accurate disclosure of material changes experienced by the issuer

Providing investors with transparent and efficient access to information about reporting issuers in order to enhance investor protection and maintain investor confidence in the capital markets. Continuous disclosure is also significant because 94% of all capital market activity in Canada takes place in secondary markets (where there is no prospectus requirement). Finally, continuous disclosure can facilitate the raising of capital through the issuance of new securities because reporting issuers with good continuous disclosure records may be eligible to file short form prospectuses under **NI 44-101**, or offering memoranda under the **S2.9** prospectus exemption in **NI 45-106**.

### Consequences

Selective disclosure and a reporting issuer’s failure to meet its continuous disclosure requirements can result in: loss of investor confidence, lower trading prices, a lower credit rating, higher cost of capital, and civil liability.

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| **A Reporting Issuer’s Four Periodic Disclosure Requirements NI 51-102** |
| **1. QFSs and AFSs: S4.1, 4.3** | All reporting issuers must QFSs and audited AFSs. These must generally include IS, a balance sheet, a statement of retained earnings, and a cash flow statement. |
| **2. MD&A: S5.1** | All reporting issuers must prepare and file a MD&A in Form 51-102F1 to accompany its QFS and AFS. The MD&A should analyze the financial statements, discuss the dynamics of the business, discuss current or pending obligation and liabilities, and provide management’s insight on how the issuer is likely to perform in the future.  |
| **3. AIF: S6.1** | All reporting issuers, excluding venture issuers, must prepare and file an AIF, which is similar to a prospectus because it requires detailed disclosure of the reporting issuer’s history, operations, and financial affairs. It must also include a discussion of the issuer’s prospects, disclosure of social and environmental policies that are fundamental to the issuer’s operation, and disclosure of risk factors such as environmental and health risks, or political considerations.  |
| **4. Information Circulars and Proxy Solicitation: S9.1** | All reporting issuers must distribute a proxy form and information circular to all registered holder of voting securities in advance of a shareholder meeting. The form allows someone to vote on the shareholder’s behalf and the information circular sets out the date and time of the meeting, and matters to be acted on at the meeting, plus supporting information.  |

## Reporting Material Change

* **NI 51-102 S1.1 “material change”: (a)** 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 a security of the issuer, or **(b)** a decision to implement a change referred to above made by the directors of the issuer, or senior management of the issuer who believe that confirmation of the decision by the directors is probable
* **S7.1:** A reporting issuer also has an ongoing obligation to make timely and accurate disclosure of material changes that affect the reporting issuer. When a material change occurs, the reporting issuer must:
	+ 1. Immediately issue and file a news release disclosing the nature and substance of the material change, and
	+ 2. As soon as practicable or within 10 days of material change occurring, file a **Material Change Report**, Form 51-102F3
* Timely disclosure of a material change is essential to promotion of active capital markets and investor protection
* Exemption: When putting out information would be unduly prejudicial you can put in confidential report, commission requires you to renew confidentiality of report every 10 days.

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| **How to Determine if a Change is a Material Change that Requires Timely Disclosure NI 51-102 S7.1** |
| ***Pezim*** – elements of material change | The change must be a) in relation to the affairs of the issuer, b) in the business, operations, asserts or ownership of the issuer, and c) material (would reasonably be expected to have a significant effect on the market price or value of the securities of the issuer.HELD: P’s assay and drilling results, which doubled reserves, amounted to a material change because it was a change in assets. Senior management were granted options and there should have been timely disclosure of results. The problem was compounded by trading in the interim before disclosure took place and sanctions were imposed.  |
| ***Kerr v Danier Leather*** – a material fact is not a material change | “Material change” is limited to a change in the business, operations or capital. This limitation is a deliberate, policy based “attempt to relieve reporting issuers of the obligation to continually interpret external political, economic, and social development as they affect the affairs of the business, unless the external changes will result in a change in the business, operations or capital of the issuer.” HELD: Unseasonably warm weather (an external factor) was a “material fact”, but not a “material change” so D’s failure to disclose this fact, a change in their QFS) did not amount to a breach of its continuous disclosure obligation.  |
| ***AiT*** – material change is not a “bright-line” test; it’s a question of mixed fact and law | In the context of a proposed M&A, whether or not this proposed transaction constitutes a material change depends on whether a decision to implement the transaction has taken place. “Where the proposed transaction is speculative, contingent, and surrounded by uncertainties, a commitment from one party to proceed doesn’t constitute a material change. HELD: Ait should have disclose the potential acquisition as soon as the decision to proceed was made. They shouldn’t have waited until the final acquisition agreement was sign – this is a breach of the *timely* disclosure obligation.  |
| ***YBM Magnex*** – probability/magnitude test | Use the probability/magnitude test to determine whether a contingent future event had become sufficiently crystallized to raise the obligation to disclose the material change: (a) an assessment of the probability that the event will occur having regard to all known or ascertainable facts, and (b) an assessment of the magnitude or significance of the change, in terms of whether the information would be viewed by reasonable investors as important information for making a decision to buy, sell, or continue to hold their securities.HELD: YBM should have disclosed their potential inability to file its audited statements on time, which would mean they would face a cease trade order – this was a material change as the magnitude is self-evident and it was sufficiently probably that they would be able to get an audit on time. They only disclosed this audit issue 18 days after the suspension so it was not as soon as practicable.  |
| **NP 51-201, *Disclosure Standards***, encourages reporting issuers to err on the side of disclosure – the policy includes a list of recommendations regarding materiality for reporting issuers, including adopting a formal disclosure policy, and how many people can speak on behalf of the issuer. |
| **Examples of Changes likely to Require Prompt Disclosure** |
| * Changes in share ownership that may affect control of the company
* Changes in the corporate structure
* Take-over bids or issuer bids
* Changes in capital structure
* Public or private sales of additional security
* R&D affecting the company’s resources, technology, product or market
 | * Major corporate acquisitions or dispositions
* Significant changes in management
* Entering into, or loss of, significant contracts
* Significant litigation
* Major labour disputes
* Events of default under financing or other major agreements
* Borrowing a significant amount of funds
 |

# Securities Regulators and Corporate Governance

## Corporate Governance – Regulating Corporate Affairs – Four Sources

* A corporate legislation (ie: *BCBCA*)
* Securities legislation
* Rules and policies of stock exchanges
* Proxy advisory firms (ie: ISS and Glass Lewis)

The trend in securities-side regulation of corporate governance has been towards compliance or explanation: regulators will make a recommendation and if a company chooses not to comply with the recommendation they must explain why – comply or explain. Under corporate legislation, companies are required to have shareholder meetings at least once a year. Two things must happen at an annual general meeting: the election of directors and appointment of auditors. Corporate legislation requires that shareholders be given proper noticeof shareholder meetings. Securities legislation requires that companies solicit proxiesin advance of shareholder meetings: **Part 9 of NI 51-102 *Continuous Disclosure Obligations***.

## Options for a Dissastified Shareholder

Reasons for shareholder dissatisfaction: executive compensation, stock options, corporate governance issues (ie: the board does not have any independent directors), disclosure, and regulatory issues.

1. Go to the chair of the board to express concerns and try to negotiate a change to management or board membership
2. Ambush the end of the AGM:This will only work if the company does not have an advance notice policy, and if the dissident shareholder can rely on the information circular exemption in **NI 51-102 S9.2(2)** when there are no more than 15 shareholders. Management could find out in advance and postpone the meeting to adopt an advance notice policy, as was the case in ***Mundoro***. An ambush is not as cheap as a negotiated settlement, but less expensive than a full blown proxy contest.
3. Wait until the AGM and solicit then, but the board could likely get a postponement.
4. Full blown proxy solicitation by requisitioning a shareholders’ meeting – you must meet the requirements set out in corporate legislation to requisition a meeting. It also depends whether an AGM will be called soon anyways. The risk is that management will not comply with statutory timing requirements and it can take up to 4 months to requisition meeting. The dissident must comply with these rules governing proxy solicitation (see below).
* General hurdles that a dissident may face:
	+ Management control of the process
	+ Management’s defensive tactics (ie: the ability to postpone meetings, adopt an advance notice policy)
	+ Management’s use of entrenchment devices (ie: staggered boards, advance notice policy)
	+ Scorched earth tactics
	+ The issuance of shares to friendly investors

### Proxy Solicitation

**S116, NI 51-102 S1.1:** A proxy is a completed and executed form of proxy by which a security holder has appointed a person as their nominee to attend and act on their behalf at a meeting of security holders.

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| **Management Proxy Solicitation (Mandatory)** |
| **NI 51-102, S9.1(1)**: If a reporting issuer’s management gives notice of a meeting of its registered holders of voting securities, management must, at or before giving notice, “send to each registered holder of voting securities who is entitled to notice of the meeting a form of proxy for use at the meeting.” Under **S9.1(2)**, this proxy must be accompanied by an information circular. This requirement applies to all proxy solicitations by management, as per the definition of “solicit” (**NI 51-102 S1.1**).* A single issuance of a news release to clarify the record did not amount to a solicitation, however, had there been a *subsequent* news releases, this may have qualified as a solicitation: ***Smoothwater Capital****.* A dissident launched a proxy contest by requisitioning a shareholder meeting under corporate legislation – in response, management issued a news release. The dissident argued that management’s newsletter qualified as a “solicitation” (because it encouraged shareholders *not* to execute the dissident’s proxy form), and so management’s failure to provide an information circular constituted a violation of securities law.
* In *Pacifica Papers,* management obtained “lock-up” agreements from a number of shareholders (assurance that these shareholders would give management their proxies) in advance of sending out an information circular. A dissident argued that management obtaining lock-up agreements amounted to solicitations, and that these illegal solicitations should render a shareholder vote related to a plan of arrangement invalid. Though the BCSA and BCCA refused to render the shareholder vote invalid, the courts (confusingly!) suggested that the lock-up agreements amounted to solicitation of proxies, that proxies are *always revocable,* and that there is no requirement to send an information circular to shareholders *prior* to soliciting proxies.
 |
| **Dissident Proxy Solicitation (Optional)** |
| **NI 51-102, S9.1(2)**, if a party, other than management, solicits proxies, this proxy must be accompanied by an information circular.**NI 51-102 S1.1:** Soliciting, in connection with a proxy, is any request for a proxy, any request to not execute a proxy form or to revoke a proxy, and any communication with a shareholder that a reasonable person would relate to giving, withholding, or revoking a proxy. EXEMPTION: Non-management is not required to send an information circular with a proxy solicitation if:* The total number of shareholders whose proxies are being solicited is 15 or less (this recognizes the opportunity for one-on-one discussion): **S9.2(2)** OR
* The solicitation is made to the public by broadcast, speech, or publication, and the person has filed information: **S9.2(4)**.

The content requirements for a non-management information circular are less onerous than the content requirements for a management information circular, BUT all information circulars must contain enough information to allow a reasonable shareholder to make an informed decision.  |

# Insider Trading

Insider trading involves the purchase or sale of securities of a company effected by or on behalf of a person who has a special relationship to the company (likely that they will have access to relevant information concerning the company that is known to the public). This is regulated to ensure fairness in making as much information as possible available to investors in order to maintain confidence in capital markets. It is in the spirit of making capital markets free and open, where the price of the security is based on the fullest possible knowledge of all the relevant facts.

* Not all insider trading is improper, so, in response, a two-pronged legislation was developed:
	+ Legal Insider Trading: Trading by an insider is legal if they report trades within a certain time period and those trades are not based on any undisclosed material information.
	+ Go-to-jail Insider Trading: Trading by insiders is illegal where an insider, or any other person in a “special relationship” with the issuer, trades based on undisclosed material information or informs anyone (tipping), other than in the ordinary course of business, of undisclosed material information

## Legal Insider Trading

* **S1(1) “insider”: (a)** a director or officer of an issuer, **(b)** a director or officer that is itself an insider or subsidiary of the issuer, **(c)** a person that has direct or indirect control over, or beneficial ownership, of more than 10% of voting rights attached to all the issuer’s outstanding voting securities, **(d)** an issuer that has purchased, redeemed or otherwise acquired its own securities, or **(e)** a person designated as an insider by the regulator in the “public interest” under **S3.2**

### Insider Reporting Requirements

1. **S87, NI 55-104 S3.2:** Within 10 calendar days of becoming an insider of a reporting issuer, the insider must file an initial Insider Trading Report. The insider must disclose their beneficial ownership of, or control or director over, securities of the reporting issuer, and any interest in, or right or obligation associated with, a related financial instrument involving a security of the reporting issuer. ITRs are available to the public online on SEDI (System for Electronic Disclosure by Insiders)
2. **S87, NI 55-104 S3.3:** Within 5 days of any subsequent change (ie: exercising an option or buying or selling securities of the reporting issuer, the insider must file a new ITR, disclosing the change.
* **S155(1)**&**(2)**: If you fail to file a required ITR, that insider has committed an offence and can be liable for a fine up to $3 million, or to no more than 3 years imprisonment or both. The regulator can also make an order for compliance under **S157(1)** or an enforcement order, including a cease trade order under **S161.** So, you should probably just file that shit.

### Exemptions to the Insider Reporting Requirements – An insider is exempt from filing ITRs…

1. If they have no securities – no ownership, direction, or control over any of the reporting issuer’s securities
2. If the change is one that affects all holders of a class of securities equally, or is available to all securities of a class – BUT the reporting issuer must report this within one business day
3. A director or officer of a subsidiary or affiliate of the reporting issuer is exempt UNLESS they have access to undisclosed material information in the ordinary course of business. This exemption doesn’t apply if the subsidiary is a major subsidiary whose assets equal at least 10% of the reporting issuer or if the affiliate is a material contractor/supplier for the reporting issuer.
4. An institutional investor may be exempt if it files an early warning report upon acquiring more than 1-% shares and every additional 2% acquired and does not have access to material undisclosed information.
5. **S91:** The regulator may grant discretionary exemptions, on application, where it wouldn’t be prejudicial to the public interest to do so.

## Go-To-Jail Insider Trading – 2 Elements (Special Relationship and Undisclosed Material Information: S57.2)

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| **X must be in a special relationship with the reporting issuer: S3** | A person is in a special relationship with an issuer if the person **(a)** is an insider, affiliate, or associate of **(i)** the issuer, **(ii)** a person that is proposing to make a take-over bid for the securities of the issuer **(iii)** a person that is proposing **(A)** to become a party to a reorganization, amalgamation, merger, arrangement or similar business combination with the issuer, or **(B)** to acquire a substantial portion of the property of the issuer, **(b)** is engaging in or is proposing to engage in any business or professional activity with or on behalf of the issuer or with or on behalf of a person in (a)(ii) or (iii)**(c)** a director, officer or employee of the issuer or of a person described in (a)(ii) or (iii) or (b),**(d)** knows of a material fact or of a material change with respect to the issuer, having acquired the knowledge while in a relationship described above with the issuer, or **(e) TIPPEE LIABILITY:** knows of a material fact/change, having acquired the knowledge from another person at the time when **(i)** that person was in a special relationship with the issuer or **(ii)** they knew or reasonably ought to have known the other person was in a special relationship with the issuer |
| **The trade must have occurred based on knowledge of material information** | **Material change** as “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 a security of the issuer.”**Material fact** as **“**a fact that would reasonably be expected to have a significant effect on market price or value of securities.”When advising clients about the materiality of historic/existing information (past financials, etc), it is important to look at both the market impact test and the reasonable investor test. The RIT is used in the US, but is now migrating north. Information is material if the reasonable investor would consider the information important to an investment decision. The SCC applied this test in ***Sharbern*** and said “an omitted fact is material if there is a substantial likelihood that its disclosure would have been viewed by the reasonable investor as having significantly altered the total mix of information made available.”When advising clients about the materiality of potential/future information (a pending merger, lawsuit, etc), the test to determine disclosure is the **probability/magnitude test** (***YBM Magnex****)*: the materiality of a potential future event depends on (a) an assessment of the probability that the event will occur having regard to all known or ascertainable facts, and (b) an assessment of the magnitude or significance of the change, in terms of whether the information would be viewed by reasonable investors as important information for making a decision to buy, sell, or continue to hold their securities. This test was applied by the OSC in an insider-trading context in ***Donnini****.* The issue was whether knowledge of a potential financing deal for a company, Kasten, which was negotiating the deal with Yorkton (a company for which Donnini was a director and the fourth largest shareholder) constituted material information. Donnini learned about this second financing in a 3-min “hallway” conversation and then traded Kasten stock based on this info. The OSC found that this was material info b/c negotiations for this financing were “sufficiently advanced”. |
| **This material information must not be generally disclosed:****NP 51-201, *Disclosure Standards*** | Two factors to determine whether material information has been “generally disclosed”: ***Harold P Connor***1. The material information must be disseminated to the trading public and reach the marketplace.
2. The trading public must have sufficient time to digest and analyze the information given its nature and complexity.

A press release was issued, but insufficient time passed after the issuance before the defendant traded. The OSC found the defendant guilty of illegal insider trading, and also recommended that insiders wait a minimum of 1 full trading day after the release of information before trading. |

### Tipping and Defences for Giving Just the Tip

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| **S57.2: (1)** Issuer is a reporting issuer or any other issuer whose securities are publicly traded |
| **Restriction** | **Defences: S57.4** |
| **(2)** A person must not enter into a transaction involving a security of an issuer or a related financial instrument of a security of an issuer if the person **(a)** is in a special relationship with the issuer and **(b)** has material information that is undisclosed | **(1)** If you reasonably believe the other party (person you are buying from or selling to) to the transaction knows of the material information **(3)** If, the person **(a)** enters into the transaction under a written automatic dividend reinvestment plan, written automatic purchase plan, or other similar written automatic plan, in which the person agreed to participate before obtaining knowledge of the material information, or **(b)** enters into the transaction as a result of a written legal obligation **(i)** imposed on the person, or **(ii)** that the person entered into before obtaining knowledge of the material information**(4)** If the person entered into the transaction **(a)** as agent under the specific unsolicited instructions of the principal, **(b)** as agent under specific instructions that the agent solicited from the principal before obtaining knowledge of the material information, **(c)** as agent/trustee for another person because of that other person’s participation in a written automatic dividend reinvestment plan, written automatic purchase plan or other similar plan, or **(d)** as agent/trustee for another person to fulfill a written legal obligation of the other person.**(5)** If no individual involved in making the decision to enter into the transaction or make the recommendation on behalf of the person **(a)** has knowledge of the material information, **(b)** is acting on the recommendation or encouragement of an individual who has that information. |
| **(3)** An issuer or a person in a special relationship with an issuer must not inform another person of a material fact or material change about the issuer unless **(a)** it is generally disclosed or **(b)** it is necessary in the course of business of the issuer or of the person in the special relationship | **(2)** If you reasonably believe that the person you are telling material information to already knows that information |
| **(4)** A person who proposes to **(a)** make a take-over bid for the securities of the issuer, **(b)** to become a party to a reorganization, amalgamation, merger, arrangement or similar business combination with the issuer, or **(c)** to acquire a substantial portion of the property of the issuer must not inform another person of a material fact or material change with respect to the issuer unless **(d)** it is generally disclosed or **(e)** it is necessary to effect the take-over bid, business combination or acquisition | **(2)** If you reasonably believe that the person you are telling material information to already knows that information |
| **(5)** If a material fact or material change of an issuer has not been generally disclosed, the issuer, or a special relationship person must not recommend or encourage another person to enter into a transaction involving a security of the issuer or a related financial instrument of a security of the issuer. | **(5)** If no individual involved in making the decision to enter into the transaction or make the recommendation on behalf of the person **(a)** has knowledge of the material information, **(b)** is acting on the recommendation or encouragement of an individual who has that information.  |
| **Reasonable Belief that the Information was Disclosed** | **Reasonable Mistake of Fact** | **Necessary Course of Business** |
| The onus is on X to prove that he or she had a reasonable belief that the information was “generally disclosed”. Two factors to determine whether material information has been “generally disclosed”: ***Harold P Connor***1. The material information must be disseminated to the trading public and reach the marketplace.
2. The trading public must have sufficient time to digest and analyze the information given its nature and complexity.

In ***Green***, the issue was whether information of a possible takeover was adequately disclosed. The defendants notified Green of possible takeover in very general terms. Green brought an action against them for insider trading. The ONCA found that the very general letter to Green was inadequate general disclosure b/c it failed to include sufficient details.  | The onus is on X to prove that they had a reasonable belief that the information would not have a substantial effect on the company’s share price (or another reasonable mistake of fact). In ***Fingold****,* Cineplex’s 4th quarter results were unexpected and disappointing. F, a director of Cineplex, sold shares in Cineplex to two companies he controlled. Although the results were material information, F made a reasonable mistake of fact and so was not liable. In ***Harper****,* a company obtained bad assay results from 800 soil samples. These bad results were not disclosed. Harper had a special relationship with the company, and sold his shares. He said he had a reasonable belief that the results did not constitute material information based on advice from project geologist. But ON court concluded that Harper failed to establish that he had a *reasonable* belief that the soil samples were not material.  | **NP 51-201** sets out when the necessary course of business defence is available. The question of whether something is in the necessary course of business is a question of mixed fact and law that must be determined on a case-by-case basis and in light of the policy reasons underlying the tipping provisions. In ***Royal Trustco,*** the disclosure of information to a shareholder as part of an attempt to defend against a takeover bid was not found to fall within the definition of “necessary course of business.” |
| **Enforcement of Illegal Insider Trading/Tipping** |
| **Administrative Sanctions under the BCSA \*most common****S161:** The regulator may make various enforcementorderswhen it is in the public interest to do so. **S162**: The regulator may impose fines up to $1 million for each contravention of the Act, if it’s in the public interest to do so.EXAMPLE: The regulator may suspend, restrict, or terminate the X’s registration, exclude X from trading in BC markets, remove X or prohibit X from acting as a director/officer of an issuer, or reprimand X. **Criminal Sanctions under the Criminal Code**: **S382.1, *Criminal Code***Prohibited insider trading is an indictable offence and the offender may be liable to imprisonment for a term not exceeding 10 years. Tipping (**S382.1(2)**) is a hybrid offence for which the offender may be liable to imprisonment for a term not exceeding 5 years. The prosecution must establish that the accused *knowingly* used or passed on undisclosed material information. **Quasi-Criminal Sanctions under the BCSA:S155****S155(5):** The maximum penalty for a contravention of **S57.2** is a fine not more than the greater of $3 million and an amount equal to triple any profit made by X thanks to the contravention, or imprisonment for not more than 3 years, or both. **Civil Court Proceedings: S157** The regulator may apply to the BCSC for an order that X has contravened a provision in the act, an order that X pay the regulator any amount obtained, directly or indirectly, as a result of the contravention, an order setting aside a trade, or an on order that X otherwise rectify the contravention to the extent that rectification is possible. **Statutory Civil Liability: S136**A plaintiff may recover losses against X. The amount payable by X would be the less of the losses incurred by the plaintiff or an amount determined in accordance to the regulation (but a change in market price *unrelated* to the material information is not attributable to damages). |

# Change of Control Transactions

## Types of transactions a client can use to acquire control of another issuer

Any change of control transaction will require some kind of information circular to allow investors to make an informed decision, whether for a shareholder vote at a meeting or for an offer to tender in a bid.

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| **Asset Purchase Deal** |
| The offeror acquires some or all of the target’s assets, and following the transaction, the target continues to exist. There is no need to acquire the target’s liabilities. However, any advantageous tax benefits/deductions available to the target will likely be non-transferrable to the offeror.  |
| **Amalgamation** |
| This is the process by which two companies merge and carry on as one. This can be carried out under ***BCBCA* S269, *CBCA* S181**. An amalgamation must be adopted by shareholders in a special resolution (67% of securities). An information circular must also be circulated to shareholders in advance of meeting to approve the amalgamation. All assets, liabilities, lawsuits, etc are transferred/shared with an amalgamation. |
| **Plan of Arrangement** |
| This is a court-supervised change of control transaction that can be carried out under ***CBCA* S192, *BCBCA* S288***.* An information circular must be distributed. A plan of arrangement requires a special resolution – typically 2/3 of shareholders at a meeting. If approved by the court, a plan of arrangement is a single step transaction (ie: the offeror will be able to acquire 100% of the target’s shares at closing – versus take-over bids, which is a two-step transaction). This is only possible in a friendly situation, where the target’s board and management support the transaction. Requirements for approval are set out in the ***BCE***: 1) Statutory requirements were satisfied (information circular and a special resolution vote), 2) the application for the POA was put forward in good faith, and 3) applying the business judgment test, the arrangement was “fair and reasonable” (ie: the arrangement has a valid business purpose, dissenting shareholders have access to appraisal remedies). All assets, liabilities, lawsuits, etc will be transferred/shared with a POA. |
| **Take-Over Bids \* SEE BELOW** |
| **Proxy Contests** |
| A proxy contest can enable a current shareholder to gain control of a company without an actual takeover, or can lay the groundwork for executing a (hopefully) friendly takeover bid later on. For example, activist Canadian Pacific Railway shareholder Bill Ackman (who controlled 14% of CP shares through his company PS) successfully won a proxy contest in 2012. Ackman was able to introduce his own slate of friendly directors. SEE PAGE 16-17 |
| **Going-Private Transaction:** |
| This is a transaction by which a reporting issuer becomes a private entity (no continuous disclosure documents, less cost and administrative burden). This can accomplished through either a take-over bid (the issuer attempts to buy shareholders out of their share) or a squeeze-out merger. An amalgamation is a going-private transaction, and it is a business combination (**MI61-101 S1.1**), which you need minority approval for (**S4.2**). The exemption is a squeeze-out is having 90% of the outstanding shares (**S4.6**). |

## Important Disclosure Requirement for offer/bidder who Completes a “Significant Acquisition” – Must File a Busniess Acquisition Report within 75 Days: NI 51-102 S8.2

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| **For Non-Venture Reporting Issuers NI52-102 S8.3** | **For Venture-Listed Reporting Issuers NI52-102 S8.3** |
| A significant acquisition is one that satisfies one of the three following tests with a **20**% change threshold:1. **Asset** **Test**: If the reporting issuer’s proportionate share of consolidated assets of the business/related businesses exceed 20% of the consolidated assets of the reporting issuer. This is calculated using the audited financial statements of the issuer and the business/related businesses for the most recently complete financial year, ended before the date of acquisition.2. **Investment** **Test**: If the reporting issuer’s consolidated investments in and advances to the business/related businesses exceeds 20% of the consolidated assets of the reporting issuer as of the last day of the more recently completed financial year before the date of acquisition.3. **Income** **Test**: If the reporting issuer’s proportionate share of the consolidated income from continuing operations of the business/related businesses exceed 20% of the consolidated income from continuing operations of the reporting issuer. This is calculated using the audited financial statements of the reporting issuer and the business/related businesses for the most recently completed financial year that ended before the date of acquisition.  | A significant acquisition is one that satisfies one of the following three tests with a **40**% change threshold:1. **Asset** **Test**: If the reporting issuer’s proportionate share of consolidated assets of the business/related businesses exceed 40% of the consolidated assets of the reporting issuer. This is calculated using the audited financial statements of the issuer and the business/related businesses for the most recently complete financial year, ended before the date of acquisition.2. **Investment** **Test**: If the reporting issuer’s consolidated investments in and advances to the business/related businesses exceeds 40% of the consolidated assets of the reporting issuer as of the last day of the more recently completed financial year before the date of acquisition.3. **Income** **Test**: If the reporting issuer’s proportionate share of the consolidated income from continuing operations of the business/related businesses exceed 40% of the consolidated income from continuing operations of the reporting issuer. This is calculated using the audited financial statements of the reporting issuer and the business/related businesses for the most recently completed financial year that ended before the date of acquisition. |

## Take-Over Bids

**MI62-104 S1.1:** A takeover bid occurs when an offeror (the bidder) makes an offer to purchase outstanding shares of a corporation (the target). An offer qualifies as a takeover bid if it, on its own or in combination with shares already held by the bidder, result in the bidder acquiring 20% or more of the targets shares.

**MI62-104 S1.8(3):** If a bidder is acting jointly and in concert with another person or company, both the bidder and the person with whom they are acting with must count their shares together (including those that both have the option to acquire) to determine whether the 20% threshold has been met.

In BC, takeover bids are governed by **MI62-104** (takeover bid rules that apply to all jurisdictions except ON), **NP62-203** (policy related to the interpretation of the Bid Regime), **NP62-202** (defensive tactics for the target company, **NI62-103** (early warning system), and ***BCBCA* S300**.

The primary goals of takeover bid legislation are to encourage takeover bids and to protect investors of target companies.

### The Bidder’s Obligation during a “Formal” Takeover Bid – Equal treatment, disclosure and Timing

The rules regulating takeover bids aim to protect the interests of target shareholders: to ensure that they are treated fairly, that they have full info in making their decisions regarding the bid, and that they have ample opportunity to consider the bid.

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| **The Bidder’s Equal Treatment Obligation** |
| Duty to Make Bid to All Security Holders: **MI62-104 S2.8**: A bidder must make their offer to all shareholders of the class of securities subject to the bid who are in the local jurisdiction. **S135** gives a civil right of action to shareholders who were entitled to receive the offer, but didn’t receive it. Pro Rata Take-up: **MI62-104 S2.26(1)**: If more securities are tendered than the offeror seeks to acquire, the bidder must purchase shares from tendering shareholders on a proportionate basis (ie: purchase the same proportion of shares from all tendering shareholders according to the number of shares that each shareholder tendered).Identical Consideration: **MI62-104 S2.23**: All target shareholders must be offered identical consideration or identical choice of consideration. If a shareholder tendered before the bidder raised the offer price, that shareholder is entitled to the higher offer price as they shouldn’t be disadvantaged for tendering early. Prohibition Against Collateral Benefits: **MI62-104 S2.25**: Prohibits bidder from making side deals with certain shareholders (ie: control persons), to give them any collateral benefit for their shares (ie: money, gifts). EXCEPTION: Employment compensation/benefit or severance arrangements where the employee owns less than 1% of the target shares is fine. |
| **Bidder and Target Directors’ Disclosure Obligations** |
| Bidder’s Takeover Bid Circular: **MI62-104 S2.9(1)(b) & 2.10(3)**: To launch a takeover bid, the bidder must either deliver a takeover bid circular to all target shareholders or publish an announcement in a major daily newspaper, and within two days of receiving a list of the target shareholders from the target, must deliver a takeover bid circular to all of them (**MI62-104 S2.9(1)(a) & 2.10(2)**). A takeover bid circular must contain enough information to allow the target shareholders to make an informed decision about the offer and the bidder. Liability for misrepresentations in a takeover bid circular:* **S155(1)(b)** makes it a quasi-criminal offence to fail to deliver a bid circular.
* **S132(1)** imposes primary market liability on the bidder and the bidder’s directors for misrepresentations contained in a takeover bid circular.
* **S140.2** imposes secondary market liability for misrepresentations contained in a takeover bid circular (considered a “core document”).
* **S161** allows the regulator to take administrative action (ie: make an enforcement order like a cease trade order) if the contravention of securities law violates public interest

Directors’ Circular: No later than 15 days after a takeover bid has been launched, the target board of directors must prepare and deliver a directors’ circular to all target shareholders (**MI62-104 S2.17**). This circular must recommend to security holders that they either accept or reject the bid and state the reasons for this recommendation, or explain why the board is not making a recommendation. Liability for misrepresentations in a takeover bid circular:* **S155(1)(a)** makes it a quasi-criminal offence to fail to deliver a bid circular.
* **S132(3)** imposes primary market liability for misrepresentations in a circular on all directors and officers who signed it.
* **S140.3** imposes secondary market liability for misrepresentations contained in a directors’ circular (considered a “core document”).
* **S161** allows the regulator to take administrative action (ie: make an enforcement order like a cease trade order) if the contravention of securities law violates public interest

Bidder’s Variation of Terms: After Launch: **MI62-104 S2.12**: If a bidder changes its offer after the bid has been launched (ie: change the price, add another form of consideration), they must issue a news release and deliver a notice of variation to all target shareholders whose securities were not taken up before the date of the variation (and shares cannot be tendered and taken up for a minimum 35 days after the bid is launched). Pre-Launch (advertisement is published): If variation occurs before the bidder has distributed the takeover bid circular to target shareholders, the bidder must publish an ad summarizing the change, file, and deliver a notice of variation to the target company, and then send the takeover bid circular, along with the notice of variation, to the target shareholders within 2 days of receiving the list of target shareholders from the target company (**MI62-104 S2.14**). A bid must not expire within 10 days of change: if there is a change, the bid will be extended until 10 days after the change, this prolongs the withdrawal period.Early Warning System: **MI62-104 S5.2**: Any person who acquires control of over 10% of voting or equity securities must file an early warning report and issue and file a news release on SEDI, identifying the person who has made the acquisition and the extend of control. For every subsequent 2% acquired, another report and a news release must be filed.  |
| **Bidder’s Timing Obligations** |
| **MI62-104 S2.28:** A bid must remain open to target shareholders for at least 35 days. Time starts running when the circular is mailed out and when the advertisement runs.**MI62-104 S2.30:** Target shareholders have a right to withdraw their tender for 10 days following any changes to the terms of the bid, or the 35 days the bid is open, whichever is longer (other than an increase in price).**MI62-104 S2.32(4):** A bidder can extend the date on which the offer is set to expire in order to give shareholders more time to tender their shares BUT before a bidder can extend the timeline, it must take up all securities that have already been tendered, unless the bid is extended while shareholders still enjoy a withdrawal right (**S2.32(6)**).  |

### Exemptions from Formal Takeover Bid Requirements **MI62-104 Part IV**

* **S4.1:** Normal Course of Purchase Exemption:
	+ No more than 5% of shares purchased in a 12 month period (which includes those acquired by persons acting jointly and in concert)
	+ There must be a published market
	+ You can’t pay more than FMV
* **S4.2:** Private Agreement Exemption
	+ You must buy from 5 or less shareholders
	+ You cannot make an offer to buy a class of security holders generally, so long as its less than 5 shareholders
	+ You cannot pay more than 115% of FMV for the securities
* Non-reporting issuer exemption:
	+ They are exempt if: there is no published market for the securities, and there are no more than 50 holders of securities that are the subject of the take-over bid at the commencement of the bid.
* Foreign Takeover Bid Exemption:
	+ The target securities are primarily traded on a foreign stock exchange and the target company has a de minimis number of security holders in Canada

# Civil Liability for Fucking Up

## Primary Market Liability

### Civil Liability for Misrepresentation in a Prospectus or Offering Memorandum

**S1(1) “misrepresentation”:** An untrue statement of a material fact, or an omission to state a material fact that is required to be stated, or necessary to prevent a statement that is made from being false or misleading in the circumstances it was made.

**S131(1)(a)**: If a prospectus contains a misrepresentation, a purchaser of securities offered by the prospectus during distribution is deemed to have relied on the misrepresentation. They don’t need to prove that they actually relied on it.

**(15)** If misrepresentation is contained in a record incorporated by reference in, or deemed incorporated into, a prospectus, the misrepresentation is deemed to be contained in the prospectus.

**S131(1)(b)** Purchasers have a right of action against:

* **(i)** the issuer or a selling security holder on whose behalf the distribution is made
* **(ii)** every underwriter that is in a contractual relationship with the issuer or selling security holder on whose behalf the distribution is made
* **(iii)** every director of the issuer at the time the prospectus was filed
* **(iv)** every person whose consent to disclosure of information in the prospectus has been filed (limited only to a report, opinion or statement that they prepared: **(2)**)
* **(v)** every person who signed the prospectus

**S131(11)** The liability of all these people is joint and several, except for underwriters, whose liability is limited to the portion of the distribution underwritten by it (**(9)**).

A plaintiff can seek two types of relief:

1. Damages: These are calculated based on the difference between the price paid for the securities and their value once the misrepresentation was disclosed, limited to the depreciation caused by it (**S131(10)**): ***Danier Leather***. This is limited by **S131(13)**, which states that a plaintiff can’t recover more than the price they paid for the securities.
2. Rescission: **S131(3)** This is only available against the issuer, or the underwriter in the case of a bought-deal agreement. This involves the return of the shares to the issuer in return for the money paid by the plaintiff and the right of action under (1) disappears.

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| **Defences for Misrepresentations in a Prospectus or Offering Memorandum** |
| **Purchaser: Actual Knowledge: S131(4)** | If D establishes the purchaser had knowledge of the misrepresentation, no liability. |
| **Defendant: No Knowledge: S131(5)(a) \*doesn’t apply to the issuer or selling security holder (8)** | If the prospectus was filed without D’s knowledge, no liability. To rely on this, D must have given reasonable general notice of their lack of knowledge upon becoming aware of the prospectus being filed.  |
| **Defendant: Withdrawal of Consent: S131(5)(b) \*doesn’t apply to the issuer or selling security holder (8)** | If D withdrew consent to the prospectus upon finding out about any misrepresentation, and gave reasonable general notice before the purchase of securities (ie: news release) of their withdrawal and the reason for it, no liability. |
| **Defendant: Reliance on an Expert: S131(5)(c) \*doesn’t apply to the issuer or selling security holder (8)** | If D didn’t believe and had no reasonable grounds to believe that part of the prospectus relating to an expert report, opinion or statement contained a misrepresentation, no liability.  |
| **Expert Defendant: Unfair Representation: S131(5)(d) \*doesn’t apply to the issuer or selling security holder (8)** | If the prospectus did not fairly represent D’s expert report, opinion, or statement, no liability. To rely on this, D must have reasonable grounds to believe that the relevant part of the prospectus did fairly represent their report, opinion or statement, OR advised the regulator as soon as practicable upon becoming aware of the misrepresentation, and gave reasonable notice that they were withdrawing their expertise.  |
| **Forward-Looking Information: S131(8.1)**&**(8.2)** | D is not liable for a misrepresentation of FOFI if D proves that the document contained reasonable cautionary language, that the material facts and assumptions underlying the FOFI were set out and that D had a reasonable basis for drawing such conclusions. |
| **Defendant: Due Diligence: S131(7) \*doesn’t apply to the issuer or selling security holder (8) – THE MOST IMPORTANT DEFENCE** |  If D is not the issuer and believed that there was no misrepresentation and conducted “a reasonable investigation to provide reasonable grounds for a belief that there had been no misrepresentation”, no liability.US Modified Objective Approach: What would a reasonable director have done in the circumstances?: ***BarChris*** “The liability of a director who signs a prospectus does not depend on whether or not he read it or, if he did, whether or not he understood what he reading.”OSC Subjective/Objective Approach: Different directors can be held to different standards based on their ability, experience, and involvement: ***YBM*** “We are satisfied that significant efforts were made by the Directors to ascertain the facts and assess their materiality. However, we find that the process adopted by the Directors to support their judgment and belief that…the disclosure provided was full, true and plain, was deficient” |

## Secondary Market Liability

### Civil Liability for Misrepresentations in COntinuous Disclosure Documents and Failure to Make Timely Disclosure

* **S140.3(1)**&**(2)**&**(4)**: A misrepresentation or omission released by or on behalf of the responsible issuer or an “influential person” (a control person, a promoter, or an insider who is not a director or officer of the responsible issuer) gives rise to liability (ie: in a document, on its website, or in a public oral statement).
* **S140.3(4)**: A failure to make timely disclosure of a material change will give rise to liability.

**S140.3:** A person who buys or sells a security between the time of the misrepresentation was made and the time when the misrepresentation was publicly corrected has a right of action against:

* The responsible issuer – this includes all reporting issuers, and any other issuer with a real and substantial connection to BC whose securities are publicly traded.
* The directors and officers of the responsible issuer at the time the document was released – if it was a public oral statement or misrepresentation by an influential person, or a failure to disclose material change, then liability is limited to those directors and officers who authorized, permitted, acquiesced to it.
* Each influential person who knowingly influenced the responsible issuer to release the document, make the public oral statement, or failure to disclose, or who knowingly influenced one of those people to authorize, permit or acquiesce to the release of the document/public statement/failure to disclose.
* Experts, where the misrepresentation was contained in a report, statement, or opinion made by them, and where the report or oral statement contained, summarized or quoted from the expert’s report, statement or opinion

**S140.6**: Except where D, other than the issuer, knew of a misrepresentation or failure to make a timely disclosure, liability is proportionate.

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| **The Burden of Proof** S140.4 |
| **Core Documents** | **Non-Core Documents and Public Oral Statements** |
| Core documents include: Prospectuses, Take-over bid circulars, directors’ circulars, MD&A, AIF, AFS, IFS, information circulars.The burden of proof is simply the existence of a misrepresentation – P doesn’t need to prove that D knew or should’ve known about it. | Non-core documents include new releases, investor presentations, etc.The burden of proof is that there was a misrepresentation + D knew or should’ve reasonably known that this misrepresentation existed.  |

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| **Recoverable Damages: Liability Caps** S140.7(1) |
| **Responsible Issuer** | The greater of 5% of its market cap (the number of common shares outstanding, multiplied by the market price per share) or $1 million. |
| **Directors and Officers (or someone else who made a public oral statement)** | The greater of 50% of the aggregate of D’s compensation from the issuer and its affiliates or $25,000. |
| **Experts** | The greater of the revenue that the expert and its affiliates earned from the issuer and its affiliates during the 12 months preceding the misrepresentation or $1 million. |
| **S140.7(2):** Misrepresentations or failure to disclose made/done knowingly does not have a liability cap and liability is joint and several as per **S140.6(3)**. |

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| **Defences for Misrepresentation in Continuous Disclosure Documents & Failure to Make Timely Disclosure** |
| **Purchaser: Actual Knowledge: S140.4(5)** | D is not liable if D establishes that the P bought or sold with knowledge that the document or public oral statement contained a misrepresentation or with knowledge of the material change.  |
| **Due Diligence: S140.5(6)** | D is not liable for a misrepresentation if they prove that before the release of the document or the making of the public oral statement, D conducted or caused to be conducted “a reasonable investigation” and at the time of the release or statement “had no reasonable grounds to believe” that the document or oral statement contained a misrepresentation. |
| D is not liable for a failure to make timely disclosure if they prove that before the failure to make timely disclosure occurred, D conducted or caused to be conducted a reasonable investigation and had no reasonable grounds to believe that a failure to make timely disclosure would occur. |
| **S140.4(7)** sets out a list of factors that a court will consider in determining whether an investigation was reasonable under **S140.4(6)**.* The knowledge, experience, and function of D
* The office held by D (if D was an officer)
* The presence or absence of another relationship with the responsible issuer (ie: officer, employee, shareholder), if D is a director
* The existence of any system designed to ensure that the responsible issuer’s disclosure compliance system and on the responsible issuer’s officers, employees and others whose duties would ordinarily have given them knowledge of relevant fact
* For experts reports, what professional standards are applicable to expert D in preparing and releasing the document, making the public oral statement or ascertaining the facts contained in the document or public oral statement
* In the case of failure to make timely disclosure, the role and responsibility of D involved in the decision not to disclose the material change.

These factors attempt to strike a balance – in some companies, it’s not reasonable to assume that every director or officer is involved in the disclosure decision.  |

# Enforcement

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| **Investigative Powers: Part 7, S142** | The regulator has very broad investigative powers. Notably, there is no evidentiary threshold that must be met before the regulator can begin an investigation. ***Deloitte***: the OSC sought evidence from the issuer’s auditor as part of an investigation into the issuer’s compliance with continuous disclosure requirements. The SCC held that the OSC’s request was reasonable, but that the auditor should have had opportunity to mount a full answer and defence.  |
| **Administrative Enforcement Powers: S161, 162** | The regulator has the power to make a variety of enforcement orders and impose fines where it is in the public interest to do so. Examples of enforcement orders:**S161(1):** If the commission or the executive director considers it to be in the public interest, the commission or the executive director, after a hearing, may order one or more of the following: * Cease trade order: **S161(1)(b)**
* Resignation of a director or officer: **S161(1)(d)(i)**
* Orders prohibiting persons from becoming:
	+ A director or officer of any issuer: **S161(1)(d)(ii)**
	+ A registrant or promoter: **S161(1)(d)(iii)**
	+ Acting in a management or consultative capacity in the markets: **S161(1)(d)(iv)**
	+ Engaging in investor relations activities: **S161(1)(d)(v)**
* Power to reprimand: **S161(1)(d)(j)**
* Power to imposes fines of up to $1 million per contravention: **S162**

S161 is not exhaustive – the regulator may commence an enforcement action even in absence of express breach of the Act or rules. To meet the residual public interest test, the conduct or transaction must clearly be demonstrated to be abusive of shareholders in particular and capital markets in general: ***Canadian Tire***Judicial Review of Regulator Decisions: **S167**The Securities Commissions will be shown deference. Decisions made by the regulator may be appealed to the BCCA with leave of the court. In ***Donnini***, one party involved settle IT allegations and was given a much more lenient penalty than Donnini. The Divisional court allowed an appeal from sanctions, but dismissed the appeal from liability. The CoA restored the Commission’s decisions.A lawyer acting in their professional capacity can be subject to reprimand through public enforcement powers of the provincial securities regulator: ***Wilder*** (there is a public interest in protecting investors, disciplining lawyers may be part of this, hearing by the Commission does not interfere with independence of the bar)In order to invoke public interest grounds, especially in the absence of a breach of law, there must be clear abuse of shareholders in particular, or capital markets in general: ***Canadian Tire*** (Bidders found a way to work around coattail provisions, which was not a technical breach of securities laws. This would’ve fucked over most of the shareholders. The commission intervened with their public interest power)OSC has the power to take preventative measures when imposing sanctions: ***Committee for Equal Treatment of Asbestos Shareholders***Sanctions can be supported by the goal of general deference: ***Cartaway*** |
| **Quasi-Criminal Enforcement Powers S155** | **(1)** Creates quasi-criminal liability for contravening particular sections of the Act (ie: illegal insider trading and tipping), or for failing to comply with an order made under the Act. The particular sections that give rise to quasi-criminal liability include:* Requirement to be registered in order to trade, act as an advisor, act as an investment fund manager, or act as an underwriter: **S34**
* Requirement to file a prospectus in the required form when distributing a security, unless exempted under the Act: **S61**
* Prohibition against insider trading and tipping: **S57.2**
* Requirement to provide continuous disclosure of material changes: **S85**
* Requirement to file initial and subsequent insider reports: **S87**
* Failing to file, provide, deliver, or send a record that is required to be filed, provided, delivered, or sent under the Act.

**(2)** A person who commits a quasi-criminal offence under the Act may be liable to a fine of not more than $3 million, or to imprisonment for not more than 3 years, or both.The standard of proof is beyond a reasonable doubt: ***R v Landen*** (high standard)There does not need to be a link between contravention and profit – you only need to establish that the profit took place and not the link between the offence and profit. If a person has contravened provisions in the Act, you are liable to disclose profits, though not more than $3 million, or not more than triple the profit: ***R v Harper*** |
| **Criminal Enforcement Powers Criminal Code** | The Criminal Code is rarely used to enforce compliance with securities law. That said, there are a number of provisions in the Code that relate to securities regulation, including:* It is an indictable offence to create a false prospectus with the intent to induce investors, under **S400** of the Code
* It is an indictable offence to defraud the public of any money, property, or valuable security, under **S380(1)** of the Code. **(2)** is affecting prices of shares, market manipulation
* It is an indictable offence who mails letters or circulars designed to deceive or defraud the public under **S381** of the Code.
* It is an indictable offence to buy or sell a security knowingly using inside information, under **S382.1** of the Code (includes tipping)

Criminal Enforcement versus Quasi-Criminal Enforcement:* Criminal Code offences generally include a higher threshold. For example, for illegal insider trading under **S382.1** of the Code, the prosecution must prove that the accused “knowingly” used inside information to trade. Under securities legislation, the regulator need to establish that the accused knew that another party was in a special relationship, or that the material information was not disclosed, enough that accused ought to have known.
* The Code refers to issuers generally, not just reporting issuers.
* Under the Criminal Code, the various relationships with an issuer that prohibit individuals from using insider information to trade includes shareholders, but appears to not include holders of non-share securities, such as debt or unit holders.
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| **Civil Enforcement Powers S157** | The regulator may apply to the BCSC for an order that a person has contravened a provision in the Act, an order that the person pay the regulator any amount obtained, directly or indirectly, as a result of the contravention, an order setting aside a trade, or an order that the person otherwise rectify the contravention to the extent that rectification is possible.  |